No. 21-1369

United States Court of Appeals
For the Fourth Circuit

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,

Plaintiffs-Appellees,

v.

ALAN WILSON, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of South Carolina
Civil Action No. 3:20-cv-00508 (Hon. Mary Geiger Lewis)

RESPONSE TO PETITION FOR REHEARING EN BANC

Julie A. Murray
Hannah Swanson
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
(202) 803-4045
julie.murray@ppfa.org
hannah.swanson@ppfa.org

Attorneys for Plaintiff-Appellee Planned Parenthood South Atlantic

Genevieve Scott
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3605
gscott@reprorights.org

Attorney for Plaintiffs-Appellees Greenville Women's Clinic and Dr. Terry L. Buffkin

(For Continuation of Appearances See Inside Cover)

M. Malissa Burnette
Kathleen McDaniel
Grant Burnette LeFever
Burnette Shutt & McDaniel, PA
P.O. Box 1929
Columbia, SC 29202
(803) 904-7913
mburnette@burnetteshutt.law
kmcdaniel@burnetteshutt.law
glefever@burnetteshutt.law

Attorneys for all Plaintiffs-Appellees

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INTRODUCTION

A year ago, the South Carolina General Assembly enacted a law banning abortion after roughly six weeks of pregnancy, in flagrant violation of *Roe v. Wade* 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Plaintiffs-Appellees, the last remaining South Carolina abortion clinics (hereinafter, the "providers") sued, and a district court preliminarily enjoined state officials from enforcing the six-week ban and related provisions.

The government defendants and other state-official intervenors (collectively, the "state officials") appealed from the preliminary-injunction order. The state officials did not defend the ban's legality on the merits, instead arguing that the district court erred in holding that the providers have third-party standing and a cause of action under 42 U.S.C. § 1983 to vindicate their patients' rights, and that the district court's preliminary injunction was overbroad.

In a straightforward application of longstanding federal precedent and South Carolina severability law, a unanimous panel of this Court affirmed. As both the district court and the panel concluded, "[t]his case does not present a close call." Op. 13.

Neither does the state officials' petition for rehearing en banc. En banc review is "not favored," and should only be granted in those rare circumstances where review by the full Court is necessary to ensure uniformity of the Court's decisions, or to address a question of "exceptional importance," such as where this Court's law conflicts with that of another circuit or a state supreme court. Fed. R. App. P. 35(a). The state officials cannot meet this standard, and their arguments rest on manufactured conflicts, mischaracterizations of the panel's opinion, and erroneous constructions of the challenged law's requirements. En banc review should be denied.

STATEMENT OF THE CASE

South Carolina Senate Bill 1 ("SB 1" or "the Act") prohibits any person from performing an abortion where a "fetal heartbeat has been detected." SB 1, § 3 (adding S.C. Code Ann. § 44-41-680(A)). SB 1 defines "fetal heartbeat" to include even early embryonic cardiac activity, which can be detected on ultrasound by six weeks of pregnancy, before many people even know they are pregnant. Accordingly, SB 1's prohibition effectively bans abortion after approximately six weeks' gestation.

In addition to the six-week ban, SB 1 includes definitions that facilitate the ban; penalties for violations of the ban; and exceptions to those penalties. SB 1, § 3 (adding S.C. Code Ann. §§ 44-41-610; -680(B), (C), (D); -690; -700; -740). SB 1 also includes an ultrasound requirement, reporting and recordkeeping requirements, a civil enforcement mechanism, and other supporting provisions, each of which is designed to facilitate or compel compliance with the six-week ban.

Because the Six-Week Ban squarely violates the constitutional right under *Roe* and *Casey* to end a pregnancy before viability and because SB 1's other provisions are not severable from the unconstitutional ban, the district court preliminarily enjoined the state officials from enforcing any portion of SB 1. JA289–292; JA296–299; JA303. The state officials appealed, challenging only the providers' third-party standing, their ability to state a third-party claim under 42 U.S.C. § 1983, and their entitlement to an injunction of SB 1 as a whole.

This Court broke no new ground by dispensing with each argument. First, applying *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the panel held that the providers have third-party standing on behalf of their patients to challenge SB 1 because the law directly regulates their conduct and, if enforced, would violate their patients' constitutional rights. Op. 9–11.

Second, the panel rejected the state officials' contention that litigants relying on third-party standing cannot state claims under Section 1983. Even though defendants forfeited this argument in the district court at the preliminary-injunction stage, *see* Response Br. 30–32, the panel assumed for the state officials' benefit that the issue was properly presented on appeal and nevertheless rejected the argument on the merits. Op. 11–12 at n.*. As the panel explained, third-party standing "operates as an 'exception'" to the general rule that Section 1983 plaintiffs "must assert [their] own legal rights and interests." *Id.* (quoting *Kowalski v. Tesmer*, 543

U.S. 125, 129–30 (2004)). Accordingly, consistent with all other circuits to have directly addressed this issue and decades of federal court practice, Response Br. 35–36, the panel held that Section 1983 permits a claim on behalf of a third party where the litigant can otherwise demonstrate third-party standing.

Third, the panel held that the district court did not err in enjoining the state officials from enforcing SB 1 in its entirety, rather than attempting to sever the unconstitutional six-week ban from SB 1's other provisions. Op. 12–13. The panel provided analysis directly and by "rest[ing] on the reasoning of the district court," which had examined SB 1's severability clause, along with SB 1's statutory structure. Op. 13. Despite the state officials' misreading of SB 1's requirements, the panel correctly recognized that "the portions of the Act that require an abortion provider to perform an ultrasound, document the results, display the ultrasound images to the patient, and offer the patient the opportunity to listen to any detected fetal heartbeat are plainly intended to facilitate the Act's 'fetal heartbeat' abortion ban," and therefore could not be severed from the ban itself. *Id*.

ARGUMENT

I. This Court's Third-Party Standing Holding Is Required Under Binding Precedent

In *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), five members of the U.S. Supreme Court affirmed that abortion providers have third-party standing to challenge a state law that directly regulates their conduct, where enforcing that law would violate the constitutional rights of the abortion providers' patients. *Id*. at 2117–20 (plurality opinion); *id*. at 2139 n.4 (Roberts, C.J., concurring specifically in the plurality's standing analysis). Given this precedent, the panel rightly concluded the providers have third-party standing to challenge SB 1, which subjects the providers to criminal and other penalties for providing abortion before viability and thereby violates their patients' Fourteenth Amendment rights. Op. 9–10 (quoting *June Med. Servs*., 140 S. Ct. at 2118–19 (plurality opinion)).

Although the state officials now ask the full Court to review that holding, they do not even cite *June Medical Services* in their en banc petition, much less explain how this Court, sitting en banc, could possibly reach a different conclusion than the panel did. The Court, no matter its configuration, is duty-bound to follow Supreme Court precedent.

Instead, the state officials focus their petition on other Supreme Court and Fourth Circuit case law that they contend bars third-party standing where a plaintiff has a "conflict of interest" with the related third party. The state officials claim that because SB 1 is intended to protect patients and provides patients with a private right of action in response to certain violations of the statute, the providers have a conflict of interest with their patients in seeking to have SB 1 invalidated. Pet. for Reh'g En Banc (hereinafter "PREB") 2, 10–13.

The state officials' "conflict-of-interest" argument was directly rejected in *June Medical Services*, 140 S. Ct. at 2119 (plurality opinion). There the Supreme Court explained that it is "a common feature of cases in which we have found third-party standing" that a state law purportedly protects a third party whose rights the law violates. *Id.*; *see also id.* at 2120 (collecting similar third-party challenges); *Craig v. Boren*, 429 U.S. 190, 200–01 (1976) (holding that beer vendors had third-party standing to challenge on customers' behalf a law regulating alcohol sales purportedly to protect "public health and safety"); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (same as to attorneys challenging on clients' behalf a law regulating attorneys' fee arrangements).

The Supreme Court's observation is no less applicable because SB 1 creates private civil liability among other penalties. In fact, civil liability is a feature of many abortion restrictions that have been challenged by abortion providers. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 143 (2007) (challenge to abortion method ban that included "a provision authorizing civil actions," which the Supreme Court characterized as "not of relevance"); *see also, e.g.*, *Casey*, 505 U.S. at 907 (appendix to plurality opinion) (quoting 18 Pa. Cons. Stat. § 3208(a)(1)) (challenged biased-counseling statute with a private right of action); *Planned Parenthood Cent. Mo. v. Danforth*, 428 U.S. 52, 86 (1976) (same as to abortion restriction that made doctors "liable in an action for damages"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324–25 (2006) (same as to parental-notice law, *see* N.H. Rev. Stat. Ann. § 132:27); *Stuart v. Camnitz*, 774 F.3d 238, 243 (4th Cir. 2014) (same as to ultrasound & mandatory display requirements for abortion patients, *see* N.C. Gen. Stat. Ann. § 90-21.88).

Indeed, the Seventh Circuit has repeatedly rejected the claim that abortion providers and their patients have a conflict of interest that vitiates the providers' standing to challenge abortion restrictions, and no circuit has decided otherwise. *See Karlin v. Foust*, 188 F.3d 446, 456 & n.5 (7th Cir. 1999) (citing Wis. Stat. § 253.10(6)); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 793–95 (7th Cir. 2013); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 910–11 (7th Cir. 2015); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 954–55 (W.D. Wis. 2015) (citing Wis. Stat. § 253.095(4)).

The state officials' petition for rehearing en banc ignores all of these cases and established federal practice, instead relying on two decisions that predate *June Medical Services*, and which in any event do not conflict with the panel's opinion here. *See* PREB 2.

First, in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), the Supreme Court held that a father lacked prudential standing to challenge the recitation of the Pledge of Allegiance at his child's school, where the child's mother had sole legal custody to represent the child's interests and intervened in the litigation to object to the father's claims. *Id.* at 15 & n.7. The court emphasized the "hard questions of domestic relations" at issue and took care to distinguish its refusal of prudential standing from the separate line of third-party standing cases on which plaintiffs rely here. *Id.* at 17; *see also id.* at *25 (Rehnquist, C.J., concurring) (calling the Court's standing ruling so narrow as to be "good for this day only").

Similarly, in *Stanley v. Darlington County School District*, 84 F.3d 707, 715–16 (4th Cir. 1996), this Court rejected third-party standing for a putative plaintiff who was already actively litigating against the third parties whose interests the putative plaintiff claimed to represent in the same action. PREB 2, 10–11. At most, *Stanley* stands for the proposition that courts may decline to recognize a litigant's third-party standing where the third party is already actively litigating before the court to further her own interests.

Lastly, the state officials take issue with the panel's observation in the alternative that the providers likely satisfy the third-party standing test that requires a "close relationship" between the plaintiff and "the person who possesses the right" and a "hindrance to the possessor's ability to protect [their] own interests." Op. 10–11 (quoting *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 215 (4th Cir. 2020), *as amended* (Aug. 31, 2020)). Because abortion providers threatened with criminal and civil liability from an abortion restriction need not *also* establish this traditional close relationship with patients and a hindrance to those patients' ability to bring suit in order to have third-party standing, the state officials' grievances with this part of the panel's opinion are irrelevant. *See June Med. Servs.*, 140 S. Ct. at 2119; *Md. Shall Issue*, 971 F.3d at 215–16 (recognizing that this traditional showing is not required in vendor-vendee suits).

And as a matter of law, the providers would meet such a standard if it applied. Response Br. 25–27; Suppl. Reply in Supp. of Pls.' Mot. for Prelim. Inj. 4–5, *Wilson*, No. 3:20-cv-00508-MGL (Mar. 10, 2021), ECF No. 67; *see also Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion) (recognizing the "patent[ly]" close relationship between abortion providers and patients and the "obstacles" that patients face in bringing suit); *Md. Shall Issue*, 971 F.3d at 216 ("Courts have invariably found that a vendor has a sufficiently close relationship with its customers when a challenged statute prevents that entity from transacting business with them.").

In sum, the panel adhered to binding Supreme Court and Fourth Circuit precedent on third-party standing.

II. This Court's Conclusion That the Providers Can Bring a Section 1983 Claim Is Consistent With Case Law of This and Other Circuits

The state officials ask this Court to review en banc the panel's holding that the providers can state a claim under 42 U.S.C. § 1983 on behalf of their patients because those providers have third-party standing to assert their patients' constitutional rights. *See* Op. 11–12 at n.* (explaining that third-party standing operates as an "exception" to the general rule that Section 1983 plaintiffs must assert their own rights (quoting *Kowalski*, 543 U.S. at 130)). In the state officials' view, Section 1983 forecloses such third-party suits, instead limiting plaintiffs to those individuals whose constitutional rights are directly violated—here, abortion patients.

En banc review is unwarranted. First, the panel left open the question whether the state officials' Section 1983 argument was even properly presented on appeal, instead assuming that point and rejecting the argument on the merits. Op. 11–12 at n.*. However, the state officials forfeited this argument at the preliminary-injunction stage, and the district court accordingly did not address it in the only order under review. *See* Response Br. 30–32. En banc review is "not favored" in the usual case, *see* Fed. R. App. P. 35, and it would be a waste of judicial resources where the Court may not even reach the issue on which review is sought.

Second, the panel's conclusion on the availability of a Section 1983 claim here is consistent with holdings of the Sixth, Seventh, and Eighth Circuits, the only other courts of appeals to have directly addressed this issue. *Van Hollen*, 738 F.3d at 793–94 (rejecting argument that abortion-provider plaintiff with third-party standing could not assert Section 1983 claims to vindicate rights of patients); *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207–08 (6th Cir. 2011) (conducting third-party standing analysis to determine whether teachers could bring Section 1983 claims on behalf of students); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum. Servs.*, 293 F.3d 472, 478 (8th Cir. 2002) (recognizing that medical providers with third-party standing to assert patients' rights have a cause of action under Section 1983 to assert those rights); *see also Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 1 F.4th 552, 559 n.4 (8th Cir. 2021) (holding that where an abortion provider has third-party standing, the argument that the provider "may not file a § 1983 action" on behalf of patients "also fails"), *reh'g en banc granted & op. vacated*, (8th Cir. July 13, 2021), *cert. denied sub nom. Schmitt*, No. 21-3 (U.S. Oct. 4, 2021).

The state officials do not cite these cases or acknowledge that for decades federal courts have recognized third-party standing in suits for declaratory and injunctive relief brought under Section 1983, both in cases involving abortion providers and in other contexts. *See, e.g.*, *Craig*, 429 U.S. at 191–94 (1976); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 818–19 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–84 (1977); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1988 (2018); *Ezell v. City of Chi.*, 651 F.3d 684, 696 (7th Cir. 2011). And as the Seventh Circuit recognized in rejecting the same arguments made by the state officials here,[1] "the cases are legion that allow an abortion provider, such as [the providers], to sue to enjoin as violations of federal law (hence litigable under 42 U.S.C. § 1983) state

[1] *See* Br. & Required Short App'x of Defendants-Appellants at *16–24, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013) (No. 13-2726), 2013 WL 5424897.

laws that restrict abortion." *Van Hollen*, 738 F.3d at 794. Were the state officials' Section 1983 argument correct, all of these cases would have been barred.

In the face of this precedent, state officials quote *Howerton v. Fletcher*, 213 F.3d 171, 173 (4th Cir. 2000), to argue that "[a] section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." PREB 13. But *Howerton*, *Rizzo v. Goode*, 423 U.S. 362 (1976), and similar cases that the state officials cite, *see* PREB 13–16, just state the general rule and do not involve assertions of third-party standing. They do not foreclose the well-established third-party standing exception to that rule.

In sum, the panel joined every other circuit to have considered the precise question presented by the state officials and correctly rejected the state officials' attempt to unravel decades of Section 1983 case law.

III. The Panel's Severability Holding Is Consistent With Binding Precedent

As with their threshold arguments, the state officials' request for en banc review of the panel's opinion as to severability should be rejected.

First, the state officials contend that the panel ran afoul of Supreme Court precedent by treating severability as "a factual question subject to 'abuse of discretion' review," as opposed to a "pure question of law." PREB 5 (quoting *Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2208 (2020)). However, the panel simply recognized that a grant of preliminary injunctive relief is reviewed for abuse of discretion, Op. 12, and that under that standard, the Court reviews a "district court's factual findings for clear error and review[s] its legal conclusions de novo." *Id.* (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)); *accord Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc). This is black-letter law, not the basis for en banc review.

Second, the state officials argue that the panel ignored SB 1's severability clause, in conflict with *Leavitt v. Jane L.*, 518 U.S. 137 (1996). But the panel made no such error, and there is no conflict. In *Leavitt*, the Supreme Court held that under Utah law, a statute was severable where it imposed two different gestational-age abortion bans. 518 U.S. at 137–38, 144.

That the Supreme Court reached a different conclusion as to severability than the panel here is unremarkable. *Leavitt* involved application of a different state's severability law to a wholly different statute than the one at issue here. Moreover, contrary to the state officials' contention, *Leavitt* did not treat a severability clause as dispositive, even under the applicable Utah law. Although the Supreme Court faulted the Tenth Circuit for not using that clause as a "point of departure," *id.* at 140, it also considered statutory structure and purpose, as Utah law required.

Consistent with *Leavitt*'s admonition that federal courts apply state severability law, the panel did so through its own analysis and by "rest[ing] on the reasoning of the district court," Op. 13, which expressly considered SB 1's severability clause as an indicator of legislative intent, JA297. The panel also directly invoked *Pinckney v. Peeler*, 862 S.E.2d 906 (S.C. 2021), on which the state officials rely for the applicable legal standard. Op. 12–13. And in line with other South Carolina decisions, the panel considered not only statutory text, but also SB 1's structure and operation. *Id.* at 13; *see, e.g.*, *Sloan v. Wilkins*, 608 S.E.2d 579, 583–84 (S.C. 2005) (analyzing severability clause nearly identical to SB 1's and also considering the "underlying purpose" of a provision before severing some portions and keeping others);[2] *Joytime Distribs. & Amusement Co. v. State*, 528 S.E.2d 634, 654 (S.C. 1999) (examining severability provision and statutory structure); *Pinckney*, 862 S.E.2d at 915 (describing a severability clause nearly identical to SB 1's as "important" but also considering statutory structure and purpose).

At bottom, the state officials quibble with the panel's application of South Carolina law—precedent that the panel and all parties agree must apply—to the particular statute at issue here on review from a preliminary-injunction order. But the "function of en banc hearings is not to review alleged errors for the benefit of

[2] The S.C. Supreme Court later abrogated *Sloan* in *American Petroleum Institute v. S.C. Department of Revenue*, holding that the appropriate remedy for violations of the constitutional single-subject rule at issue was to invalidate the offending act in full. *See* 677 S.E.2d 16, 19 (S.C. 2009), *holding modified as to appropriations laws by S.C. Pub. Int. Found. v. Lucas*, 786 S.E.2d 124 (S.C. 2016). But *Sloan* confirms that, under South Carolina law, SB 1's severability provision does not require courts to ignore other indicia of legislative intent and statutory operation.

losing litigants," *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (per curiam) (citing *W. Pac. R. Corp. v. W. Pac. R. Corp.*, 345 U.S. 247, 256–59 (1953)), a limitation all the more applicable where alleged errors are, in fact, not errors at all. As the panel and district court decisions explain, the provisions to which state officials point "are plainly intended to facilitate the Act's 'fetal heartbeat' abortion ban," and therefore cannot be severed from the ban itself. Op. 13; *see also* Response Br. 46–51.

For example, Section 3 of the Act, which contains the six-week ban, also lays out exceptions to the six-week ban, SB 1, § 3 (adding S.C. Code §§ 44-41-690, -700), and requires abortion providers to perform an ultrasound and to "record a written medical description of the ultrasound images of the . . . fetal heartbeat, if present and viewable." SB 1, § 3 (adding S.C. Code Ann. § 44-41-630); *see also id.* (adding S.C. Code Ann. § 44-41-650) (stating that the ultrasound is necessary to determine "whether the human fetus . . . has a detectable fetal heartbeat"). These exceptions and requirements, along with the ultrasound display mandated irrespective of a patient's wishes, are part and parcel of the ban and were appropriately enjoined.

Similarly, Section 4 requires the abortion provider to report to the state, for any abortion performed, the results of the "fetal heartbeat testing" required by the Act and whether the abortion was medically necessary such that an exception to the six-week ban would apply. *Id*. § 4 (amending S.C. Code Ann. § 44-41-460(A)). Such reporting is not "capable of being executed . . . independent of" the unconstitutional ban itself. *Joytime Distribs.*, 528 S.E.2d at 654.

For these reasons, and those set forth in the decisions of the panel and the district court, the panel correctly affirmed the scope of the district court's injunction.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing en banc.

Respectfully submitted,

/s/ Julie A. Murray
Julie A. Murray
Hannah Swanson
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
(202) 803-4045
julie.murray@ppfa.org
hannah.swanson@ppfa.org

Attorneys for Plaintiff-Appellee Planned Parenthood South Atlantic

M. Malissa Burnette
Kathleen McDaniel
Grant Burnette LeFever
Burnette Shutt & McDaniel, PA
P.O. Box 1929
Columbia, SC 29202
(803) 904-7913
mburnette@burnetteshutt.law
kmcdaniel@burnetteshutt.law
glefever@burnetteshutt.law

Attorneys for all Plaintiffs-Appellees

/s/ Genevieve Scott
Genevieve Scott
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
917-637-3605
gscott@reprorights.org

Attorney for Plaintiffs-Appellees Greenville Women's Clinic and Dr. Terry L. Buffkin

Dated: March 25, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Plaintiffs-Appellees certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) and 35(e) because it contains 3,837 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(ii) complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared in Times New Roman font in a size equivalent to 14 points or larger.

Dated: March 25, 2022

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I, Julie A. Murray, hereby certify that on this day the foregoing Response was served electronically on all parties via CM/ECF.

Dated: March 25, 2022

/s/ Julie A. Murray
Julie A. Murray