No. 2022-0318

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. 110151

THE CINCINNATI INSURANCE COMPANY,

Plaintiff-Appellant,

v.

DISCOUNT DRUG MART, INC.,

Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN OPPOSITION TO JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Ohio businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP communicates with the Director of the Ohio Department of Insurance, Judith French, on a regular basis during meetings of the National Association of Insurance Commissioners, where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted *amicus* briefs in more than 500 cases. For instance, UP's *amicus* brief was cited

in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). In addition, UP has submitted *amicus* briefs in many cases before this Court.[1]

UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath.U.L.Rev. 603, 608 (1984)).

SUMMARY OF THE ARGUMENT

UP is concerned with the insurance industry's recent efforts to reshape insurance coverage law in Ohio and elsewhere as it applies to commercial general liability ("CGL") policies and government suits against policyholders. With increasing frequency, governments have sought damages against policyholders in numerous industries by asserting public-nuisance claims alleging bodily injuries to the governments' citizens. From firearms to lead paint to opioids to climate change, state governments and political subdivisions contend they have provided treatment, care,

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[1] *See, e.g.*, *Acuity v. Masters Pharmaceutical, Inc.*, No. 2020-Ohio-1134 (Ohio Supreme Court); *Garrett Well LLC v. The Frick-Gallagher Mfg. Co.*, No. 2021-0249 (Ohio Supreme Court); *Neuro-Communication Servs., Inc. v. The Cincinnati Ins. Co.*, No. 2021-0130 (Ohio Supreme Court); *Motorists Mut. Ins. Co. v. Ironics, Inc. and Owens-Brockway Glass Container, Inc.*, No. 2020-0306 (Ohio Supreme Court); *World Harvest Church v. Grange Mut. Cas. Co.*, 148 Ohio St.3d 11, 2016-Ohio-2913, 68 N.E.3d 738; *The Lincoln Elec. Co. v. Travelers Cas. and Sur. Co.*, No. 2013-1088 (Ohio Supreme Court); *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, et al., 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800; *Pilkington N. Am. v. Travelers Cas. and Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121; *Goodyear Tire and Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835. A listing of all cases in which UP has filed *amicus* briefs is at https://uphelp.org/amicus-briefs/. All URLs last visited April 25, 2022.

and services to residents with medical needs, and through public-nuisance suits seek to recover their costs from policyholders for such treatment, care, and services as damages.[2]

CGL policies were written to cover the type of damages claimed in these government entity public-nuisance suits. And the majority of courts, both in Ohio and nationwide, have held they do cover such suits. That is because, as longstanding precedents of this Court have recognized, the plain meaning of standard-form CGL policies cover "all" suits seeking "bodily injury" damages regardless of the identity of the person or organization serving as claimant.

The insurance industry; however, is currently engaged in a concerted effort to undermine those precedents to avoid its clear coverage obligations. As part of those efforts, insurers are now pursuing two appeals to this Court that present the same basic question, namely, whether the Ohio Court of Appeals correctly held that lawsuits brought by government entities seeking to recover for the costs of providing medical care, treatment, and other government services to residents who have become addicted to opioids qualify as suits seeking "bodily injury" damages, as required to trigger coverage under standard form CGL policies.

The first appeal raising this issue is *Acuity v. Masters Pharmaceutical, Inc*., No. 2020-Ohio-1134. That appeal has been fully briefed and argued since September 8, 2021. This case, following eight months after *Masters Pharmaceutical* was submitted for decision, raises the same question. Accordingly, the Court should decline jurisdiction over this discretionary appeal pending resolution of the appeal in *Masters Pharmaceutical*.

Declining jurisdiction is particularly warranted in this case because the Eighth District's decision—like the First District's decision in *Masters Pharmaceutical*—is a straightforward

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[2] To be sure, these suits rest on controversial legal theories. The fact remains, however, that courts have not dismissed or granted summary judgment on these actions as a matter of course. And, in any event, when it comes to liability insurance, the merits of the underlying claims are irrelevant. CGL policies specifically cover all allegations, even those that are false, fraudulent, or unfounded.

application of Ohio law, was correctly decided, and should not be disturbed. CGL policies cover, among other things, suits seeking "bodily injury" damages. The standard form CGL policies define "bodily injury" damages to "include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury." As both the Ohio appellate courts and the clear majority of courts around the country have found, suits brought by government entities seeking damages for the costs they allegedly incurred to provide medical care for residents who have suffered bodily injuries fit squarely within the scope of this definition.

Having been happy to accept the risk associated with policyholders' premiums, insurers are now unhappy that the promises they made will force them to pay policyholders' claims for these lawsuits. Accordingly, the insurance industry *amici* come to this Court as Chicken Little, claiming the "sky is falling," and arguing that enforcing the plain terms of the policies will lead to the collapse of the insurance industry. It is not the proper function of courts to rewrite the agreed and paid for terms of an insurance contracts to rescue insurers from their own underwriting decisions. In any case, the industry similarly threatened insolvency when courts began enforcing CGL policies to provide coverage for asbestos liabilities and environmental liabilities. The industry survived.

If insurers do not want to cover these losses on a going forward basis they can issue (and many have issued) specific exclusions to remove these liabilities from the scope of CGL coverage or it can decline to write policies to specific classes of policyholders. Likewise, if insurers are concerned with the magnitude of past losses, they can put policies into runoff or obtain retrospective premiums to cut off or limit their exposure to these losses. What insurers cannot do is accept massive premiums from their policyholders, and then ask the courts to shield them from the consequences of their underwriting decisions. Ohio law requires that their policies be enforced as written.

For the reasons above, the Court should deny Cincinnati Insurance Company's request to accept jurisdiction.

STATEMENT OF FACTS

UP adopts the Statement of the Case and Facts from the jurisdictional memorandum filed by Appellee, Discount Drug Mart, Inc.

ARGUMENT

I. Proposition of Law No. 1: The Court should decline to take up this appeal pending the resolution of *Masters Pharmaceutical*.

On December 15, 2020, this Court accepted jurisdiction over the appeal of the First Appellate District's decision in *Acuity v. Masters Pharmaceutical, Inc*., No. 2020-1134. The Court heard oral arguments in *Masters Pharmaceutical* on September 8, 2021, and the case is now fully briefed, argued, and awaiting decision. *Masters Pharmaceutical* involves a similar question of law as this case. The issue presented in both cases is whether lawsuits brought by government entities seeking to recover for the costs of providing care and government services to residents who have become addicted to opioids qualify as suits seeking "bodily injury" damages, as required to trigger coverage under standard form CGL policies. In fact, the Eighth District cited to the First District's decision in *Masters Pharmaceutical* in support of its decision in this case.

Taking up Cincinnati Insurance Company's appeal at this juncture would be a waste of this Court's limited resources and may have the unintended effect of unnecessarily delaying the expeditious resolution of the appeal in *Masters Pharmaceutical*. Any such delay would significantly undermine the public interest. There are currently thousands of lawsuits pending in courts across the country, brought by nearly every state and countless political subdivisions, against participants in the supply chain for prescription opioid medications that seek "bodily

injury" damages for the cost of care and medical services of individuals who have become addicted to opioids. Thousands of such suits have been consolidated in the National Opioid MDL currently pending in the United States District Court for the Northern District of Ohio. *See In re National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio) ("National Opioid MDL"). The judge overseeing the National Opioid MDL has described those cases, collectively, as "the most complex and important group of cases ever filed." *See In re National Prescription Opiate Litigation*, N.D.Ohio No. 1:17-MD-2804, 2019 2019 U.S. Dist. LEXIS 165494, at *1 (Sept. 26, 2019).

As the West Virginia Supreme Court of Appeals recently held, states have a "compelling interest" a timely resolution of the question of whether insurance will be respond to those cases. *See St. Paul Fire & Marine Ins. Co. v. Amerisourcebergen Drug Corp.*, 868 S.E.2d 724, 735-36 (W. Va. 2021). That interest is best served by this Court first resolving the *Masters Pharmaceutical* appeal—which has been fully briefed and argued for nearly eight months—and only after that appeal is resolved evaluating whether there are any remaining issues left for the Court to address in this case.

II. Proposition of Law No. 2: An appeal to this Court is unnecessary because the Eighth District's decision is a straightforward application of longstanding Ohio law.

The insurance industry's demand that this Court immediately take up this appeal, rings particularly hollow, because the Eight District's decision below—like the First District's decision in *Masters Pharmaceutical*—is a straightforward application of longstanding Ohio precedent, which is entirely consistent with the clear majority of courts across the country that have considered this exact same issue.

The Cincinnati Insurance Company, and its insurance industry *amici*, argue that coverage cannot be available for these prescription opioid liability suits brought by government entities on

the theory that CGL coverage only applies where the named plaintiff suffered the bodily injury or property damage at issue. That argument, however, is entirely untethered to the terms of standard form CGL policies. Standard form CGL policies provide coverage for sums policyholders become obligated to pay for suits seeking "bodily injury" damages. Those policies further define "bodily injury" damages to "include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury."[3] The costs incurred by state and local governments providing medical care and treatment to residents suffering from opioid addiction fits squarely within the scope of this coverage "claimed by any person *or organization* for care . . . resulting at any time from the bodily injury." To hold otherwise, would be to render these clear policy provisions a nullity, as both the First District and Eight District recognized.

The Ohio appellate courts are not alone in the conclusion that prescription opioid liability suits brought by government entities fit within the scope of coverage under CGL policies. The clear majority of courts around the country are in agreement. For instance, in *Cincinnati Insurance Co. v. H.D. Smith*, the United States Court of Appeals for the Seventh Circuit held that Cincinnati Insurance Company was obligated to defend a pharmaceutical distributor against a lawsuit by the State of West Virginia alleging that the distributor's negligent distribution of prescription opioid medications to West Virginia caused the state to incur significant damages providing medical care

[3] The insurance policies at issue in this case use the clauses "because of bodily injury" and "for bodily injury." Both clauses cover the damages asserted by the governments here. *See Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 813 F.Supp. 576, 586 (N.D.Ohio 1993) (holding that policy covering damages "for bodily injuries" required insurer to cover claims by the cities of New York and Philadelphia for damages caused by lead paint). *See also AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, 2020 W.V. Cir. LEXIS 3, ¶ 55 (Nov. 23, 2020) (holding that insurer had duty to defend under policy covering damages "for bodily injury" where government sought costs of providing medical treatment to residents suffering from opioid addiction); *Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, D.Or. No. 6:30-cv-00256, 2020 U.S. Dist. LEXIS 184487, at *9–10 (Oct. 5, 2020) ("These opioid cases do not turn on an expansive reading of the phrase 'because of,' . . . but rather on a common sense understanding of interrelated events. . . . [A]lthough the plaintiffs in the underlying litigation were seeking damages for economic harms, those harms were causally connected to bodily injuries.").

and treatment to West Virginia residents who later became addicted to opioid products. 829 F.3d 771, 772 (7th Cir.2016).

Just as in this case, Cincinnati Insurance Company argued the suit was not covered because "West Virginia seeks its own damages, not damages on behalf of its citizens." *Id.* at 774. The Seventh Circuit responded to that argument by asking, "But so what?" *Id.* The court explained that the argument, was "untethered to any language in the policy." *Id.* The court analogized West Virginia's costs to the costs a parent incurs to care for an injured child, and held the policy's coverage for care resulting from bodily injury—the same coverage afforded under all standard form CGL policies—extended to costs a government incurs to provide medical care to injured residents. *Id.* On remand, the district court held that in addition to triggering coverage for the duty to defend, West Virginia's lawsuit also triggered coverage for the duty to indemnify under a standard form CGL policy. *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 410 F. Supp. 3d 920, 923 (C.D.Ill.2019).

Other cases have followed *H.D. Smith*'s holding or reached the same conclusion independently. For example, in *AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, the West Virginia Circuit Court, Boone County, addressed the scope of coverage under a CGL policy for the State of West Virginia's lawsuit seeking as damages the State's costs associated with providing necessary medical care, facilities, and services for treatment of West Virginia's residents. 2020 W.V. Cir. LEXIS 3 ¶ 55 (Nov. 23, 2020). Applying a textual analysis, the Court considered the same economic-loss argument Cincinnati Insurance Company and the insurance industry *amici* make here and concluded that "the relevant question under the general liability insurance coverage section of the St. Paul Policy is not whether the damages sought were 'economic' but rather whether the damages sought resulted from bodily injuries." *Id.* ¶ 114. The Court held that the damages sought by the State of West Virginia "resulted from bodily injuries, especially to the extent the damages represent sums of money expended by the State of West Virginia in an effort

to provide care and cure to persons affected by the disease of opioid addiction," and "are, therefore, properly treated as damages 'for' 'bodily injury.'" *Id.* ¶ 121.

Most recently, in *AIU Insurance Co. v. McKesson*, N.D.Cal No. 20-cv-07469, 2022 U.S. Dist. LEXIS 64242 (Apr. 5, 2022), the United States District Court for the Northern District of California considered the question of whether prescription opioid liability lawsuits brought by government entities are covered under general liability insurance policies. The District Court, applying California law, held that these lawsuits seeking to recover for the costs of providing care and government services to residents who have become addicted to opioids qualify as suits seeking damages "because of bodily injury." *Id.* at 27. In reaching this decision, the court rejected as unpersuasive the contrary minority position articulated by the Delaware Supreme Court in *ACE American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022), noting that "[n]othing in the policy language limits coverage to claims asserted by the person injured, a person recovering on behalf of the person injured, or an organization that treated the person injured and demonstrates the existence and cause of the 'specific' injuries." *McKesson*, at *26. The court held that the express terms of standard-form CGL policies only require "damages claimed by any organization for care resulting at any time from the bodily injury," which includes "forms of relief that might reimburse the government plaintiffs' costs of responding to and providing care for the bodily injury suffered by people in their jurisdictions." *Id.*, at *26-27.

The rationale employed by these courts is not unique to opioid cases. For example, courts have held that the standard CGL coverage grant for suits seeking damages for "bodily injury or property damage" triggers a duty to defend firearm manufacturers and distributors against suits brought by government entities seeking to recover the costs of police, emergency medical care, and other government services alleged to have arisen from bodily injuries caused by firearms and lead paint. *See, e.g.*, *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found.*, 5th Cir. No. 99-31046, 99-CV-90-J, 2000 U.S. App. LEXIS 40229, at *4 (July 11, 2000); *N.A.A.C.P. v. Acusport Corp.*, 253 F.Supp.2d 459, 463 (E.D.N.Y.2003); *SIG Arms Inc. v. Employers Ins. of Wausau*, 122

F.Supp.2d 255, 260 (D.N.H.2000); *Beretta U.S.A. Corp. v. Fed. Ins. Co.*, 117 F.Supp.2d 489, 496 (D.Md.2000).

Insurance disputes arising from government lead paint claims follow this same trend: the claims are covered under CGL policies, even though the plaintiffs did not suffer bodily injury themselves. *See, e.g.*, *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 813 F.Supp. 576, 586 (N.D.Ohio 1993).

In addition to these past examples, CGL policies will continue to be essential when it comes to payments for government claims in the future, including with respect to government claims based on bodily injury and property damage allegedly incurred by citizens due to climate change. *See*, *e.g.*, *Mayor and City Council of Baltimore v. BP P.L.C. et al.*, Md.Cir.Ct. No. 24C18004219 (2018); *Delaware ex rel. Jennings v. BP America Inc. et al.*, D.Del. No. 20-1429-LPS, 2022 U.S. Dist. LEXIS 2378 (Jan. 5, 2022).

In short: the First District's decision in *Masters Pharmaceutical* and the Eighth District's decision below are nothing more than a straightforward application of unambiguous policy language to longstanding Ohio precedents that place Ohio squarely on the side of the overwhelming majority of courts that have considered this question. There is, therefore, no need for this Court to entertain the novel theories advanced by Cincinnati Insurance Company and its insurance industry *amici*.

III. Proposition of Law No. 3: Liability insurance markets are sufficiently resilient to handle liabilities like those at issue in this case without significantly affecting the availability and affordability of liability insurance.

Faced with unambiguous policy language and clear precedent, the insurance industry *amici* resort to doomsday predictions in an effort to avoid the consequences of their underwriting decisions. The *amici*—in bold type—tell this Court that applying standard form CGL policies as written "**will threaten the solvency of insurers across Ohio**." OII Amicus Br. at 12 (emphasis in

original). This is not the first time insurers have made similar arguments. With the advent of asbestos liabilities and the strict liability schemes for environmental claims under CERCLA and other laws, insurers similarly threatened the imminent collapse of the industry and CGL market. Those doomsday scenarios did not come to pass, and there is no reason to believe they will come to pass here.

First, "[i]t is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result. A contract 'does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto.'" *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 362, 678 N.E.2d 519 (1997); *see also Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 8 ("It is well settled that 'insurance policies should be enforced in accordance with their terms as are other written contracts.'"). Thus, whether a finding of coverage will hurt insurers' bottom line is entirely irrelevant to the question of whether an insurance policy covers a particular loss. *See Montrose Chem. Corp. v. Admiral Ins. Co*., 35 Cal.App. 4th 335, 352 (1992), *aff'd* 10 Cal. 4th 645 (1995) ("Notwithstanding Admiral's hectoring (that we are about to single-handedly cause 'the demise of the insurance industry'), we refuse to rewrite its contracts of insurance."). The only relevant question is the meaning of the unambiguous policy terms. *See Goodyear*, ¶ 8.

Second, even if the profitability of insurance companies were relevant to the question of contract interpretation, and it is not, the fact remains that liability insurance markets are sufficiently resilient to handle liabilities like those at issue in this case without materially affecting the availability or affordability of liability insurance either in Ohio or around the nation. When insurers accept premiums, they accept the risk that a loss, and potentially a very large loss, will arise. The mere fact that the potential liability that government opioid claims present may be substantial does not mean they are uninsurable. The insurance industry has a wide variety of tools at its disposal to

manage the risks associated with these liabilities both prospectively, such as by writing exclusions, and retrospectively, such as by purchasing retroactive reinsurance or putting the coverage in runoff.

One of the main methods that liability insurers use to manage risks that they deem to be "uninsurable" is to draft policy provisions that exclude those risks on a prospective basis. In fact, recognizing the increase in opioid claims against policyholders, insurers have already responded by amending their CGL policies to include express exclusions for opioid liabilities. *See* Swiss Reinsurance Company, *Opioid Crisis: Insurers on the Defense* (2018) ("Insurers are also crafting and delivering opioid exclusions into the marketplace. Some are applying opioid exclusions to manufacturers and distributors…. Other insurers are applying exclusions across all potentially exposed risks.");[4] Daniel S. Brettler, *Protecting Your Firm from the Growing Opioid MDL: The Role of Insurance & Risk Management*, Conner Strong & Buckelew (July 2018) ("[S]ome carriers have taken immediate, decisive action to insert outright exclusions for opioids and governmental actions into their policies. Others are attempting to exclude allegations involving opioid addiction.").[5]

As for existing insurance policies that lack exclusions, one way that insurers can manage the risks associated with such policies is by putting these policies into runoff (a general term for the process of managing categories of claims for which the insurer does not plan to continue to provide insurance in the future). *See* Tom Baker, *Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. Rev. 59 (2021). The insurer may also take steps to separate the management of those claims from its ongoing business, including by purchasing retroactive reinsurance for all or some portion of the coverage under the policies in runoff. *Id.*

Further, it bears underscoring that the insurance industry's claims of imminent demise are entirely unsupported by the record, and there are good reasons to believe those claims are untrue.

[4] https://bit.ly/3cAkaf9.

[5] https://bit.ly/3kyV445.

Because insurers can add exclusions to limit their exposure to government entity lawsuits (and many have), enforcing existing policies as written would not increase the cost of new policies. Moreover, there is no evidence that the industry is insufficiently capitalized to pay claims under those policies that do provide coverage for prescription opioid liability lawsuits. The insurers have provided no evidence regarding the reinsurance they have in place to cover these claims or the amounts they have reserved to pay them. Claims of industry collapse cannot justify a *post hoc* revision of the contracts these insurers wrote, particularly based on the unsupported say-so of *amici*.

CONCLUSION

There is no need to take up this appeal, particularly before this Court decides *Masters Pharmaceutical*, which raises the same issue of law. The Eight District's decision is a straightforward application of clear Ohio law to unambiguous policy terms that is consistent with the clear majority of courts around the country. The insurance industry's doomsday predictions are unfounded and unsupported, and do not justify rewriting the clear terms of the contracts they issued.

Dated: April 25, 2022

Respectfully submitted,

/s Justin H. Werner

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 25th day of April, 2022, via email, on the following:

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