No. 23-12692

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER WILLIAMS,
Plaintiff-Appellant,

v.

ALABAMA STATE UNIVERSITY and BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1 and 29-2, the undersigned counsel of record for amicus curiae the Equal Employment Opportunity Commission certifies that, in addition to those identified in the certificate filed by the plaintiff-appellant, the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Equal Employment Opportunity Commission

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Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a governmental entity, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with administering and enforcing the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d). This appeal presents an important question about how to appropriately allocate the burden of proof for wage-discrimination claims under the EPA.

The district court here did not hold the defendants to their burden for proving an affirmative defense, and it placed an additional burden on the plaintiff. It held that the defendants had established an affirmative defense based on "evidence . . . that the Defendants *could have legitimately* relied on" education and experience as factors other than sex. R. 38 at 10-11 (emphasis added). It then required the plaintiff to prove pretext. But, under the EPA, defendants must prove that a factor other than sex *in fact* caused the wage disparity, and the burden does not shift back to the plaintiff to prove pretext.

Given the EEOC's role in enforcing the EPA, the EEOC respectfully offers its views on the burden-shifting framework for EPA claims. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUE[1]

Wage discrimination claims under the EPA have only two parts: the plaintiff must prove a prima facie case, and then, to avoid liability, defendants must prove an affirmative defense caused any difference in pay. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-197 (1974). The district court held that the defendants established their affirmative defense with evidence of a factor other than sex on which the defendants *could have* relied and that the plaintiff then did not prove pretext. Did the district court err by inappropriately decreasing the burden the defendants must carry to prove their affirmative defense and by requiring the plaintiff to prove pretext in addition to her prima facie case?

STATEMENT OF THE CASE

A. Statement of the Facts

Jennifer Williams served as deputy athletic director and interim athletic director for Alabama State University before applying for and being appointed athletic director. *See* R. 28-1 at 4 (¶ 8).[2] She was the athletic

[1] The EEOC takes no position on any other issue in this case.

[2] For record citations, "R.# at #" refers to the district court docket entry and CM/ECF-assigned page numbers. Where appropriate, the original page, line, or paragraph numbers are provided parenthetically.

director for almost three years before resigning. R. 25-2 at 8, 30 (28:23-29:1, 116:24-117:3). At the time she resigned, Alabama State paid her a $135,000 salary. R. 28-1at 4 (¶ 8).

Before Alabama State hired her, Williams earned a master's degree in athletic administration and worked for two other Division I schools. *Id.* at 1-6 (¶¶ 3-19). She served as assistant director of athletics for DePaul University for three years, where she had a variety of responsibilities, including giving initiatives, alumni engagement events, and working with head coaches on fundraising. *Id.* at 1 (¶¶ 4-5). She then worked as associate athletic director for development at North Carolina Agricultural & Technical School for more than four years, where she managed the budget and worked with coaches and staff on fundraising. *Id.* at 2-4 (¶¶ 6-7).

Williams began working as deputy athletic director at Alabama State in 2016. *Id.* at 4-5 (¶ 9). She reported to the athletic director on all aspects of the program, including the eighteen intercollegiate teams, policy development, and personnel management. *Id.* While she was deputy director, Williams nearly doubled donor revenue and implemented a plan that increased ticket revenue by more than a third. *Id.* at 6 (¶ 18).

After Alabama State's athletic director left, Williams became interim director of athletics on September 30, 2017. R. 25-2 at 7 (24:11-25:6). In that position, she was directly responsible for the management of the athletics program, including the supervision of 60 coaches, 20 staff, and 350 student athletes. R. 28-1 at 7-8 (¶ 20). Alabama State reappointed Williams as interim athletic director in July 2018. R. 25-2 at 8 (28:18-22).

In fall 2018, Alabama State announced it was hiring an athletic director. R. 25-5 at 1-2 (¶ 3). The job posting included both education and experience requirements. R. 25-9. On education, the posting required "a minimum of a master's degree, preferably in sports management or sports administration, or an MBA." *Id.* at 2. On experience, it required "at least five years of experience in major leadership posts in sports administration and management." *Id.* The posting listed a starting salary of $125,000. *Id.*

Williams applied, and Alabama State hired her. R. 25-2 at 8-9 (29:2-31:21). Williams met the education requirement and had worked in athletic departments for nine years. According to Alabama State, however, Williams did not meet the experience requirement based on what Alabama State believed to be insufficient years of "experience in the direct management and administration of athletics." *See* R. 25-5 at 2 (¶ 4). It

nevertheless credited her for experience fundraising for other athletics departments. *Id.*

Williams requested a salary of $135,000 with performance incentives, and Alabama State agreed. *Id.* Williams requested a raise the following year, but Alabama State chose to give her a one-time $5,000 signing bonus instead. R. 25-2 at 11 (39:7-11). While Williams was athletic director, Alabama State won championships in multiple sports, as well as forty-three conference championships, two academic awards for best GPA in the conference, and three consecutive Commissioner's Cup Awards. R. 28-1 at 9-10 (¶ 26-29). She also received awards for excellence, including the Women Leaders in College Sports award for FCS Administrator of the Year. *Id.* at 11-12 (¶ 30). And she served on the NCAA's Division I Football Oversight Committee, chaired several conference committees, including the conference realignment committee, and was part of the Alabama State president's executive leadership team. *Id.* at 10-12 (¶¶ 28-32). Her base salary remained $135,000 during her tenure as athletic director.

In 2021, Williams resigned and began working as USA Basketball's Chief Development Officer. R. 25-15; R. 25-21; R. 25-2 at 32 (123:11-13). Alabama State then posted the athletic director position again. R. 25-5 at 3

(¶¶7, 9). The job posting was similar to the 2018 posting, but modified the education and experience requirements. *Id.* at 3 (¶ 9); R.25-17. It now sought "a master's degree, preferably in sports management or sports administration, an MBA or terminal degree." R. 25-17 at 2. And it required "at least seven to ten years of experience in major leadership posts in sports administration and management." *Id.* The posting also listed the salary as negotiable. *Id.* at 1.

Alabama State hired Jason Cable. R. 25-5 at 3 (¶ 9). Cable had a master's degree in secondary education and a Ph.D. in higher education administration. R.25-19 at 1. He had never been an athletic director before. *See id.* at 1-3. He had approximately eight years of experience in athletic departments and two years of experience working for the athletic conference in which Alabama State competes. *See id.*; R. 25-5 at 3 (¶ 9). Cable requested and received a starting salary of $170,000, along with performance incentives. R. 25-5 at 4 (¶ 10).

B. District Court's Decision

The district court granted Alabama State's motion for summary judgment on Williams's EPA claim. After holding that Williams established her prima facie case, the court addressed Alabama State's affirmative

defense. It explained that the burden was "heavy," because Alabama State had to prove that "the factor of sex provided *no basis* for the wage differential." *Id.* (quoting *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003)). The court reasoned that experience and training can be legitimate factors other than sex so long as they "are not so subjective 'to render them incapable of being rebutted.'" *Id.* (quoting *Schwartz v. Fla. Bd. of Regents*, 954 F.2d 620, 623 (11th Cir. 1991) (per curiam)). The court then said that "education and experience" can be factors other than sex if they are not "used as 'pretext for differentiation because of gender.'" *Id.* at 9 (quoting *Irby v. Bittick*, 44 F.3d 949, 956 (11th Cir. 1995)).

The court held that Alabama State had met its burden on the affirmative defense. Kevin Rolle, chief of staff to the university president, submitted an affidavit, and the court gave credence to Rolle's statement that Alabama State accepted Cable's proposed salary "given his terminal degree and his years of experience and serving in specific athletic administrative roles." *Id.* (quoting R. 25-5 at 4 (¶ 10)). The court noted that Cable had not been an athletic director and that his "Ph.D. was in Higher Education Administration rather than Athletic Administration," but observed that Alabama State "decided his experience and degree were

relevant." *Id.* The court stated that Alabama State could simply "point[] to justifiable evidence that the decision was made based on factors other than sex." *Id.* at 10. Comparing Cable and Williams, the court held that the "[e]vidence demonstrates, by a preponderance of the evidence, that the Defendants could have legitimately relied on Cable's higher degree and greater relevant experience to set his higher salary." *Id.* at 10-11.

Rather than ending its inquiry, the court held that Williams had to show pretext. *Id.* at 11. To do so, the court said, Williams had to "produce evidence which directly establishes discrimination, or which permits a jury to reasonably disbelieve the employer's proffered reason." *Id.* (quoting *Steger*, 318 F.3d at 1079). Williams had not shown Alabama State's asserted reliance on education was pretextual, the court held, because Alabama State believed Cable's degree was relevant and Alabama State's job posting did not say the terminal degree had to be in sports administration. *Id.* at 13. The court similarly held that Williams "ha[d] not provided sufficient evidence to rebut the difference in experience between herself and Cable." *Id.* at 14. It concluded that Williams "ha[d] not shown that sex, rather than the legitimate subjective business justifications offered by the Defendants, influenced the Defendants' decision to pay Cable a higher salary." *Id.* at 15.

SUMMARY OF THE ARGUMENT

The district court did not hold Alabama State to the appropriate burden for summary judgment on an EPA affirmative defense, and it erroneously required Williams to prove pretext. The unambiguous language of the EPA, as well as decisions from the Supreme Court, this Court, and many other circuits establish a burden-shifting framework tailored to the EPA. First, the plaintiff must establish a prima facie case; then, the defendant must prove an affirmative defense in fact caused the difference in pay in order to avoid liability. Under the EPA, the burden never shifts back to the plaintiff to prove pretext.

The district court, however, held that Alabama State prevailed on its affirmative defense by offering evidence that a factor other than sex could have caused the wage disparity and that Williams had not proven pretext. These holdings conflict with the EPA's text and controlling precedent. This Court should clarify that its earlier precedent, rather than the decisions the district court followed, sets out the proper framework for EPA claims.

ARGUMENT

Congress passed the EPA "to remedy . . . 'an ancient but outmoded belief that a man, because of his role in society, should be paid more than a

woman even though his duties are the same.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)). "The solution," according to the Supreme Court, "was quite simple in principle: to require that equal work will be rewarded by equal wages." *Id.* (internal quotation marks omitted).

That solution led to a burden-shifting framework for EPA claims that differs from the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for claims under Title VII and similar statutes. Although this Court has long recognized that difference, *see, e.g.*, *Mitchell v. Jefferson Cnty. Bd. of Educ.*, 936 F.2d 539, 546-47 (11th Cir. 1991), the district court relied on more recent decisions from this Court to lighten Alabama State's burden to prove an affirmative defense and impose an additional burden on Williams to prove pretext.

I. Under the EPA, the defendant must prove an affirmative defense actually caused the wage disparity in order to avoid liability.

The EPA's "basic structure and operation are . . . straightforward." *Corning Glass Works*, 417 U.S. at 195. It has two parts. First, the plaintiff "must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires

equal skill, effort, and responsibility, and which are performed under similar working conditions.'"[3] *Id.* (quoting 29 U.S.C. § 206(d)(1)). Then "the employer has the burden of proof" to prove one of four affirmative defenses: "three specific and one a general catchall provision—where different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'" *Id.* at 196-197 (quoting 29 U.S.C. § 206(d)(1)).

This two-part burden-shifting framework is markedly different than the *McDonnell Douglas* framework often used for Title VII claims. Under *McDonnell Douglas*, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). Once the plaintiff proves a prima facie case, the burden shifts to the defendant to "articulat[e] one or more legitimate non-discriminatory reasons for its action," before the plaintiff must then show

[3] The EPA prohibits "paying wages to employees . . . at a rate less than the rate" paid to employees of the other sex. 29 U.S.C. § 206(d)(1). Wage rate includes commissions, incentives, profit sharing, and other similar forms of compensation. 29 C.F.R. § 1620.12(a).

pretext. *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). "This burden is exceedingly light; the defendant must merely proffer non-gender based reasons, not prove them." *Meeks v. Comput. Assocs. Int'l*, 15 F.3d 1013, 1019 (11th Cir. 1994) (internal quotation marks omitted).

Under the EPA, in contrast, the plaintiff "must meet the fairly strict standard of proving that she performed substantially similar work for less pay," before "[t]he burden then falls to the employer to establish one of the four affirmative defenses." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992). This difference matters: "If the evidence is in equipoise on . . . whether a salary differential is based on a 'factor other than sex,' the plaintiff is entitled to judgment on her EPA claim. However, the employer prevails on the Title VII claim." *Meeks*, 15 F.3d at 1019.

These frameworks differ because the EPA is a "strict liability" statute. *See Miranda*, 975 F.2d at 1533. Where the *McDonnell Douglas* framework applies to statutes prohibiting intentional discrimination, the EPA focuses instead on whether an employer proves a factor other than sex caused the pay disparity. "In a Title VII case, the allocation of burdens . . . is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8 (1981). In contrast,

in an EPA case, the "plaintiff is not required to prove intentional discrimination, just that the employer pays unequal wages for equal work." *Mitchell*, 936 F.2d at 547.

The EPA thus requires the employer to prove the wage disparity "is made pursuant to" one of the affirmative defenses. 29 U.S.C. § 206(d). To prevail, Alabama State must "submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity." *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018); *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir. 2020) (en banc); *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000); *see also Brock v. Georgia Sw. Coll.*, 765 F.2d 1026, 1037 n.23 (11th Cir. 1985) ("[T]he appellants hold the burden of proving to the trier of fact that this is not just an ex post facto attempt to find differences between male and female faculty and then use those differences to explain unequal pay."), *overruled on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

In doing so, the employer must prove not only that it relied on a factor other than sex, but that the difference between the employees matches the difference in wages. "Thus, a very slight difference in

experience would not justify a significant compensation disparity." EEOC Compliance Manual Vol. II, § 10-IV(F)(2)(a), *available at* https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination; *see also Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1313 (10th Cir. 2006) (holding that summary judgment for defendant was inappropriate in part because, even if defendant "had to compete for [the comparator's] services," there was "no evidence that it had to pay him $60,000 in order to retain him").

That burden is even higher at summary judgment. This Court has "note[d] the difficulty inherent in" granting summary judgment to a defendant on an EPA affirmative defense because the "[c]redibility and the weight to be given such 'explanations' are traditionally matters left to the consideration of fact finders." *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 595 (11th Cir. 1994). Thus, the employer "must prove at least one affirmative defense so clearly that no rational jury could find to the contrary." *Stanziale*, 200 F.3d at 107 (internal quotation marks omitted); *Md. Ins. Admin.*, 879 F.3d at 121.

The district court here erred when it conflated the burdens of proof for an EPA claim with the *McDonnell Douglas* framework. *See Meeks*, 15 F.3d

at 1020. The court correctly described the requirements for the prima facie case, and it initially identified the appropriate burden on the defendant. In particular, it acknowledged that Alabama State had to "prov[e] by a preponderance of the evidence that the pay differences are based on . . . any factor other than sex," and that that burden was "heavy." R. 38 at 8 (quoting *Steger*, 318 F.3d at 1078).

But the court did not hold Alabama State to that heavy burden. Alabama State moved for summary judgment, yet the court allowed Alabama State to meet its burden "by pointing to *justifiable* evidence that the decision was made based on factors other than sex." R. 38 at 10 (emphasis added). And it held that the evidence was sufficient to "demonstrate[] . . . that [Alabama State] *could have* legitimately relied on Cable's higher degree and greater relevant experience to set his higher salary." *Id.* at 10-11 (emphasis added). That articulation tracks the *McDonnell Douglas* framework, not the high standard required to obtain summary judgment on an affirmative defense under the EPA. The district court therefore erred.

II. Under the EPA, the plaintiff need not prove pretext.

The court appeared to ease the burden on Alabama State because it believed, in error, that the burden shifted back to Williams to prove pretext. R. 38 at 11. But this Court has already held that "the burden shifts to the defendant to *prove* that a 'factor other than sex' is responsible," and "[i]f the defendant fails, the plaintiff wins." *Miranda*, 975 F.2d at 1533 (emphasis added). This Court's decisions in *Mitchell*, *Miranda*, and *Meeks* also follow *Corning Glass* in providing only two steps for EPA claims. *Meeks*, 15 F.3d at 1018; *Miranda*, 975 F.2d at 1526; *Mitchell*, 936 F.2d at 547. They make no mention of an additional pretext step, and both *Mitchell* and *Miranda* explicitly recognize that EPA claims do not require intent—the intent that a pretext step would reveal. *See Mitchell*, 936 F.2d at 547; *Miranda*, 975 F.2d at 1526. There is thus no pretext step under the EPA.

Consistent with *Miranda*, *Mitchell*, and *Meeks*, the majority of other circuits also reject a pretext step for EPA claims. *Rizo*, 950 F.3d at 1223 & n.4 (Ninth Circuit collecting cases from the First, Third, Fourth, Sixth, and Eighth circuits); *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 474 (7th Cir. 2012); *see also King v. Univ. Healthcare Sys., L.C.*, 645 F.3d 713, 724 (5th Cir. 2011) (contrasting burdens under Title VII to burdens for EPA claim).

The district court, meanwhile, primarily relied on two more recent decisions from this Court—*Irby* and *Steger*—for a pretext step, but both conflict with *Corning Glass* and this Court's earlier precedent.[4] *Irby* initially defined the EPA burdens of proof accurately, but it then added a step requiring the plaintiff to "rebut the [employer's] explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential." 318 F.3d at 1078 (citing *Schwartz*, 954 F.2d at 623, and *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1045 (5th Cir. 1973)). Nowhere in *Irby* did this Court explain the basis for this additional step or how to reconcile that step with the two-step burden-shifting framework set out by the Supreme Court in *Corning Glass* and this Court's earlier decisions. *See id. Steger*, meanwhile, only quoted *Irby*; it did not otherwise explain the basis for requiring pretext. 318 F.3d at 1078.

[4] *Irby* and *Steger* are not this Court's only decisions incorporating pretext into EPA claims, but those other decisions generally rely on *Irby* and *Steger* for that additional pretext step. *See, e.g.*, *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1363 (11th Cir. 2018); *Reddy v. Dep't of Educ.*, 808 F. App'x 803, 810 (11th Cir. 2020).

Digging deeper, the decisions *Irby* cited also do not justify requiring pretext. *Schwartz*, a per curiam decision issued after *Mitchell*, relied on *Brock* to support a pretext requirement. *Schwartz*, 954 F.2d at 623. But *Brock* does not require pretext. To the contrary, it set out the two steps of the EPA analysis before holding that "none of appellants' affirmative defenses explains the pay differentials shown by appellee's prima facie case." *Brock*, 765 F.2d at 1036-37. In a footnote again emphasizing that defendants "hold the burden of proving to the trier of fact that this is not just an ex post facto attempt to find differences between male and female faculty and then use those differences to explain unequal pay," it used the word "pretextual"—but only in reference to the defendant's failure to establish an affirmative defense. *Id.* at 1037 n.23. Similarly, the Fifth Circuit in *Hodgson* did not require the plaintiff to prove pretext; instead, it held the defendant had not carried its burden to prove an affirmative defense. 475 F.2d at 1045-47.

Regardless, this Court should not follow *Irby* or *Steger* at the expense of its earlier precedent in *Miranda*, *Mitchell*, and *Meeks*. "Under [this Court's] prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc). This Court's "adherence to the prior-

panel rule is strict," and "when there are conflicting prior panel decisions, the oldest one controls." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) (per curiam).

Mitchell, *Miranda*, and *Meeks* predate *Irby* and *Steger*, and the pretext step introduced in those later decisions cannot be reconciled with this Court's earlier decisions, the EPA's language, or the Supreme Court's decision in *Corning Glass Works*. We therefore ask this Court to confirm, consistent with its earlier precedent, that plaintiffs seeking relief under the EPA are not required to prove pretext.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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September 29, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Eleventh Circuit Rule 32-4. It contains 3,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7) & (f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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September 29, 2023

CERTIFICATE OF SERVICE

I certify that on this 29th day of September, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system. I further certify that I caused four (4) paper copies of the foregoing brief to be mailed to the Clerk of Court by Federal Express, ground delivery, postage pre-paid.

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