No. 20-3075

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE CVS PHARMACY, INC.; OHIO CVS STORES L.L.C.; DISCOUNT DRUG MART, INC.; GIANT EAGLE, INC.; HBC SERVICE COMPANY; RITE AID OF MARYLAND, INC. D/B/A MID-ATLANTIC CUSTOMER SUPPORT CENTER; RITE AID OF OHIO, INC.; RITE AID HDGTRS. CORP.; WALGREENS CO.; WALGREENS EASTERN CO.; AND WALMART INC.
Petitioner-Defendants

On appeal from the United States District Court for the Northern District of Ohio, Eastern Division Case No. 1:17-md-2804

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF CHAIN DRUG STORES SUPPORTING PETITIONERS AND IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Carter G. Phillips
Robert D. Keeling
Joshua J. Fougere
Jacquelyn E. Fradette
Emmanuel C. Hampton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Don L. Bell, II
NATIONAL ASSOCIATION OF CHAIN DRUG STORES
1776 Wilson Blvd. Suite 200
Arlington, VA 22209
(703) 837-4231

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America and National Association of Chain Drug Stores respectfully submit this Corporate Disclosure Statement and state as follows:

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The National Association of Chain Drug Stores ("NACDS") is a non-profit, tax-exempt organization incorporated in Virginia. Chains operate over 40,000 pharmacies, and NACDS' over 80 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ nearly 3 million individuals, including 157,000 pharmacists. NACDS members also include more than 900 supplier partners and over 70 international members representing 21 countries. NACDS has no parent corporation, and no publicly held company has 10% or greater ownership in NACDS.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Association of Chain Drug Stores ("NACDS") represents traditional drug stores, supermarkets and mass merchants with pharmacies. They fill over 3 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability.

There is no denying the magnitude of the opioid crisis in America. It is a devastating social and economic problem—one that deserves serious

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amici curiae*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. A motion for leave to participate as *amici curiae* has been filed with the Court.

solutions. Although the dispute underlying Petitioners' mandamus petition concerns litigation relating to the opioid epidemic, amici are not participating because of that subject matter. Rather, amici file this brief becaused herence to the Federal Rules of Civil Procedure in multi-district litigation proceedings is of particular concern to the Chamber, NACDS, and their members.

The Chamber and NACDS join and support all three of Petitioners' Requests for Mandamus, but they submit this brief in particular to discuss the Court's third error. This error has particularly significant implications for the Chamber and NACDS's members, for whom the costs of discovery frequently soar into millions of dollars and sensitive company and customer information is potentially exposed, resulting in an inexorable pressure to settle claims regardless of the underlying merits. The Chamber, NACDS, and their members have a substantial interest in the enforcement of the relevance and proportionality analysis set forth in Federal Rule of Civil Procedure 26(b)(1) in MDLs. *See*, *e.g.*, U.S. Chamber Inst. for Legal Reform, *Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure*, at 3-7 (Nov. 7, 2013) (addressing the proposed amendment to Rule 26). Many of the Chamber and NACDS's members are repeatedly named as defendants in MDLs and large litigation such as class actions, and accordingly often face significant discovery

requests. The Chamber, NACDS, and their members thus have a strong interest in the proper resolution of this dispute.

This Court should grant mandamus to ensure that district courts apply Rule 26's proportionality requirements in all aspects of federal litigation, including MDLs. This Court should make clear that a focused consideration of actual relevance and a careful analysis of discovery burdens are undeniably required in large, complex cases. Accordingly, this Court should ensure that district courts managing MDLs follow the Federal Rules as written and that they have no license to adopt ad hoc exceptions.

ARGUMENT

I. THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO MULTI-DISTRICT LITIGATION PROCEEDINGS

Federal Rule of Civil Procedure 26(b)(1) provides that the scope of discovery is limited to information "relevant to any party's claim or defense" and "proportional to the needs of the case." In adding the proportionality standard to Rule 26, the Rules Committee recognized that severity of costs and the burden imposed by the discovery sought are critical to prevent litigation from becoming so expensive and time consuming that it simply implodes because no one can afford it. *See* John Roberts, *2015 Year-End Report on the Federal Judiciary*, at 6 (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf. Even if the information sought is relevant, district courts have the authority "to limit the

scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007); *see also In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 236 (6th Cir. 2016).

This sensible relevance and proportionality analysis under Rule 26 applies with equal (if not greater) force to MDL proceedings as it does to individual actions in Federal courts. *See* Fed. R. Civ. P. 1 & 81. Indeed, the MDL statute explicitly instructs the Judicial Panel on Multidistrict Litigation to adopt procedures for consolidated cases "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. 1407(f). As described by the Judicial Panel on Multidistrict Litigation, the purpose of the MDL process is "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary."[2] "Cases consolidated for MDL pretrial proceedings ordinarily retain their separate identities." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 904 (2015); *see also In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2012 WL 10684, at *2 (E.D. Mich. Jan. 3, 2012) ("An MDL proceeding is merely a collection of cases, combined to achieve efficiencies in pretrial proceedings. MDL courts cannot lose

[2] Judicial Panel on Multidistrict Litigation Overview Brochure, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Overview%20Brochure%2010-16-2019.pdf (last visited Jan. 23, 2020)

sight of the separate and distinct nature of those actions." (internal quotation marks omitted)). Consolidation "does not merge the suits into a single cause, or change the rights of the parties." *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933).

The 2015 amendments to the Rule were added against the backdrop of a proliferation of complex MDL proceedings.[3] The rule changes did not carve out an MDL specific standard that relaxes the need to consider relevance to a party's claims or defenses or whether the discovery sought is proportional to the needs of the case. Indeed, in ruling on a discovery dispute while presiding over an MDL, Judge David G. Campell, who served as the chair of the Advisory Committee on the Federal Rules of Civil Procedure from 2011 to 2015, explained that under the Rules Enabling Act, 28 U.S.C. § 2072, "the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1)" and that "[t]he test going forward is whether evidence is 'relevant to any party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence.'" *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016).

Moreover, "the 2015 amendments also added proportionality as a requirement for permissible discovery. Relevancy alone is no longer sufficient—

[3] Since the 1968 statute was passed, the JPML has considered over 2,870 dockets involving approximately 670,000 cases and millions of claims. https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Overview%20Brochure%2010-16-2019.pdf

discovery must also be proportional to the needs of the case." *Id*. And District Courts presiding over MDL proceedings around the country have applied a close proportionality and relevance standard when ruling on, and denying, discovery requests in large MDLs. *See, e.g.*, *id*. at 566 (denying MDL Plaintiffs' request for communications with foreign regulators because "burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery"); *infra* at 8-9.

II. THE DISTRICT COURT'S ORDER TO PRODUCE NATIONWIDE, HIGHLY SENSITIVE INFORMATION VIOLATES RULE 26

The District Court failed to conduct a relevance or proportionality analysis as required by Rule 26(b)(1), instead reasoning that because the MDL has 2,500 cases, Petitioners should produce expansive nationwide information since *some* of those cases may need *some* of that information later. In so doing, the District Court abandoned its duty to apply the Rule as written and imposed massive burdens on all Petitioners now forced to produce sensitive information from their pharmacies nationwide without any finding that this scope of information met the discovery standards or was needed for any case. If left to stand, this sharp departure from the careful balancing required by the law will become precedent that future MDL judges may follow. This will burden entities, impose high costs, and will subject individual and corporate data to exposure in litigation without an established need. Because the District Court's order clearly violates the textual

requirements of Rule 26 and sets a dangerous precedent, the Court should grant the petition for writ of mandamus and reverse.

A. The Scope of the Information to be Produced Is Fatally Overbroad and Not Proportional

The District Court ordered petitioners to produce pharmacy "transactional dispensing data for the entire United States" from 2006 to the present. This means that all Petitioners (which include the largest pharmacy chains in the United States) must produce transaction dispensing data for every opioid prescription purchased from all of their pharmacies for a 14 year period. The District Court's cavalier treatment of Rule 26's discovery standards and the resulting breathtaking order demonstrate why it is necessary that courts carefully adhere to the requirements of relevance and proportionality as written and as intended by the Rules Committee.

Petitioners objected to the nationwide geographic scope of the District Court's discovery order because only information related to Cuyahoga County and Summit County are relevant to Track One-B.[4] The District Court, however, rejected Petitioners' geographic scope arguments with almost no analysis. The original order broadly stated that "[d]ispensing-related claims are at issue in many

[4] The Track One-B cases are only *The County of Summit, Ohio. v. Purdue Pharma L.P.*, Case No. 18-OP-45090 (N.D. Ohio); (2) *The County of Cuyahoga v. Purdue Pharma L.P.*, Case No. 17-OP-45004 (N.D. Ohio). *In re Nati'l Prescription Opiate Litig.*, 1:17-md-2804, Case Management Order One, RE 232, Page ID # 1084; Track One-B Case Management Order, RE 2940, Page ID # 430081.

of the nearly 2500 cases in this MDL, and the pharmacies will be responsible for producing discovery responsive to those claims." Track One-B Case Management Order, RE 2940, Page ID # 430083. The order on reconsideration merely references the "necessities" of "the entire MDL." Order on Reconsideration, RE 3055, Page ID # 477519. But in neither the original order nor the order on reconsideration did the District Court identify any case in the MDL where nationwide information is relevant, nor did it present any support for the proposition that *all* of this information is relevant across various cases.[5] Indeed, the Court explicitly ruled that nationwide dispensing data is *not* relevant to the specific Ohio cases in Track One-B, the only cases at issue in the order, implicitly recognizing that data for prescriptions filled outside each municipality are irrelevant to their respective claims. Order on Reconsideration, RE 3055, Page ID # 477519. The court nevertheless ordered nationwide discovery even though not every municipal plaintiff asserts dispensing-related claims, and even those that do have not named all Petitioners as defendants in to such claims. Track One-B Case Management Order, RE 2940, Page ID # 430083. Prescription data are clearly

[5] It did not even identify a single other case where state or county specific prescription information is needed now. Track One-B Case Management Order, RE 2940, Page ID # 430082-430083.

irrelevant from municipalities not asserting dispensing claims and from Petitioners not facing them for a particular municipal plaintiff.

The District Court's order is patently overbroad and wasteful—exactly what the Rules amendments and the MDL device are designed to guard against.

B. The District Court Insufficiently Considered Patient-Privacy Concerns

As part of Rule 26's proportionality analysis, courts must balance the burden of discovery on third-party privacy, and the ability to protect that privacy if the requested information is produced, against plaintiffs' need for the information. *See* Robert D. Keeling & Ray Magnum, *The Burden of Privacy in Discovery*, 20 Sedona Conf. J. 415, 417 (2019) (discussing that with the rise of Big Data "an emerging consensus of courts and commentators has concluded that privacy may—indeed, should—be considered as part of the proportionality analysis required under Rule 26(b)(1)"). Indeed, courts frequently deny requests for discovery that, although relevant, would unduly threaten the privacy of the companies' systems or individuals' data at issue. *See Henson v. Turn, Inc.*, No. 15-cv-01497, 2018 WL 5281629, at *5 (N.D. Cal. Oct. 22, 2018) (collecting cases holding that the privacy burdens inherent in making forensic images of mobile devices or computers made the requests disproportionate to the needs of the case); *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617-LHK, 2016 WL 11505231, at *1 (N.D. Cal. Apr. 8, 2016) (denying request to make forensic images of Plaintiffs' devices because of

burdens on privacy and noting that "under the revised discovery rules, not all relevant information must be discovered."); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 249 F.R.D. 8, 12 (D. Mass. 2008); *Klein v. Affiliated Grp., Inc.*, No. 18-cv-949, 2019 WL 1307884 at *12 (D. Minn. Mar. 22, 2019) ("[T]he Court must balance 'the movant's need for the information on one pan of the scales and ... the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.").

Here, the discovery order raises significant privacy concerns that the District Court insufficiently accounted for in its proportionality analysis. The upshot of the court's ruling is that the required production covers every person who filled an opioid prescription from any of the Petitioners' pharmacies across the country from 2006 to the present. This total could be upwards of tens of millions of records and individuals.

The District Court did not undertake sufficient analysis regarding the privacy interests (and risks) at stake in producing this volume of sensitive medical information in its original order. Track One-B Case Management Order, RE 2940, Page ID # 430081. On reconsideration, the court at least acknowledged the privacy interests of the millions of individuals whose information will now unwittingly become part of this case. Order on Reconsideration, RE 3055, Page ID

477517. But the court dismissed such privacy concerns simply because it issued protective orders binding the recipients of the data. *Id*. A protective order is not a panacea for all privacy concerns, however, especially where the sensitive information of non-party patients is at stake. *See Klein*, 2019 WL 1307884, at *12 ("The Court also has doubts about the ability of the Protective Order in this case to protect the non-party patients' HIPAA protected health information.").

Nor does a protective order allow the District Court to ignore the ever-present risk of an inadvertent disclosure, data breach, or leak. A protective order can never completely eliminate that risk, which remains especially significant here given the massive size and scope of the data set, and the number of parties and attorneys involved in this MDL. Likely thousands of reviewers will have access to the prescription data. Assuming a protective order means zero risk of disclosure is wishful thinking belied by the cruel realities of our digital age.[6] Indeed, companies spend millions of dollars on their electronic storage and security systems (and to comply with regulations like HIPAA) and are still subject to frequent attacks from hackers due to the high value of the information these entities possess. And law firms are also increasingly the target of such malfeasance because of the valuable

[6] *See* Ponemon Inst. LLC, *Sixth Annual Benchmark Study on Privacy & Security of Healthcare Data* (May 2016), https://www.ponemon.org/local/upload/file/Sixth%20Annual%20Patient%20Privacy%20%26%20Data%20Security%20Report%20FINAL%206.pdf.

data they maintain in their records systems.[7] It is simply wrong to assume (as the District Court's order implicitly did) that this information will never leak because there is a protective order; in fact, the much safer assumption is that it will.

Moreover, the District Court further erred by resting solely on its protective orders because it failed to consider whether the receiving entities (law firms and state agencies) are *actually* equipped to protect data of this scope and sensitivity. The District Court declared the recipients subject to the relevant HIPAA regulatory standards for storing private patient data. Order on Reconsideration, RE 3055, Page ID # 477517. But it made no assessment of whether the receiving entities systems were in compliance with HIPAA (which is itself a challenging and expensive standard to meet) or that the parties had the resources to comply, or otherwise had the technical ability to ensure that data of this sensitivity and scope would be protected.

The court simply did not grapple with any of these very serious concerns or realities as other courts have done and as Rule 26(b) demands. *See Klein*, 2019

[7] *See* Matthew Goldstein, *Cravath Law Firm Discloses a Data Attack*, N.Y. Times, (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/business/dealbook/cravath-law-firm-discloses-a-data-attack.html; Christine Simmons, Xiumei Dong & Ben Hancock, *More than 100 Law Firms Have Reported Data Breaches; And the problem is Getting Worse*, Law.com (Oct. 15, 2019), https://www.law.com/2019/10/15/more-than-100-law-firms-have-reported-data-breaches-and-the-picture-is-getting-worse/?slreturn=20200024144532.

WL 1307884 at *12. This omission is egregious in light of the lack of any finding that data *of this scope* was needed in any case.

When the scope of the information to be produced is coupled with the fact that the information itself is of a highly sensitive nature and there is no identified need for *nationwide* information, the proportionality balance tips conclusively against production. *In re Bextra & Celebrex*, 249 F.R.D. at 14 (denying motion to compel sensitive confidential information and noting even anonymized information ran the risk it "may well disclose the reviewer's identity"). The District Court ordered patently disproportionate discovery which is not cured by the existence of a protective order. Fed. R. Civ. P. 26(b)(1).

C. This Court's Review is Urgently Needed Because the District Court's Order Sets a Dangerous Precedent for the Scope of MDL Discovery

This Court should grant immediate review because if production is required to go forward, Petitioners and the individuals whose data they will produce will be irreparably harmed. In essence, once production has been made and this vast amount of information is now in the hands of the representatives for Summit and Cuyahoga County, and potentially the far flung representatives of Plaintiffs in the MDL writ large, it cannot be undone. The genie will be let out of the bottle and all of the privacy concerns and risks of disclosure discussed above will become impossible to eliminate.

The Court should also grant review because the District Court's order, if allowed to stand, will set a dangerous precedent that subsequent MDL judges may follow.

First, this MDL is one of the most high profile legal proceedings pending and it regularly is reported about by both trade and national press.[8] Litigants and courts, particularly future MDL judges, are watching closely and may rely on the procedural rulings set in this case for years to come. Because pre-trial rules are not routinely appealable, litigants have an "inability for error correction relating to pretrial rulings that can have enormous significance for many litigants." Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Penn. L. Rev. 1669, 1706 (2017). Moreover "[t]he lack of appellate review also means that little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across jurisdictions." *Id*. That is all the more reason to grant review

[8] Jeff Overley & Emily Field , *What to Watch as the Opioid MDL Nears Moment of Truth*, Law360 (Oct. 17, 2019), https://www.law360.com/articles/1209863/what-to-watch-as-opioid-mdl-nears-moment-of-truth; Colin Dwyer, *Public Health; Your Guide to the Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation.

here, provide some much needed guidance, and ensure that the concededly liberal boundaries of Rule 26 are not stretched to their breaking point.

Second**,** purely on the basis that there are cases in the MDL pending in jurisdictions around the country, and some of those cases may *later* require production of specific information, the District Court disregarded the protections and standards of law in Rule 26 and ruled that *all* Petitioners must produce data covering the *entire* country over a 14 year period. There is no limiting principle in what the District Court ordered. Following this lead, MDL judges will feel empowered to order similarly sweeping nationwide discovery, even where the discovery may only be relevant to limited cases or jurisdictions (as is the case) here, simply because the MDL spans the country and *some* of that information might be needed later. Indeed, it will always be more expedient and simpler in an MDL for the Court to order production of everything possible, rather than conduct the relevance and proportionality analysis Rule 26 requires. Expediency obviously is no excuse for ignoring the rule's requirements.

Third, if nationwide discovery in MDLs becomes the new normal, then non-party businesses and consumers alike may have their sensitive information swept up and floating in MDL discovery databases without any countervailing need for the exposure. MDL proceedings cover vast ranges of industries and subject matters, everything from transportation, consumer products, financial instruments

and securities, pharmaceuticals, healthcare and insurance, business-to-business litigation, antitrust, labor and employment, and the list goes on.[9]

The business community, particularly pharmacies and health care providers, are deeply concerned about protecting the sensitive information of their customers that they are entrusted to safeguard. It is impossible to predict now what information from which industry may be subject to discovery (in the next MDL) under the District Court's new logic. The safeguards and standards in Rule 26 are necessary to ensure that no more information than is needed for the case will be injected into litigation.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Mandamus and reverse the District Court's orders.

Respectfully submitted,

/s/ Carter G. Phillips
Carter G. Phillips

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.

Carter G. Phillips
Robert D. Keeling
Joshua J. Fougere
Jacquelyn E. Fradette

[9] The number of cases and interests affected by MDL proceedings is similarly staggering. "Nearly 40 percent of the civil cases currently pending in federal courts—now over 130,000—are part of a multidistrict litigation, or MDL." Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1165 (2018).

Washington, DC 20062
(202) 463-5337

Don L. Bell, II
NATIONAL ASSOCIATION OF CHAIN DRUG STORES
1776 Wilson Blvd. Suite 200
Arlington, VA 22209
(703) 837-4231

Emmanuel C. Hampton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

January 24, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Federal Rule of Appellate Procedure 29(d) because it contains 3,654 words, as determined by the Microsoft Word 2016 word-processing system, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Carter G. Phillips
Carter G. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2020, I caused the foregoing Brief of *Amici Curiae* Chamber of Commerce of the United States of America and National Association Of Chain Drug Stores to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Carter G. Phillips
Carter G. Phillips