No. 22-50748

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, AND BRENDA LI GARCIA,

Plaintiffs-Appellants,

v.

JOHN B. SCOTT, TEXAS SECRETARY OF STATE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

Brief of The Andrew Goodman Foundation, March for Our Lives, and The National Vote at Home Institute as *Amicus Curiae* in Support of Appellants

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed entities as described in the fourth sentence of Rule 28.2.1, 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.

In addition to the persons identified in the briefs of the litigants, the following entities have an interest as amicus curiae in the outcome of this appeal. None have a financial interest in the outcome of the appeal within the meaning of Rule 28.2.1:

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The Andrew Goodman Foundation
March for Our Lives
The National Vote At Home Institute

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STATEMENT REGARDING ORAL ARGUMENT

Amici do not seek to join in oral arguments.

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STATEMENT OF IDENTIFICATION OF *AMICI CURIAE*

Amicus Curiae Andrew Goodman Foundation ("AGF") is a 501(c)(3) non-profit organization dedicated to supporting youth leadership development, voting accessibility, and social justice initiatives on campuses across the country, including in Texas. AGF works to make young voices and votes a powerful force in democracy.

In May of 1964, Andrew Goodman was 20 years old. He joined Freedom Summer, a voter registration youth coalition project aimed at registering Black Americans to vote in Mississippi. On Andrew's first day of arrival, he and two other civil rights workers, James Chaney (age 21) and Michael Schwerner (age 24), were murdered by the Ku Klux Klan. Their story struck a public chord that contributed to the passage of the Voting Rights Act of 1965.

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Today, in Texas and across the country, AGF's student Ambassadors, continue this legacy by organizing and mobilizing young voters. Given its objectives, AGF has a substantial interest in ensuring that the Twenty-Sixth Amendment is protected and that young voters have unfettered equal access to the ballot. AGF has an "interest" in this case. *See* Fed. R. App. P. 29(b)(1) and 5th Cir. R. 29.2.

Amicus Curiae March for Our Lives ("MFOL") is a 501(c)(3) organization of young people from Texas and across the country dedicated to promoting civic

engagement, education, and direct action to achieve sensible gun violence prevention policies that will save lives. After the 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, MFOL formed and in one month organized the largest single day of protest against gun violence in the nation's history. From its Road to Change initiative that registered 50,000 new voters and spurred the highest-ever youth voter turnout in the 2018 midterm elections to its successful advocacy for dozens of local, state, and federal laws, MFOL uses the power of youth voices to create safe and healthy communities and to protect the rights to safety and democracy for all. These young people—all too familiar with mass shootings and other forms of gun violence—have a vital interest in voting and electing representatives accountable to their interests. Given its objectives, MFOL has a substantial interest in ensuring that the Twenty-Sixth Amendment is protected and that young voters have unfettered equal access to the ballot. MFOL has an "interest" in this case. *See* Fed. R. App. P. 29(b)(1) and 5th Cir. R. 29.2.

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Amicus Curiae National Vote at Home Institute ("NVAHI") is a 501(c)(3) organization dedicated to increasing voter access across the country, including Texas. NVAHI aims to increase voter access to, use of, and confidence in voting at home – in which voters receive mailed out paper ballots; return them either by postage-free mail or in person to a wide range of accessible, convenient, and secure

locations; and track them online, in real-time, to ensure their vote is counted. NVAHI believes that mail ballot access is an important way to make voting fair and equitable for all Americans. Robust mail ballot systems increase turnout across demographics — regardless of party affiliation — while maintaining security and instilling confidence in the results. Given its objectives, NVAHI has a substantial interest in ensuring that the Twenty-Sixth Amendment is protected and that young voters have unfettered equal access to the ballot. Thus, NVAHI has an "interest" in this case. *See* Fed. R. App. P. 29(b)(1) and 5th Cir. R. 29.2.

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Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and state that Plaintiffs-Appellants have consented to the filing of this brief and the accompanying Motion for Leave to File Amicus Brief and to File Out of Time, and Defendants-Appellees have opposed the filing of same.

No party or its counsel authored this brief in whole or in part. No party or its counsel contributed financial support intended to fund the preparation or submission of this brief. No individual or organization other than *Amici* and its counsel have contributed financial support intended to fund the preparation or submission of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

"The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI.

The explicit text of the Twenty-Sixth Amendment constitutionalized a protected classification with regard to ballot access – age, forbidding denial or abridgement of the right to vote "on account of age."

Texas laws violate this unequivocal command by providing that "[a] qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day," Tex. Elec. Code § 82.003, while requiring voters younger than 65 to provide a statutorily mandated reason to become eligible. *Id.* §§ 82.001–82.002, 82.004. Regular voting methods are provided for one set of voters, while —simply on account of age —another set of voters is left without.

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I. The Twenty Sixth Amendment, Unequivocally a Civil Right Amendment, Prohibits Prima Facie Age Discrimination in Absentee Voting.

The Twenty-Sixth Amendment is at a crossroads. It was adopted as a civil rights amendment designed to level the voting-rights playing field by age, just as the Fifteenth Amendment did for race and the Nineteenth Amendment for sex. Like those amendments, the Twenty-Sixth Amendment's plain language precludes laws

and state action that stratify voters' opportunities to exercise the franchise on account of a protected classification. Notably, the Twenty-Sixth Amendment was ratified across party lines and with unprecedented speed —in less than 100 days.

Congress and the states recognized the unique value that youth offer in protecting democracy. As President Nixon noted during the ceremonial certification of the Amendment, young people infuse the democratic process with "*some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country, throughout history, we find, goes through ebbs and flows of idealism*." Richard Nixon, U.S. President, Remarks at the Ceremony Marking the Certification of the 26th Amendment to the Constitution (July 5, 1971) (emphasis added).

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During the decade after ratification, courts deployed the Amendment consistent with that purpose — even applying strict scrutiny to invalidate restrictions. Though litigation under the Amendment went quiet starting in the 1980s, the Amendment remains part of the constitutional foundation that supports every voter's right to vote, regardless of how frequently it was invoked in litigation over time. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1119, 1134–37 (2019).

A. The Twenty-Sixth Amendment Epitomized a Cross-Partisan Commitment to Expand the Right to Vote to Encourage Active Citizenry of Youth for the Betterment of America.

The enfranchisement of youth voters has historically received cross-partisan support. It was a Republican, Sen. Arthur Vandenburg of Michigan, who first proposed a constitutional amendment lowering the voting age in 1942. Jennifer Frost, *The GOP once supported youth voting and encouraged participation*, WASH. POST. (Dec. 5, 2022), https://www.washingtonpost.com/made-by-history/2022/12/05/young-voters-republicans/. During his 1954 State of the Union, Republican President Eisenhower called for the constitutional amendment, echoing the slogan "old enough to fight, old enough to vote" borne out of the Revolutionary War. *See* Dwight D. Eisenhower, U.S. President, Annual Message to the Congress on the State of the Union (Jan. 7, 1954).

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Republican Michigan Gov. George Romney, father of Sen. Mitt Romney, enthusiastically supported it, explaining: "Young people get greatly interested in public affairs ahead of their 18th birthdays." Frost, *supra*. Republican Sen. Barry Goldwater of Arizona testified before Congress in favor as well. Bromberg at 1132, n. 115. *See also* Frost, *supra*.

A variety of reasons were advanced to support ratification, particularly the general recognition of the nation's expansion towards a more inclusive suffrage. Additional themes included how voices of hope and idealism are central to the functioning of a healthy democracy; that increased educational attainment and awareness of contemporary events readied youth voices for the franchise more than generations past; and that young people increasingly assumed adult responsibilities such as fighting in war, taking on debt, and living independently. *See* Bromberg at 1131–32 (citing legislative record). The prior emergency-pandemic-election litigation is a dangerous departure from the cross-partisan historical arc of the Amendment and threatens to render it meaningless at a time when youth voting rates are on the rise due to increasing concerns about what their futures hold amid a democratic crisis.

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B. The Twenty-Sixth Amendment Incorporates Fourteenth Amendment Principles for Equal Access to the Ballot and the Removal of Special Burdens for Youth Voters.

In the Voting Rights Act Amendments of 1970, Congress declared that a twenty-one-year voting age requirement "has the effect of denying to citizens eighteen years of age but not twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment

of the Constitution" and "does not bear a reasonable relationship to any compelling State interest." Pub. L. No. 91-285, §§ 301–305.

Katzenbach v. Morgan, 384 U.S. 641 (1966), upheld the Voting Rights Act of 1965 pursuant to the Fourteenth Amendment, and inspired passage of the Voting Rights Act Amendments of 1970 for "due process" and "equal protection" when it came to the youth franchise, restrictions of which were legislated to be subject to strict scrutiny. The constitutionality of these portions of the Voting Rights Act, as amended, were reinforced in *Oregon v. Mitchell* with respect to federal elections. 400 U.S. 112 (1970). *See also* Bromberg at 1124–31.

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Further, as the Senate Report accompanying the Senate Joint Resolution which was later enacted as the Twenty-Sixth Amendment provides:

> [F]orcing young voters to undertake *special burdens*—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.
>
> S. REP. NO. 92-26, at 14 (1971) (accompanying S.J. Res.7, 92d Cong. (1971)) (emphasis added).

Congress declared its intent to prevent "special burdens" for young voters and contemplated how those burdens might apply to their ability to vote both in-person and by mail.

During the prior emergency election-pandemic litigation phase of this case upon preliminary injunction review, *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020), the panel did not see a Twenty-Sixth Amendment violation, but it foreshadowed that "equal protection questions may come to the fore." *Id.* at 193. The relevant question today is: *"Is one set of voters being treated fundamentally differently – i.e., subject to prima facie discrimination – on account of a protected constitutional classification?"* The obvious conclusion to this answer is Yes.

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The explicit text of the Twenty-Sixth Amendment constitutionalized a new class of voters – youth, and a new classification with regard to ballot access – age, forbidding denial or abridgement of the right to vote "on account of age." The legislative text supporting ratification specifies a broad goal "to encourage greater political participation on the part of the young'' and underscores the elimination of "forcing young voters to undertake special burdens." S. REP. NO. 92-26, at 14 (1971), *supra* at 8. Congress found the "result" of such special burdens "and the election procedures that create it" are "inconsistent with the purpose of the Voting

Rights Act" and "such segregation might even amount to a denial of their 14th Amendment right to equal protection . . . in the exercise of the franchise." *Id.*

The history animating ratification of the Twenty-Sixth Amendment, and the direct legislative text, are repeatedly informed by Fourteenth Amendment equal protection principles. To write this history out of the Twenty-Sixth Amendment through a search of 1971 election administration procedures would suggest that the right to vote today must be tied to now-antiquated election mechanisms in place in 1788 when the United States Constitution was adopted, or the late 1800s when the Reconstruction Amendments were ratified. If one were to substitute within the text of Tex. Elec. Code § 82.003 ("[a] qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day") the words "male" or "female," or "Caucasian" or "African American," instead of "65 years of age or older," then violations of the Fourteenth, Fifteenth, and Nineteenth Amendments would be presumed. A violation of the Twenty-Sixth necessarily follows.

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II. Restrictive Vote By Mail ("VBM") Laws Prevent Active and Equal Participation in Elections.

Young Americans are eager to exercise their vote and voice. Restrictive VBM laws prevent their active, equal participation in our electoral system.

A. Vote By Mail Usage Has Increased Significantly Across the Nation, Including by Youth Voters, and Across Partisan Lines.

The 2022 midterm election boasted what is estimated to be the second-highest youth turnout for midterm elections in the past 30 years. *Millions of Youth Cast Ballots, Decide Key 2022 Races*, CTR. FOR INFO. & RSCH. ON CIVIC LEARNING AND ENGAGEMENT ("CIRCLE") (Nov. 9, 2022), https://circle.tufts.edu/latest-research/millions-youth-cast-ballots-decide-key-2022-races. The use of VBM among young voters has also increased dramatically, with 45% reporting they used VBM or absentee ballots in 2020, more than double the reported 19% of young voters in 2016. Peter de Guzman et al., *Youth Mail-In Voting Increased in 2020, but Restrictions Threaten Access in 2022,* CIRCLE (Oct. 20, 2022), https://circle.tufts.edu/latest-research/youth-mail-voting-increased-2020-restrictions-threaten-access-2022. An explanation for the popularity of VBM for youth is the barriers they face (particularly among low-income youth) when voting in person, such as busy work or school schedules and family responsibilities, and unreliable access to transportation, particularly in light of off-campus polling locations.[1] *See generally* Reynol Junco et al., *Expanding the Electorate: How Simple*

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[1] As this matter proceeds through litigation before the Fifth Circuit Court of Appeals, it should be noted that a new Texas bill was filed on February 16, 2023 to

Changes in Election Administration Can Improve Voter Participation Among Low-Income Youth, CIRCLE (2018). Youth voters are not apathetic – to the contrary, the vast majority of them (88%) believe that voting makes a difference, and very few (7%) feel it is a "waste of time." *Id.*

Indeed, VBM increases voter turnout across age cohorts and partisan lines. Notably, studies on the effects of VBM on political parties show that VBM has no "meaningful partisan effects" on voting or election outcomes. Daniel M. Thompson et al., *Universal Vote-By-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 PROC. OF THE NAT'L ACAD. OF SCIENCES 14042, 14055 (2020). *See also* Adam J. Berinsky et al., *Who Votes by Mail?: A Dynamic Model of the Individual-Level Consequences of Voting-by-Mail Systems*, 65 PUB. OP. Q. 178, 192 (2001) ("The VBM system . . . works through partisanship to ensure that partisans – Democrats and Republicans alike (and equally) – keep voting.")

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While the onset of the COVID-19 pandemic has undoubtedly increased use of VBM, its rate has been steadily increasing over the past two decades. Charles Stewart III, *How We Voted in 2020: A First Look at the Survey of the Performance of American Elections*, MIT ELECTION DATA + SCI. LAB 1, 2 (2020). Altogether, the use

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prohibit county commissioners from designating on-campus polling locations on institutions of higher education. *See* H.B. No. 2390, 88 Leg. Sess. (TX 2023) (filed).

of VBM has increased nearly sixfold between 1996 to 2020, from 8% to 46%, with a 25-point increase from 2016 to 2020. *Id.*

When examining VBM trends from 2016 to 2022, there was a "meteoric rise" in use, especially among young voters and voters of color.[2] *See* DELIVER MY VOTE EDUCATION FUND ET AL., VOTE-BY-MAIL: MODELING VOTER PARTICIPATION IN THE 2018 MIDTERM ELECTION 3, https://voteathome.org/portfolio/vote-by-mail-modeling-voter-participation-in-the-2018-midterm-election/. The minority of states like Texas that have "Excuse Required" policies often see a lower number of VBM ballots, as these policies deter the use of VBM, *id.* at 6, and various studies have found that the impact of VBM policies "affect sub-sections of the electorate differently" and reinforce the positive impact among youth and racial and ethnic groups. *Id.* at 8.

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B. Texas's VBM Laws Impact Minority Voters on Account of Age.

The group next positioned to inherit the franchise in Texas – i.e., the under-18 population – is majority minority, including Latino, Black, and Asian populations

[2] For example, Pennsylvania allowed no-excuse absentee voting for the first time in the 2020 election, which led to the almost ten-fold increase of overall VBM use from "4% of all votes cast to nearly 40%" and a 42-percentage point and 56-percentage point increase respectively among Black and AAPI voters. *Id.* In Florida, young voters of color surpassed the VBM usage of their white peers for the first time in 2020. *Id.*

(70.5%). *See* William H. Frey, *New 2020 Census Results Show Increased Diversity Countering Decade-Long Declines in America's White and Youth Populations,* BROOKINGS INST. (Aug. 13, 2021), https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/. Indeed, minorities are now the majority of the undergraduate and graduate student population in Texas. *See* Lloyd Potter, *Texas Demographic Characteristics and Trends and Higher Education* 29 (2021), https://demographics.texas.gov/Resources/Presentations/OSD/2021/2021_01_26_TexasAssociationofStateSeniorCollegeandUniversity.pdf.

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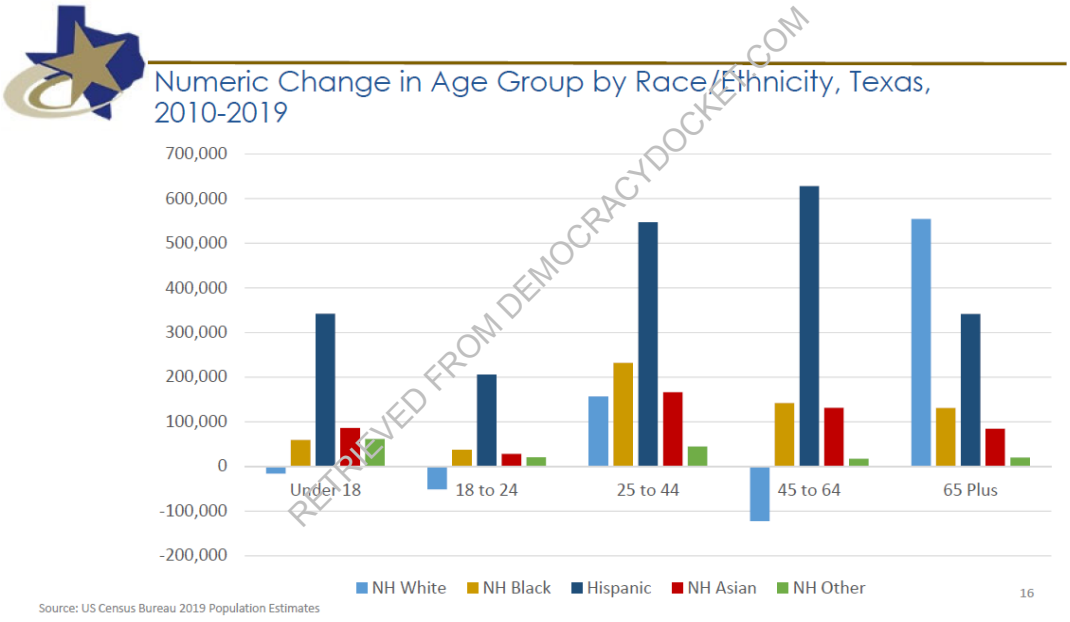
An example of this demographic shift of age and race in the state is evident in Harris County. Harris is the largest county in Texas and home to 14% (2.4 million) of the state's registered voters. *See* Brief of Harris County, Texas as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction at 2, *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) (No. 20-50407). As the largest county in the state, those who are running for political office (both state and federal) understand the voting power the county has within the state. Harris County's political importance cannot be understated. Notably, approximately 70% of Harris County residents are non-white, while non-whites comprise only 32% of those 65-plus within the County. *Id.* at 3. In other words, the unabridged access to VBM that elder voters

who are majority-white possess creates severe distortion in minority access in the County, with wider statewide and national political impact.

Similar trends are evident across the state where numeric changes in age groups by race and ethnicity demonstrate the predominant increase of the white population in the 65-plus age cohort between 2010 and 2019, compared to others within the age cohort, and compared to younger age cohorts:

Image 1



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Lloyd Potter, *supra,* at 13.

The demographic and voting shifts in Texas demonstrate increased stratification for youth voters and minority youth voters.

III. Conclusion

The prima facie age discrimination evident by Texas's VBM laws suppresses the ability for young people to address and resolve issues within their communities and is particularly pernicious because it is this group that has the most to gain and lose as it inherits the future. The right to vote cannot be read out of the right to VBM, particularly given the increased, prolific use of this mechanism across the nation, independent of partisanship and age. Age discrimination in VBM untowardly impacts the rising demographic of minority youth, particularly in Texas. Texas's VBM laws are in direct contravention to the purpose and power of the Twenty-Sixth Amendment and its Fourteenth Amendment and Voting Rights Act influences.

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* * *

Respectfully submitted,

/s/ Yael Bromberg by permission

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word in 14-point Equity font.

Dated: February 22, 2023

/s/ Jared G. LeBlanc
Jared G. LeBlanc

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system in No. 22-50748 on February 22, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 22, 2023

/s/ Jared G. LeBlanc
Jared G. LeBlanc

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