9-15-2022

Brief of Amicus Curiae Notre Dame Law School Religious Liberty Clinic in Support of Plaintiffs-Appellants

John A. Meiser

Francesca Genova Matozzo

No. 22-11674

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THAI MEDITATION ASSOCIATION OF ALABAMA, INC.; SIVAPORN NIMITYONGSKUL; VARIN NIMITYONGSKUL; SERENA NIMITYONGSKUL; and PRASIT NIMITYONGSKUL,

Plaintiffs-Appellants,

v.

CITY OF MOBILE, ALABAMA**,**

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama
No. 1:16-cv-00395

BRIEF OF *AMICUS CURIAE* NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS

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No. 22-11674
Thai Meditation Association of Alabama, Inc., et al
v. City of Mobile, Alabama

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-2, counsel for *amicus curiae* hereby certifies that the following persons and entities have an interest in the outcome of this case and were not included in the certificates of interested persons previously filed by the parties in this case:

Notre Dame Law School Religious Liberty Clinic (*amicus curiae*)

Lacoste, Joshua (student research assistant for *amicus curiae*)

Matozzo, Francesca (counsel for *amicus curiae*)

Meiser, John (counsel for *amicus curiae*)

Schnieder, Megan (student research assistant for *amicus curiae*)

Sirilla, Athanasius (student research assistant for *amicus curiae*)

Pursuant to 11th Cir. R. 26.1-3(b) counsel certifies that *amicus curiae* is aware of no publicly traded corporation with an interest in this proceeding.

B. Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Notre Dame Law School Religious Liberty Clinic certifies that it is not a corporate entity, does not issue stock, and operates within the Notre Dame Law School at the

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University of Notre Dame, a nonprofit educational institution organized exclusively for charitable, religious, and scientific purposes within the meaning of 501(c)(3) of the Internal Revenue Code.

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STATEMENT OF THE ISSUES

Amicus curiae agrees with the Statement of the Issues presented in Appellants' opening brief. This brief addresses only the first issue: whether the district court incorrectly applied RLUIPA substantial-burden analysis.

INTERESTS OF AMICUS CURIAE[1]

The Notre Dame Law School Religious Liberty Clinic promotes and defends the freedom of religion or belief for all people. It promotes not only the freedom for individuals to hold religious beliefs but also their right to exercise those beliefs and to live according to them. It has represented individuals and organizations from an array of faith traditions in cases to defend the right to religious worship, to preserve sacred lands from destruction, and to prevent discrimination against religious believers. In addition to defending against infringements of religious freedom, the Religious Liberty Clinic seeks to ensure that critical legal protections for religious exercise—like those Congress enacted in RLUIPA—are faithfully interpreted and applied.

The Notre Dame Law School Religious Liberty Clinic files this brief by leave of court pursuant to Federal Rule of Appellate Procedure 29(a)(2).

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

SUMMARY OF THE ARGUMENT

This Court already corrected the district court's errant understanding of RLUIPA's substantial-burden analysis once in this case. Unfortunately, a second correction is needed now.

In Thai Meditation Association's first appeal, this Court explained that "the district court misread our opinion in *Midrash*" and, as a consequence, had erroneously required the Association to show that the government "completely prevent[ed]" its religious exercise in order to demonstrate a substantial burden. *Thai Meditation Ass'n of Ala. v. City of Mobile* (*"Thai Meditation I"*), 980 F.3d 821, 830 (11th Cir. 2020). This Court rejected that overly restrictive understanding of "substantial burden," outlined how to evaluate burdens under the appropriate standard, and remanded the case for the district court to do so. *See id.* at 830–32.

On remand, district court misread this Court's opinions once again. To guide the district court on remand, this Court instructed it to determine "whether the City's denial of the plaintiffs' zoning applications was akin to significant pressure which directly coerced the plaintiffs to conform their behavior" by considering six non-exhaustive factors that might be relevant to that question. *Id.* (alterations omitted). The district court appears to have missed the forest for the trees—focusing more on the bulleted list of factors than the question those factors are supposed to inform. Instead of asking to what degree Thai Meditation

Association's religious exercise has been hampered, the district court simply asked which side each of the six factors favored, tallied them up, and measured which ledger was longer. In the end, the court reached the startling conclusion that the City's decision did not substantially burden the plaintiffs' religious exercise even though it deprived them of their only reasonable means to fulfill a necessary religious practice.

The district court's gross misapplication of the opinion in *Thai Meditation I* must be corrected. This Court's opinion is not a checklist. It did not enumerate a set of discrete items to be counted and stacked against each other. Rather, the opinion must be understood and applied for what RLUIPA demands that it be: a holistic analysis built upon several considerations that fit neatly together to determine whether the City's decision substantially impedes the plaintiffs' ability to fulfill their religious needs.

Here, the answer to this question is unequivocally yes. As the district court found, the plaintiffs need to build a meditation center at the Eloong property in order to fulfill core practices of their Buddhist faith. Neither the City nor the district court has identified any other way that the Association or its members could satisfy those needs without facing other substantial obstacles. But the district court missed that conclusion by fundamentally misunderstanding this

Court's prior decision, losing sight of the inquiry at hand, and mechanically applying a formula that cannot be squared with RLUIPA.

This Court must reverse once again. The district court's disjointed analysis not only badly misreads the opinion in *Thai Meditation I*, but it imposes new barriers to relief under RLUIPA that neither the statute nor this Court has recognized. This Court must clarify the appropriate analysis for evaluating substantial burdens in cases like this—both to fix the erroneous decision below and to ensure that other courts will not repeat the same mistake.

ARGUMENT

I. *Thai Meditation I* outlines a holistic approach to evaluate religious burdens imposed by land-use decisions.

RLUIPA tightly circumscribes the government's authority to "impose a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a person" or institution. 42 U.S.C. § 2000cc(a)(1) (emphasis added). As the "ordinary or natural meaning" of the phrase "substantial burden" makes clear, the focus is on the *effect* of the government's action on the plaintiff's religious practices. *See Thai Meditation I*, 980 F.3d at 830 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004))). In *Thai Meditation I*, this Court observed that the burdens imposed by land-use decisions fall along a spectrum: at one end, a "mere incidental effect or inconvenience on religious exercise doesn't constitute a substantial burden," and at

the opposite extreme, "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.* at 830 (internal quotation marks omitted). The threshold to show a substantial burden lies somewhere between: if a plaintiff must modify his or her religious behavior as "the result of government coercion or pressure," that is enough. *Id.* at 831.

Determining where a case falls along this spectrum is the essence of substantial-burden analysis. *See id.* The answer, of course, is context-dependent. It must consider both the specific exercise the religious believer seeks to practice and how the government's actions affect his ability to do so. And to help perform the analysis, this Court identified six considerations that—among others—may be relevant to those questions. *See Thai Meditation I*, 980 F.3d at 831–32.[2]

Those factors are not to be treated as discrete items in a checklist. Rather, as described below, they work neatly together to help assess just what effect the land-

[2] The six factors are: (1) "whether the plaintiffs have demonstrated a genuine need for new or more space"; (2) "the extent to which the City's decision . . . effectively deprives the plaintiffs of any viable means by which to engage in protected religious practice"; (3) "whether there is a meaningful 'nexus' between the coerced or impeded conduct and the plaintiff's religious exercise"; (4) whether the City's decisionmaking process reflects unfairness or arbitrariness; (5) whether the plaintiffs have an opportunity to submit modified applications to satisfy the City's objections; (6) "and whether the alleged burden is properly attributable to the government . . . or whether the burden is instead self-imposed." *Thai Meditation I*, 980 F.3d at 831–32.

use denial has had on the plaintiff. The importance of any consideration hinges entirely on the degree to which it helps answer that question.

A. A court must first ask whether the requested land use relates to a religious need.

The inquiry begins by asking whether the plaintiffs are "engaged in religious exercise" and whether they "have demonstrated a genuine need for new or more space" to fulfill that exercise. *See Thai Meditation I*, 980 F.3d at 829–31.[3] There might be many such needs, such as adding space to accommodate a growing congregation,[4] building facilities to host additional religious services,[5] or preserving religious activity in the face of new laws that purport to prohibit it.[6] But the land use must be needed for at least *some* religious function; desired uses that are unrelated to a plaintiff's religious exercise fall outside RLUIPA's protection. *See, e.g.*, *Livingston Christian Sch. v. Genoa Twp.*, 858 F.3d 996 (6th Cir. 2017) ("LCS focuses on increasing enrollment and raising revenue, but has not identified any religious activity . . . that could not be performed . . . ."); Sherif Girgis, *Defining "Substantial Burden" on Religion and Other Liberties*, 108 Va. L.

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[3] This is the first factor listed in *Thai Meditation I*. *See supra* n.2.

[4] *See Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 558 (4th Cir. 2013); *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069–70 (9th Cir. 2011).

[5] *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F. 3d. 338 (2d Cir. 2007).

[6] *See Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

Rev. (forthcoming 2022) (manuscript at 43–46), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912126 (discussing religious necessity of land uses).

Closely related, the challenged decision must actually affect the religious practice in question. In this Court's words, there must be some "meaningful 'nexus' between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise." *Thai Meditation I*, 980 F.3d at 832.[7] This, of course, makes sense. Regardless whether the plaintiff seeks to engage in religious activity, RLUIPA provides no relief from land-use decisions unless they affect—and thus may impose some burden upon—the ability to do so.

B. The court must then consider whether the challenged decision impairs the plaintiff's ability to fulfill that need.

After determining that the land-use decision relates to a genuine religious need, the Court then evaluates the extent to which the decision actually impedes the plaintiff's ability to fulfill that need. Or, as this Court put it, the inquiry must consider "the extent to which the City's decision, and the application of its zoning policy more generally, effectively deprives the plaintiffs of any viable means by

[7] This is the third factor listed in *Thai Meditation I*. *See supra* n.2.

which to engage in protected religious exercise." *Thai Meditation I*, 980 F.3d at 832 (internal quotation marks omitted).[8]

Indeed, courts regularly consider whether the plaintiff retains alternative ways to fulfill the religious need in spite of a zoning denial. It is often argued, for example, that the plaintiff could simply use or move to another property. *See, e.g.*, *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 603 (9th Cir. 2022); *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1005–06 (6th Cir. 2017); *Westchester*, 504 F.3d at 352. Or it may be argued that the plaintiff still retains other ways to have its zoning application approved. In this Court's words, the City's decision may not be final because the plaintiff may have been offered "an opportunity to submit modified applications that might satisfy the City's objections." *See Thai Meditation I*, 980 F.3d at 832.[9] In either case, the theory is the same: the challenged decision does not burden the plaintiff's religious exercise, because it has not blocked him from alternative means to perform it.

The substantial-burden inquiry often turns significantly on consideration of the adequacy of these supposed alternatives. If the alternatives themselves are substantially burdensome, then their mere existence does not eliminate the burden

[8] This is the second factor listed in *Thai Meditation I*. *See supra* n.2. As discussed in this section, the remaining three factors (four, five, and six) all relate to and help answer this overarching question, as well.

[9] This is the fifth factor listed in *Thai Meditiation I*. *See supra* n.2.

created by the challenged decision. A proposed alternate site, for example, cannot just be "technically available" but must meet the organization's religious needs and be ready for use without incurring substantial burdens due to distance, delay, cost, or uncertainty. *See New Harvest Christian Fellowship*, 29 F.4th at 602; *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 558 (4th Cir. 2013) ("[E]even though other suitable properties might be available . . . the delay, uncertainty, and expense of selling the current property and finding a new one are themselves burdensome."); *see also, e.g.*, *Livingston Christian Schs.*, 858 F.3d at 1005–06; *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005); *Westchester*, 504 F.3d at 351; *Midrash*, 366 F.3d at 1228. And a supposed "opportunity" to receive zoning approval by complying with burdensome conditions or participating in a burdensome or futile reapplication process will not do. *See, e.g.*, *Chabad Lubavitch v. Liftchfield Hist. Dist.*, 768 F.3d 183, 196 (2d Cir. 2014); *Westchester*, 504 F.3d at 349; *Sts. Constantine & Helen*, 396 F.3d at 901. For example, the plaintiff need not continue to participate in a decisionmaking process that is arbitrary, unfair, or otherwise suggests that the plaintiff will simply be "jerked around."[10] *Thai Meditation I*, 980 F.3d at 832; *see also Westchester*, 504 F. 3d. at 352–53; *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 981

[10] This is the fourth factor listed in *Thai Meditation I*. *See supra* n.2.

(9th Cir. 2006). There must be an actually "*reasonable* opportunity" for the plaintiff to have its application approved through further process. *Westchester*, 504 F.3d at 349 (emphasis added).

On the other hand, courts may be reluctant to fault the challenged land-use decision for practical costs or delays that the plaintiff imposed upon itself. Thus, where a proposed alternative is possible but burdensome, this Court asks "whether the alleged burden is properly attributable to the government (as where, for instance, a plaintiff had a reasonable expectation of using its property for religious exercise) or whether the burden is instead self-imposed." *Thai Meditation I*, 980 F.3d at 832.[11] For instance, if a religious organization knowingly bypassed a suitable and readily available property, then the government may not be held responsible for the additional burden of finding and relocating to yet another one. *See, e.g.*, *Livingston Christian Schs.*, 858 F.3d at 1011 (plaintiff leased adequate property to another group instead of using it to meet its religious needs). Nor may a plaintiff be relieved of burdens that result from a stubborn "unwillingness to modify its proposal to comply with applicable zoning requirements." *Thai Meditation I*, 980 F.3d at 832. But the touchstone of the inquiry remains the burden faced by the plaintiff—and where, for instance, a City's zoning scheme has left a plaintiff without any reasonable options to build, the lack of a settled

[11] This is the sixth factor listed in *Thai Meditation I*. *See supra* n.2.

expectation to do so does not undermine the claim. *See New Harvest Christian Fellowship*, 29 F.4th at 602 ("[T]hat a religious group has imposed a burden upon itself by acquiring a property whose use is already restricted is relevant but not dispositive of the substantial burden inquiry."); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851–52 (7th Cir. 2007) (contrasting self-imposed burden where plaintiff could have purchased suitable property zoned for religious use with government-imposed burden where "a paucity of other land available for churches" left plaintiff no choice).

* * *

At bottom, no mathematical formula can determine whether a land-use decision substantially impedes a plaintiff's religious exercise. That inquiry, like the relevant facts that inform it, depends on the particular circumstances of a case and the particular claims of the parties. *See, e.g.*, *New Harvest Christian Fellowship*, 29 F.4th at 602 ("[O]ur approach to determining the presence or absence of a substantial burden is to look at the totality of the circumstances."). And all of the factors are aimed at understanding whether the government action somehow impedes the religious exercise of a plaintiff. The opinion in *Thai Meditation I* is premised upon and appropriately accounts for this reality. This Court must ensure that the opinion is applied in ways that will continue to do so.

II. The district court erred by transforming *Thai Meditation I* into a mechanical test divorced from the meaning of substantial burden.

As described above, the substantial-burden inquiry outlined by this Court in *Thai Meditation I* is a multifaceted—but cohesive—assessment of (1) what the plaintiff's religious needs are; (2) how the challenged land-use decision affects to those needs; and (3) the extent to which that decision now stands in the way of their fulfillment. Unfortunately, the district court seems to have lost sight of the ball, transforming that opinion into a rote and disjointed checklist.

The district court's wooden application of the factors listed in *Thai Meditation I* not only badly misreads that opinion, but in the end, places significant new obstacles to relief under RLUIPA. Even under the district court's own findings, there can be no doubt that Thai Meditation Association's religious exercise has been substantially burdened. That conclusion should not be rejected based on how the court tallied the six *Thai Meditation I* bullet points as if they were a scorecard.

A. The district court's own findings demonstrate that the City's decision imposed a substantial burden.

Upon an appropriate analysis, there can be no doubt that the City's decision has substantially burdened Thai Meditation Association's religious exercise.

First, as the district court found, the Association has a genuine religious need to construct a new meditation center at the Eloong property. Doc. 214 at 23. The

Association needs a quiet and peaceful location where it can "host meditation retreats for participants to develop meditative concentration as well as monks." *Id.* at 21. Its current location, in a commercial area, does not allow it to "develop the serenity and concentration that are essential to developing effective meditation," nor does it allow the organization to conduct retreats in the way its religion mandates. *Id.* at 21–22. Indeed, the Association identified thirteen religious practices that its current property cannot fulfill, leading the district court to find that the group has a "genuine need" to develop the Eloong property. *Id.* at 21–22.

Second, the district court agreed that the City's decision has a close nexus to those religious needs—and the court found no alternative through which Thai Meditation Association could otherwise satisfy them. *See id.* at 23–25. Unlike the proposed development at the Eloong property, neither of Thai Meditation's other properties can provide all that it needs. *Id.* Moreover, the district court found that selling the Eloong property and finding a different, suitable property would result in substantial "delay, uncertainty, and expense." *Id.* at 24. The court found no other way that Thai Meditation could satisfy its religious needs while avoiding those burdens. In sum, the district court concluded—correctly—that "the City's decision effectively deprives [Thai Meditation] of any viable means by which to engage in protected religious exercise." *Id.*

Together, these findings provide all that is needed to show a substantial burden: the proposed development of the Eloong property is necessary to fulfill religious needs that Thai Meditation cannot satisfy through other, non-burdensome alternatives. That should have ended the question.

B. The district court reached the opposite conclusion by erecting new hurdles for RLUIPA plaintiffs.

Despite finding everything that is needed to prove a substantial burden, the district court rejected that conclusion based on three ultimately extraneous points: (1) the Association could technically submit a new zoning application; (2) the City had not acted arbitrarily against the Association; and (3) at the time it purchased the Eloong property, the Association had no settled expectation that it would be allowed to build a meditation center there. None of these points undermines the analysis described above, nor do these observations combine to erase the burden that Thai Meditation Association has suffered.

First, the district court's observation that the plaintiffs "are able to submit a modified application for the proposed meditation center" does not alter the burden analysis. A party whose zoning application is denied can *always* try again. The proper question is thus not whether further application processes are technically available, but whether the evidence suggests that such processes offer a non-burdensome path to zoning approval. *See supra* Part I.B; *Thai Meditation I*, 980 F.3d at 832 (contrasting a final decision from one where plaintiffs are given "an

opportunity to submit modified applications that might satisfy the City's objections"). Here, there is no reason to believe that any modified application would actually satisfy the City's objections, many of which were intractable. *See generally* Appellants' Br. at 30–32. There is thus no reason to conclude that a second bite at the apple would alleviate the burdens the Association faces.

Second, the district court's suggestion that the City's decisionmaking process "does not reflect arbitrariness" is wholly beside the point. Counting this factor against the plaintiffs fundamentally misunderstands its role in substantial-burden analysis. A plaintiff need not show that the City imposed a substantial burden on him *arbitrarily*—and the City is certainly not credited for refraining from doing so. *See Chabad Lubavitch*, 768 F.3d at 195. Rather, arbitrariness is relevant to substantial-burden analysis where it might relieve a plaintiff of the need to continue jumping through futile regulatory hoops.[12] *See supra* Part I.B. That is, a plaintiff will not be asked to participate in further regulatory processes to receive zoning approval where the evidence suggests that he would simply be "jerked around" if he tried to do so. *Thai Meditation I*, 980 F.3d at 832. Because no further regulatory process would adequately address the Association's needs in the first place, it does not matter whether such a process would be administered fairly.

[12] Of course, arbitrary government conduct may also be relevant later in the analysis, regarding the separate question of whether the government had a compelling and narrowly-tailored interest in imposing the substantial burden.

Finally, the district court's assertion that the plaintiffs did not have any settled expectation to develop the Eloong property again misses the point. Even if the Association knew it would need City approval to build a meditation center there, the district court did not find that there were any suitable properties where the Association could have avoided that reality. *Cf. Bethel World Outreach*, 706 F.3d at 558 (plaintiff not faulted for buying property that would require zoning approvals because "modern zoning practices are such that landowners are rarely *guaranteed* approvals"). At best, the court noted that commercially zoned properties would have allowed development without further approval. Doc. 214 at 25. But, as the district court itself recognized, such properties would not do because the plaintiffs "require a quiet, serene environment for their religious exercise." *Id.* at 23. Indeed, the Association *already* owns a commercial property which the district court found insufficient for this very reason. *Id.* at 25–26; *see also* Appellants' Br. 22 ("[R]equiring plaintiffs to locate in a commercial area . . . limits them to exactly the type of locations that have proven to be inadequate for their religious exercise."). Where there is such a "paucity of other land available" for religious use, the plaintiff is not to be faulted for seeking permission to build in the only place it can. *Petra Presbyterian Church*, 489 F.3d at 851.

At bottom, the district court's disjointed analysis of the factors listed in *Thai Meditation I* is wholly untethered to the meaning of "substantial burden." RLUIPA provides relief from substantial burdens on religious exercise, full stop. It does not demand that plaintiffs also show that they win four out of six points on some scorecard that neither the statute nor this Court created.

CONCLUSION

The district court misread this Court's opinion in *Thai Meditation I* and badly misapplied what should have been a straightforward substantial-burden analysis under RLUIPA. For the second time in this case, correction by this Court is needed.

Amicus curiae respectfully urges this Court to reverse the decision below. [13]

Dated: September 15, 2022

Respectfully submitted,

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[13] The Notre Dame Religious Liberty Clinic thanks students Josh Lacoste, Megan Schneider, and Athanasius Sirilla for their assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3972 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements Fed. R. App. P. 32(a)(6) because it was prepared used Microsoft Office Word in 14-point Times New Roman.

Dated: September 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, I electronically filed the foregoing brief with the Clerk of Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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