Nos. 22-1291 and 22-1292

United States Court of Appeals for the Tenth Circuit

JOAN OBESLO, et al.,

Plaintiffs,

v.

EMPOWER CAPITAL MANAGEMENT, LLC, and
EMPOWER ANNUITY INSURANCE COMPANY OF AMERICA

Defendants-Appellees.

SCHNEIDER WALLACE COTTRELL KONECKY LLP,

Attorney-Appellant,

(*caption continued on inside cover*)

Appeal from the U.S. District Court for the District of Colorado
(Civ. No. 1:16-cv-00230) (The Honorable Christine M. Arguello, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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Attorney-Appellant.

CORPORATE DISCLOSURE STATEMENT

Amicus makes the following disclosure under Tenth Circuit Rule 26.1: The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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AMICUS CURIAE'S STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America submits this amicus brief in accordance with Federal Rule of Appellate Procedure 29.[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region in the ccountry. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Because its members frequently face lawsuits, the Chamber is concerned about the increasing congestion in the judicial system and the significant role that attorneys have played in driving the surge in

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae,* its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

meritless litigation. Affirming the decision below would serve the twin interests of preserving litigation standards while discouraging frivolous lawsuits.

INTRODUCTION AND SUMMARY

The obligation to abandon frivolous claims is a critical backstop against vexatious litigation. And in an age of surging civil litigation costs—hundreds of billions of dollars annually for the tort system alone—that backstop is only more important. When parties and attorneys press forward frivolous claims, they drain the resources of our court system and delay justice for the meritorious claims. Those costs only increase as litigation is prolonged, so the obligation to abandon frivolous claims doesn't end with the filing of a complaint or even with the denial of a motion for summary judgment. It remains throughout litigation, even up through trial.

Sanctions are a critical tool for reinforcing that obligation, as this case illustrates. Here, Appellants took a frivolous case to trial even though it was apparent that the claims were doomed to fail. That choice warranted sanctions, and the district court appropriately exercised its discretion under 28 U.S.C. § 1927 to award attorneys' fees against

Appellants. The awarded sanction was both reasonable and proportionate to Appellants' insistence on pursuing meritless claims and recklessly proceeding to trial on those claims. The court sent a message not only to the sanctioned attorneys but also to other potential litigants and their attorneys: pursue meritless claims at risk of financial penalty. That message only grows more important as litigation proliferates, and this Court should affirm.

ARGUMENT AND AUTHORITIES

I. SANCTIONS PLAY AN IMPORTANT ROLE IN DETERRING FRIVOLOUS LITIGATION.

"'[O]f all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant.' Yet, none is more important." *Loftus v. SEPTA*, 8 F. Supp. 2d 458, 459 (E.D. Pa. 1998)), *aff'd*, 187 F.3d 626 (3d Cir. 1999). Lawyers, "as officers of the court," have a special duty to "avoid conduct that undermines the integrity of the adjudicative process." *See* Model Rules of Prof'l Conduct 3.3. And to "deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage

their own proceedings." *United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 856 (10th Cir. 2005).

Sanctions thus play a critical role in our legal system. "When a party's, or counsel's, actions threaten the Court's mandate to promote justice and judicial efficiency, sanctions are the tools the Court may use to 'preserve the dignity of the legal process.'" *Hernandez v. Wade Shows, Inc.*, No. CIV-13-1085-C, 2015 U.S. Dist. LEXIS 5445, at *2 (W.D. Okla. Jan. 16, 2015) (citation omitted). Courts must ensure that dockets aren't clogged by meritless lawsuits so that parties with well-supported claims get their day in court.

As commentators from all sides understand, overwhelming caseloads, substantial litigation delays, and spiraling costs threaten aggrieved parties' access to justice. *See* Kristina Davis, *A House Subcommittee Hearing Stressed Crushing Caseloads and Due Process Delays Across the Country, including San Diego*, U.S. COURTS (Feb. 25, 2021) ["Davis, *House Subcommittee Hearing*"]. In 2022, filings in U.S. district courts exceeded case closures, and the total pending civil and criminal cases grew by 7% to 761,028. *See Federal Judicial Caseload Statistics 2022*, U.S. COURTS (last visited Apr. 19, 2023). Federal courts

across the Nation recognize the problem. Chief District Judge Kimberly Mueller of the Eastern District of California believes that "[f]or 20 years-plus, we've been in a judicial emergency." Davis, *House Subcommittee Hearing*.

The costs of litigation overload are staggering, and they take many forms. For example, in 2020, tort litigation cost $443 billion, or 2.1 percent of the U.S. gross domestic product (GDP)—and only 53 percent of that amount went to claimants. U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 2, 21 (Nov. 2022). That represents nearly three times the total tort costs from 1994, far exceeding the costs in any other country. *See* Tillinghast-Towers Perrin, *Tort Cost Trends: An International Perspective*, App. 2 (1995). In the class-action arena, corporate defense spending alone accounted for more than $3.5 billion in 2022, continuing a long-running upward trend. *See* Carlton Fields, *12th Annual Class Action Survey* (Mar. 6, 2023), at 4–6. Defending even one class action can cost more than $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011).

Llawyer-driven litigation is partly to blame. In a variety of contexts, plaintiffs' attorneys bring lawsuits designed to drive settlements, which can result in large payouts for attorneys. "Attorneys have the unique power to subject innocent individuals to a situation in which simply paying off frivolous claimants through monetary settlements is often cheaper than litigating the case." Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 226 (2007). For example, in securities class actions, high defense costs and the potential for ruinous liability create strong pressure on defendants to settle regardless of merit. *See* Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 16, STANFORD CLEARINGHOUSE (2020) (less than 1% of securities class filings from 1997 to 2018 reached trial verdict and nearly half settled). Aware of those dynamics, "plaintiffs with weak claims" can "extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

Likewise, in the ERISA space, the number of retirement-plan lawsuits has skyrocketed over the last decade—driven by plaintiffs' lawyers seeking to extract high-dollar settlements with hefty attorney's

fees. *Employee Benefit Class Settlements Gleaned Over $500M in 2017*, BLOOMBERG LAW (Jan. 23, 2018), bit.ly/3XSr1qU. Fiduciary liability insurance companies have paid "well over one billion in settlements" in those cases. Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 13, EUCLID SPECIALTY (Dec. 2020). And a large portion of those settlements goes to plaintiffs' lawyers, not plaintiffs themselves: One study of class action settlements from 2019–2020 found that "more than half of [class] settlement[s] on average went to attorneys or others who were not class members." *See* U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 13 (Aug. 2022) ("A defining feature of current class action practice is that settlements purportedly entered into on behalf of consumers are structured to reward class counsel with excessive fees while providing class members with little—if any—relief.").

Those increased costs are particularly troubling because frivolous lawsuits remain an exasperating feature of our legal system. In a recent putative class-action lawsuit, for example, the plaintiff alleges that a customer was misled by the promise that microwave macaroni-and-

cheese would be "ready in 3 1/2 minutes" because that time did not include the time spent adding water and stirring in addition to the time spent in the microwave. *See Ramirez v. Kraft Heinz Foods Co.*, No. 22-cv-23782 (S.D. Fla. Nov. 18, 2022). No issue is too small for an enterprising plaintiff's lawyer to use as a vehicle for imposing costs on a defendant business.

In many instances, "parties and their lawyers will learn that a lawsuit is frivolous only after the lawsuit commences"—or even worse (as here), only after a worthless case goes to trial. Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 62 (2004). "All cases, simply by virtue of being filed, have an immediate value for the plaintiff that creates an inherently superior bargaining position for the plaintiff's attorney"—even when the underlying claims are not worth the paper they're written on. McMillian, 31 AM. J. TRIAL ADVOC. at 226. Given the significant potential for abuse—and a demonstrated history of abuse across the Nation—federal courts should use the tools available to them to rein in frivolous litigation.

II. 28 U.S.C. § 1927 IS ONE TOOL AMONG MANY THAT COURTS CAN USE TO SANCTION LITIGATION MISCONDUCT.

Federal Rule of Civil Procedure 11 "is the most prominent provision authorizing sanctions for litigation abuse." 1 SANC. FED. LAW OF LIT. ABUSE § 1 (2022).[2] But Rule 11 is just one rule among many authorizing sanctions. Federal Rules of Civil Procedure 16(f), 26(g), 30(d)(2), and 37, Federal Rules of Appellate Procedure 38 and 46(c), and two federal statutes—28 U.S.C. § 1912 and 28 U.S.C. § 1927—are also available to courts to address abusive litigation tactics, including pursuing obviously meritless claims. *Id.*

Those different rules apply in different contexts. Federal Rules of Civil Procedure 11, 16(f), 26(g), 30(d)(2), and 37 apply only to civil litigation. *See, e.g.*, 1 SANC. FED. LAW OF LIT. ABUSE § 1 (Rule 11 "applies to all civil litigation papers presented in federal district court, with the exception of discovery requests, responses, objections and discovery motions."). Rules 16(f), 26(g), 30(d)(2), and 37 "apply only to specific

[2] *Sanctions: The Federal Law of Litigation Abuse* is authored by Gregory P. Joseph, a past president of the American College of Trial Lawyers, a former chair of the American Bar Association Section of Litigation, and a former member of the Advisory Committee on the Federal Rules of Evidence.

pretrial papers and activities at the district court level." *Id.* Appellate Rules 38 and 28 U.S.C. § 1912, on the other hand, "extend to all cases, civil and criminal," and are limited to appeals. *Id.*

As happened below, district courts can also impose sanctions under 28 U.S.C. § 1927—which "extend[s] to all cases, civil and criminal"—but only against a party's counsel. 1 SANC. FED. LAW OF LIT. ABUSE § 1. The statute authorizes sanctions against attorneys "who so multipl[y] the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. It "embraces *everything they do* in federal court." 1 SANC. FED. LAW OF LIT. ABUSE § 1 (emphasis added). Unlike other sanctions powers, "[*a*]*ll* cases and proceedings are covered" by § 1927 across "*all* stages of *all* litigations, from commencement through appeal." *Id.* (emphasis added). Accordingly, § 1927 requires "attorneys to regularly re-evaluate the merits of their claims and to avoid prolonging meritless claims." *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006).

Even in the absence of those and other statutes and rules, federal courts retain inherent power "necessary to the exercise of all other[] [powers]." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). That

inherent power derives from the "control necessarily vested in courts to manage their own affairs" but are not conferred or "governed . . . by rule or statute." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962). The courts' inherent power "applies to all proceedings, and no one is exempted from its reach." 1 SANC. FED. LAW OF LIT. ABUSE § 1. It includes the authority to award attorneys' fees against a party's counsel. *See, e.g.*, *Chambers*, 501 U.S. at 48.

III. 28 U.S.C. § 1927 AUTHORIZED THE SANCTIONS AGAINST APPELLANTS.

The district court followed 28 U.S.C. § 1927's plain language in awarding the sanctions below: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Although the statute's history "parallels that of Rule 11," its importance "has been dramatically reinvigorated" in recent years because of "publicity that has . . . been showered on litigation abuse." *Id.* In 1980, Congress amended § 1927 to expand the category of recoverable expenses allowed by the statute. Today, the statute is marked by "its

breadth"—it embraces "everything [lawyers] do in every federal court." 1 SANC. FED. LAW OF LIT. ABUSE § 1.

Courts around the country have exercised their discretion under § 1927 to punish counsel for advancing meritless claims. *See Steffens v. Steffens*, No. 99-1253, 2000 U.S. App. LEXIS 6912, at *9–10 (10th Cir. Apr. 17, 2000) (counsel's "continued prosecution of the federal action after it became apparent that it was meritless warranted sanctions" under Section 1927); *O'Rourke v. Dominion Voting Sys.*, No. 21-1442, 2022 U.S. App. LEXIS 34194, at *16-17 (10th Cir. Dec. 13, 2022) (quoting *Frey v. Town of Jackson*, 41 F.4th 1223, 1245 (10th Cir. 2022)) ("'[c]ontinuing to pursue claims after a reasonable attorney would realize they lacked merit can warrant sanctions under § 1927.'"); *Timmons v. Lockheed Martin Corp.,* No. 11-cv-03408, 2014 WL 235597, at *2 (D. Colo. Jan. 22, 2014) ("[I]t is objectively unreasonable to continue asserting claims that have no factual or legal basis and thus reasonably should have been dismissed voluntarily.").[3]

[3] *See also Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 235 (1st Cir. 2010) (affirming § 1927 sanctions for continuing a case that the court found "groundless [and] unreasonable"); *In re 60 E. 80th St. Equities*, 218 F.3d 109, 120 (2d Cir. 2000) (affirming § 1927 sanctions below and awarding § 1927 sanctions on appeal for repeated bad faith and pursuing frivolous

This case is illustrative. To prevail on their claims, Appellants had to prove, among other elements, "actual damages." *See* 15 U.S.C.

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arguments on appeal); *Murphy v. Hous. Auth. & Urban Redevelopment Agency*, 51 F. App'x 82, 83 (3d Cir. 2002) (affirming § 1927 sanctions given the plaintiff's "pursuit of baseless claims, the frivolous nature of which he should have been aware by, at the latest, the [d]efendants' filing of their motion for summary judgment" and when both federal and state courts "had already held that [the plaintiff's claims] were not cognizable under either of those sources of law."); *Salvin v. Am. Nat'l Ins. Co.*, 281 F. App'x 222, 226 (4th Cir. 2008) (affirming § 1927 sanctions and explaining that "[b]y refusing to voluntarily dismiss the case once its lack of merit became evident, [the plaintiff] protracted the litigation."); *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 247 (5th Cir. 1998) (affirming § 1927 sanctions for the "willful continuation of a suit known to be meritless"); *Milner v. Biggs*, 566 F. App'x 410, 414 (6th Cir. 2014) ("The district court acted within its discretion to sanction [the plaintiff under § 1927] for continuing to litigate his meritless claims after [the defendant] offered to provide the only relief to which his clients were entitled."); *Burda v. M. Ecker Co.*, 2 F.3d 769, 773 (7th Cir. 1993) ("The district court's findings that the lawsuit was insupportable and pursued merely to vex [the defendant] and 'bully' a settlement . . . support an award of sanctions under 28 U.S.C. § 1927."); *Lee v. First Lender Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001) (sanctions were warranted under 28 U.S.C. § 1927 because the plaintiff did not abandon baseless claims until after extensive discovery and motion practice); *Franco v. Dow Chem. Co. (In re Girardi)*, 611 F.3d 1027, 1061 (9th Cir. 2010) ("a finding that the attorneys recklessly raised *a* frivolous argument which resulted in the multiplication of the proceedings is also sufficient to impose sanctions under § 1927."); *Cook-Benjamin v. MHM Corr. Servs.*, 571 F. App'x 944, 949 (11th Cir. 2014) (affirming sanctions under § 1927 because "counsel's steadfast refusal to drop [their] claims" despite the "shocking lack of evidence . . . until the response to the defendants' summary judgment motion unnecessarily and unreasonably multiplied the litigation.").

§ 80a- 35(b)(3). Aware of that requirement, Appellants, hoping to get to trial, represented that expert testimony would ultimately substantiate their damages. They did so despite "the red flags that Defendants and the Court raised with respect to [the proposed expert's] opinions." *See* Order, *Obeslo v. Great-West Cap. Mgmt.*, No. 16-cv-00230 (D. Colo. Sept. 28, 2020), ECF No. 400, at p. 3 ["Order, *Obeslo*"]. But "[w]hen he testified, [the expert] was thoroughly discredited," going "as far as admitting that some of his opinions were implausible and 'probably shouldn't have been included' in his report." *Id.* On top of that, Appellants ignored the "persuasive and credible" evidence in the record that "overwhelmingly proved that [Defendants'] fees were reasonable and that they did not breach their fiduciary duties." *Id.* at p. 4. Had Appellants "objectively reviewed the evidence," the fatal flaws with their claims "would have been as obvious to them as it was to the [district court]." *Id.* at pp. 6–7. In those ways, Appellants violated their ongoing duty to "regularly re-evaluate the merits of their claims and to avoid prolonging meritless claims." *Steinert*, 440 F.3d at 1224.

Instead of dropping meritless claims, Appellants leveraged the complexity of claims under the Investment Company Act and relied on

their purported expert to frame the litigation as a "battle of the experts" that only a trial could resolve. They did so in the face of obvious holes in their claims, consistently representing that their expert would substantiate their damages. But those representations proved false.

IV. APPELLANTS' PROPOSED FRAMEWORK FOR AWARDING SANCTIONS UNDER 28 U.S.C. § 1927 RUNS COUNTER TO THE STATUTORY TEXT AND OTHERWISE MAKES NO SENSE.

Because Appellants cannot show that the district court abused its wide discretion under 28 U.S.C. § 1927, they argue for a safe harbor under which a district court may not sanction counsel for taking a case to trial after withstanding a motion for summary judgment. Appellants argue that their surviving summary judgment "should have, *in and of itself*, precluded a sanctions award under § 1927." Schneider Br. at 17 (emphasis added); *see also id.* at 23; *id.* at 27; *id.* at 34; Schlichter Br. at 30; *id.* at 37–38. This Court should reject that proposed safe harbor for multiple reasons.

First, the proposed rule has no basis in the statute. Under the statute, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably

incurred because of such conduct." 28 U.S.C. § 1927. The statute does not create a safe harbor permitting counsel to press frivolous claims after withstanding summary judgment.

Second, courts have applied the statute to issue sanctions after the denial of summary judgment. A survey of cases applying 28 U.S.C. § 1927 demonstrates that judges apply the statute at all stages of litigation, including after summary judgment. *See e.g.*, *Steinert,* 440 F.3d at 1223 (citations omitted); *In re Francis,* No. 1:15-CV-889-GBL-MSN, 2017 WL 4080990, at *3 (E.D. Va. Sept. 14, 2017), *aff'd*, 739 F. App'x 184 (4th Cir. 2018) ("[T]he text of 28 U.S.C. § 1927 does not place any time limitation on the Court's ability to award attorneys' fees, expenses, or costs."); *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 101 (3d Cir. 2008) ("Unlike Rule 11, the application of § 1927 may become apparent only at or after the litigation's end, given that the § 1927 inquiry is whether the proceedings have been unreasonably and vexatiously multiplied."); *Ridder v. City of Springfield,* 109 F.3d 288, 297 (6th Cir. 1997) ("Unlike Rule 11 sanctions, a motion for excess costs and attorney fees under § 1927 . . . [is not] untimely if made after the final judgment in a case."). Appellants provide no basis for this Court to adopt a

categorial approach that is inconsistent with the statutory language and cases applying it.

Third, Appellants' proposed rule ignores that counsel can engage in unreasonable and vexatious conduct at any stage in the litigation—before, during, and after trial. The rule that Appellants seek would give litigants a free pass to take meritless cases to trial simply because they avoided summary judgment. It would encourage counsel to continue pressing meritless claims after surviving a motion to dismiss or summary judgment for the chance of a nuisance settlement—and press forward through the phases of litigation (pretrial and trial) that often prove the greatest drain on the court's and parties' time and resources. But the lead-up to trial can reveal that a party's claims are meritless. Here, for example, although Appellants survived summary judgment based on their representations about what one of their expert witnesses would say, the district court found that "in preparing for trial, [Appellants] must have realized the weaknesses in [that testimony] that were likely to be exposed on cross examination, as well as the fatal legal flaws upon which his opinions were based." *See* Order, *Obeslo*, at p. 6. Proceeding to trial—and the attendant strain on the court's and parties' time and resources—

raises the same concerns discussed above about delaying access to justice for the meritorious. Attorneys should not be permitted to impose those burdens simply because a frivolous claim managed to escape summary judgment or other pre-trial hurdles.

V. THE SANCTIONS IMPOSED AGAINST APPELLANTS WERE REASONABLE AND PROPORTIONATE.

The district court's sanction against Appellants was reasonable and proportionate to their insistence on pursuing meritless claims and recklessly proceeding to trial on those claims. The sanction strikes a balance: It is punitive—as it should be—but it will not threaten counsel's or their respective law firms' livelihood. It is not an existential threat to the firms.

* * *

The fee award below does no more than send the message that lawyers should not get a free pass to take a frivolous case to trial in violation of their continuing duty to abandon meritless claims. Unless courts deliver that message, frivolous litigation in the United States will continue to multiply like party guests.

CONCLUSION

Sanctions are integral to the federal judicial system. As multiplying litigation intensifies across the Nation, court-imposed sanctions are more important now than ever. The obligation to abandon frivolous litigation persists throughout a case's life, and courts' discretion to impose sanctions does not (and cannot) vanish when a case proceeds to trial.

The Court should affirm the district court's order imposing sanctions on Appellants.

Dated: May 4, 2023

Respectfully ssubmitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(4)(G), (a)(5), and 32(a)(7), (g) because it contains 3,833 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

In accordance with this Circuit's CM/ECF Procedures Section II(J), I also certify that this document: (1) contains no information subject to the privacy redaction requirements of Circuit Rule 25.5, (2) the hard copies to be submitted to the Clerk of the Court are exact copies of the version submitted electronically, and (3) the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: May 4, 2023

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CERTIFICATE OF SERVICE

On May 4, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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