No. 21-10302

In the United States Court of Appeals for the Fifth Circuit

VICTOR LEAL; PATRICK VON DOHLEN; KIM ARMSTRONG,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES OF AMERICA; KENT SULLIVAN; TEXAS DEPARTMENT OF INSURANCE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division
Case No. 2:20-cv-00185-Z

REPLY BRIEF OF APPELLANTS VICTOR LEAL, ET AL.

H. DUSTIN FILLMORE III
CHARLES W. FILLMORE
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Plaintiffs-Appellants

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The government contends that the plaintiffs lack standing, and that their non-delegation claim is both meritless and barred by res judicata. We will first address Article III standing before proceeding to the merits.

I. The Plaintiffs Have Alleged Article III Standing

The government contends that the plaintiffs have failed to "establish" standing in their complaint. *See* Appellees' Br. at 12. But this case is at the pleading stage, where a plaintiff needs only to allege and not prove the elements of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of the Article III standing inquiry] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). Detailed factual allegations are not required; a complaint needs only to provide a plausible basis for believing that Article III standing can be established. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). The complaint does more than enough to plausibly allege the components of Article III standing.

A. Each Of The Plaintiffs Has Alleged Injury In Fact

Plaintiffs Victor Leal and Patrick Von Dohlen are devout Roman Catholics who oppose all forms of birth control, and they want to purchase health insurance that excludes coverage of contraception to avoid subsidizing other people's contraception and becoming complicit in its use. ROA.16 (¶ 31). Plaintiffs Leal and Von Dohlen allege that the continued enforcement of the

federal Contraceptive Mandate inflicts Article III injury—even though the *DeOtte* injunction allows insurers to offer contraceptive-free policies to individual religious objectors—because it remains "impossible" for them to obtain health insurance that excludes contraceptive coverage:

> The federal defendants' enforcement of the Contraceptive Mandate, along with the state defendants' enforcement of Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), make it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception, thereby inflicting injury in fact.

ROA.17 (¶ 33). Plaintiffs Leal and Von Dohlen want to purchase health insurance that excludes contraceptive coverage, and they have specifically alleged that it is "impossible" for them to do so in the current regulatory climate. That assuredly constitutes "injury in fact." If a woman alleged that she could not obtain an abortion because federal and state regulations had chased out willing providers and made it "impossible" for her to access the procedure, that would surely qualify as Article III injury. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 124–25 (1973). It is hard to understand how a different result can obtain here.

Plaintiff Armstrong has likewise alleged injury in fact by asserting that she is unable to purchase or obtain less expensive health insurance that excludes contraceptive coverage:

> The federal Contraceptive Mandate also inflicts injury in fact on non-religious objectors such as Ms. Armstrong, who are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need.

ROA.17 (¶ 35); *see also* ROA.16-17 (¶¶ 32–33). Ms. Armstrong is not required to prove that compulsory contraceptive coverage leads to higher premiums at this stage of the litigation. She needs only to *allege* that she is being "forced to pay higher premiums for health insurance that covers contraceptive services" that she does not want or need, and those allegations must be accepted as true at the motion-to-dismiss stage. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.").

B. Each Of The Plaintiffs Has Alleged Traceability And Redressability

The plaintiffs have specifically alleged that their inability to purchase health insurance that excludes contraceptive coverage is traceable to the federal defendants' enforcement of the Contraceptive Mandate. *See* ROA.17 (¶ 33) ("The federal defendants' enforcement of the Contraceptive Mandate, along with the state defendants' enforcement of Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), make it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception, thereby inflicting injury in fact."); ROA.18 (¶ 37) ("The plaintiffs' injuries are fairly traceable to the defendants' enforcement of the federal Contraceptive Mandate and the Texas contraceptive equity law"). They have also alleged that the Contraceptive Mandate has increased the price of health-insurance premiums. ROA.17 (¶ 35)

("The federal Contraceptive Mandate also inflicts injury in fact on non-religious objectors such as Ms. Armstrong, who are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need."). The government denies that the plaintiffs have sufficiently alleged traceability or redressability, but none of its arguments can defeat standing at the motion-to-dismiss stage.

First, the government contends that the plaintiffs' injuries are partially attributable to the actions of third-party insurance companies, which should (in the government's view) make standing "'substantially more difficult to establish.'" Appellees' Br. at 12 (quoting *California v. Texas*, 141 S. Ct. 2104, 2117 (2021)). But this case is at the pleading stage, so the plaintiffs need only to allege and not prove that contraceptive-free health insurance will become available in the absence of the Contraceptive Mandate. *See California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (noting that "mere allegations" of traceability suffice before the summary-judgment stage (quoting *Clapper v. Amnesty International USA*, 568 U.S. 398, 411–12 (2013)). And the plaintiffs have unambiguously alleged that the continued enforcement of the Contraceptive Mandate makes it untenable for insurers to offer contraceptive-free health-insurance policies to the general public, and that an injunction against the continued enforcement of the Contraceptive Mandate will expand the availability of contraceptive-free health insurance plans. ROA.17 (¶ 34) ("Without the federal Contraceptive Mandate, insurers will have the freedom to offer policies that exclude contraceptive coverage to the general public, just as they

did before the Contraceptive Mandate, which *will expand* the health-insurance options available to consumers who oppose contraceptive coverage for sincere religious reasons." (emphasis added). The plaintiffs have also alleged that consumers *will* pay lower premiums for health insurance in the absence of the Contraceptive Mandate. ROA.17 (¶ 35) ("The federal Contraceptive Mandate also inflicts injury in fact on non-religious objectors such as Ms. Armstrong, who are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need."). Nothing more is required at this stage of the litigation.

Second, the government claims that the existence of the Texas contraceptive-equity law severs any causal connection between the federal Contraceptive Mandate and the plaintiffs' injuries. *See* Appellees' Br. at 12 (claiming that the Texas contraceptive-equity law "independently prevents insurers in Texas from selling plans without contraceptive coverage."). But the government is misdescribing the requirements of the Texas law. The Texas law is not a contraceptive mandate; it does not require health insurers to cover contraception, and it does not prohibit cost-sharing arrangements such as co-pays and deductibles. ROA.15 (¶ 24); ROA.174-176. It is a contraceptive-equity law, which merely requires insurers to cover contraception on the same terms that they cover other prescription drugs. *See* Tex. Ins. Code § 1369.104–.109 (ROA.174-176). An injunction against the continued enforcement of the federal Contraceptive Mandate would alleviate the plaintiffs' injuries by allowing insurers to exclude or limit coverage of contracep-

tion—so long as they impose identical exclusions or limitations on the coverage of prescription drugs.[1] And in all events, the "traceability" requirement does not require a plaintiff to allege but-for or even proximate causation; a plaintiff needs only to allege that its injuries are "fairly traceable" the defendants' conduct, and that it is "likely" (not certain) that those injuries will be redressed in some way by a favorable court ruling. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct."); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) ("[T]he relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." (emphasis removed); *Larson v. Valente,* 456 U.S. 228, 244, n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury"). The allegations of the complaint easily clear those hurdles. ROA.16-18 (¶¶ 31–37).

Finally, the government questions whether private insurers would offer contraceptive-free health insurance in the absence of the federal Contracep-

1. The plaintiffs sought injunctive relief from the district court against the continued enforcement of the Texas contraceptive-equity law. ROA.21-23. But the district court held that it lacked jurisdiction to consider those claims, ROA.449-457, and the plaintiffs have not appealed this aspect of the district court's holding.

tive Mandate. *See* Appellees' Br. at 13–15. But these are factual questions that cannot be resolved on a motion to dismiss. The plaintiffs are not required to demonstrate that insurance companies actually will offer contraceptive-free health insurance in response to their lawsuit at this stage of the litigation. And if the government wants to dispute the plaintiffs' allegation that insurers "will expand" the availability of contraceptive-free health insurance in response to the requested injunction, it can do so at summary judgment. The plaintiffs have asserted that this will occur, and that is all that is needed to *allege* redressability under the rules of notice pleading. *See Leatherman*, 507 U.S. at 164 ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint."). The "plausibility" standard from *Twombly* does not allow a court to disbelieve the factual assertions that appear in a complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citation and footnote omitted)).

And in all events, the government does not contest the plaintiffs' assertion that consumers will pay lower premiums for health insurance in the absence of the Contraceptive Mandate. ROA.17 (¶ 35) ("The federal Contraceptive Mandate also inflicts injury in fact on non-religious objectors such as Ms. Armstrong, who are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need."). So even

if the government could somehow convince this Court to deny the truth of the plaintiffs' allegation that insurers would offer contraceptive-free policies in the absence of the Contraceptive Mandate, the plaintiffs would still have standing to challenge the Contraceptive Mandate based on their allegations that it has increased the price of health-insurance premiums.

II. Mr. Leal and Mr. Von Dohlen's Claims Are Not Barred By Res Judicata

The plaintiffs contend that the district court's res judicata holding is incompatible with *Hellerstedt*, and that its dismissal of Leal and Von Dohlen's constitutional challenges to 42 U.S.C. § 300gg-13(a)(4) is incompatible with the "same nucleus of operative fact" test that has traditionally governed res judicata inquiries. The government denies each of these claims, but none of its arguments hold water.

A. The District Court's Res Judicata Dismissal Contradicts *Hellerstedt*

The plaintiffs' opening brief asserted that the district court's res judicata dismissal violates *Hellerstedt* in two separate and distinct ways. First, *Hellerstedt* holds that a litigant who challenges a statutory provision in an initial lawsuit may challenge a "separate, distinct provision" in a second lawsuit—even when those claims arise out of the same nucleus of operative facts. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016). In this lawsuit, Leal and Von Dohlen are challenging the constitutionality of 42 U.S.C. § 300gg-13(a)(4), a "separate, distinct provision" from the agency

rules that they had previously challenged in *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019). It follows that *Hellerstedt* bars any res judicata defense over their challenge to this "separate, distinct provision" of federal law, regardless of whether the claims fall within the "nucleus of operative fact" at issue in the previous lawsuit.

The government tries to get around *Hellerstedt* by claiming that the separate statutory provisions in that case "established 'different, independent requirements' and 'serve[d] two different functions.'" Appellees' Br. at 18 (quoting *Hellerstedt*, 136 S. Ct. 2292, 2308 (2016)). But that is equally true of 42 U.S.C. § 300gg-13(a)(4) and the agency rules establishing the Contraceptive Mandate. The statute merely authorizes the Health Resources and Services Administration to decide which "preventive care and screenings" for women should be covered without cost-sharing arrangements. The agency rules, by contrast, require that all FDA-approved contraceptive methods must be covered as preventive care by all private insurers without cost-sharing arrangements such as co-pays or deductibles. The function of 300gg-13(a)(4) is to delegate authority to HRSA. The function of the Contraceptive Mandate, by contrast, is to specify that contraception must be covered by all private insurers as "preventive care." These are indisputably "different functions," and they are also "different, independent requirements." *Hellerstedt*, 136 S. Ct. 2292, 2308 (2016).

Second, *Hellerstedt* holds that a facial and as-applied challenge to the same statutory provision will be different claims—even when those claims

arise out of the "same nucleus of operative fact"—as long as the claims involve "important human values." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305-06 (2016). The government tries to avoid this portion of *Hellerstedt* by asserting that the follow-up lawsuit in *Hellerstedt* was based on "new facts and circumstances." Appellees' Br. at 19. But Leal and Von Dohlen's lawsuit is likewise based on new facts and circumstances that emerged after the *DeOtte* injunction took effect—namely, that the *DeOtte* injunction was insufficient to protect the rights of individual consumers of health insurance who wish to purchase contraceptive-free policies on the market. This lawsuit—just like the second lawsuit in *Hellerstedt*—rests on "new material facts,"[2] "later, concrete factual developments,"[3] and "events the postdate the filing of the initial complaint,"[4] and that is all that is needed to demonstrate that Leal and Von Dohlen are *not* asserting "the very same claim" as the *DeOtte* litigants. *See Hellerstedt*, 136 S. Ct. at 2307.

Finally, the government does not contest Leal and Von Dohlen's claim that this case involves "important human values," which appears to be both a necessary and sufficient condition for triggering *Hellerstedt*'s approach to res judicata. *See Hellerstedt*, 136 S. Ct. at 2305 ("[W]here 'important human values—such as the lawfulness of continuing personal disability or restraint—

2. *Hellerstedt*, 136 S. Ct. at 2305.
3. *Hellerstedt*, 136 S. Ct. at 2306.
4. *Hellerstedt*, 136 S. Ct. at 2305 (citation and internal quotation marks omitted).

are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (quoting Restatement (Second) of Judgments § 24, Comment *f* (1980)); id. at 2306("The claims in both *Abbott* and the present case involve 'important human values.'").

B. Leal And Von Dohlen Can Challenge The Constitutionality Of 42 U.S.C. § 300gg-13(a)(4) Under The "Same Nucleus Of Operative Facts" Test

Leal and Von Dohlen can also surmount the government's res judicata defense under the "same nucleus of operative fact" test. The "nucleus" of operative fact in this case surrounds *Congress's* action in enacting an unconstitutional statute,[5] and the relevant facts concern nothing more than the text of this statute and the meaning of the Constitution. The "nucleus" of operative facts in *DeOtte* concerned the behavior of *executive-branch officials* who were enforcing the Contraceptive Mandate in a manner that violated the Religious Freedom Restoration Act, and the relevant facts involved the meaning of RFRA and the content of the Contraceptive Mandate.

The government insists that these claims are "based on the same nucleus of operative facts,"[6] but it never explains and offers no argument for how there is any overlap between the relevant factual nuclei. The government correctly observes that merely offering a "different legal theory" is insufficient

5. *See generally* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010).

6. Appellees' Br. at 17.

to avoid a res judicata bar,[7] but the plaintiffs' argument does not rest on the fact that they are offering new legal theories in this case. The plaintiffs' argument against res judicata is that the relevant factual nuclei are distinct, because the *DeOtte* lawsuit was challenging the legality of an agency regulation, while this lawsuit is challenging the constitutionality of Congress's decision to delegate that authority in the first place. The government has no answer to this, and it provides no analysis of the relevant factual "nucleus" in either of the two cases.

All that the government has to offer is a conclusory assertion that "a challenge to the constitutionality of a statute can and should be raised in the same action challenging regulations implementing the statute." Appellees' Br. at 18. But this does not answer the plaintiffs' argument that the factual nuclei are distinct, and it gives no leverage in showing that the claims in this case arise from the same "nucleus of operative fact" as the claims in *DeOtte*. It is also unsupported by any citation of authority. Leal and Von Dohlen are litigating a distinct claim from the *DeOtte* litigants, and the district court erred in dismissing those claims on res judicata grounds.

III. Section 300gg-13(a)(4) Fails To Provide An "Intelligible Principle" To Guide HRSA's Discretion

The government correctly observes that the Supreme Court and the Fifth Circuit have upheld broad delegations of authority to administrative

7. Appellees' Br. at 17.

agencies. *See* Appellees' Br. at 20–31. But the non-delegation doctrine is not extinct, and the Supreme Court's ruling in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020), makes clear that the doctrine remains judicially enforceable.

The problem with the delegation of authority in section 300gg-13(a)(4) is that there is no "intelligible principle" in the language of the statute that purports to guide HRSA's discretion in deciding which "preventive care and services" should be covered. The government tries to create an intelligible principle by observing that the HRSA's authority is limited to "preventive care and screenings" and only "with respect to women." Appellees' Br. at 24. But this argument wrong equates a *boundary* on the scope of agency's authority with the *intelligible principle* needed to guide the agency's discretion within those statutory boundaries. The government's reliance on HRSA's efforts to cabin its own discretion is similarly misguided,[8] as an agency cannot cure a congressional failure to provide an intelligible principle in the statutory language by creating or imposing those constraints on its own initiative. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 473 (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had

8. *See* Appellees' Br. at 24–25; *id.* at 30–31.

omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

The Supreme Court cases cited by the government all involved statutes in which *some* semblance of an "intelligible principle" appeared in the statutory language. Statutes that instruct agencies to determine and recover "excessive profits" from military contractors,[9] or to set "fair and equitable" commodities prices,[10] or to regulate in a manner consistent with "public interest, convenience, or necessity"[11] describe at least some standard for the agency to follow or aspire to. Section 300gg-13(a)(4) has nothing of this sort to provide guidance to the agency, and it appears to authorize HRSA to mandate coverage for whatever preventive care it wants. The government notes that HRSA's decisions will remain subject to arbitrary-and-capricious review under the APA,[12] but that does salvage an unconstitutional delegation of authority. Merely telling an agency not to act in an arbitrary or capricious manner does not establish an "intelligible" principle.

Finally, the government suggests that the Supreme Court might read an intelligible principle into section 300gg-13(a)(4) to avoid pronouncing the statute unconstitutional. *See* Appellees' Br. at 28–29 ("[T]he Supreme Court

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9. *Lichter v. United States*, 334 U.S. 742, 785-86 (1948).
10. *Yakus v. United States*, 321 U.S. 414, 420 (1944) (quotation marks omitted).
11. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943).
12. Appellees' Br. at 27.

could interpret the provision at issue here in a way that would avoid constitutional concerns . . . . [T]he Court could reinterpret the delegation to HRSA in a manner that would provide an even more robust 'intelligible principle' than the statute already contains."); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000). But the Supreme Court did not do that in *Little Sisters*. On the contrary, *Little Sisters* construed the statute in a manner that aggravated the absence of an intelligible principle by recognizing the authority of HRSA to create exceptions to its preventive-care mandates. It is hard to see how this Court could adopt a different approach given the Supreme Court's actions in *Little Sisters*, as well as the Court's apparent invitation of a non-delegation challenge.

CONCLUSION

The judgment of the district court should be reversed to the extent it dismissed the claims brought against the federal defendants, and the case should be remanded for further proceedings.

Respectfully submitted.

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

H. DUSTIN FILLMORE III
CHARLES W. FILLMORE
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Dated: September 21, 2021

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on September 21, 2021, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon:

KAREN SCHOEN
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Room 7533
Washington, D.C. 20530
(202) 514-3159 (phone)
(202) 307-2551 (fax)
karen.a.schoen@usdoj.gov

BRIAN W. STOLTZ
Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
(214) 659-8626 (phone)
(214) 659-8807 (fax)
brian.stoltz@usdoj.gov

Counsel for the Federal Defendants

MATTHEW BOHUSLAV
Assistant Attorney General
General Litigation Division
Post Office Box 12548
Austin, Texas 78711-2548
(512) 463-2120 (phone)
(512) 320-0667 (fax)
matthew.bohuslav@oag.texas.gov

WILLIAM SUMNER MACDANIEL
Assistant Attorney General
Financial Litigation and Charitable
Trusts Division
Post Office Box 12548
Austin, Texas 78711-2548
(512) 936-1862 (phone)
(512) 477-2348 (fax)
william.macdaniel@oag.texas.gov

Counsel for the State Defendants

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

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1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4,079 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellants

Dated: September 21, 2021

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on September 21, 2021, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, through the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellants