No. 24-1559

IN THE
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

HEATHER SCHROEDER and MISTY TANNER,
individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,
v.

PROGRESSIVE PALOVERDE INSURANCE COMPANY;
PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:22-cv-00946
Judge Jane Magnus-Stinson
Magistrate Judge M. Kendra Klump

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS


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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 24-1559

Short Caption: Heather Schroeder et al. v. Progressive Paloverde Insurance Company et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Chamber of Commerce of the United States of America and the American Property Casualty Insurance Association as *Amici Curiae*

The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP for *Amici Curiae*

(3) If the party or amicus is a corporation:

i) Identify all of its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Signature /s/ Adam G. Unikowsky Date: May 28, 2024

Attorney's Printed Name: Adam G. Unikowsky

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N/A

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N/A

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Attorney's Printed Name: Kevin R. Palmer

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N/A

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## STATEMENT REGARDING CONSENT

All parties consent to the filing of this amicus brief.[1]

## IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (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 of the country. An important function of the Chamber is to represent the interests of its members in matters 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, including cases involving class actions.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of both the overall U.S. property-casualty insurance

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

market and Indiana's automobile insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

The District Court's class-certification order contradicts hornbook class-action law. Progressive's insurance contracts require it to pay the "actual cash value" (ACV) of its insureds' totaled cars. Plaintiffs contend that one component of Progressive's "actual cash value" valuation—its application of a "Projected Sold Adjustment" (PSA)—is inaccurate. The District Court certified a class of insureds, finding that the "legitimacy of PSAs as a means of calculating ACV" is a question "common to the class" under Rule 23. A-15 (Order at 15) (citation omitted). This reasoning is wrong. Commonality requires not "the raising of common 'questions'—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, the "legitimacy of PSAs as a means of calculating ACV" cannot generate any common answers because even if PSAs are inaccurate, a court would still have to determine, in every individual insured's case, whether the use of a PSA

led to a valuation that was lower than ACV. And because Plaintiffs' proposed alternative valuation methodology would result in lower valuations for many class members than the valuations they received, Plaintiffs cannot show that they will adequately represent the putative class.

The District Court's certification order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber, APCIA, and their members have a strong interest in ensuring that courts comply with those standards.

## SUMMARY OF ARGUMENT

The District Court erred in finding that Plaintiffs satisfied Rule 23's commonality and predominance requirements. Plaintiffs claim that Progressive failed to pay the ACV of class members' totaled cars. Their theory is that Progressive's use of PSAs—which are one type of adjustment that Progressive folds into its valuation analysis—rests on outdated assumptions. But that showing, even if it could be made, would not establish Progressive's liability to any—much less every—class member. Plaintiffs would still have to prove, for each class member, that the PSA actually produced a valuation below ACV.

The District Court certified the class on the assumption that the Plaintiffs intended to show that the mere use of PSAs *in and of itself* is a contractual breach. But this is not Plaintiffs' theory—and even if it were, the Court should not have

certified a class on that basis. Nowhere does the contract prohibit the mere use of PSAs, and the District Court should not have certified a class based on a plainly incorrect legal theory.

The District Court also erred in finding that Plaintiffs would adequately represent the class. Plaintiffs' damages model would benefit some putative class members and harm others—the epitome of an intra-class conflict. The District Court's contrary conclusion rests on a misunderstanding of Plaintiffs' legal theory.

## ARGUMENT

### I. Plaintiffs Failed to Prove Commonality and Predominance.

The District Court concluded that there was a question "common to the class," Fed. R. Civ. P. 23(a), which "predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(b). That conclusion was wrong. No common question exists. Even if one did, individual questions would predominate. The District Court's reasoning fundamentally misunderstands Rule 23 and, if adopted by this Court, would profoundly distort class-action practice in this circuit.

#### A. Common questions do not exist—and certainly do not predominate—because ACV must be assessed on a vehicle-by-vehicle basis.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted). "[P]laintiffs wishing to proceed through a[n opt-out] class action must actually *prove*—not simply plead—that their

proposed class satisfies each requirement" of Rule 23(b)(3)—commonality, predominance, and superiority. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350-51).

In this case, Plaintiffs have not proven that any common question exists, much less that it predominates over individualized questions. Plaintiffs seek to certify a class of Progressive's insureds who purchased an insurance policy that promises to pay "actual cash value" (ACV) of totaled automobiles. In order to calculate ACV, Progressive uses a system designed by Mitchell International, Inc. When calculating the Mitchell valuation, Progressive applies an adjustment known as the "[p]rojected [s]old [a]djustment" (PSA) to account for the fact that many used cars sell for less than list price. A-4 (Order at 4). Plaintiffs claim that PSAs are "baseless and invalid." A-13 (Order at 13). They proffer expert testimony that "the PSA is unjustified, arbitrary, capricious, and not reflective of the used car market." *Id.* (quotation marks omitted).

But as Plaintiffs' expert testimony makes clear, Progressive's use of PSAs does not result in a payment below ACV for *all* class members. Although Plaintiffs' expert "contends that using the Mitchell methodology but not deducting the PSA is a sound way to determine ACV," he "agrees there are other sound ways, including

using guidebooks like the National Automobile Dealers Association Guide ('NADA') and the Kelley BlueBook ('KBB')." A-7 (Order at 7). For some class members, the NADA or KBB value is lower than the Mitchell Valuation, which incorporates the PSA. A-19 (Order at 19). If, for those plaintiffs, the use of the alternative would result in a payment of ACV, then the use of the Mitchell Valuation—which served to *increase* the ACV calculation—cannot possibly have yielded a breach of contract.

Therefore, no common question exists. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350-51 (citation omitted). Commonality also requires not just "the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, *supra* at 132). Here, Plaintiffs contend that PSAs are based on outdated assumptions and should not be used. In other words, they contend that the common question is: "should Progressive have used PSAs?" But no common answer to that question could drive the resolution of the litigation. Suppose Plaintiffs prove that PSAs are systematically inaccurate and should never be applied. That finding would still not drive the resolution of the litigation with respect to *any* putative class member, because that finding would not answer the question that matters: did Progressive

breach the contract by paying less than ACV? For every class member, the determination of whether Progressive breached the contract would still require an individualized analysis of whether the amount of money the class member received is lower than ACV. Plaintiffs therefore cannot show any common questions in the sense relevant to Rule 23.

Even if Plaintiffs could prove commonality, they could not prove predominance. "Predominance builds on commonality; whereas Rule 23(a)(2) requires the existence of a common question, Rule 23(b)(3) requires the common question(s) to 'predominate' over the individual ones." *Eddlemon v. Bradley Univ.*, 65 F.4th 335, 338 (7th Cir. 2023) (internal quotation marks and citation omitted). "[T]he predominance inquiry requires a court to understand what the plaintiffs will need to prove and evaluate the extent to which they can prove their case with common evidence." *Id.* at 339 (internal quotation marks and ellipses omitted).

Here, individualized issues predominate for a straightforward reason: it is *inevitable* that there will be individual liability trials with respect to *every single* class member. As already explained, even if Plaintiffs were to prove, following class certification, that PSAs rest on outdated assumptions about the market for used cars, that fact would teach precisely nothing about whether Progressive is liable to any particular class member. For every single class member, the court would still have to ask the question: was the payment *in fact* lower than ACV? That question would

depend on individualized evidence regarding the characteristics of the class member's particular car. The asserted flaw in PSAs, if proven, might be one piece of relevant evidence supporting the insured's case, but a court would still have to weigh that evidence alongside all the other insured-specific evidence before making a determination regarding that particular insured. Because the court would need to review particularized evidence with respect to every putative class member before determining whether any of them were entitled to damages, individualized questions predominate.

B. The District Court's reasoning is wrong.

The District Court's reasoning with respect to both commonality and predominance is misguided. In finding that a common question exists, the District Court reasoned that the case "turns generally on whether Progressive's use of PSAs violated its contractual obligation to pay the proposed class members the ACV of their vehicles.'" A-15 (Order at 15) (quoting *Drummond v. Progressive Specialty Ins. Co.*, 2023 WL 5181596, at *9 (E.D. Pa. Aug. 11, 2023), *appeal pending*, No. 24-1267 (3d Cir.)). This statement misunderstands the parties' dispute. "Progressive's use of PSAs" could never, in and of itself, "violate[] its contractual obligation to pay the proposed class members the ACV of their vehicles." *Id.* (internal quotation marks omitted). The only thing Progressive could do that would "violate[] its contractual obligation to pay the proposed class members the ACV of

their vehicles" is *not pay the proposed class members the ACV of their vehicles*. *Id.* (quotation marks omitted). If Progressive uses a PSA, but nonetheless pays a class member the ACV of a vehicle, there is no breach. Thus, no common question exists, much less predominates—even if Progressive uses PSAs for every single class member, there will be, at most, *some* instances where it breaches the contract (because it pays less than ACV) and *other* instances where it does not breach the contract (because it pays ACV, or more than ACV).

In finding that commonality is satisfied, the District Court stated that the "common answer is quite clear: the use of PSAs either did or did not violate the contract." A-15 (Order at 15) (internal quotation marks omitted). In its discussion of predominance, the District Court doubled down on this reasoning. It explained that variations in the facts of individual class members' cases might "prove to be a problem if the common issue Ms. Schroeder had identified was whether Progressive paid ACV to putative class members." A-22-23 (Order at 22-23). "But instead, the common issue here is whether Progressive's use of PSAs to determine ACV violated the Policy." A-23 (Order at 23) (footnote omitted). "This issue predominates over this litigation and any individualized issues that exist." *Id.*

This reasoning misunderstands the plaintiffs' claim. The plaintiffs are not alleging that the "use of PSAs," in and of itself, violated the contract. Instead, Plaintiffs allege that Progressive breached its obligation under the policy to pay the

"actual cash value of the … damaged property." A-3 (Order at 3); *see* A-13 (Order at 13) (noting Plaintiffs' concession that the "form Policy language applicable to every Class member … establishes the relevant duty"). And *that* issue cannot be resolved for every class member in one fell swoop, because—regardless of the accuracy of PSAs in general—that answer will turn on the particular facts of each claimant's case.

But suppose Plaintiffs actually *were* alleging that the use of PSAs—in and of itself—violated the contract. In other words, suppose Plaintiffs' theory, as the District Court apparently believed, was that even for those class members who actually *did* get ACV for their vehicles, Progressive breached the contract so long as it relied on PSAs in connection with its valuation. Could a class then be certified, on the theory that whether "the use of PSAs … did or did not violate the contract," A-15 (Order at 15) (quotation marks omitted), *is* a common question under Rule 23?

The answer is no. The problem with this effort to skirt Rule 23 is that it rests on a plainly incorrect interpretation of the contract. Nothing in the contract suggests that the mere use of PSAs—untethered from any actual valuation error—is a breach. Indeed, the contract is silent on PSAs. Nor would any insured have any reason to care whether Progressive uses PSAs, so long as the insured ultimately receives ACV.

A breach-of-contract theory hinging on Progressive's mere use of PSAs would require rewriting the contract.

Thus, even if Plaintiffs *had* argued that the class should be certified because the contract contains a separate prohibition on using PSAs, class certification should have been denied because that substantive argument is *wrong*. Under Rule 23, a court may not accept a plaintiff's legal theory as gospel at the class-certification stage. "The Rule does not set forth a mere pleading standard." *Comcast Corp.*, 569 U.S. at 33 (internal quotation marks omitted). "Rather, a party must not only be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Id.* "The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.*; *accord Eddlemon*, 65 F.4th at 339 (finding that district court abused its discretion in certifying a class when district court's "predominance analysis merely accepted Eddlemon's proffered common questions without referring to the common evidence presented to answer those questions").

Applying that principle here, Plaintiffs claim that this case presents a common question: whether the "PSA deduction is baseless and invalid." A-13 (Order at 13). But in order to decide whether that is a common question, the court must decide whether such a finding would *in fact* be a sufficient basis to find a breach of contract

with respect to each class member—not merely that Plaintiffs *claim* that it would. And it would not. The contract's plain language makes clear that each case turns on whether the individual projected sale price of each vehicle satisfied the requirement that Progressive pay ACV, not on whether PSAs are "baseless and invalid." *Id.* Under *Comcast*, the district court erred in certifying the class without scrutinizing the legal theory underpinning—and ultimately, defeating—Plaintiffs' theory of classwide liability. *See Eddlemon*, 65 F.4th at 339-40 (courts must "begin the class certification analysis by identifying the elements of the plaintiff's various claims" (quotation marks, brackets and citation omitted)).

This may result in a partial analysis of the merits of the plaintiff's claim at the class-certification stage. But that is an inevitable and common feature of class-action litigation. The Supreme Court has repeatedly "emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and "[s]uch an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33-34 (internal quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 34 (quotation marks omitted). That is precisely the case here. The question of "would proof that PSAs are generally inaccurate establish Progressive's liability with respect to each class member?"—the relevant

inquiry for commonality under Rule 23—overlaps with the question of "did Progressive breach the contract by using PSAs?"—the relevant inquiry for liability. But notwithstanding this overlap, the Court must resolve the commonality question prior to class certification.

This is not to say, of course, that a court should resolve all common legal issues prior to class certification. Suppose a contract is ambiguous on a particular issue, and resolution of that ambiguity could resolve the defendant's liability to the class in one fell swoop. In that case, this contract-interpretation question might be a "common question" under Rule 23, such that it should be answered after, rather than before, class certification. But the court must ascertain whether that legal question actually exists; it cannot simply accept the plaintiff's representation that it does.

If the District Court's reasoning is upheld, enterprising plaintiffs could extend this Court's precedent to manufacture class certification in every single case. They could simply assert that a legal theory exists that would allow the defendant's liability to be adjudicated on a classwide basis—and if the defendant argues that the legal theory was faulty, the plaintiffs could say that this is an issue to be resolved after class certification.

This outcome would violate the letter and spirit of Rule 23 and would result in serious harm to class-action defendants. Even if a legal theory undermining a class claim appears meritless, class certification is still a pivotal event. "Certification

as a class action can coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (internal quotation marks omitted). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded by rule as stated*, *Microsoft Corp. v. Baker*, 582 U.S. 23 (2017); *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("[T]he possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" (quoting H. Friendly, *Federal Jurisdiction: A General View* 120 (1973)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and

not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Given that reality, the court should reaffirm that classes may not be certified based on manifestly faulty legal theories.

## II. Plaintiffs Failed to Prove Adequacy.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Conflicts of interest, as distinct from differences in entitlements, create an issue of adequacy of representation by requiring the class representative to choose between competing class members." *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Here, there is a fundamental intra-class conflict. Plaintiffs claim that the use of the Mitchell Valuation—which incorporates PSAs—caused an artificial decrease in the valuation of their cars. But Plaintiffs also acknowledge that the NADA and KBB methodologies are sound ways of calculating ACV. For many class members, the NADA and KBB methodologies would yield lower valuations than the Mitchell Valuation. In other words, insofar as Plaintiffs endorse the accuracy of the NADA and KBB methodologies, their position would make numerous class members worse off—the epitome of an intra-class conflict that should have barred certification.

The District Court gave two reasons for rejecting Progressive's adequacy objections. First, it reasoned that "[w]hile Ms. Schroeder has chosen to contest only

the PSA aspect of the WCTL methodology, the Court notes that she is proceeding under Rule 23(b)(3), so putative class members may opt out of the class." A-19 (Order at 19). "Any class member wishing to pursue other perceived shortcomings in Progressive's ACV calculation are free to opt out of the class and, if not, Ms. Schroeder will adequately represent them." *Id.* By this reasoning, adequacy would *never* be required in a damages class, because class members are *always* allowed to opt out of such classes under Rule 23(c)(2)(B)(v). This reasoning sharply conflicts with the text of Rule 23, which requires a showing of adequacy in *every* case, including in cases where class members can opt out.

Second, the court reasoned that Ms. Schroeder was an adequate representative of the class because "[i]f she is able to show that using a PSA was a breach of the Policy, all class members would receive more." A-19 (Order at 19). This reasoning repeats the error in the district court's commonality and predominance analysis. "Using a PSA," standing alone, is not a "breach of the Policy." Instead, a "breach of the Policy" occurs when Progressive pays less than ACV. And as to *that* issue, the interests of plaintiffs who benefit from the NADA and KBB methodologies vis-à-vis the Mitchell Valuation diverge from the interests of plaintiffs who are harmed by those methodologies.

The certification of an overbroad class that includes members who benefited from the Mitchell Valuation harms both Progressive and the absent class members.

From a defendant's perspective, the bigger the class, the bigger the damages exposure. And it is not very comforting to the defendant that it may eventually have the chance to winnow down the class. Defendants faced with excessively broad classes must, as a matter of risk management, assume the worst. Thus, when overbroad classes are certified, the coercive effect of class certification on defendants is magnified precisely *because* the District Court failed to adhere to Rule 23's procedural requirements.

## CONCLUSION

The District Court's class-certification order should be reversed, and the case remanded for further proceedings.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 3,915 words, excluding the parts of the brief exempted by Rule 32(f).

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I hereby certify that on this 28th day of May, 2024 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

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