UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-5408

ADAMS & BOYLE, P.C., et al.,

Plaintiffs-Appellees

v.

HERBERT H. SLATERY III, Attorney General and Reporter, et al.,

Defendants-Appellants.

BRIEF OF AMICUS CURIAE THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:15-cv-00705)

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 6th Cir. R. 26.1, Amicus Curiae the Ethics and Religious Liberty Commission of the Southern Baptist Convention states that it is a non-profit organization, has no parent corporation, and does not issue stock.

Dated: April 23, 2020.

Respectfully submitted,

s/ Kevin Theriot
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

INTEREST OF AMICUS

The Ethics and Religious Liberty Commission of the Southern Baptist Convention ("ERLC"), which has offices in Nashville, Tennessee and Washington, D.C., is dedicated to engaging the culture with the gospel of Jesus Christ and speaking to issues in the public square for the protection of religious liberty and human flourishing. The ERLC "exists to assist the churches by helping them understand the moral demands of the gospel, apply Christian principles to moral and social problems and questions of public policy, and to promote religious liberty in cooperation with the churches and other Southern Baptist entities."[1] The Southern Baptist Convention holds as its sincere religious belief that "[a]t the moment of conception, a new being enters the universe, a human being, a being created in God's image. This human being deserves our protection, whatever the circumstances of conception."[2]

The ERLC is dedicated to protecting life in all stages of development, especially those in the womb. As part of this mission, it operates the Psalm 139 Project, an initiative designed to make people

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[1] The Ethics & Religious Liberty Commission, *About the ERLC*, https://erlc.com/about (last accessed Apr. 22, 2020).

[2] Southern Baptist Convention, *Position Statements*, https://bit.ly/34ZMumZ (last accessed Apr. 22, 2020).

aware of the life-saving potential of ultrasound technology in crisis pregnancy situations and to help pregnancy centers minister to abortion-vulnerable women by providing ultrasound equipment for them to use.[3] The ERLC also operates the Stand for Life initiative, which engages storytellers worldwide to provide pro-life stories that engage the heart, influence viewpoints, and cultivate what generations believe about the value of every life.[4]

The ERLC has an interest in protecting the sanctity of human life from conception until natural death. It also has an interest in the health and welfare of its fellow citizens of Tennessee, and therefore an interest in implementing social distancing and preserving medical equipment by the temporary suspension of elective medical procedures during the unprecedented COVID-19 pandemic.

[3] Psalm 139 Project, https://psalm139project.org/ (last accessed Apr. 22, 2020).
[4] Stand for Life, https://www.standforlife.org/ (last accessed Apr. 22, 2020).

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae the Ethics and Religious Liberty Commission of the Southern Baptist Convention states that (i) no party's counsel authored the brief in whole or in part, (ii) no party or party's counsel contributed money to fund preparing or submitting this brief, and (iii) no person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

ARGUMENT

Abortion is not an absolute right. The Supreme Court has long recognized that States have a valid interest in regulating abortion. States also have a duty to protect the health and safety of women who undergo this life-altering procedure. That is why courts have repeatedly upheld laws requiring waiting periods, ultrasounds, parental rights notifications for minors, and prohibitions against partial-birth abortions—even before viability.

The plaintiff clinics are not women protected by these laws, and the clinics do not qualify for third-party standing to represent women. Plaintiffs' interest in not being regulated by the Executive Order conflicts with

the interest of women seeking safe medical services and those who simply want to stop the spread of COVID-19 and ensure the availability of Personal Protection Equipment (PPE) for those who need it.

Yet Plaintiffs seek a special exemption to Tennessee Governor Bill Lee's Executive Order requiring the postponement of *all* elective surgeries and non-urgent medical procedures until April 30, 2020.[5] Importantly, the Order permits surgical and invasive procedures if a physician determines it is necessary "to prevent death or risk of substantial impairment of a major bodily function" or "serious adverse consequences to a patient's physical condition."[6] The Executive Order does not prohibit medication abortions because such procedures are not considered "surgical" or "invasive." *See* Appellants' Combined Emergency Mot. for Stay Pending Appeal and Merits Br. at 10 n. 20. Otherwise, the Order treats abortion the same as other elective procedures, just like pro-choice advocates have done for many years. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2320-21(2016) (Ginsburg, J., concurring)

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[5] State of Tennessee, *Executive Order by the Governor No. 25,* https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf (last accessed April 21, 2020).

[6] *Id.*

(citing Brief for Social Science Researchers filed in support of Whole Woman's Health and comparing abortion to dental procedures).

And to be perfectly clear, the extraordinary suspension of *all* elective medical procedures, no matter the kind of procedure involved, is important to slow the spread of the virus through social distancing—protecting women seeking abortions and those who accompany them—and to ensure that healthcare workers fighting COVID-19 have adequate access to PPE. Governors across the country have called for a temporary halt to all elective surgeries and procedures at all hospitals and ambulatory surgical centers.[7]

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[7] Thirty States have required postponing elective procedures because of the pandemic: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

Five states and the District of Columbia *recommend* postponing elective procedures: Illinois, Maine, Massachusetts, North Carolina, and South Carolina.

Ambulatory Surgery Center Association, *State Guidance on Elective Surgeries*, Apr. 20, 2020, https://bit.ly/2V9NpNk (last accessed Apr. 21, 2020).

Postponing non-essential medical procedures is not the only unprecedented action being taken by most states. They are also enforcing social distancing by prohibiting gatherings in groups of more than 10 and by enacting stay-at-home orders that prohibit virtually any face-to-face encounters other than buying groceries. As church communities voluntarily comply with prudential judgment of civil authorities, such governmental policies touch upon the constitutional and God-given right to assemble for worship. The policies also implicate and drastically restrict the constitutional rights to purchase firearms, protest, and speak freely. Yet governments enacted these policies anyway to protect healthcare workers, their patients, the elderly, those with compromised immune systems, and all others—including those who work at and visit Plaintiff clinics.

Everyone's priority during this national crisis should be to protect vulnerable lives. Others seeking elective medical procedures are making that sacrifice. So are people of faith, public protestors, and tens of millions of others. The abortion industry is demanding special treatment not to save lives, but to end them. This Court should not allow abortion businesses to flout social distancing requirements and drain critical

medical resources from the front lines. Because if Plaintiffs succeed in obtaining a court-ordered exemption to the Order, others will surely follow.

This Court should reverse and vacate the preliminary injunction.

I. Plaintiffs lack third-party standing because their interests conflict with the women's interests they purport to represent.

"In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio,* 499 U.S. 400, 410 (1991); *Accord Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (expressing a "reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties"). There are some exceptions to this default rule. Most relevant here is the catchall exception that applies when (1) the litigant "has a 'close' relationship with the person who possesses the right" and (2) the third party faces a "hindrance" to protecting her own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). In *Singleton v. Wulff*, a plurality held that those factors were satisfied when two doctors raised women's abortion rights in a challenge to a state

law that excluded elective abortions from Medicaid funding. 428 U.S. 106, 114–18 (1976).

But exceptions to the bar on third-party standing—both the general two-prong exception and that exception as applied to abortion doctors in *Singleton*—do not apply when there is a conflict between the litigant's and the third party's interests. The Supreme Court established this in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). The plaintiff there was a father raising his daughter's asserted constitutional interest in objecting to hearing others recite the words "under God" in the Pledge of Allegiance at public school. *Id.* at 5. According to her mother, the daughter had "no objection either to reciting or hearing" the Pledge. *Id.* at 9. The Court held that the father could not raise the daughter's rights. *Id.* at 15. The father's "standing derives entirely from his relationship with his daughter." *Ibid.* But "[i]n marked contrast to our case law on [third-party standing]," the Court said (while citing *Singleton*), "the interests of this parent [the litigant] and this child [the third party] are not parallel and, indeed, are potentially in conflict." *Ibid.* *Elk Grove* reaffirmed that conflict between a litigant's and third party's interests displaces the rules for third-party standing—including

Singleton's analysis for abortion providers. Under those circumstances, the litigant cannot assert the third party's rights.[8]

This conflict-of-interest rule fits within the logic of existing third-party standing doctrine. The first prong of the catchall exception—the "close relation[ship]" between litigant and third party—contemplates "an *identity* of interests" between the two. *Lepelletier*, 164 F.3d at 44 (emphasis added). No such relationship exists when the litigant's and third party's interests diverge, as when a doctor seeks to invalidate a rule that helps keep his patients safe.

The conflict-of-interest rule also makes sense in other contexts. Courts would not allow an adoption agency to raise children's asserted right to a family placement in a case challenging agency-screening requirements for child safety. Nor could employers raise their employees' wage-and-hour rights to invalidate an OSHA regulation that limits dangerous tasks to a few hours per week.

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[8] "[C]onflicts of interests between the plaintiff and the third party . . . strongly counsel against third party standing," *In re Majestic Star Casino, LLC*, 716 F.3d 736, 763 (3d Cir. 2013); "there must be an identity of interests" between the litigant and the third party, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999); and they must "have interests which are aligned," *Canfield Aviation, Inc. v. Nat'l Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988).

An unavoidable conflict exists here. Plaintiffs' interest in avoiding the Executive Order conflicts with women's interests in protecting their health and the health of every other Tennessean. Plaintiffs invoke women's rights to overturn a regulation that keeps those women safe. Plaintiffs assert no claim that the Executive Order restricts their right to operate their businesses, even though it directly regulates them.

Allowing abortion doctors to raise women's abortion interests in this circumstance would turn principles of third-party standing on their head. A conflicted litigant is not a fitting "proponent" for the third party's interest. *See Singleton*, 428 U.S. at 115 (plurality). Such a litigant is an advocate who will distort the case and sacrifice the right-holder's interests. Women seeking abortion are the best parties to protect their rights, and there is no hinderance to them doing so here.

The district court's preliminary injunction should be vacated because Plaintiffs lack standing to request it.

II. Pre-viability abortion is not an absolute right and is subject to regulation in virtually every state.

A. The right to abortion has never been absolute.

"[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolto*n, 410 U.S. 179, 189 (1973)

(cleaned up). *Accord Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 782 (1986) (Burger, Chief Justice, dissenting) ("[E]very Member of the *Roe* Court rejected the idea of abortion on demand."). The Fifth Circuit recently confirmed this point, refusing several abortion clinics' request to enjoin Texas' postponement of all elective medical procedures, including abortions. *In re Greg Abbott*, 2020 WL 1685929 (5th Cir. April 7, 2020).

The Fifth Circuit relied on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which upheld compulsory vaccinations over individual objections during a smallpox epidemic. Three seminal abortion cases cite *Jacobson* for the proposition that the right to abortion is not unlimited: *Roe v. Wade*, 410 U.S. 113, 154 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992), and G*onzales v. Carhart*, 550 U.S. 124, 163 (2007). *In re Greg Abbott*, 2020 WL 1685929 at *7.

Indeed, throughout the United States, pre-viability abortions are legally subject to regulation in many ways, including waiting periods, ultrasound requirements, parental rights notifications, and prohibitions on partial-birth abortion. Restrictions on pre-viability abortion are

permissible if they do not place an "undue burden" on a woman's decision to end her pregnancy. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

The undue-burden standard is less protective of abortion procedures than strict scrutiny. *See id.* at 876–78. To apply the test, courts evaluate whether an abortion restriction furthers a valid state interest. *Hellerstedt*, 136 S. Ct. at 2310. In so determining, courts may conduct their own inquiry based on the evidence presented. *Id.* Courts then analyze whether the law confers benefits that outweigh the burdens imposed. *Id.* at 2309.

No one contests that Tennessee has a valid interest in slowing COVID-19's spread to the most vulnerable members of society. Nor does anyone contest that Tennessee has a valid interest to ensure adequate medical care for those who contract the virus and the healthcare personnel who care for them by conserving personal protection equipment. The Governor's Order furthers those interests by suspending all non-essential services, including elective medical procedures of all kinds. Just this week, the Eighth Circuit found that the Arkansas restriction on elective surgical procedures—including elective abortions, but excluding non-elective and medication abortions, just as the

Tennessee Governor's Executive Order—"does not operate as an outright ban on all or virtually all pre-viability abortions" and therefore is a permissible temporary restriction on abortion. *In re Rutledge*, 2020 WL 1933122 at *6–*7 (Apr. 8th Cir. 22, 2020). Amicus urges this Court to hold the same.

The Order does not single out abortion; neither does it grant abortion a special exemption. In short, it is neutral among elective medical procedures. And with good reason. Preventing a single transmission of the virus by postponing an elective abortion may save many lives.[9] And healthcare workers treating patients with COVID-19 can put PPE to the best use at this critical juncture. Yet abortion clinics claim that they, among all service providers in Tennessee, should get a free pass when all other citizens are making sacrifices for the good of the whole. Nothing in the law compels that result.

[9] COVID-19 spreads exponentially. So just one infected person in a population can spread the disease to 1024 others in 30 days. Ethan Siegel, *Why 'Exponential Growth' is so Scary for the COVID-19 Coronavirus*, Forbes Magazine (March 17, 2020), https://bit.ly/2URvWKy (last accessed Apr. 21, 2020).

B. Tennessee's interest in fighting the pandemic satisfies the undue burden standard.

Limiting face-to-face contact with others is far and away the best method to reduce COVID-19's spread. The CDC recommends avoiding gathering in groups and staying at least six feet from those outside an individual's household.[10] Hence, a temporary pause on all day-to-day conduct—including elective medical procedures—is warranted.

Additionally, the viral pandemic that the United States and Tennessee are experiencing has led to a shortage of vital medical equipment routinely used in elective procedures. According to the CDC, of particular concern is the shortage of PPE used by "healthcare personnel to protect themselves, patients, and others when providing care" to infectious patients.[11] This shortage is "posing a tremendous challenge to the US healthcare system because of the COVID-19 pandemic."[12] A vital key to combating this shortage is for "local and state

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[10] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Social Distancing, Quarantine, and Isolation*, https://bit.ly/2RokIev (last accessed Apr. 21, 2020).
[11] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Strategies to Optimize the Supply of PPE and Equipment,* https://bit.ly/3aZAkNi (last accessed Apr. 6, 2020).
[12] *Id*.

health departments, and local and state partners to work together to develop strategies that identify and extend PPE supplies."[13] One of the strategies the CDC specifically recommended is to "cancel elective and non-urgent procedures/appointments."[14]

Governor Lee's Executive Order temporarily suspending all elective medical procedures to maintain social distancing and preserve medical equipment like PPE implements these CDC recommendations. The Order will save the lives of Tennesseans experiencing medical emergencies and those requiring necessary procedures by limiting the spread of the virus and preserving medical equipment necessary to treat it.

When evaluating the constitutionality of laws inhibiting abortion, the Supreme Court considers their purpose. *Casey*, 505 U.S. at 877. One legitimate—even compelling—purpose is to protect the health of Tennessee citizens. *See id.* at 878. The compelling interest of protecting public health justifies a temporary pause in elective abortions.

Moreover, the Governor's Executive Order benefits Plaintiffs and their patients. The "State has a legitimate interest in seeing to it that

[13] *Id.* (cleaned up).
[14] *Id.*

abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973). During this public health crisis, "maximum safety" for patients—and medical staff—is to minimize contact with others, especially in view of the need for social distancing and the PPE shortage. Plaintiffs' continued performance of elective abortions creates unnecessary close contact and encourages traveling, which will also spread the virus. This is all on top of abortion patients' need for scarce hospital services because of the well-recognized risk of serious complications that accompanies both surgical and medication abortion.

The purpose of the Governor's Executive Order is to protect public health in a time of national crisis, not to restrict abortion. It applies to all elective medical procedures, not just elective abortions. The Order satisfies the undue burden standard, and Plaintiffs have not proved they are entitled to a special exemption from the Order that no other Tennessee business has. The Court can be certain that if the district court's preliminary injunction is upheld, many others will be knocking on the courthouse door for their own exemption.

C. Virtually all states regulate abortion in some way.

Almost all states restrict abortion, and many of these restrictions regulate abortions before viability. Currently, 27 states require a waiting period between an initial consultation and the abortion procedure. Twenty-one states have laws prohibiting partial-birth abortions (a particular abortion procedure), all but three of which apply to pre-viability abortions. Thirty-seven states "require some type of parental involvement in a minor's decision to have an abortion."[15] Twenty-six states "regulate the provision of ultrasound by abortion providers," and fourteen of these states require an ultrasound for each woman seeking an abortion.[16]

Tennessee has various limitations on abortion that legally apply to abortions performed before viability.[17] For example, a woman desiring to procure an abortion in Tennessee is required to have an initial appointment at the abortion facility to obtain information on the probable

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[15] Guttmacher Institute, *An Overview of Abortion Laws as of April 1, 2020*, https://bit.ly/2VM1DnY (last accessed Apr. 21, 2020).
[16] Guttmacher Institute, *Requirements for Ultrasound as of April 1, 2020*, https://bit.ly/2y0uHQi (last accessed Apr. 21, 2020).
[17] *See* Guttmacher Institute, *State Facts About Abortion: Tennessee*, https://bit.ly/2VpEGYA (last accessed Apr. 21, 2020).

gestational age of the unborn child, the risks and benefits of an abortion and continued pregnancy, and the existence of numerous public and private agencies that are available to assist her. TCA § 39-15-202. Following such counseling, a woman must then wait 48 hours before having an abortion. *Id*. This restriction unquestionably limits the right to an abortion even prior to viability. But it is not an unconstitutional deprivation of the mother's rights, because the state's policy is furthering a valid state interest.

Plaintiffs' insinuation that abortion is an unassailable right and cannot be restricted—even during a national crisis—is unfounded.

III. The abortion industry wants special treatment while churches and others with fundamental constitutional rights are voluntarily cooperating with civil authorities to fight the pandemic.

Churches across Tennessee have voluntarily cooperated with the orders of civil authorities to fight the COVID-19 pandemic. Limiting church services is particularly painful for those churches that require weekly church attendance and observance of religious ceremonies. For example, the Southern Baptist Convention believes that "[t]he first day of the week is the Lord's Day. …It commemorates the resurrection of Christ from the dead and should be employed in exercises of worship and

spiritual devotion."[18] Catholics believe "[t]he Sunday celebration of the Lord's Day and his Eucharist is at the heart of the Church's life."[19] Yet churches across Tennessee—and myriad others across the country—have temporarily halted public worship services to prevent the spread of COVID-19. This is no small incursion on religious liberty as churches across the world have been following the requirement to worship together for almost 2,000 years.

Unlike the abortion proponents here, churches that have sought relief from discriminatory COVID-19 proclamations are not seeking a special exemption. A law targeting churches and treating them differently than other types of gatherings is far different than Tennessee's executive order postponing all elective surgeries—including abortion.

Social distancing also impedes the right to assemble for political and other purposes. Court closures have postponed criminal jury trials,

[18] Southern Baptist Convention, *Basic Beliefs*, https://bit.ly/3cGueSt (last accessed Apr. 22, 2020).
[19] *Catechism of the Catholic Church* at 2177, https://bit.ly/2VgO5An (last accessed Apr. 21, 2020)

causing the loss of Sixth Amendment rights.[20] Ohio restricted the right to vote by postponing a primary election due to COVID-19 health concerns.[21] New York is restricting Second Amendment rights by forcing stores selling firearms to close.[22] And political parties are postponing or cancelling altogether rallies and even national nominating conventions.

The Fifth Circuit recently noted that the "exponential growth of COVID-19" has "closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, [limited] worship services, and locked down…cities." *In re Greg Abbott*, 2020 WL 1685929 at *9. People from all walks of life are sacrificing cherished freedom to save lives. "The right to abortion [should be] no exception." *Id*. at *1.

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[20] Melissa Chan, *'It Will Have Effects for Months and Years.' From Jury Duty to Trials, Coronavirus is Wreaking Havoc on Courts*, Time (March 16, 2020), https://bit.ly/3e6mkTU (last accessed Apr. 21. 2020).
[21] *See State ex rel. Speweik v. Wood Cty. Bd. of Elections*, No. 2020-0382, 2020 WL 1270759 (Ohio Mar. 17, 2020); J. Edward Moreno, *Ohio Supreme Court Denies Challenge to State Primary Delay*, The Hill (Mar. 17, 2020), https://bit.ly/2wq4la5 (last accessed Apr. 21, 2020).
[22] Danny Hakim, *Ailing N.R.A. Finds New Rallying Cry: Keep Gun Shops Open*, The New York Times (Apr. 2, 2020), https://nyti.ms/3aZAqEE (last accessed Apr. 21, 2020).

CONCLUSION

Plaintiffs lack the third-party standing necessary to sue because their interests conflict with the women the clinics purport to represent. Moreover, the Executive Order postponing all elective surgeries meets the undue-burden test's threshold in this unique emergency. COVID-19 spreads when people are in close proximity, and the virus is often transmitted before someone even knows they are sick. All it takes is one asymptomatic abortion doctor or pregnant mother in a single abortion clinic, and many dozens of Tennesseans will become seriously ill as a result. Some of them will die. Plaintiffs have no legal duty to protect those third parties. But the Tennessee Governor is certainly well within constitutional boundaries to do so. The Court should reverse the district court, vacate the injunction, and enter judgment for the State.

Respectfully submitted this 23rd day of April 2020,

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CERTIFICATE OF COMPLIANCE

This brief complies with the world limit of Fed. R. App. P. 8 and 32(a)(7)(B) because this brief contains 3,893 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: April 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2020, I electronically filed the above with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

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