CASE NO. 19-13339
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PARTSFLEET, LLC, PARTSFLEET II, LLC, FLEETGISTICS HOLDINGS, LLC, SCRIPTFLEET, LLC, US PACK SERVICES, LLC, MEDIFLEET, LLC and US PACK HOLDINGS, LLC,
Defendants-Appellants,

v.

CURTIS HAMRICK, on behalf of himself and those similarly situated,
Plaintiff-Appellee.

On appeal from an interlocutory order of the United States District
for the Middle District of Florida, No. 6:19-cv-137

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF BY THE NATIONAL EMPLOYMENT LAW PROJECT and NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION In Support of Rehearing and Reversal

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Appeal No. 19-13339

PARTSFLEET LLC, et al. v. HAMRICK, et al.
CERTIFICATE OF INTERESTED PERSONS, CORPORATE DISCLOSURE STATEMENT, AND STATEMENT PURSUANT TO FRAP 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici curiae* hereby provide the following disclosure statements:

National Employment Law Project is a non-profit corporation that offers no stock; there is no parent corporation or publicly owned corporation that owns 10 percent or more of this entity's stock.

National Employment Lawyers Association is a non-profit corporation that offers no stock; there is no parent corporation or publicly owned corporation that owns 10 percent or more of this entity's stock.

Appeal No. 19-13339

PARTSFLEET LLC, et al. v. HAMRICK, et al.

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *amici* certifies that in addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement provided by Appellees/Plaintiffs in their petition for rehearing, the following persons and entities have an interest in the outcome of this case.

- National Employment Law Project
- National Employment Lawyers Association
- Liss-Riordan, Shannon, attorney for *Amici Curiae*

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Dated July 20, 2021

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MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* ON BEHALF OF PLAINTIFFS-APPELLEES

Pursuant to Fed. R. App. P. 29(b), the National Employment Law Project ("NELP") and the National Employment Lawyers Association ("NELA") by and through undersigned counsel, hereby move for leave to participate as *amici curiae* in support of Plaintiffs-Appellees in the case entitled *Partsfleet LLC, et al. v. Hamrick*, No. 19-13339. NELP and NELA urge the Eleventh Circuit Court of Appeals to grant the Petition for Rehearing and to reverse the panel's decision finding that Plaintiffs, last-mile delivery drivers, are not exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1. A true and correct copy of the proposed brief is attached to this motion.[1] In support, *amici* provide the following:

NELP is an organization dedicated to ensuring that federal and state employment laws are enforced consistently with their broad remedial nature so that workers are paid fairly and fully for all work performed. NELP submits this brief not to repeat the arguments made by the parties, but to bring the Court's attention to our unique perspective as advocates for low-wage workers in industries where misclassification is prevalent, including the delivery and trucking industry. NELP has expertise in independent contractor scams, and the costs inherent in those

[1] *Amici* sought Defendant-Appellants' consent to their request for leave to file an amicus brief, which Defendants denied.

abuses as well as the issue of forced arbitration and its effect on enforcement of wage-and-hour laws.

NELP is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP's area of expertise includes the workplace rights of nonstandard workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional testimony addressing the issue of employment and misclassification. NELP is in a position to provide an analysis of the importance of enforcement of wage laws, their impact on unfair competition, and the public policies embodied in the FLSA.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to

working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

An amicus brief is desirable, and the matters asserted are relevant to the disposition of this case. As long-time membership groups and advocates on behalf of low-wage workers in the Eleventh Circuit and workers throughout the United States, *amici* are in a position to provide an analysis of the impact of the panel's decision on enforcement of the wage laws in the trucking and delivery industry, where misclassification is particularly rampant. Furthermore, *amici's* expertise in the area of mandatory arbitration allows *amici* to shed light on the ways in which the panel's decision creates conflict and uncertainty for delivery drivers and their advocates and is out of step with the reasoning and holdings of numerous other courts.

WHEREFORE, movants pray that their Motion be granted, and that this Court allow the filing of their *amici curiae* brief in this appeal.

Respectfully submitted,

For *Amicus Curiae*
National Employment Law Project,
National Employment Lawyers
Association,

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Dated: July 20, 2021

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that a copy of the foregoing document was filed electronically with the Clerk of Court of the United States Court of Appeals for the Eleventh Circuit and served upon all counsel of record via the Court's CM/ECF system on July 20, 2021.

s/Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

CASE NO. 19-13339
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BRIEF *AMICUS CURIAE* by THE NATIONAL EMPLOYMENT LAW PROJECT and NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION In Support of Rehearing and Reversal

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Appeal No. 19-13339

PARTSFLEET LLC, et al. v. HAMRICK, et al.

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- National Employment Law Project
- National Employment Lawyers Association
- Liss-Riordan, Shannon, attorney for *Amici Curiae*

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Dated July 20, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*

The National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include the workplace rights of contingent workers and forced arbitration. NELP collaborates closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in the Eleventh Circuit, and has litigated and participated as amicus in numerous cases addressing the rights of contingent workers under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on the problems of independent contractor misclassification.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

A ruling denying *en banc* review of the panel's decision would undermine Amici's longstanding policy goals and those of close partners in worker advocacy

organizations throughout the Eleventh Circuit.

STATEMENT OF ISSUES & SUMMARY OF ARGUMENT

Amici's brief does not duplicate the parties' arguments but instead explains why the panel's Section 1 determination is a matter of exceptional importance warranting *en banc* review.

The panel's finding that "last-mile" delivery drivers who complete the final leg of an interstate shipment do not qualify as a "class of workers engaged in foreign or interstate commerce" is squarely at odds with the decisions of numerous other courts and creates needless conflict and uncertainty for delivery drivers and their advocates. The panel's decision also fails to follow the Supreme Court's instruction that courts look to the "ordinary meaning" of the text of Section 1 at the time Congress enacted the FAA.

The threshold Section 1 determination in this case is no mere procedural matter; rather, it effectively dictates whether the significant harms Defendants-Appellants' misclassification imposes on their drivers, on law-abiding employers, and on public coffers will continue unchecked, or whether Defendants-Appellants will be held accountable for their lawbreaking in a public court in this Circuit.

ARGUMENT

A. Last-Mile Delivery Drivers Like the Plaintiffs Have Consistently Been Found Exempt From the FAA

In holding that last-mile delivery drivers are not exempt from the FAA under Section 1's transportation worker exemption, the panel's decision in this case is an outlier. Indeed, the decision is in direct conflict with numerous other courts, which have consistently held so-called "last-mile" delivery drivers, who complete an interstate shipment to its final destination, are transportation workers "engaged in interstate commerce" for purposes of the FAA. *See, e.g.*, *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 20 (1st Cir. 2020), *cert. denied,* No. 20-1077, 2021 WL 2519107 (U.S. June 21, 2021); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 1374 (2021) [1]; *Ward v. Express Messenger Sys., Inc.*, 413 F. Supp. 3d 1079, 1085 (D. Colo. 2019); *Nieto v. Fresno Beverage Co., Inc.*, 33 Cal. App. 5th 274, 281-85 (Cal. Ct. App. 2019), *reh'g denied* (Mar. 27, 2019); *Muller v. Roy Miller Freight Lines, LLC*, 34 Cal. App. 5th 1056, 1060 (2019); *Christie v. Loomis Armored US, Inc.*, No. 10-cv-02011-WJM-KMT, 2011 WL 6152979 (D. Colo. Dec. 9, 2011); *see also Harden v. Roadway Package Sys.,*

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[1] Just last month, the Supreme Court denied certiorari in *Waithaka* and *Rittmann*. The panel decision conflicts with the outcome and approach taken by the First and Ninth Circuits in those cases.

Inc., 249 F.3d 1137, 1141 (9th Cir. 2001) (holding delivery driver for pre-cursor to FedEx was a transportation worker under Section 1 exemption).

Indeed, truck drivers are quintessential transportation workers, just like railroad employees or seamen, the other two enumerated categories of workers listed in the statute. That a particular driver made deliveries of goods being shipped across state lines on one *intra*state leg of the larger interstate journey does not change the essential character of the work; such a driver is still "engaged in interstate commerce" within the meaning of the FAA.[2]

That last-mile delivery drivers should be exempt from the FAA is consistent with the purposes of the Section 1 exemption, as explained by the Supreme Court in *Circuit City*. The Court interpreted Section 1 as applying only to transportation workers, as opposed to *all* employees across all industries, citing the exclusion of

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[2] The district court in *Rittmann* summarized the logical fallacy of requiring that Section 1 turn on whether a class of drivers crosses state lines regularly:

> Consider the following hypothetical…A distribution center in Northern California receives a shipment of mattresses from New York, some of which are then transported by a long-haul driver to a distribution center in Southern California, others of which are delivered by a short-haul driver to a customer in Southern Oregon. The long-haul truck driver would not be any less subject to the transportation worker exemption than the short-haul truck driver, whose route happens to cross state lines. If an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination—even if it is the last leg of the journey—that employee falls within the transportation worker exemption.

Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019).

other enumerated categories of transportation workers -- railroad employees and seamen -- and "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods…" *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). To the extent Congress' principal concern in drafting Section 1's exemption was the potential disruption of commerce at a nationwide level, the panel's holding is at odds with this overriding concern. The "free flow of goods" and long-distance supply chains that concerned Congress when it passed the Section 1 exemption have become increasingly complex, and companies increasingly subcontract certain legs of the larger interstate journey, some of which may be wholly intrastate. In finding last-mile delivery drivers to be exempt from the FAA, other courts have observed that "a strike by UPS or FedEx drivers, who only personally travel intrastate, would cause a ripple effect in interstate commerce because goods travelling interstate would still not make it to their final destination." *Rittmann*, 383 F. Supp. 3d at 1201-02; *see also Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019) ("[A] strike by last-mile delivery drivers for Amazon would disrupt interstate commerce."). Thus, last-mile delivery drivers are precisely the type of worker that was intended to be exempted from the FAA because of their critical role in interstate commerce.

B. The Panel's Decision Fails to Follow the Supreme Court's Dictates Regarding Interpretation of the Section 1 Exemption

The panel opinion also failed to heed the Supreme Court's "important caution" that courts should look to the "ordinary meaning" of the text "at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019). The panel observed that "seamen" and "railroad employees", the other two enumerated categories of workers, "[g]enerally…travel from state-to-state, or country-to-country" and that including delivery drivers making only intrastate trips "is inconsistent with the general interstate and international work of 'seamen' and 'railroad employees'…" Panel Op., *27-28. But the terms "seamen" and "railroad employees" were not understood to predominantly perform long-distance deliveries across state lines when the FAA was passed. Indeed, the Supreme Court in *New Prime* looked to contemporaneous statutes such as the Transportation Act of 1920, 66 Cong. Ch. 91 (1920), 41 Stat. 456, and the Erdman Act, 55 Cong. Ch. 370 (1898), 30 Stat. 424, to better understand how the term "railroad employees" was understood at the time of the FAA's passage. *See New Prime*, 139 S. Ct. at 542-43. This approach underscores why other Circuit Courts have looked to precedents under the Federal Employers' Liability Act (FELA), which utilizes similar language to the FAA to glean the meaning the of the phrase "engaged in interstate commerce." *See, e.g.*, *Waithaka*, 966 F.3d at 19; *Rittmann*, 971 F.3d at 912. The FELA cases make clear that railroad workers who transported goods

within a single state in the course of a larger interstate journey were "engaged in interstate commerce" under the FELA.[3]

Contrary to the panel's conclusions, there is no danger that affirming the district court would "sweep in numerous categories of workers whose occupations have nothing to do with interstate transport" simply because they delivered something that once originated out of state. Panel Op., *26 (quoting *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020)). The *Wallace* decision upon which the panel relied *distinguished* between workers who transported goods as one leg of a larger interstate chain of commerce (i.e. workers "connected…to the act of moving [] goods across state or national borders," *see Wallace*, 970 F.3d at 802, like the last-mile delivery drivers at issue here) and workers who deliver goods that happen to at some time have originated out of state (such as "dry cleaners who deliver pressed shirts" that happen to be "manufactured in Taiwan" and "ice cream truck drivers selling treats…made with milk from an out-of-state dairy."). *Id.*[4]

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[3] *See, e.g.*, *Philadelphia & Reading Ry. Co. v. Hancock,* 253 U.S. 284, 285-86 (1920); *Norfolk & W. R. Co. v. Com. of Pennsylvania*, 136 U.S. 114, 119 (1890); *Kach v. Monessen Sw. Ry. Co.*, 151 F.2d 400, 401 (3d Cir. 1945).

[4] *Wallace* did <u>not</u> hold that workers must cross state lines to be exempt, and the Seventh Circuit has since clarified that "[a]ctual transportation [for purposes of Section 1 of the FAA] is not limited to the precise moment either goods or the

The Plaintiffs here are not drivers working for a small business making local deliveries of goods that have long since come to rest before being resold and delivered locally. Instead, they are employed as an integral part of an interstate supply chain, performing one leg of a *continuous* interstate journey. The goods delivered by Plaintiffs are still in the course of their interstate shipment, having not yet arrived at their final destination. The panel was wrong to suggest that the movement of the goods (as opposed to the workers) is not a critical component of the analysis, Panel Op., *24-25; instead, the crucial distinction is between goods that are in the course of a continuous interstate shipment, having not yet reached their final destination, and goods which have already come to rest and are merely being re-sold and delivered locally.[5]

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people accompanying them cross state lines." *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 498 (7th Cir. 2021) (emphasis added).

[5] The panel's decision frames the test for determining whether a given class of workers is exempt under Section 1 as requiring that the workers (1) be "employed in the transportation industry"; and (2) "actually engage in the transportation of goods in interstate commerce…." Panel Op., *16 (internal quotation omitted). Here, the panel did not opine that Plaintiffs were not "employed in the transportation industry"; however, this requirement can give rise to confusion if courts distinguish between drivers who work for logistics companies, delivering third-party goods and those who work in-house for companies, delivering their own products. Such drivers are not in the "furniture" or "snack food" industry simply because they work in-house for a furniture company or a snack food company where they do the exact same work as outsourced delivery drivers.

C. The Panel's Decision Will Allow Exploitation of Last-Mile Delivery Drivers to Continue Unchecked, Absent *En Banc* Review

Delivery drivers, including last-mile delivery drivers like the Plaintiffs, are among the most likely to be misclassified as independent contractors and to have their rights violated. Misclassification is widespread in the trucking and delivery industry, and numerous courts have found such workers to be improperly classified as contractors under state law. *See, e.g.*, *DaSilva v. Border Transfer of MA, Inc.*, 377 F. Supp. 3d 74, 94 (D. Mass. 2019); *Matter of Claim of Cowan*, 159 A.D.3d 1312, 1314 (N.Y. App. Div. 2018); *Craig v. FedEx Ground Package Sys., Inc.*, 300 Kan. 788, 812 (2014); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014); *Anderson v. Homedeliveryamerica.com, Inc.*, No. 11-10313-Gao, 2013 WL 6860745, at *2 (D. Mass. Dec. 30, 2013). Indeed, Defendant USPack is itself currently the subject of considerable litigation, including an enforcement action by the U.S. Department of Labor. *See Scalia v. USPack Logistics LLC, et al.*, Civ. A. No. 4:20-cv-040009 (D. Mass.).

These decisions recognize that the systems utilized by USPack and similar companies lead to systematic exploitation of delivery drivers by their employers. For example, in one case involving "last-mile" delivery drivers, the Seventh Circuit observed that "[t]he number of independent contractors in this country is

growing" because of the "economic incentives for employers to use independent contractors and [that] there is a potential for abuse in misclassifying employees as independent contractors." *Craig v. FedEx Ground Package System, Inc.*, 686 F.3d 423, 430–31 (7th Cir. 2012) (*per curiam*).

In light of the widespread labor exploitation across the delivery industry, the consequences of holding that last-mile delivery drivers fall outside the Section 1 exemption will be dire. Misclassification denies workers the protection of workplace laws, including wage and hour protections, health and safety protections, workers' compensation, and more. Workers who seek to enforce wage laws against these delivery companies will be stymied if drivers cannot file suit in court or band together collectively to bring class and collective actions.[6] States and the federal governments will continue to lose out on payroll taxes and insurance premiums that companies would pay if they properly classified their workers in these often-dangerous jobs as employees.[7]

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[6] Imposing forced arbitration resulted in $9.2 billion in wage theft in 2019 because 98% of workers with claims subject to arbitration never file a claim. Hugh Baran & Elisabeth Campbell, FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET $9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS (JUNE 2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf.

[7] *See* NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE

For years, companies like USPack have openly defied state and federal law by misclassifying their employees, hiding behind their forced arbitration provisions (which include collective and class-action waivers) and using the FAA to evade accountability in court. USPack and other delivery companies rely on the unilaterally imposed label of "independent contractor" to argue that their workers are running their own separate businesses, when the reality shows that they are not in charge of their work. Whether last-mile delivery drivers will continue to have their wage claims stymied and compelled to individual arbitration, or whether courts will finally reach the merits of the companies' misclassification and impose systemic remedies for workers in this industry, is thus an issue of exceptional importance to drivers, who are economically imperiled by misclassification.

Determining whether the FAA applies to these workers is a threshold inquiry that in many cases will determine whether these workers will be able to hold these companies accountable in a public court proceeding at all. Thus, the panel's decision could have far-reaching implications for the entire delivery industry.

CONCLUSION

For the foregoing reasons, this Court should grant *en banc* review and

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TREASURIES (Oct. 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf

reverse the erroneous ruling of the panel decision in this case.

Dated: July 20, 2021

Respectfully submitted,

/s/ Shannon Liss-Riordan

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(b)(4), I hereby certify that this brief contains 2,599 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point size Times New Roman font.

Dated: July 20, 2021

/s/ Shannon Liss-Riordan_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 2021, true and correct copies of the foregoing Motion for Leave to File an Amicus Brief and accompanying proposed Amicus Brief were served on counsel of record for each of the parties, by via CM/ECF.

Dated: July 20, 2021

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