No. 22-30087

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE STATE OF LOUISIANA, by and through its Attorney General, Jeff Landry; THE STATE OF ALABAMA, by and through its Attorney General, Steve Marchall; THE STATE OF FLORIDA, by and through its Attorney General, Ashley Moody; THE STATE OF GEORGIA, by and through its Attorney General, Christopher M. Carr; THE COMMONWEALTH OF KENTUCKY, by and through its Attorney General, Daniel Cameron; THE STATE OF MISSISSIPPI, by and through its Attorney General, Lynn Fitch; THE STATE OF SOUTH DAKOTA, by and through its Governor, Kristi Noem; THE STATE OF TEXAS, by and through its Attorney General, Ken Paxton; THE STATE OF WEST VIRGINIA, by and through its Attorney General, Patrick Morrisey; THE STATE OF WYOMING, by and through its Attorney General, Bridget Hill,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; CECILIA ROUSE, in her official capacity as Chairwoman of the Council of Economic Advisers; SHALANDA YOUNG, in her official capacity as Acting Director of the Office of Management and Budget; KEI KOIZUMI, in his official capacity as Acting Director of the Office of Science and Technology Policy; JANET YELLEN, Secretary, U.S. Department of Treasury; DEB HAALAND, Secretary, U.S. Department of the Interior; TOM VILSACK, in his official capacity as Secretary of Agriculture; GINA RAIMONDO, Secretary, U.S. Department of Commerce; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; JENNIFER GRANHOLM, Secretary, U.S. Department of Energy; BRENDA MALLORY, in her official capacity as Chairwoman of the Council on Environmental Quality; MICHAEL S. REGAN, in his official capacity as Administrator of the Environmental Protection Agency; GINA MCCARTHY, in her official capacity as White House National Climate Adviser; BRIAN DEESE, in his official capacity as Director of the National Economic Council; JACK DANIELSON, in this official capacity as Executive Director of the National Highway Traffic Safety Administration; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana,

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS-APPELLANTS AND VACATUR

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May 10, 2022

AMICUS CURIAE'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULE 29.2

No. 22-30087

THE STATE OF LOUISIANA, by and through its Attorney General, Jeff Landry, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen submits this supplemental certificate of interested persons to fully disclose all those with an interest in the amicus brief and provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Amicus curiae **Public Citizen, Inc.**, is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. Amici curiae are represented by **Scott L. Nelson** and **Allison M. Zieve** of **Public Citizen Litigation Group**, which is a non-profit, public interest law firm that is part of **Public Citizen Foundation, Inc.,** a non-profit, non-stock corporation that has no parent corporation and in which no publicly traded corporation has an ownership interest of any kind.

/s/ Scott L. Nelson
Scott L. Nelson
Counsel for Amicus Curiae
Public Citizen

May 10, 2022

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit the public, and it is often involved in litigation either challenging or defending agency actions under the Administrative Procedure Act (APA). Significant questions of administrative law are thus central concerns of Public Citizen, and Public Citizen has often filed briefs in cases raising such issues—including cases concerning whether agency actions comport with the APA's requirement that substantive rules must generally be promulgated through notice-and-comment rulemaking procedures. *See* 5 U.S.C. § 553.

In this case, the plaintiffs' challenge to the Interagency Working Group's interim estimates of the social costs of carbon (SCC) faces substantial threshold issues concerning justiciability and whether the actions challenged constitute final agency action reviewable under the

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money intended to fund the brief's preparation or submission, nor did any person other than the amicus curiae, its members, or its counsel.

APA, as explained in the federal appellants' brief. But if the plaintiffs could surmount those hurdles, the likelihood that they will ultimately succeed on the merits of their claims also weighs against the plaintiffs' request for preliminary injunctive relief for reasons less thoroughly addressed in the appellants' brief and in the district court's opinion. In particular, the district court's conclusion that the plaintiffs are likely to prevail on their claim that the interim estimates constitute a substantive rule that was promulgated without adherence to the APA's notice-and-comment procedures rests on a number of key errors.

This Court may well dispose of this case based on the threshold issues raised by the federal appellants. In the event that it does not, however, Public Citizen believes that this short brief addressing in greater detail the problems with the district court's ruling that the plaintiffs' notice-and-comment claim is likely to succeed on the merits may be of assistance to the Court in considering whether the district court abused its discretion in issuing the preliminary injunction.

ARGUMENT

The district court's conclusion that the plaintiffs are likely to succeed on their notice-and-comment challenge to the Working Group's

SCC estimates rests largely on the view that the estimates amend or partially repeal provisions of Circular A-4, a guidance document issued in 2003 by the White House Office of Management and Budget (OMB) to assist federal agencies in submitting cost-benefit analyses of regulatory actions for review under Executive Order 12866, 58 Fed. Reg. 51735 (1993). Specifically, the district court credited the plaintiffs' argument that the SCC estimates contradict, and thus "effectively repeal," Circular A-4's statements that cost-benefit analysis under the Executive Order should generally consider domestic costs and benefits rather than global ones, and should employ 3% and 7% discount rates in reducing future costs and benefits to present value. ROA.4061. The court further accepted the plaintiffs' contention that, because OMB provided public notice of its intention to issue Circular A-4 and solicited and received public comment before finalizing the circular, Circular A-4 was a regulatory action issued "through the notice and comment procedure" established by 5 U.S.C. § 553. *Id.* It followed, according to the district court, that Circular A-4 could only be repealed or amended using "the same procedures … used to issue the rule in the first instance." ROA.4062 (quoting *Clean Water Action v. EPA*, 936 F.3d 308, 312 (5th Cir. 2019) (quoting *Perez v. Mortg.*

Bankers Ass'n, 575 U.S. 92, 100 (2015))). The district court therefore concluded that issuance of the interim SCC estimates required notice-and-comment rulemaking and that absent such proceedings the estimates "were promulgated 'without observance of procedure required by law.'" *Id.* (quoting 5 U.S.C. § 706(2)(D)).

The district court's reasoning is erroneous as a matter of law. The APA's requirement that agencies employ notice-and-comment rulemaking applies only to the extent that the relevant statutory provision, 5 U.S.C. § 553, commands use of that procedure. Courts are not free to impose procedural requirements on agency action beyond those required by the APA. Agencies, by contrast, if they choose to do so, are free to provide public notice and an opportunity to comment on guidance documents and other pronouncements that are *not* subject to the statutory mandate of notice-and-comment rulemaking. When they do, they do not trigger a non-statutory requirement that they use notice-and-comment rulemaking every time they may in the future revise their views on the same subject-matter. Rather, notice-and-comment rulemaking is required by section 553 only when agencies issue substantive rules with the force of law. OMB's pronouncements about

regulatory review under Executive Order 12866, whether or not they are made after notice and public comment, do not, and cannot, have such force, because regulatory review under Executive Order 12866 is a matter not of substantive law, but of the President's authority to supervise and require information from executive branch officials who are subordinate to the President. The regulatory review process does not, and cannot, alter the substantive statutory requirements those officials must obey in exercising regulatory authority delegated by Congress.

I. Courts lack authority to require agencies to use notice-and-comment rulemaking procedures for actions other than promulgation of legislative rules—that is, rules that have the force of law.

The APA broadly defines a "rule" to include "an agency statement … of future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of any agency," 5 U.S.C. § 551. The APA's requirement of notice-and-comment rulemaking, however, applies only to a subset of those rules. Section 553 explicitly excludes from the notice-and-comment requirement several categories of agency statements that fall within section 551's definition of "rules," including "interpretative rules, general

statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).[2]

As the Supreme Court has explained, section 553's plain text limits the requirement of notice-and-comment rulemaking to rules that are exercises of an agency's statutory authority, conferred by Congress, to issue "legislative" rules—that is, rules that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *accord Perez*, 572 U.S. at 96. This Court has likewise consistently recognized that the notice-and-comment requirement applies only to substantive rules that create rights and obligations with the force of law. *See*, *e.g.*, *Amin v. Mayorkas*, 24 F.4th 383, 392 (5th Cir. 2022); *Texas v. EEOC*, 933 F3d 433, 441–42, 451 (5th Cir. 2019); *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015); *Texas v. United States*, 787 F.3d 733, 762–63 (5th Cir. 2015); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619

[2] Neither section 551 nor section 553 applies to rules not promulgated by an agency. This brief assumes for the sake of argument that the Working Group estimates and OMB's guidance on regulatory review are "agency statements" within the meaning of section 551. As the federal appellants' brief reflects, that assumption is itself doubtful.

(5th Cir. 1993); *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1174–75 (5th Cir. 1988).

Importantly, if an agency statement does not fall within the class of rules for which section 553 requires notice-and-comment rulemaking (and assuming that no other applicable statute requires similar procedures), courts may not impose such requirements. The Supreme Court long ago ruled that the APA does not permit courts to require more than section 553 demands by "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978). In other words, section 553 "establishe[s] the maximum procedural requirement which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.*

More recently, in *Perez*, the Supreme Court reiterated that, if an agency statement is not a legislative rule for which section 553 requires notice-and-comment rulemaking, a court may not hold it to be procedurally defective based on the absence of notice and comment. The Court emphasized that "imposing such [procedural] obligations is the responsibility of Congress or the administrative agencies, not the courts."

575 U.S. at 102. The Court therefore held that if section 553 does not require an agency to use notice-and-comment procedures to issue a rule because it lacks the force of law, the agency also is not required to use those procedures to amend or repeal the rule. *Id*. at 101.

II. Notice-and-comment rulemaking is not required when an agency modifies a statement that is not a legislative rule, even if the agency received comments before issuing the original statement.

Despite the Supreme Court's longstanding insistence that courts may not impose rulemaking procedures not required by section 553, the district court appears to have concluded that notice-and-comment may be required in a set of circumstances not specified in section 553: namely, when an agency statement amends or partially contradicts an earlier agency statement that was issued after public notice and opportunity to comment, even where notice-and-comment procedures were not required by section 553. The court relied on the Supreme Court's statement in *Perez* that section 553 "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance," 575 U.S. at 101, and on this Court's repetition of that language in *Clean Water Action*, 936 F.3d at 313–14.

The district court's out-of-context quotation of *Perez* and *Clean Water Action* suggests that those decisions hold nearly the opposite of what they do. In context, the cited sentence from *Perez* reflects the Supreme Court's recognition that section 553 imposes the same requirements on agency statements that repeal or amend a rule as on the initial issuance of a rule, because section 553 applies to "rule making," which, as defined in section 551, includes both issuance and repeal of a rule. 575 U.S. at 101. In other words, as *Perez* stated, section 553's "mandate" is the same for both actions. *Id.* Accordingly, as the final sentence in the relevant passage of the opinion emphasizes, the procedures an agency must use to repeal a validly promulgated rule are the same ones that it was *required* to use when it issued the rule, although not necessarily the ones it actually *did* use: "Because an agency is not *required* to use notice-and-comment procedures to issue an initial interpretive rule, it is also not *required* to use those procedures when it amends or repeals that interpretive rule." *Perez*, 575 U.S. at 101 (emphasis added). Nothing in *Perez* supports the view that if an agency goes beyond the requirements of section 553 by eliciting public comment

before issuing a statement that is *not* a legislative rule, it must do the same before modifying or even retracting that statement.

Clean Water Action likewise does not suggest that an agency must exceed section 553's requirements in amending a statement if it chose to do so when it first issued the statement. Rather, *Clean Water Action* quoted *Perez* as support for its holding that an agency acted properly in using notice-and-comment rulemaking to promulgate a substantive amendment postponing the effective date of a legislative rule that had been properly promulgated through notice-and-comment rulemaking. *See* 936 F.3d at 313–14. Other appellate decisions that have quoted the same language from *Perez* have likewise done so as support for the proposition that a legislative rule properly promulgated through notice-and-comment rulemaking can be amended or repealed only through the same means. *See*, *e.g.*, *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 217–18 (D.C. Cir. 2020); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). The decisions do not hold that an agency subjects itself to heightened procedural requirements if it alters a statement on which it initially chose to solicit public comment when section 553 did not require it to do so.

As both *Perez* and *Vermont Yankee* emphasize, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing court are generally not free to impose them if the agencies have not chosen to grant them." *Perez*, 575 U.S. at 102 (quoting *Vermont Yankee*, 435 U.S. at 524). Indeed, agencies often request public comment when they issue policy statements or interpretive rules on significant subjects, and OMB has encouraged agencies to request public comment on economically significant guidance documents even when section 553 would not require notice and comment. *See* OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (2007).[3] Holding that the *voluntary* provision of such an opportunity for public comment subjects the agency to *mandatory* notice-and-comment requirements for future statements on the same subject-matter would discourage agencies from exercising their discretion to allow public involvement in the formulation of policies. That approach would also be directly contrary to the Supreme Court's holdings in *Perez* and *Vermont*

[3] In some circumstances, an agency's use of notice-and-comment rulemaking may be probative of its intent to exercise statutorily delegated authority to issue a rule with the force of law. *See*, *e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007). As explained below, no such inference is possible here.

Yankee that, except to the extent section 553 requires the use of specific procedures, courts must leave agencies "free to fashion their own rules of procedure." *Perez*, 575 U.S. at 102 (quoting *Vermont Yankee*, 435 U.S. at 544). Because section 553 nowhere states (or even implies) that an agency must use notice-and-comment rulemaking to alter a statement (such as an interpretive rule or general statement of policy) that is not a legislative rule if the agency provided the public with notice and an opportunity to comment before issuing that statement, *Perez* forecloses courts from imposing such a requirement.

Accordingly, even assuming that the Working Group's interim SSC estimates "amend" or partially "repeal" OMB's Circular A-4, they are not subject to section 553's notice-and-comment requirements merely because OMB provided notice and solicited comment before issuing the circular. Only if Circular A-4 were a legislative rule for which the APA *required* notice and an opportunity for comment would its revision also require notice-and-comment procedures under section 553.

III. Neither OMB Circular A-4 nor the Working Group's interim SCC estimates are legislative rules.

An agency action is a "legislative" rule with "the force of law" (and hence subject to section 553's notice-and-comment rulemaking

procedures, *Perez*, 572 U.S. at 96) "only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule." *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Neither Circular A-4 (which the district court treated as a rule that may not be amended without notice-and-comment procedures) nor the Working Group's SCC estimates (which the district court saw as procedurally improper amendments to an existing rule) are legislative rules subject to section 553's requirements, because they are not exercises of authority delegated by Congress to create legally binding rules. Rather, both Circular A-4 and the interim SCC estimates provide instruction to agencies on how to follow Executive Order 12866, a presidential directive that agencies subject to presidential supervision perform cost-benefit analyses of significant regulatory actions for review by OMB on behalf of the President. That directive itself creates no rights and obligations with the force of law, as its own terms explicitly acknowledge, E.O. 12866 § 10, 58 Fed. Reg. at 51744, and instructions

specifying how agencies are to provide OMB with the information the order requires likewise involves no such rights and obligations. [4]

Far from being an exercise of legislatively delegated authority to issue binding rules, Executive Order 12866's direction that agencies participate in a regulatory review process, and the OMB guidance that implements it, is grounded in the President's authority to supervise and require information from presidential subordinates (that is, those executive branch officials who are subject to removal at will by the President) in the performance of tasks assigned them by law. *See* Office of Legal Counsel, Proposed Executive Order Entitled 'Federal Regulation,' 5 U.S. Op. O.L.C. 59 (1981) ("OLC Opinion"). Although the

[4] In addition to implementing Executive Order 12866, Circular A-4 also reflects OMB's fulfillment of Congress's directive that OMB issue "guidelines" to agencies for informational reports to Congress on the costs and benefits of regulation under the Regulatory Right-to-Know Act, Pub. L. No. 106-554, § 1(a)(3), App. D, title VI, § 624, 114 Stat. 2763, 2763A-161 (2000). Congress did not require that those guidelines take the form of legislative rules promulgated through notice-and-comment rulemaking, but required only that they receive peer review. *Id.* § 624(d). Plaintiffs in this case do not appear to assert that the requirement that agencies use the interim SCC estimates *for regulatory review under Executive Order 12866* amends Circular A-4 insofar as it also provides guidelines under the Regulatory-Right-to-Know Act (nor do they identify any injury such amendment would cause them). Even if they did, section 553 would not apply to the amendment of those "guidelines" given that it was not applicable to their issuance to begin with.

extent of that authority has long been debated, *see generally* Robert Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 Fordham L. Rev. 2487 (2011); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001), it does not include authority to make law or to override congressional directives. *See* OLC Opinion, 5 U.S. Op. O.L.C. at 61. Any presidential authority to supervise the exercise of regulatory authority by subordinate executive branch officials can operate only within the limits established by the statutes delegating that authority, *see id*. at 63–64, and by the APA's general prohibition on arbitrary and capricious agency action, *see* 5 U.S.C. § 706.

Accordingly, while the President may require his subordinates to provide OMB with an analysis concerning the costs and benefits of their proposed actions, and to carry out that analysis in accordance with specific directives (including, as relevant here, computation of the costs of greenhouse gas emissions in accordance with the interim SCC estimates), the President may not direct an agency to base a regulatory action on a cost-benefit analysis if a statute does not permit consideration of costs. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466–72

(2001). Executive Order 12866 comports with this limitation by repeatedly making clear that it instructs agencies to consider costs and benefits in rulemaking only to the "extent permitted by law," E.O. 12866 § 1(b), 58 Fed. Reg. at 51735, and does not "displac[e] the agencies' authority or responsibilities, as authorized by law," *id*. § 10, 58 Fed. Reg. at 51744. Similarly, in the more common situation in which agencies may (or must) consider costs and benefits, *see Michigan v. EPA*, 576 U.S. 743, 750–61 (2015), Executive Order 12866 neither purports to authorize agencies to base their actions on any costs and benefits that they may be prohibited from considering by statute, nor displaces the requirement that agencies fulfill their basic obligations of "reasoned decisionmaking," *id*. at 750, with respect to costs and benefits they may lawfully consider.

Moreover, because neither the executive order nor guidance instructing agencies on how to conduct cost-benefit analysis for purposes of review under that order constitutes an exercise of authority delegated by Congress to fill statutory gaps, such materials are not themselves subject to the deference to which legislative rules are entitled under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). Thus, in any judicial review of agency

action that relied in part on cost-benefit analysis conforming to the order, the lawfulness of the agency's reliance on such analysis (including the reasonableness of its use of the Working Group's SCC estimates) would be determined under the APA and governing substantive statutes without regard to any presidential directive that the analysis conform to particular requirements for purposes of review under Executive Order 12866. *See*, *e.g.*, *Zero Zone, Inc. v. Dep't of Energy*, 832 F.3d 654, 677–80 (7th Cir. 2016).[5]

In sum, an executive order facilitating the President's supervision of executive branch subordinates in the performance of their statutory duties is not a font of authority for the promulgation of rules with the force of law. Statements by the President's agents instructing agencies on the details of how they should provide information to facilitate the President's supervision are not rules with the force of law, but means by which "departments and agencies in the Executive Branch [that] are subordinate to [the] President … may consult and coordinate to

[5] By contrast, as *Zero Zone* illustrates, if an agency is really *bound by law* to make use of another agency's determinations in its cost-benefit analysis, its compliance with that requirement is not arbitrary and capricious. *See* 832 F.3d 681–82.

implement the laws passed by Congress." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 249 (D.C. Cir. 2014) (Kavanaugh, J.). Such statements cannot, and do not purport to, "change[ ] the statutory criteria" on which regulatory agencies act. *See id*. And as long as they remain within those bounds, such statements are not subject to the requirement of notice-and-comment rulemaking. *See id*. at 250.

Accordingly, Circular A-4 is not a legislative rule to the extent it provides agencies with guidance regarding the submission of information for purposes of regulatory review under Executive Order 12866. Likewise, insofar as they instruct agencies how to determine certain costs for purposes of such review, the Working Group's interim SCC estimates are not legislative rules—regardless of whether they modify Circular A-4 to some extent. The issuance of the Working Group's interim SCC estimates therefore did not require notice-and-comment rulemaking under section 553.

CONCLUSION

This Court should vacate the preliminary injunction entered by the district court.

Respectfully submitted,

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May 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on May 10, 2022.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the text of the foregoing brief is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 3,683 words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson