

No. 20-1422

IN THE
**United States Court of Appeals
for the Third Circuit**

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SAFEHOUSE, A PENNSYLVANIA NONPROFIT CORPORATION; AND JOSE BENITEZ,
PRESIDENT AND TREASURER OF SAFEHOUSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (No. 2:19-cv-00519-GAM)
Honorable Gerald A. McHugh

**BRIEF OF FOURTEEN CITIES AND COUNTIES AS *AMICI CURIAE* IN
SUPPORT OF APPELLEES' PETITION FOR REHEARING *EN BANC***

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO CITIES AND COUNTIES NATIONWIDE.	4
A. Research Demonstrates that Overdose-Prevention Sites Can Save Lives in Cities and Counties Fighting the Opioid Epidemic.	4
B. Overdose-Prevention Sites Advance Federal Public Health Policy.....	9
C. The Court’s Decision Will Impact Overdose-Prevention Efforts Around the Third Circuit and Beyond.....	9
II. THE PANEL’S DECISION IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CONTROLLED SUBSTANCES ACT.....	11
CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 Cases	
<i>City of Chicago v. Barr</i> , 961 F.3d 882 (7th Cir. 2020)	10
<i>City of Los Angeles v. Barr</i> , 941 F.3d 931 (9th Cir. 2019)	10
<i>City of Philadelphia v. Att’y Gen.</i> , 916 F.3d 276 (3d Cir. 2019)	10
<i>City of Providence v. Barr</i> , 954 F.3d 23 (1st Cir. 2020)	10
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006)	12
 Statutes	
21 U.S.C. § 856(a)(2)	3, 4, 9, 11
21 U.S.C. § 1102(2)	12
 Other Authorities	
Chicago Dep’t of Public Health, <i>2019 Chicago Opioid Overdose Data Brief</i> (December 2020), available at https://www.chicagohan.org/documents/14171/234367/Chicago++2019+Opioid+Brief.pdf/08ce046c-b29e-42e8-409a-a8529d79bc77?t=1609373556834	6
Chris Lisinski, <i>Lelling Reaffirms Opposition to Supervised Drug Consumption Sites</i> , GBH News (Oct. 3, 2019), available at https://www.wgbh.org/news/local-news/2019/10/03/elling-fed-enforcement-still-awaits-injection-facilities	2

Cook County Dep’t of Public Health, <i>Opioid Epidemic in Suburban Cook County</i> (February 2021), available at https://cookcountypublichealth.org/wp-content/uploads/2021/02/CCDPH-Opioid-Epidemic-Report-2.18.21.pdf	6
Ctrs. For Disease Control and Prevention, <i>Opioid Data Analysis and Resources</i> (Jan. 25, 2021), available at https://www.cdc.gov/drugoverdose/data/analysis.html	4
<i>Evaluation of an Unsanctioned Safe Consumption Site in the United States</i> , N. Eng. J. Med. (Aug. 6, 2020), available at https://www.nejm.org/doi/full/10.1056/NEJMc2015435	8
Institute for Clinical and Economic Review, <i>Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value</i> (Jan. 8, 2021), available at https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf	2, 8
Jennifer J. Carroll, PhD, MPH et al., <i>Evidence-Based Strategies for Preventing Opioid Overdose: What’s Working in the United States</i> (2018) available at https://www.cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf	7, 9
Lauren Lee, <i>Allegheny reports increase in opioid overdose deaths</i> , Pittsburgh Post-Gazette (July 10, 2020) available at https://www.post-gazette.com/news/health/2020/07/10/Pittsburgh-Opioid-overdose-Naxolone-Allegheny-County-Health-Department/stories/202007100127	5
Mike Carter, <i>Seattle’s new U.S. Attorney says he won’t allow city to open safe-injection site</i> , The Seattle Times (Apr. 3, 2019) available at https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site	2
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Nat'l Institutes of Health, <i>Overdose Death Rates</i> (Jan. 29, 2021), available at https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates	5
Off. of the Chief Med. Exam'r City and County of S.F., <i>Preliminary Accidental Drug Overdose Data Rep. as of Feb. 16, 2021</i> , available at https://sf.gov/sites/default/files/2021-02/2021%2002_OCME%20Overdose%20Report.pdf	6
Peter Grinspoon, MD, <i>A tale of two epidemics: When Covid-19 and opioid addiction collide</i> , Harvard Health Publishing: Harvard Health Blog (April 20, 2020), https://www.health.harvard.edu/blog/a-tale-of-two-epidemics-when-covid-19-and-opioid-addiction-collide-2020042019569	1
Rich Lord, <i>Bill Peduto: City's Opioid Efforts Changing, may Include Safe Injection Sites</i> , Pittsburgh Post-Gazette, Feb. 1, 2018, available at https://www.post-gazette.com/local/city/2018/02/01/Bill-Peduto-Pittsburgh-opioid-crisis-epidemic-safe-injection-sites-Philadelphia/stories/201802010122 (last visited March 3, 2021)	10
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<i>Supervised Injection Facilities</i> , NPR (Aug. 30, 2018), available at https://www.npr.org/sections/health-shots/2018/08/30/642735759/justice-department-promises-crackdown-on-supervised-injection-sites	2
U.S. Census Bureau, <i>Quick Facts Washtenaw County, Mich.</i> (July 1, 2019), available at https://www.census.gov/quickfacts/fact/table/washtenawcountymichigan,MI/PST045219	6

Washtenaw County Health Dep't, *Opioid Report* (Apr. 2019),
available at
<https://www.washtenaw.org/ArchiveCenter/ViewFile/Item/940>7

INTEREST OF *AMICI CURIAE*¹

Amici are the Cities of Albuquerque, NM; Austin, TX; Chicago, IL; New York, NY; Oakland, CA; Pittsburgh, PA; San Diego, CA; San Francisco, CA; Seattle, WA; and Somerville, MA; as well as Cook County, IL; King County, WA; and Multnomah County, OR; and the Prosecuting Attorney of Washtenaw County, MI. We represent the residents of 14 cities and counties across the United States, more than 22 million Americans. As the level of government closest to the people, *Amici* bear primary responsibility for public health, and for decades have been on the front line of the battle against opioids. While COVID-19 has overtaken the opioid crisis in today's headlines, the pandemic has only compounded the opioid epidemic in our communities as people suffering from opioid use disorder ("OUD") experience ever more isolation and anxiety while being barred from attending in-person recovery meetings and peer-support groups.²

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this brief. No person other than *Amici* and their counsel made a monetary contribution to its preparation.

² Peter Grinspoon, MD, *A tale of two epidemics: When Covid-19 and opioid addiction collide*, Harvard Health Publishing: Harvard Health Blog (April 20, 2020), <https://www.health.harvard.edu/blog/a-tale-of-two-epidemics-when-covid-19-and-opioid-addiction-collide-2020042019569>.

Several of the undersigned *Amici* filed a brief in support of Safehouse on the merits. *See* ECF No. 79 (referred to herein as “Localities Br.”). As explained in that brief, overdose-prevention sites like Safehouse are promising, evidence-based medical interventions. *See* Localities Br. 8-11. They are likely one of the best hopes to rescue people from overdose with life-saving naloxone administration, and to refer people in crisis to OUD treatment and social support services. *See id.*³ Many localities, including several *Amici*, have concluded that overdose-preventions sites could help address this public health crisis. *See* Localities Br. 11-16.

Rather than support these efforts, the Department of Justice (“DOJ”)—under the former administration—decided to bring this first-of-its-kind action against Safehouse, and threatened other actions wherever sites are opened.⁴ If it stands, the

³ *See also* Institute for Clinical and Economic Review, *Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value*, 69 (Jan. 8, 2021) [“ICER Report”], available at https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf.

⁴ *See* Bobby Allyn, *Justice Department Promises Crackdown on Supervised Injection Facilities*, NPR (Aug. 30, 2018), <https://www.npr.org/sections/health-shots/2018/08/30/642735759/justice-department-promises-crackdown-on-supervised-injection-sites>; Mike Carter, *Seattle’s new U.S. Attorney says he won’t allow city to open safe-injection site*, The Seattle Times (Apr. 3, 2019), <https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site>; Shannon Lin, *US Attorney Threatens Legal Action if San Francisco Opens Supervised Injection Sites*, KQED (Mar. 4, 2020), <https://www.kqed.org/news/11804290/us-attorney-threatens-legal-action-if-san-francisco-opens-supervised-injection-sites>; Chris Lisinski, *Lelling Reaffirms Opposition to Supervised Drug Consumption Sites*, GBH News (Oct. 3, 2019), <https://www.wgbh.org/news/local-news/2019/10/03/elling-fed-enforcement-still-awaits-injection-facilities>.

panel majority's decision will hinder the development of overdose-prevention sites in the United States, resigning not just Philadelphia but communities around the country to the status quo for the foreseeable future. That stark reality has led even more jurisdictions to join the call for the Court to hear this case *en banc*.

SUMMARY OF ARGUMENT

This case presents a question of exceptional importance to public health officials fighting the opioid crisis at the local level: whether the Controlled Substances Act (specifically, 21 U.S.C. § 856(a)(2)) prohibits overdose-prevention sites like Safehouse. That is a question of first impression, and between the panel majority, Judge Roth's dissent, and the District Court's decision, it is clear that well-informed legal opinions diverge regarding the proper interpretation of Section 856(a)(2) in the context of legitimate medical interventions.

As with other public-health threats, *Amici* have taken an evidence-based approach to confronting the opioid crisis. A number of jurisdictions, including several *Amici*, have explored ways that overdose-prevention sites can bolster their response to the crisis; San Francisco even developed a full-scale operational demonstration model in its Tenderloin neighborhood. There is ever-stronger evidence that overdose-prevention sites can reduce the mortality caused by this epidemic. Sites like the one Safehouse proposes also further federal public health

policy, as they advance the objectives and methods recommended by both HHS and CDC.

The panel majority’s conclusion that Congress intended Section 856(a)(2) to prohibit overdose-prevention sites will undermine these objectives in Philadelphia and beyond, as the decision in this case is sure to influence courts (and prosecutors) nationwide. Left in place, the panel’s decision will impose the horrifying status quo for the foreseeable future. Our families are broken. Our children are orphaned. The panel’s divided ruling should not be the last word on overdose-prevention sites in this Circuit. The petition for rehearing *en banc* should be granted.

ARGUMENT

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO CITIES AND COUNTIES NATIONWIDE.

A. Research Demonstrates that Overdose-Prevention Sites Can Save Lives in Cities and Counties Fighting the Opioid Epidemic.

With often limited municipal resources, *Amici* have implemented numerous medical interventions recommended by the Centers for Disease Control and Prevention (“CDC”), including syringe-services programs, medication-assisted treatment programs, and naloxone distribution. Yet opioid overdose deaths continue to haunt our communities.⁵

⁵ Ctrs. For Disease Control and Prevention, *Opioid Data Analysis and Resources* (Jan. 25, 2021), *available at* <https://www.cdc.gov/drugoverdose/data/analysis.html>.

The rise of synthetic opioids, and illicitly manufactured fentanyl in particular, has strained existing outreach efforts beyond their limits.⁶ Fentanyl is 50 times more potent than heroin, and a person can die from a fentanyl overdose in just five minutes—from an amount as small as a grain of sand. *See* Localities Br. 5. Naloxone is no help if it is not there in time.

Between fentanyl and the COVID-19 pandemic, the opioid crisis is worse than ever. In Seattle’s home of King County, Washington, drug overdose deaths have risen every year since 2011.⁷ Fentanyl is one driver of this increase, present in only 3 overdoses during 2015 but implicated in 176 overdoses during 2020. Preliminary data show that overdose deaths in King County increased by more than 100—from 435 to 537—between 2019 and 2020.⁸ This is the most drastic single year of growth yet.⁹ Fentanyl was also the most common drug implicated in the 564 overdose deaths that occurred in 2019 in Pittsburgh’s home of Allegheny County, Pennsylvania.¹⁰ This represented an increase of 72 deaths from the prior year,

⁶ Nat’l Institutes of Health, *Overdose Death Rates* (Jan. 29, 2021), *available at* <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>.

⁷ Public Health – Seattle & King County, *Overdose Deaths – King County* (Dec. 1, 2020), *available at* <https://kingcounty.gov/depts/health/examiner/services/reports-data/overdose.aspx>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Lauren Lee, *Allegheny reports increase in opioid overdose deaths*, Pittsburgh Post-Gazette (July 10, 2020), *available at* <https://www.post-gazette.com/news/health/2020/07/10/Pittsburgh-Opioid-overdose-Naloxone-Allegheny-County-Health-Department/stories/202007100127>.

despite the fact that Allegheny County's Health Department has distributed more than 20,000 naloxone kits and held 165 training programs to teach residents how to administer it.¹¹ And in San Francisco, preliminary data for 2020 reported 697 accidental overdose deaths, with fentanyl contributing to more than 500 of them.¹²

The list goes on. Chicago, Illinois reported 855 opioid-related overdose deaths in 2019, with 80% involving fentanyl.¹³ And in suburban Cook County outside of Chicago, acute opioid-exposure overdoses accounted for more than \$500 million in hospital charges from 2016 to 2019, with a disproportionate share of those costs falling on government insurance programs, uninsured individuals, and hospitals themselves.¹⁴ Washtenaw County, Michigan, a county of about 367,000,¹⁵ has lost more than 450 residents to opioid overdoses since 2011, with the proportion

¹¹ *Id.*

¹² Off. of the Chief Med. Exam'r City and County of S.F., *Preliminary Accidental Drug Overdose Data Rep. as of Feb. 16, 2021*, 7, available at https://sf.gov/sites/default/files/2021-02/2021%2002_OCME%20Overdose%20Report.pdf.

¹³ Chicago Dep't of Public Health, *2019 Chicago Opioid Overdose Data Brief* (December 2020), available at <https://www.chicagohan.org/documents/14171/234367/Chicago++2019+Opioid+Brief.pdf/08ce046c-b29e-42e8-409a-a8529d79bc77?t=1609373556834>.

¹⁴ Cook County Dep't of Public Health, *Opioid Epidemic in Suburban Cook County* (February 2021), available at <https://cookcountypublichealth.org/wp-content/uploads/2021/02/CCDPH-Opioid-Epidemic-Report-2.18.21.pdf>.

¹⁵ U.S. Census Bureau, *Quick Facts Washtenaw County, Mich.* (July 1, 2019), available at <https://www.census.gov/quickfacts/fact/table/washtenawcountymichigan,MI/PST045219>.

of deaths associated with synthetic opioids like fentanyl increasing from 38% to 84% from 2016 to 2018.¹⁶

Because tolerating the preventable deaths of tens of thousands of Americans is not an option, *Amici* have been forced to explore additional strategies to address the opioid crises. Sites like Safehouse ensure that health workers can administer naloxone in time to prevent overdose deaths, and can even prevent overdoses in the first place through on-site testing that detects fentanyl in drug samples.¹⁷ Available data show that the chances of facilitating a person's transition to treatment and recovery are far better at a place like Safehouse than in an abandoned building or subway car or on the street.

The promise of overdose-prevention sites is not an empty one. It is based on research. There are over a hundred sites operating worldwide, including sites in Canada, Australia, Germany, the Netherlands, and France, and scores of studies show these sites reduce overdose frequency and public drug use without increasing drug trafficking or crime. *See* Localities Br. 8-11. Research also shows that

¹⁶ Washtenaw County Health Dep't, *Opioid Report* (Apr. 2019), *available at* <https://www.washtenaw.org/ArchiveCenter/ViewFile/Item/940>.

¹⁷ Nat'l Harm Reduction Coalition, *Fentanyl Test Strip Pilot* (Oct. 5, 2020), *available at* <https://harmreduction.org/issues/fentanyl/fentanyl-test-strip-pilot/>; Jennifer J. Carroll, PhD, MPH et al., *Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States*, Ctrs. For Disease Control and Prevention, (2018), *available at* <https://www.cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf>.

overdose-prevention sites provide valuable community support for people who use drugs, resulting in reduced public drug use and syringe litter. *Id.*¹⁸ One example is InSite, which has been running in Vancouver for over 15 years. Localities Br. 9. Studies confirm the site has increased use of OUD treatment services, while reducing fatal overdoses in the vicinity of InSite by 35%. *Id.* at 9-11. And a comprehensive literature review released earlier this year confirmed that, based on available data, “no client” of an overdose-prevention site “has *ever* experienced death from overdose within a facility.”¹⁹

Research indicates that overdose prevention sites would have similar effects in U.S. cities. Cost-benefit studies of the feasibility of opening sites in Baltimore, Philadelphia, and San Francisco all found that the costs of operation would be more than offset by the savings realized by preventing HIV, hepatitis, and other infections, increasing enrollment in medication-assisted treatment, and reducing hospitalizations and deaths from opioid overdoses. *See* Localities Br. 8. And a recent study of an unsanctioned site operating since 2014 at an undisclosed location in the United States revealed that, like its international counterparts, the site was able to reverse every single one of the overdoses that occurred at the site.²⁰

¹⁸ *See also* ICER Report, *supra*, pp. 12, 32

¹⁹ *Id.*, p. ES4.

²⁰ Alex H. Kral, Ph.D., et al., Correspondence, *Evaluation of an Unsanctioned Safe Consumption Site in the United States*, N. Eng. J. Med. (Aug. 6, 2020) <https://www.nejm.org/doi/full/10.1056/NEJMc2015435>.

B. Overdose-Prevention Sites Advance Federal Public Health Policy.

In addition to this robust body of evidence, guidance from federal health agencies aligns with the principles of overdose-prevention sites. The U.S. Department of Health and Human Services (“HHS”) advocates “better targeting of overdose-reversing drugs,” which is a prime benefit of overdose-prevention sites. *See* Localities Br. 12-13. Likewise, the CDC promotes values that reflect Safehouse’s approach to overdose-prevention sites, including the need to “meet people where they are” in their road to recovery.²¹ Overdose-prevention sites would greatly improve the efficacy of nearly every measure the CDC recommends, including medication-assisted treatment with methadone or buprenorphine, widespread distribution of naloxone, syringe-services programs, fentanyl testing strips, testing for HIV and hepatitis C, and linkage to medical, mental health, and social services.²²

The panel’s ruling, however, stops the work of organizations like Safehouse in its tracks. That will in turn undermine the work of federal public health agencies.

C. The Court’s Decision Will Impact Overdose-Prevention Efforts Around the Third Circuit and Beyond.

The panel’s decision is the first of a U.S. Court of Appeals to address the application of Section 856(a)(2) to a medical intervention to fight opioid overdose

²¹ Carroll, *supra*, at 4.

²² *Id.* at 26.

deaths. As such, the Court’s ruling in this case will reach far beyond Philadelphia. Other localities in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands are also battling the opioid crisis and are desperate for every measure to stop residents from dying. Pittsburgh Mayor Bill Peduto, for one, has recognized that overdose-prevention sites have “a proven record of being able to lessen the number of people who die, of being able to provide a safe environment to stop blood-borne diseases, and provide[] the gateway for people to say, ‘I need help.’”²³

Other localities around the country, including *Amici* New York City, San Francisco, Oakland, King County (together with Seattle), and Somerville, Massachusetts had studied sites like Safehouse and explored similar measures in their communities before the DOJ filed this action. *See* Localities Br. 8-11. The Court’s decision will surely influence any future decision on this topic, as with other recent matters of first impression this Court has considered. *See, e.g., City of Providence v. Barr*, 954 F.3d 23, 26 (1st Cir. 2020) (citing *City of Philadelphia v. Att’y Gen.*, 916 F.3d 276 (3d Cir. 2019)); *City of Chicago v. Barr*, 961 F.3d 882, 902 (7th Cir. 2020) (same); *City of Los Angeles v. Barr*, 941 F.3d 931, 942 (9th Cir. 2019) (same).

²³ Rich Lord, *Bill Peduto: City’s Opioid Efforts Changing, may Include Safe Injection Sites*, Pittsburgh Post-Gazette, Feb. 1, 2018, *available at* <https://www.post-gazette.com/local/city/2018/02/01/Bill-Peduto-Pittsburgh-opioid-crisis-epidemic-safe-injection-sites-Philadelphia/stories/201802010122> (last visited March 3, 2021).

Overdose-prevention sites would help stop the loss of lives in our communities. This Court's decision may well determine whether any sites like Safehouse are able to open, when they are desperately needed. The full Court should consider whether the panel majority, or the dissent and the District Court, was correct.

II. THE PANEL'S DECISION IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CONTROLLED SUBSTANCES ACT.

For all the reasons set forth in our brief on the merits (*see* Localities Br. 16-29), Judge Roth's dissent, and Safehouse's petition, *Amici* respectfully submit that the panel's decision should be reversed. The majority's decision stretches the text of Section 856(a) beyond its limit, in a manner that Congress never intended, and that no Court has ever endorsed. Where, as here, a site will not manufacture, store, prescribe, distribute, or administer controlled substances, and the purpose of the facility is to provide lifesaving medical treatment and wraparound rehabilitation services, there is no CSA violation under the plain language of Section 856. The panel's ruling vindicates the DOJ's curious desire under the former administration to prosecute organizations running facilities that address public health needs and *combat* illicit drug use, while tying the hands of local officials who share the same goals.

That turns the CSA on its head. Congress unequivocally “declare[d] that it is the policy of the United States . . . to meet the problems of drug abuse through . . . the development and support of community-based prevention programs.” 21 U.S.C. § 1102(2). And the Supreme Court has stated in no uncertain terms that the CSA “manifests no intent to regulate the practice of medicine generally,” but instead is understood to regulate “illicit drug dealing and trafficking as conventionally understood.” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). There is utterly no “conventional[] underst[anding]” of “illicit drug dealing and trafficking” that could encompass overdose-prevention sites, and neither Congressional intent nor common sense supports creating one here.

CONCLUSION

The petition for rehearing *en banc* should be granted.

DATED: March 5, 2021

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I, Virginia A. Gibson, am admitted as an attorney and counselor of the United States Court of Appeals for the Third Circuit.

Dated: March 5, 2021

Respectfully submitted,

/s/ Virginia A. Gibson

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CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4) because this brief contains 2,528 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(f).

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

3. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.

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Dated: March 5, 2021

Respectfully submitted,

/s/ Virginia A. Gibson

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the foregoing with the Clerk using the Appellate CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

Dated: March 5, 2021

Respectfully submitted,

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