No. 13-1473

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REYA BOYER-LIBERTO

Plaintiff-Appellant

v.

FONTAINEBLEAU CORPORATION, ET AL.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(HONORABLE JAMES K. BREDAR)

BRIEF OF METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND THE PUBLIC JUSTICE CENTER AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT REYA BOYER-LIBERTO'S PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: _____ Date: _____

Counsel for: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITES

INTEREST OF AMICI CURIAE

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA has over 340 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C., and Maryland. MWELA's purposes include promoting the efficiency of the legal system, elevating the practice of employment law, and promoting fair and equal treatment under the law. MWELA has participated in numerous cases as amicus curiae before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

The Public Justice Center ("PJC") is a Maryland non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the underrepresented. Since its inception in 1985, the PJC has been committed to ensuring that persons harmed by discrimination in the workplace are not denied a judicial remedy. The PJC has submitted or joined in briefs of amicus curiae in, inter alia, *Ocheltree v. Scollon Prods., Inc.* 335 F.3d 325 (4th Cir. 2003); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278 (2004); and *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011).

MWELA and the PJC have an interest in this case because they seek to promote the just treatment of workers and to eliminate discrimination in the

workplace. Based on Amici's experience, an overly narrow approach to retaliation claims under Title VII would leave persons who report employment discrimination without a remedy against retaliatory responses by their employers. Without such a remedy, employees will be unwilling to alert employers to discrimination on the job, and unlawful discrimination will flourish and spread.

MWELA and the PJC hereby declare that no party or party's counsel (a) authored any portion of this Brief or (b) contributed money that was intended to fund preparing or submitting this brief. Amici further declare that (c) no person other than MWELA, the PJC, their members, or the undersigned counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

This case presents the issue of the continuing vitality of *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir. 2006), *petition for rehearing en banc denied by evenly divided court*, 467 F.3d 378 (4th Cir. 2006), *cert. denied*, 549 U.S. 1362 (2007). The panel relied on *Jordan* to affirm summary judgment on a retaliation claim brought by an employee who lost her job four days after complaining that a manager had twice called her a "porch monkey," which this Court has recognized is a highly offensive racial epithet.

Applying the standard enunciated in *Jordan*, the panel held that the employee, Liberto, had no Title VII retaliation claim because the conduct about

which she complained was not sufficiently severe or pervasive to support "an objectively reasonable belief that a hostile work environment existed." *Boyer-Liberto v. Fontainebleau Corp.*, No. 13-1473, 2014 WL 1891209, at *8 (4th Cir. May 13, 2014). In 2006, the eligible judges' votes were split 5-5 regarding whether that standard for Title VII retaliation claims should be reconsidered; as a result of the tie, a rehearing in *Jordan* was denied. Judge King wrote a dissenting opinion in which Chief Judge Wilkins and Judges Michael, Traxler, and Gregory joined. *See Jordan*, 467 F.3d at 381-83 (King, J., dissenting). The reasons stated by the five dissenters were compelling then, and they are even more so now in light of the Supreme Court's multiplicity of subsequent decisions condemning retaliation. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

Of those recent cases, the panel's decision collides most substantially with *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*. *Crawford* holds that it is protected activity for an employee to provide a "disapproving account of sexually obnoxious behavior" in response to a human resources official's generic question whether that employee had ever witnessed "'inappropriate behavior' on the part of" a manager. *Crawford*, 555 U.S. at 274-76. Under *Crawford*, Title VII anti-retaliation "protection extends to an employee

who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." *Id.* at 273. By contrast, according to the panel's decision in this case, if an employee witnessed a single incident of racial or sexual harassment—e.g., use of the word "n--er"—and reported the incident to an inquiring employer, he or she would have no protection from being fired for providing that truthful answer. That position simply cannot be reconciled with the Supreme Court's jurisprudence, which emphasizes that "Title VII depends for its enforcement" not only "upon the cooperation of employees who are willing to file complaints" but also "upon the cooperation of employees who are willing to . . . act as witnesses." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

The panel's application of the *Jordan* standard further undermines Title VII because it denies protection to employees who follow the guidance of the Supreme Court and the Fourth Circuit by reporting harassment at the first opportunity. The Supreme Court has established an affirmative defense for employers in hostile work environment cases where the plaintiff has "unreasonably failed to take advantage of" an internal grievance or complaint procedure provided by the employer. *Burlington Industries, Inc. v. Ellerth*, 524 U.S 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998). In order to comply with the doctrine, employees must "report harassing conduct *before* it becomes severe or

pervasive." *Penn. State Police v. Suders*, 542 U.S. 129, 145 (2004) (quoting *Ellerth*, 524 U.S. at 764) (emphasis added). *See also Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261 (4th Cir. 2001) (strictly applying the early reporting requirement). The panel's decision irreconcilably conflicts with the early reporting requirement by permitting employers to retaliate against workers for making exactly the reports that the Supreme Court requires.

In counsel's judgment, the panel's decision conflicts with the decisions of the Supreme Court in *Burlington Industries, Inc. v. Ellerth*; *Faragher v. Boca Raton*; *Pennsylvania State Police v. Suders*; *Burlington Northern & Santa Fe Railway Co. v. White*; and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, and with this Court's decision in *Matvia v. Bald Head Island Management, Inc*. These conflicts are not addressed in the panel's opinion. Accordingly, Amici respectfully request that this Court grant the Plaintiff-Appellant's petition for rehearing en banc.

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT DECISIONS ENCOURAGING AND PROTECTING WITNESS PARTICIPATION IN INTERNAL INVESTIGATIONS OF WORKPLACE HARASSMENT

The panel's decision irreconcilably conflicts with Supreme Court case law regarding employees who participate in internal investigations of discriminatory conduct. *Crawford* and *White* establish that Title VII protects this class of

employees from retaliation. As a practical matter, however, under the panel's decision many (if not most) witnesses will be unable to rely on Title VII's anti-retaliation provision for protection after they have cooperated with an employer's investigation of a harassment claim.

The Supreme Court held in *Crawford* that Title VII anti-retaliation "protection extends to an employee who . . . answer[s] questions during an employer's internal investigation." *Crawford*, 555 U.S. at 273. The facts in *Crawford* were summarized as follows:

> When Veronica Frazier, a Metro human resources officer, asked petitioner Vicky Crawford, a 30-year Metro employee, whether she had witnessed "inappropriate behavior" on the part of Hughes, Crawford described several instances of sexually harassing behavior . . . . Two other employees also reported being sexually harassed by Hughes.

Id. at 274. Soon thereafter, all three of those employees were fired. *Id.*

The Supreme Court reversed a grant of summary judgment for Metro. Its decision did not turn on either the number or the severity of the instances of "inappropriate behavior" reported by Crawford. The Court did not discuss or consider whether Crawford or either of the other witnesses had experienced or observed sufficient harassment to constitute a hostile work environment. Instead, the Court held that "the statement Crawford says she gave to Frazier is . . . covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee." *Id.* at 276.

The panel's decision conflicts with *Crawford*'s statement that an "account of sexually obnoxious behavior" is "covered by the opposition clause." *Id.* Liberto complained of behavior that was far more than racially "obnoxious." *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (observing that the "constant use of the word 'monkey' to describe African Americans [is] similarly odious" to the use of the word "n--er" and that "[t]o suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme"). Title VII would have protected Crawford if she had responded to Frazier's inquiry by truthfully reporting that Hughes had twice called her a "porch monkey." Under *Crawford*, Liberto's report should have been protected as well.

The conflict with *Crawford* is even more troubling when considered in light of *White*. *White* makes clear that not only the victims of harassment but also the witnesses of harassing conduct are protected by Title VII's anti-retaliation provision. *White* explains that the provision is intended to prohibit "those acts that are likely to dissuade employees from complaining *or assisting in complaints* about discrimination." *White*, 548 U.S. at 70 (emphasis added). *White* states that "Title VII depends for its enforcement" not only "upon the cooperation of employees who are willing to file complaints" but also "upon the cooperation of employees who are willing to . . . act as witnesses." *Id.* at 67.

As a practical matter, a witness to harassment may well observe fewer instances of harassment than would be sufficient to sustain "an objectively reasonable belief that a hostile work environment exist[s]." *Boyer-Liberto*, 2014 WL 1891209, at *8. Harassment amounting to a hostile work environment often "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). Many co-workers may witness just a few instances of harassment within a broader pattern that establishes a hostile work environment.

The cooperation of such witnesses is necessary to enforce Title VII. *White*, 548 U.S. at 67. Moreover, their participation in internal investigations is protected where they provide their employers with "disapproving account[s] of sexually [or racially] obnoxious behavior." *Crawford*, 555 U.S. at 276. The panel's decision, however, leaves these witnesses unprotected by Title VII unless they have witnessed harassment such that an "objectively reasonable juror could have found the presence of a hostile work environment." *Boyer-Liberto*, 2014 WL 1891209, at *8. The panel's decision thus discourages many (perhaps most) harassment witnesses from participating in internal investigations, frustrating "Congress' purpose 'to promote conciliation rather than litigation' of Title VII controversies." *Suders*, 542 U.S. at 145 (quoting *Ellerth*, 524 U.S. at 764).

II. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND FOURTH CIRCUIT DECISIONS REQUIRING EMPLOYEES TO REPORT HARASSMENT AT THE FIRST OPPORTUNITY

Even prior to *Crawford*, *Jordan*'s standard for protected conduct under the Title VII anti-retaliation provision contravened the governing case law in this Circuit. In Judge King's dissent from the denial of en banc review, he observed that "the panel majority's denial of Jordan's Title VII retaliation claim is contrary to Supreme Court precedent" and to the Fourth Circuit's application of that precedent.[1] *Jordan*, 467 F.3d at 381 (King, J., dissenting). The same conflict warrants en banc review today.

[1] Scholars of employment discrimination law have found persuasive Judge King's dissents from the panel opinion and the denial of en banc review. They have almost universally criticized *Jordan* and taken the position that *Jordan* undermines the purposes of Title VII. *See*, *e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859, 923-926 (2008) (stating that *Jordan* "punishes employees who speak up too soon against workplace harassment"); Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 Am. U. L. Rev. 1469, 1487-1503 (2007) (arguing that the "Catch-22 scenario that Judge King predicted reflects a more general problem with the 'reasonableness' requirement, namely, that individuals cannot know when their complaints will be protected and when they will not"); Gwendolyn Leachman, *Jordan v. Alternative Res. Corp.: The Fourth Circuit Limits Protection from Retaliation for Employees Reporting a Hostile Work Environment*, 28 Berkeley J. Emp. & Lab. 599, 599-606 (2010) (criticizing "the decision's potential to chill employee reporting and embolden retaliatory conduct by employers, contrary to the intent of Title VII"); Lynn Ridgeway Zehrt, *Retaliation's Changing Landscape*, 20 Geo. Mason U. Civ. Rts. L.J. 143, 174-78 (2010) (arguing that *Jordan* undermines Title VII by discouraging early reporting).

A. THE PANEL'S DECISION CONFLICTS WITH THE SUPREME COURT'S DECISIONS IN *FARAGHER*, *ELLERTH*, AND *SUDERS*

The Supreme Court has many times observed that the "primary objective" of Title VII is a "prophylactic one." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Title VII is intended to promote "[c]ooperation and voluntary compliance." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). With regard to workplace harassment, "[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Ellerth*, 524 U.S at 764.

In hostile work environment cases, Title VII "t[ies] the liability standard to an employer's effort to install effective grievance procedures." *Suders*, 542 U.S. at 145. Accordingly, in *Faragher* and *Ellerth* the Supreme Court established, and in *Suders* the Court applied, an affirmative defense permitting an employer to avoid strict liability for one employee's harassment of another. The "two necessary elements of the defense" are (1) "that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The objective of the *Faragher/Ellerth* affirmative defense is to incentivize prompt complaints about (and responses to) workplace harassment. Consequently, although a hostile work environment is characterized only by harassment that is "severe or pervasive," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), the *Faragher/Ellerth* defense is intended to prevent and correct "*any* . . . harassing behavior." *Faragher*, 524 U.S. at 807 (emphasis added). The Supreme Court has stated explicitly and repeatedly that the affirmative defense's "linkage of liability limitation to effective preventive and corrective measures" was intended to "serve Title VII's deterrent purpose by 'encourag[ing] employees to report harassing conduct *before* it becomes severe or pervasive." *Suders*, 542 U.S. at 145 (quoting *Ellerth*, 524 U.S. at 764) (emphasis added).

The panel's decision conflicts with *Faragher*, *Ellerth*, and *Suders*. According to the decision, an employer may retaliate against an employee if the employee complains of harassment not yet sufficiently severe or pervasive to sustain "an objectively reasonable belief that a hostile work environment exist[s]." *Boyer-Liberto*, 2014 WL 1891209, at *8. The panel majority acknowledges only one limited exception to this rule: where a "series of events" is "set in motion" by a harassing act, *id.*, or, in other words, where "a plan [is] in motion to create [a hostile work] environment," *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 340 (4th Cir. 2006). Because this exception is exceedingly rare, the panel's decision permits

retaliation in a broad swath of retaliation cases in which the employee has followed the dictates of *Faragher* and *Ellerth* by complaining "before [the harassing conduct] becomes severe or pervasive." *Suders*, 542 U.S. at 145.

Consider a woman whose male co-worker displays a graphically pornographic photograph in the office. A hostile work environment would be created if similar conduct continued pervasively, and *Faragher* and *Ellerth* require that the woman complain promptly or risk losing any right to bring a hostile work environment claim in the future. Nonetheless, because there is not yet the basis for a reasonable belief that a hostile work environment already exists, the panel's decision would permit the woman's employer to fire her for reporting the incident. Similarly, consider a woman whose boss shows her pornography. Imagine that she asks him to stop, telling him it was inappropriate. The panel's decision would permit the boss to fire her for objecting to the display.

There is a direct and irreconcilable conflict between (1) requiring employees to report offending conduct at the first opportunity and (2) permitting companies to fire workers for such reports. Employees will not be "willing to file complaints and act as witnesses" unless they "fe[el] free to approach officials with their grievances." *White*, 548 U.S. at 67 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 282 (1960)). The panel's decision will prevent employees from complaining about harassment and will undermine Title VII's "basic policies of

encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 765.

B. THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MATVIA*

This Court has followed *Faragher*, *Ellerth*, and *Suders* by holding that an employee cannot wait to report harassment until the harassment has become severe or pervasive enough to be actionable under Title VII. In *Matvia v. Bald Head Island Management, Inc.*, the Court rejected the plaintiff's argument that "she needed time to collect evidence against" the harasser to make her complaint credible and that she therefore should be excused from failing to report harassment at the first opportunity. *Matvia*, 259 F.3d at 269. The Court held that "*Faragher* and *Ellerth* command that a victim of . . . harassment report the misconduct, not investigate, gather evidence, and then approach company officials." *Id.* The Court thus rejected the notion that an employee should wait to complain about harassment until she is able to demonstrate an objectively reasonable belief that a hostile work environment already exists.

The facts in *Matvia* are particularly instructive. The harassment began in September, 1997, when the harasser "approached [the plaintiff], said he needed a hug, and proceeded to hug her." *Id.* at 265. Later, he told the plaintiff, "who had just dyed her hair brown, that he would have to fantasize about a brunette rather than a blond." *Id.* The harassment escalated over time to include other improper

comments and the placement of a pornographic image on the plaintiff's desk. *Id.* Finally, in December, 1997, the harasser "pulled [the plaintiff] close to him . . ., tried to kiss her, and struggled with [her] until she was able to escape." *Id.*

Based on this sequence of events, the plaintiff contended that the employer could not "as a matter of law establish that [she] unreasonably failed to invoke the company's anti-harassment policy" because she had contacted the company soon after the harasser attempted to kiss her. This Court rejected the argument, stating:

> The evidence reveals a pattern of behavior beginning in September 1997 and ending December 15. The only way we can assess whether [the plaintiff] failed to take advantage of any preventative or corrective opportunities by the employer is to examine [the plaintiff's] actions from the time the unwelcome conduct began.

Id. (citations and internal quotation marks omitted). The Court in *Matvia* required the plaintiff to complain at the very beginning of a series of incidents of harassment; otherwise she would abandon any possible redress under Title VII.

However, if the plaintiff in *Matvia had* complained after the first or the second instance of harassment, she would not have had an objectively reasonable basis for believing that a hostile work environment already existed. The panel's decision in thus permits the retaliatory firing of an employee who follows *Matvia*'s guidance. If an employee does precisely what this Court has instructed the employee to do, then the panel's decision precludes any recourse under Title VII if the employee faces resultant retaliation.

The panel's decision conflicts with not only the guidance but also the underlying reasoning in *Matvia*. The majority opinion expressly rejects the argument that Title VII protects a plaintiff from retaliation where the continuation of similar conduct would create a hostile work environment. It states that a plaintiff "cannot simply *assume*, without more, that the opposed conduct will continue." *Boyer-Liberto*, 2014 WL 1891209, at *8 (quoting *Jordan*, 458 F.3d at 341). But in *Matvia* this Court stated that "employees must report improper behavior to company officials" because "[o]therwise, the harasser's conduct *would continue*." *Matvia*, 259 F.3d at 269 (emphasis added). Under *Matvia*, an employee cannot simply assume that an incident of harassment will be isolated, but rather must report the harassing behavior at the first opportunity.

The panel's decision incentivizes victims to wait to complain until harassment is actionable. It therefore contravenes the principle underlying *Matvia*, *Faragher*, and *Ellerth*: that "Congress' intention [was] to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764. By following the *Jordan* standard for protected conduct, the panel's decision undermines the very purposes of Title VII.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that the petition for rehearing en banc be granted.

Respectfully submitted,

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The undersigned hereby certifies that this brief was prepared in compliance with the type-volume limitations under Fed. R. App. P. 32(a)(7)(B) and 35(b)(2) and the Local Rules for the U.S. Court of Appeals for the Fourth Circuit. The brief has been prepared using 14 point Times New Roman with double spacing in the text. Excluding exempt portions, the brief contains 15 pages.

s/ Stephen Z. Chertkof
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June 2, 2014

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The undersigned hereby certifies that the following counsel will be served with an electronic copy of this brief today via CM/ECF:

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June 2, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel for Amici Curiae

The Metropolitan Washington Employment Lawyers Association ("MWELA") and the Public Justice Center ("PJC") move this Court for leave to participate as *amici curiae* and file the attached brief in support of Plaintiff-Appellant Boyer-Liberto's petition for rehearing en banc.

MWELA is a local affiliate of the National Employment Lawyers Association. MWELA has over 340 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C., and Maryland. MWELA's purposes include promoting the efficiency of the legal system, elevating the practice of employment law, and promoting fair and equal treatment under the law. MWELA has participated in numerous cases as amicus curiae before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

The PJC is a Maryland non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the underrepresented. Since its inception in 1985, the PJC has been committed to ensuring that persons harmed by discrimination in the workplace are not denied a judicial remedy. The PJC has submitted or joined in briefs of amicus curiae in, inter alia, *Ocheltree v. Scollon Prods., Inc.* 335 F.3d 325 (4th Cir. 2003); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278 (2004); and *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011).

MWELA and the PJC have an interest in this case because they seek to promote the just treatment of workers and to eliminate discrimination in the workplace. Based on Amici's experience, an overly narrow approach to retaliation claims under Title VII would leave persons who report employment discrimination without a remedy against retaliatory responses by their employers. Without such a remedy, employees will be unwilling to alert employers to discrimination on the job, and unlawful discrimination will flourish and spread.

MWELA and the PJC hereby declare that no party or party's counsel (a) authored any portion of this Brief or (b) contributed money that was intended to fund preparing or submitting this brief. Amici further declare that (c) no person other than MWELA, the PJC, their members, or the undersigned counsel contributed money that was intended to fund preparing or submitting the brief.

The Plaintiff-Appellant consents to this motion. The Defendants-Appellees do not consent to this motion and plan to file an opposition.

MWELA and the PJC therefore respectfully ask this Court for leave to file a brief as amici curiae in support of Plaintiff-Appellant's petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following counsel will be served with an electronic copy of this brief today via CM/ECF:

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June 2, 2014