RECORD NO. 19-14434-HH

In The
United States Court of Appeals
For The Eleventh Circuit

RICHARD HUNSTEIN,

Plaintiff – Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE'S PETITION FOR REHEARING *EN BANC* BY COMPUMAIL INFORMATION SERVICES, INC.; DATAMATX, INC.; HATTERAS, INC.; HC3, INC.; IMS, INC.; MATRIX IMAGING SOLUTIONS, LLC; NORDIS, INC.; ONTARIO SYSTEMS, INC.; OUTPUT SERVICES GROUP, INC.; PCI GROUP, INC.; RENKIM CORPORATION; REVSPRING, INC.

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NO. 19-14434-HH

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* identify the following:

1. **Barber, Tom, Hon.** (Judge, United States District Court for the Middle District of Florida, Tampa Division)
2. **Bedard Jr., John Henry** of Bedard Law Group, P.C. (Attorney for *Amici Curiae*)
3. **Bonan, Thomas M.** of Seraph Legal, P.A. (Attorney for Richard Hunstein)
4. **Chapman, Michael Kevin** of Bedard Law Group, P.C. (Attorney for *Amici Curiae*)
5. **CompuMail Information Services, Inc.** (*Amicus Curiae*)

   CompuMail Information Services, Inc. has no corporate parent and is privately held with no public ownership.
6. **DATAMATX Inc.** (*Amicus Curiae*)

   DATAMATX Inc. has no corporate parent and is privately owned with no public ownership.

7. **Hatteras, Inc. d/b/a FocusOne** (*Amicus Curiae*)

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9. **Hunstein, Richard** (Plaintiff/Appellant)

10. **IMS, Inc.** (*Amicus Curiae*)

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11. **Matrix Imaging Solutions, LLC** (*Amicus Curiae*).

    Matrix Imaging Solutions, LLC is 100% owned by Matrix Enterprise Holdings, LLC and is privately owned with no public ownership.

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16. **Perr, Richard** of Kaufman, Dolwich, Voluck, LLP (Attorney for Preferred Collection and Management Services, Inc.)

17. **Preferred Collection and Management Services, Inc.** (Defendant/Appellee)

18. **Renkim Corporation** (*Amicus Curiae*)

    The corporate parent of Renkim Corporation is Renkim Corporation Employee Stock Ownership Trust and is privately owned with no public ownership.

19. **RevSpring, Inc.** (*Amicus Curiae*)

    The corporate parent of RevSpring, Inc. is Empower Payments Immediate Holding, LLC, and is privately owned with no public ownership.

20. **Vigh, Robert A.** of Solomon Ginsburg & Vigh, P.A. (Attorney for Preferred Collection and Management Services, Inc.).

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b) and 11th Cir. R. 29-3, the following independent businesses, collectively referred to as the "Coalition," respectfully request leave to file the accompanying *amici curiae* brief in support of the petition for rehearing and for rehearing *en banc* by Defendant/Appellee:

CompuMail Information Services, Inc.

Datamatx, Inc.

Hatteras, Inc.

HC3, Inc.

IMS, Inc.

Matrix Imaging Solutions, LLC

Nordis, Inc.

Ontario Systems, Inc.

Output Services Group, Inc.

PCI Group, Inc.

Renkim Corporation

RevSpring, Inc.

1. The Coalition

Amici curiae are twelve (12) independent businesses specializing in the production and delivery of printed and electronic business communications. Together, these print and mail vendors share an interest in preserving a debt collector's ability to act through an agent to produce and deliver important correspondence to consumers. CompuMail, the vendor utilized by the debt collector in this case, is a member of the Coalition.

Amici are leaders in the letter, data, and print processing industry which produce and deliver more than 2.7 *billion* unique pieces of physical mail to consumers annually. Coalition members serve a wide range of business sectors of the American economy including the financial, banking, healthcare, insurance, education, hospitality, telecommunications, utility, manufacturing, legal, entertainment, accounts receivable, marketing, and public sectors. Among their clients are the largest multi-national companies in the world.

The panel decision threatens to eliminate the print and mail industry for debt collectors. The consequences of this decision are far reaching, imposing significant harm on industry and consumers. Consumers rely on written correspondence from debt collectors about their credit transactions, repayment obligations, consumer rights, and important credit reporting consequences. Without print and mail vendors

to deliver this information timely and accurately, tens of millions of consumers will suffer the very harm the FDCPA was intended to prevent.

Gone are the days of licking stamps and raising the mailbox flag to deliver business correspondence. The Coalition employs more than $150mm in state-of-the-art equipment to produce and deliver billions of mail pieces. Sophisticated bar code technology is used to track every mail piece throughout its delivery journey. Placing the right letter in the right envelope and delivering it to the right person at the right address *billions* of times annually requires a level of enterprise sophistication achievable only by the print and mail industry. The Coalition employs advanced electronic transmission, data integrity, and security protocols to produce error rates less than 0.001%, which means personal financial information is not sent to the wrong person and consumers reliably receive the important correspondence they expect.

The Coalition offers a unique perspective on this case because: (1) Coalition members serve as conduits through which debt collectors act, (2) the Coalition offers a statutory interpretation approach not addressed by the parties or the panel, and (3) the Coalition identifies persuasive legal authority which the panel and parties did not consider.

2. Argument

The "classic role of amicus curiae" is "assisting in a case of general public interest, … supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration." *Funbus Sys., Inc. v. Cal. Pub. Utils. Commerce*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing M*iller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982)); *see also Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.) (leave to file should be granted where the proposed brief has stated "(a) an adequate interest, (b) desirability, and (c) relevance"). The Coalition satisfies these considerations.

The Coalition has a substantial interest in this case because the panel decision threatens to eliminate their services to the collection industry. The Coalition's brief offers an unexamined perspective on the application of the FDCPA to print and mail vendors. Specifically, the Coalition employs the Surplusage Avoidance and Consistent Use cannons of statutory interpretation not addressed by the parties or considered by the panel. The brief is relevant because it identifies legal issues, arguments, and persuasive authority applicable to the disposition of the case, including Regulation F, 12 C.F.R. §1006.1 *set seq.*, which specifically addresses the use of print and mail vendors in the collection industry. Finally, the Coalition's brief

alerts the Court to the wide reach and ruinous consequences of an uncorrected panel decision.

Justice Samuel Alito, when sitting on the U.S. Court of Appeals for the Third Circuit, opined, "I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals -- Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). The Coalition's brief satisfies the broad scope of Rule 29.

Wherefore, the Coalition respectfully requests leave to file the accompanying *amici curiae* brief.

Respectfully submitted,

BEDARD LAW GROUP, P.C.

Dated: May 27, 2021.

/s/*John H. Bedard, Jr.*
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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 849 words.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-stye requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using Microsoft Word in a proportionally spaced typeface named Times New Roman using a 14 point size with lines double spaced.

Respectfully submitted,

BEDARD LAW GROUP, P.C.

/s/ *John H. Bedard, Jr.*
John H. Bedard, Jr.
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

Pursuant to 11th Cir. R. 25-3(a), I hereby certify that on May 27, 2021, I caused the foregoing Motion for Leave to File Brief of Amici Curiae and the accompanying Brief of Amici Curiae to be electronically filed with the Clerk of Court using the CM/ECF System which will send notice of such filing to all counsel of record.

Respectfully submitted,

BEDARD LAW GROUP, P.C.

/s/ *John H. Bedard, Jr.*
John H. Bedard, Jr.
Attorney for Amici Curiae

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are twelve (12) independent businesses specializing in the production and delivery of printed and electronic business communications. Together, these companies (the "Coalition") share an interest in preserving a debt collector's ability to act through an agent to produce and deliver important correspondence to consumers. CompuMail, the vendor utilized by the debt collector in this case, is a member of the Coalition.

The Coalition produces and delivers to the United States Postal Service more than 2.7 *billion* pieces of correspondence bound for American consumers annually, including medical insurance and billing statements, personal finance documents, account statements and reminders, and debt collection notices. This correspondence often explains important consumer rights related to credit reporting, debt collection, and privacy. The print and mail industry functions as the communication conduit between businesses and consumers; serving as an extension of operations for corporate America and also the United States Postal Service. Onsite U.S. Postal Inspectors monitor the mailing operations of Coalition members, which remain bound by strict contract terms and governed by principles

[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

of agency. Coalition members employ industry leading printing and data encryption technology to achieve production accuracy rates exceeding 99.99%.

The panel decision threatens to eliminate the print and mail industry for debt collectors without the benefit of a full consideration of the issues. The Coalition submits this amicus brief to address two oversights by the panel, which if left uncorrected, would leave intact a significant misreading of the Fair Debt Collection Practices Act and eliminate the print and mail industry serving the collection industry.

STATEMENT OF THE ISSUES

1. Whether the panel erred by accepting, without consideration, the parties' legal conclusion that Preferred engaged in a "communication" with CompuMail.

2. Whether the panel decision overlooked Regulation F, 12 C.F.R. § 1006.1 *et seq.* and the CFPB's interpretation of the FDCPA to allow a debt collector's use of a print and mail vendor without violating 15 U.S.C. § 1692c(b).

SUMMARY OF THE ARGUMENT

This case presents exceptionally important issues of statutory interpretation which the panel did not consider, overlooks Regulation F and the CFPB's express authorization of a debt collector's use of print and mail vendors, and threatens to needlessly eliminate the print and mail industry serving debt collectors.

It is the Court's responsibility to say what the law is. The panel accepted without consideration the parties' erroneous legal conclusion that Preferred engaged in a "communication" with CompuMail. The panel's holding is anchored to this unexamined conclusion, generating an interpretation of the statute inconsistent with its text. CompuMail is not a "person" under the statute but instead a "medium" through which collectors convey debt information. The parties did not brief and the panel did not consider this issue of first impression.

Regulation F, 12 C.F.R. 1006.1 *et seq.,* specifically contemplates a debt collector's use of print and mail vendors without violating the rule prohibiting disclosures to third parties. The parties did not brief and the panel did not consider the Bureau's years of examination of the debt collection industry and its conclusion that print and mail vendors have a lawful place in the debt collection process.

Despite the panel's acknowledgment that it will be "upsetting the status quo in the debt-collection industry" *Hunstein v. Preferred Collection & Mgmt. Servs.*,

994 F.3d 1341 (11th Cir. 2021), the panel reached its conclusion without the benefit of a full consideration of the issues. The panel decision raises issues of exceptional importance to debt collectors, print and mail vendors, and tens of millions of consumers nationwide who rely on the print and mail industry to deliver their personal correspondence.

ARGUMENT AND CITATIONS OF AUTHORITY

1. The Panel Accepted, Without Consideration, The Parties' Legal Conclusion That Preferred Engaged In A "communication" With CompuMail.

a. That Preferred Engaged In A "communication" Under The FDCPA Is A Legal Conclusion.

Preferred disclosed to CompuMail detailed information about Hunstein and his debt. (Complaint, ¶¶17-18) CompuMail then populated that information into a prewritten template, printed, and mailed the letter to Hunstein. (Complaint,¶ 19) These facts were properly accepted as true. However, the Complaint thereafter recites the statute's definition of "communication" and applies that definition to the alleged facts, concluding that Preferred engaged in a "communication" with CompuMail as that term is defined in 15 U.S.C. § 1692a(2). (Complaint, ¶¶20-21)("The sending of an electronic file containing information about Mr. Hunstein's purported debt to a mail house is therefore a communication.") This statement is a legal conclusion because it goes beyond merely describing specific actions taken by Preferred; it purports to apply the law to those actions. *Scott v. Ruston La. Hosp. Co., LLC*, No. 16-0376, 2017 U.S. Dist. LEXIS 36539, at *14 (W.D. La. Mar. 14, 2017)(Courts may not accept legal conclusions based on accepted factual assertions.) This conclusion was conceded by the parties and simply accepted by the panel.

b. It Was Error For The Panel To Accept The Parties' Legal Conclusion Without Consideration.

The first step in considering a motion to dismiss is to "eliminate any allegations in the complaint that are merely legal conclusions." *ADA v. Cigna Corp*., 605 F.3d 1283, 1290 (11th Cir. 2010). When deciding a motion under Rule 12b(6), legal conclusions are to be disregarded. *ADA v. Cigna Corp.*, at 1290, *Wilke v. Troy Reg'l Med. Ctr.*, No. 20-11359, 2021 U.S. App. LEXIS 7752, at *5-6 (11th Cir. Mar. 17, 2021), *Vickers v. Georgia*, 567 F. App'x 744, 748 (11th Cir. 2014). The panel did not first eliminate Hunstein's legal conclusions before considering Preferred's Rule 12 motion. It is the Court's responsibility to interpret the FDCPA correctly. *McCarthan v. Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076, 1099 (11th Cir. 2017). The panel should not have accepted this legal conclusion without its own independent consideration. Left uncorrected, the panel decision will remain anchored to an unexamined, dispositive legal conclusion.

2. Preferred Did Not Engage In A "communication" With CompuMail.

Statutes should be read *in context*. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241 (1935), *Cherokee Intermarriage Cases*, 203 U.S. 76, 89; *McKee v. United States*, 164 U.S. 287; *Talbott v. Silver Bow County*, 139 U.S. 438, 443, 444. The panel's literal reading of the word "person" ignored textual indications of a more narrow meaning.

a. "Mediums" and "Persons" Are Mutually Exclusive Else "through any medium" Would Be Surplusage.

The FDCPA defines "communication" to mean "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The words "person" and "medium" are not defined, but their use in context is clear – they are mutually exclusive. "Person" does not include "medium" else the phrase "through any medium" would be surplusage. *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (Statutes are interpreted to avoid surplusage.) The definition contemplates *two* recipients of conveyances – those *to whom* conveyances are made and those *through whom* conveyances are made. The phrase "to any person" refers to the *target* at which the conveyance is directed i.e. the *object* of the conveyance. The phrase "through any medium" refers to the person or thing which carries the conveyance. Each recipient receives and possesses the information conveyed. The latter (the medium) dispossesses itself of the information by dispatching it to the target. The word "person" does not include "mediums."

b. "Mediums" Can Be People Or Things.

Absent contrary contextual indicators, undefined words in a statute are given their ordinary meaning. *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006). Websters Third defines "medium" to mean "a person through whom a purpose is accomplished." Webster's Third

International Dictionary at 1403 (1961). A second sense of the definition includes, "something through or by which something is accomplished, conveyed, or carried on." *Id.*, at 1402. The text of the FDCPA contemplates that both people and things would serve as mediums, such as when an individual serves legal process, § 1692a(6)(D), when a debt collector uses a telephone, § 1692a(7), § 1692d(5), § 1692d(6), § 1692f(5), or when a collector sends a telegram, § 1692b(5), § 1692f(5), § 1692f(8). Recognizing a debt collector's need to convey debt-related information *through mediums* such as telephone operators and telegraph clerks without violating § 1692c(b), the Federal Trade Commission issued staff commentary confirming that conveyances incident to the use of those mediums do not violate § 1692c(b). *Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act*, 53 FR 50097-02. These incidental contacts are not the kind which offend the privacy rights protected by the FDCPA. By authorizing phone calls, telegrams, and process servers, the text of the statute specifically contemplates certain conveyances of debt information *through mediums* which do not violate § 1692c(b).

c. § 1692c(b) Prohibits Communications To Persons, Not Mediums.

Section 1692c(b) does not prohibit the use of mediums – the language is *not* "a debt collector may not communicate . . .with any person *through any medium* . . ." Mediums are excluded from the prohibition. Under § 1692c(b) a collector

may use any medium to communicate with a permitted third-party. Importantly, none of the permitted third parties are mediums themselves i.e. the consumer's attorney, the creditor, the creditor's attorney, the debt collector's attorney, or a consumer reporting agency. § 1692c(b) Instead, each serves as the *object* of the collector's conveyance.

d. CompuMail Is A "medium" Through Which The "conveyance" Is Made.

Words are presumed to have the same meaning throughout a statutory text unless context indicates otherwise. *Hylton v. United States AG*, 992 F.3d 1154 (11th Cir. 2021). The statute uses the word "person" 47 times: 21 times in the context of conveying information or engaging in an act, 25 times when referring to the debt collector, the debtor, or a third party, and only a single time when describing the method of conveying information to a debtor i.e. a process server in § 1692a(6)(D). Each time "person" is used in the context of conveying information or engaging in an act, save the process server exception, the word is used to describe the *object* or *target* of the conveyance or act. CompuMail is not the object of the collector's conveyance. CompuMail is the catalyst which carries the conveyance from Preferred (the collector) to Hunstein (the debtor). Like the process server, telephone operator, and telegram messenger, CompuMail is the entity *through which* the conveyance is made or carried. It is the medium. Section 1692c(b) permits Preferred to communicate with Hunstein *through* CompuMail.

3. The Panel Decision Prohibits Incidental Conveyances Of Debt Information Contrary To The Text Of The Statute.

The statute specifically contemplates a debt collector's use of telegrams to communicate. *See,* 15 U.S.C. §§ 1692f(5), (8). Necessarily, this method requires debt collectors to convey information about a debt *through* the telegram messenger who produces a telegram and dispatches its content. The panel's interpretation of § 1692c(b) would prohibit debt collectors from utilizing telegram services because telegram messengers are not identified permissible third parties. This result is inconsistent with the statute's clear contemplation that debt collectors would reveal debt information to those serving as the *conduit* through which collectors dispatch communications. The panel's literal reading of the word "person" overlooks these important textual indicators of a more narrow meaning.

Print and mail vendors are modern day telegram messengers, communication conduits. Consistent use of the word "person" in the statute, as the *object* of a debt collector's communication, excludes mediums like CompuMail in § 1692c(b). The animating purpose of the conveyance of debt information to CompuMail, like conveyances to telegram messengers, process servers, and telephone operators, is to dispatch the content of a communication to a recipient. The statute specifically contemplates such conveyances, which are incident to the function of debt collection and legally indistinguishable from conveyances to

telegram messengers, process services, and telephone operators. The panel decision prohibits what the statute allows.

4. The Panel Did Not Consider Regulation F And The CFPB's Interpretation Of The Statute.

After 7 years of studying the debt collection industry, including the incidental contacts debt collectors have with print and mail vendors, the Bureau issued final rules regulating debt collectors. 85 FR 76734 (November 30, 2020). One month later, the Bureau issued supplemental rules focused on the content and form of debt collector communications. 86 FR 5766 (January 19, 2021). Promulgated pursuant to the Bureau's authority under the FDCPA in accordance with the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* 701 *et seq.*, the rules become effective November 30, 2021. 85 FR 76734, 76863.[2]

a. The Panel Overlooked The Bureau's Interpretation Of The Statute, Which Deserves Consideration On Rehearing.

Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944), the Bureau's interpretation of the FDCPA to allow a debt collector's use of a print and mail vendor without violating § 1692c(b) merits this Court's consideration "given the specialized experience and broader investigations and information available to the agency and given the value of uniformity in its administrative and judicial understanding of what a national law requires." *United States v. Mead Corp.*, 533

[2] The Bureau proposes to extend the effective date by 60 days. 86 FR 20334.

U.S. 218, 234-35, 121 S. Ct. 2164, 2175 (2001)(quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S. Ct. 161 (1944))(internal quotes and citations omitted). The Bureau's analysis brings added persuasive force upon this Court's interpretation of the statute which the parties and the panel did not consider. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S. Ct. 1953 (1997).

b. The Bureau's Interpretation Of The FDCPA Does Not Prohibit A Collector's Use Of A Print and Mail Vendor.

More than 85% of debt collectors surveyed by the Bureau use a print and mail vendor. 86 FR 5766, 5845, fn. 446. The Bureau makes clear that a debt collector may use that vendor's mailing address *as its own* when satisfying the collector's obligation to disclose its mailing address to consumers. *See,* 12 C.F.R. § 1006.34(c)(4)(iii); *See also,* 86 FR 5766, 5801 ("[A] debt collector may disclose a vendor's mailing address, if that is an address at which the debt collector accepts disputes and requests for original-creditor information."). The Bureau further contemplates that consumers will send disputes and information requests *regarding their debts* to debt collectors using the vendor's mailing address. 86 FR 5766, 5817 ("Thus, under the final rule, a debt collector may include a vendor's address in the consumer-response information if that is the address that the debt collector discloses pursuant to § 1006.34(c)(2)(i).") The Bureau's interpretation, though not expressed in these terms, rests on principles of agency which the panel did not consider. By using the mail vendor's address *as its own*, the debt collector *acts*

through the vendor to receive consumer correspondence. This behavior exemplifies the principal-agent relationship. *Restat 3d of Agency,* § 1.01. No language of the FDCPA indicates Congress's intent to supplant common law principles of agency such that 1692c(b) prohibits debt collectors from acting *through* agents. This issue went unexamined by the parties and the panel.

CONCLUSION

The panel's literal interpretation of the statute overlooked contextual indicators of a different meaning. *Amici curiae* request that the petition for rehearing be granted.

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This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-stye requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared using Microsoft Word in a proportionally spaced typeface named Times New Roman using a 14-point size with lines double spaced.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on May 27, 2021, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

Respectfully submitted,

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