22-1135-cv

United States Court of Appeals

for the

Second Circuit

JOHN J. HEIM,

Plaintiff-Appellant,

– v. –

BETTY DANIEL, ADRIAN MASTERS, HAVIDAN RODRIGUEZ, UNIVERSITY AT ALBANY, THE STATE UNIVERSITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. To best prepare students for success in our democracy, FIRE believes the law must remain unequivocally on the side of robust free speech rights on campus. Faculty, in particular, must be free to engage in scholarship and teaching if we hope to encourage and support the creation of new knowledge and present students with diverse viewpoints.

FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure that the First Amendment and academic freedom rights of students and faculty are protected at public

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

colleges and universities.[2] FIRE participates as an *amicus* in this case because it presents an opportunity for this Court to strengthen the rights of public college and university professors by extending First Amendment protection to their speech on matters of public concern, even when that speech occurs pursuant to their official duties.

SUMMARY OF ARGUMENT

The Supreme Court established the current standard for analyzing the First Amendment claims of a public employee in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Under the *Pickering/Connick* analysis, an employee's speech is protected if (1) the subject of the employee's speech was a matter of public concern, and (2) the government had no adequate justification for treating the employee differently from any other member of the general public. *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011) (cleaned up). In

[2] *See, e.g.*, Brief for Found. for Individual Rts. in Educ. as *Amicus Curiae* Supporting Neither Affirmance Nor Reversal, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (No. 20-3289); Brief for Found. for Individual Rts. in Educ. as *Amicus Curiae* Supporting Plaintiff-Appellant and Partial Reversal, *Cunningham v. Blackwell*, 41 F.4th 530 (6th Cir. 2022) (No. 21-6172); Brief for Found. for Individual Rts. in Educ. et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (No. 10-1413).

Garcetti v. Ceballos, the Supreme Court added another step to this analysis—holding that employee speech is protected if employees speak as citizens, not as employees pursuant to their job duties. 547 U.S. 410, 421 (2006).

The *Garcetti* framework impacts the expressive rights of more than 20 million government employees across a range of professions from desk clerks to microbiologists. Despite the difficulties of applying a single test across a varied and sprawling workforce, the Supreme Court explicitly recognized one set of public employees where *Garcetti's* framework would raise additional First Amendment concerns—professors at public universities. 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests . . . ."). It is unsurprising that the Supreme Court recognized the unique position occupied by public university professors because it has stressed that academic freedom is "a special concern of the First Amendment" that requires judicial protection. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). This case demonstrates how those additional concerns can manifest. Here,

Professor Heim is a proponent of Keynesian economics and, thus, he teaches and writes about how that philosophy can benefit our economy as part of his job duties. *Heim v. Daniel*, 1:18-cv-836, 2022 WL 1472878, at *2 (N.D.N.Y. May 10, 2022). But because of his economic philosophy, Heim was not promoted to a tenure-track position in his department, which favored a different economic philosophy.

Rigidly applying *Garcetti*'s framework would strip Heim of First Amendment protection merely because his job, as a university professor, is to teach and produce research. This offends the essence of academic freedom by punishing professors who pursue heterodox ideology. Recognizing the concerns implicated by academic freedom, the Fourth, Fifth, Sixth, and Ninth Circuits have held that the *Garcetti* framework does not apply to speech related to scholarship or teaching in higher education. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 411–12 (9th Cir. 2014); *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019); *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021). By recognizing that the *Garcetti* framework does not apply to public university faculty, the Fourth, Fifth, Sixth, and Ninth Circuits have simplified the analysis

in those cases by returning to the two-part *Pickering/Connick* inquiry. *Id.*

Although this Court has recognized the importance of academic freedom in higher education, it has yet to hold that *Garcetti* does not apply to speech related to scholarship or teaching in higher education. *Blasi v. New York City Bd. of Educ.*, Nos. 00-CV-5320, 03-CV-3836, 2012 WL 3307227, at *32 (E.D.N.Y. Mar. 12, 2012), *aff'd* 544 F. App'x 10 (2d Cir. 2013) (citing *Panse v. Eastwood*, 303 F. App'x 933 (2d Cir. 2008)). As argued below, this Court should continue to recognize the special First Amendment value of academic freedom and follow the Fourth, Fifth, Sixth, and Ninth Circuits by holding that the *Garcetti* framework does not apply to speech related to scholarship or teaching in higher education.

Additionally, this Court should regard research and writing on even niche academic issues as speech on a matter of public concern. The district court erroneously held that, regardless of whether *Garcetti* applied, Heim's research and writing was unprotected because it was not on a matter of public concern—despite recognizing that "discussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." *Heim v. Daniel*, 2022 WL

1472878 at *13, n.11 (N.D.N.Y. May 10, 2022) (quoting *Harman v. City of N.Y.*, 140 F.3d 111, 118 (2d Cir. 1998)) (cleaned up). Courts should take a broad and inclusive approach when determining whether topics in academia are matters of public concern. Such an approach is especially warranted in this case, where disputes among scholars over economic theory and the best way to order the economy have a broad and significant impact on the public at large.

ARGUMENT

This Court should follow its sister circuit courts of appeals by not applying *Garcetti* to public faculty. It should also hold that research and writing on academic issues is speech on a matter of public concern.

I. This Court Should Join Its Sister Circuits and Not Apply the *Garcetti* Framework to Public Faculty in Higher Education.

Four Circuit Courts of Appeals have held that *Garcetti*'s carve out of on-the-job, public-employee speech from First Amendment protection does not apply to public college and university faculty. This Court has already recognized the First Amendment's special concern for academic freedom and should join its sister circuits to hold that academic freedom requires the scholarship and teaching of professors at public institutions to be protected expression.

A. The Fourth, Fifth, Sixth, and Ninth Circuits Have Held That *Garcetti* Does Not Apply to Scholarship or Teaching Due to Academic Freedom Concerns.

In *Garcetti*, the Supreme Court examined whether a public employee's speech pursuant to his official job duties was protected by the First Amendment. 547 U.S. at 413. The plaintiff was a deputy district attorney who alleged that he was terminated for writing a memorandum pursuant to his duties concerning inaccuracies in an affidavit used to obtain a search warrant. *Id.* at 413–15. The Court held that the plaintiff's claim failed because he wrote the memorandum pursuant to his duties, explaining that "[t]he controlling factor in [the plaintiff's] case is that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. In reaching this conclusion, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

In his now-famous dissent, Justice Souter warned that *Garcetti*'s holding could "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and

write 'pursuant to . . . official duties.'" *Id.* at 438 (Souter, J., dissenting) (internal citation omitted). The *Garcetti* majority recognized the importance of academic freedom but chose not to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.

In *Adams*, the Fourth Circuit held that "*Garcetti* would not apply in the academic context of a public university . . . ." 640 F.3d at 562. There, the plaintiff was a professor who alleged retaliation based upon views he expressed in his scholarship and teaching. *Id.* at 553–56. The Fourth Circuit explained that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Id.* at 564. Accordingly, the Fourth Circuit held that *Garcetti* did not apply, and analyzed the plaintiff's speech under "the *Pickering-Connick* analysis . . . ." *Id.*

In *Demers*, the Ninth Circuit followed *Adams*, holding that *Garcetti* does not apply to speech related to scholarship or teaching. 746 F.3d at 406. There, the plaintiff was a professor who alleged retaliation for

distributing a "pamphlet and drafts from an in-progress book." *Id.* Citing to *Adams*, the Ninth Circuit "conclude[d] that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* at 411. Following the Fourth Circuit's approach, the Ninth Circuit held that "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*." *Id.* at 412.

In *Buchanan*, the Fifth Circuit recognized that "[t]he Supreme Court has established that academic freedom is 'a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'" 919 F.3d at 852 (quoting *Keyishian*, 385 U.S. at 603). There, the plaintiff was a professor who alleged retaliation after being terminated for using profanity and making crude jokes while teaching. *Id.* at 850–52. Like the Fourth and Ninth Circuits, the Fifth Circuit applied the *Pickering* analysis to determine whether the professor's speech was protected, stating its test as follows:

> Public university professors are public employees. To establish a § 1983 claim for violation of the First Amendment right to free speech, they must show that (1) they were disciplined or fired for speech that is a matter of public

> concern, and (2) their interest in the speech outweighed the university's interest in regulating the speech.

Id. at 853 (internal citations omitted).

Most recently, in *Meriwether*, the Sixth Circuit held that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." 992 F.3d at 505. In that case, the plaintiff was a philosophy professor who, due to personal and religious beliefs, objected to his institution's policy that faculty refer to their students using their preferred gender pronouns. For pedagogical reasons, the plaintiff typically referred to his students as "Mr." or "Ms." followed by their last name, but the school ultimately rejected his proposal that he call a transgender student by only her last name. The Sixth Circuit "rejected as totally unpersuasive the argument that teachers have no First Amendment right when teaching" and "recognized that a professor's right to academic freedom and freedom of expression are paramount in an academic setting." *Id.* (internal citations omitted).

As detailed above, the Fourth, Fifth, Sixth, and Ninth Circuits each concluded that *Garcetti*'s "pursuant to his official duties" framework cannot apply to speech related to scholarship or teaching in higher

education because of First Amendment concerns about academic freedom. By removing the *Garcetti* framework, the Fourth, Fifth, Sixth, and Ninth Circuits have made it easier for public universities and professors to understand what speech is protected and why. This simplification undoubtedly helps public universities avoid First Amendment retaliation lawsuits by professors because administrators will know they cannot punish speech simply because the speech was made pursuant to a professor's job.

This Court should follow the lead of the Fourth, Fifth, Sixth, and Ninth Circuits and hold that the *Garcetti* framework does not apply to speech related to scholarship or teaching in higher education.

B. This Court Has Recognized Academic Freedom as a Special Concern of the First Amendment.

Academic freedom protects the expressive rights of faculty members on matters related to scholarship and teaching. The Supreme Court has recognized "[o]ur national commitment to the safeguarding of these freedoms within university communities." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). In the more-than-half century, since the Court held in *Keyishian* that "[o]ur Nation is deeply committed to safeguarding academic freedom," 385 U.S. at 603, the Court has

repeatedly emphasized that academic freedom's importance demands particular judicial care. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022) (noting that academic freedom is an "additional First Amendment interest[] beyond those captured by [the public employee speech] framework"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (noting the court's "responsibility to safeguard . . . academic freedom, a 'special concern of the First Amendment'"). The judiciary must strike a careful balance between its "reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom," and as such it is not well "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." *Ewing*, 474 U.S. at 226.

This Court has likewise long recognized the importance of academic freedom. More than twenty-five years ago, for example, this Court acknowledged "that academic freedom is an important First Amendment concern." *Jeffries v. Harleston*, 52 F.3d 9, 14 (2d Cir. 1995). More recently, this Court made clear that an academic freedom claim may lie "where a restriction on speech implicates the content of a teacher's lessons . . . ."

Bhattacharya v. SUNY Rockland Cmty. Coll., 719 F. App'x 26, 27–28 (2d Cir. 2017). Academic freedom is an important part of the First Amendment because our Nation's universities are unique centers of free inquiry and knowledge creation. "By imbuing certain core academic decisions with First Amendment protection, the Supreme Court's academic-freedom jurisprudence principally protects the 'marketplace of ideas' in the university and prevents government intrusion that would otherwise 'cast a pall of orthodoxy over the classroom.'" *Burt v. Gates*, 502 F.3d 183, 191 (2d Cir. 2007) (quoting *Keyishian*, 385 U.S. at 603).

While this Court has unequivocally recognized that the First Amendment protects academic freedom, it has not addressed the tension between academic freedom protections and *Garcetti*'s "official duties" framework. This Court has specifically declined to decide whether *Garcetti* "would apply in the same manner to a case involving speech related to scholarship or teaching." *Blasi*, 2012 WL 3307227 at *32 (citing *Panse*, 303 F. App'x 933). For its part, the Supreme Court rejected an expansive reading of *Garcetti* in *Lane v. Franks*, 573 U.S. 228, 239 (2014) (stating that the Eleventh Circuit read *Garcetti* "far too broadly" when it

held grand jury testimony was not citizen speech because it concerned information the plaintiff learned through his employment).

Indeed, it was the *Garcetti* decision that upset the status quo ante. Before 2006, when *Garcetti* was decided, this Court and courts in this circuit applied the *Pickering* balancing test to faculty expression for years without issue. *See, e.g.*, *Jeffries*, 52 F.3d 9; *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) (remarking that "in striking a balance between the interests of a law professor commenting as a citizen upon issues of public concern and the interests of a State in providing the efficient provision of services by a law school, courts should seek to protect the First Amendment principles that underlie both a citizen's interest in free speech and a law school's underlying mission."); *Marinoff v. City Coll. of N.Y.*, 357 F. Supp. 2d 672 (S.D.N.Y. 2005) (balancing professor's free speech interest under *Pickering* on a motion for summary judgment). By expressly recognizing that *Garcetti* does not apply to academic speech, this Court would be merely continuing the status quo for public faculty and recognizing the supreme importance of academic freedom for our nation. *See* 547 U.S. at 425.

II. This Court Should Hold That Research and Writing on Even Niche Academic Issues Are Speech on a Matter of Public Concern.

In this case, the district court erred by holding that Professor Heim's research and writing on Keynesian economics were not matters of public concern. *See Heim*, 2022 WL 1472878, at *14. The size of a speaker's potential audience is not dispositive of whether the speech is on a matter of public concern, which is a question of law for the court to decide. *Montero v. City of Yonkers*, 890 F.3d 386, 399 (2d Cir. 2018). The district court here erred by focusing on the "relatively narrow audience" for Heim's research. *Heim*, 2022 WL 1472878, at *14. This Court should reverse the district court's narrow reasoning and hold that Heim's academic expression regarding theories of economics was indeed speech on a matter of public concern.

The Supreme Court looks broadly at the nature of the speech at issue when considering whether it involves a matter of public concern:

> Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

Lane, 573 U.S. at 241 (cleaned up) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Speech that is the "subject of general interest" may imply the existence of a broad audience, but that is not, and cannot be, the whole analysis.

By over-emphasizing the role of audience size, courts risk turning the public concern analysis into a popularity contest for speech. Indeed, much of the Supreme Court's First Amendment jurisprudence concerns speech that is or was quite unpopular or simply not of interest to the broader public. For example, in *Snyder v. Phelps*, a fundamentalist church protested before an audience of effectively zero people. Church members loudly and provocatively picketed at the funerals of American soldiers, sharing their message with mourners who were there to attend funerals, not listen to the fundamentalist group's speech. 562 U.S. 443 (2011). In *Texas v. Johnson*, the respondent offended "several witnesses" when he burned an American flag, which the Supreme Court held was symbolic speech protected by the First Amendment. 491 U.S. 397, 399 (1989). *See also Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket emblazoned with a profane message in a courthouse cannot be a criminal offense); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (striking down

prohibitions on handbilling enforced against labor organizers and Jehovah's Witnesses, among others). What was important in each of those cases was not the size of the speaker's audience but whether the speech fell into one of the very narrow categories of unprotected expression.

In this case, Heim is an economist in the Keynesian tradition, while the tenured faculty in the economics department at the State University of New York at Albany (UAlbany) subscribe to Dynamic Stochastic General Equilibrium (DSGE) analysis. His writings addressed "[w]hether Keynesian or DSGE economics correctly reflect the world." *Heim*, 2022 WL 1472878, at *13. In holding that Heim's expression would be unprotected under either the *Pickering/Connick* or *Garcetti* analyses, the district court focused on the fact that his writings were "not the 'subject of the *general* interest'" but instead had a "specific, narrow audience." *Id.*

The district court was right to point out in a footnote this Court's statement that "discussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." *Id.* at n.11 (quoting *Harman*, 140 F.3d at 118) (cleaned up). Moreover, the

district court acknowledged that the audience for Heim's work consisted of "policy wonks 'engaged in academic discussion of economics' and 'government officials engaged in economic forecasting.'" *Id.* (quoting Pl.'s Opp'n at 18). It acknowledged, but failed to grant sufficient weight to, the fact that Heim's audience, while narrow, consisted of "government officials" and "policy wonks," and his scholarship discusses the best way to order the economy. That Heim's audience consists of public servants charged with making important economic decisions is all the court should need to understand that his scholarship and teaching is on matters of public concern.

While all academic speech should be viewed as a matter of public concern, Heim's scholarship is distinctly consequential. His work in support of Keynesian economics and how best to address recessions, inflation, and other important concepts is the "paradigmatic matter of public concern" this Court recognized in *Harman*. 140 F.3d at 118. UAlbany's Economics Department itself also describes its scholarship and teaching as having broad public implications. The department's website specifies:

> Economics is the study of how society uses its resources - natural, human and man-made. Jobs, wages, the stock

> market, unemployment, inflation, income inequality, and other economic issues **affect us all on a daily basis at the individual, community, national and global levels.** By studying Economics at UAlbany you will be better able to understand these issues, to address economic problems and to contribute to their resolution.[3]

There, UAlbany's Economics Department rightly boasts about the public importance and impact of economics research and education. Consequently, scholarly debates about research methods and philosophies will also carry great public importance.

The conflict between Heim's Keynesianism and the department's DSGE philosophy is also easily distinguishable from internal politics or personal disputes. The latter may be unprotected, as the election of a department chair may be of great interest to the faculty of the department, but "a matter of concern to the academic community does not automatically translate into a 'matter of public concern.'" *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 379 n.8 (E.D.N.Y. 2010) (quoting *Ezuma v. City Univ. of N.Y.*, 367 Fed. App'x 178, 179 (2d Cir. 2010) (summary order)). While

[3] Economics, State University of New York University at Albany, https://www.albany.edu/economics [https://perma.cc/5BHC-Y7VU] (emphasis added).

Heim's and his department's dispute doubtless carries personal and professional import for Heim and others in UAlbany's economics department, it carries greater implications for the broader public than questions of who will lead a department or clashing personalities in a faculty lounge. Heim's expression through his scholarship and teaching is not about who will lead the economics department at UAlbany, who gets what office, who is assigned to which service opportunities at the university, or what course schedule someone has. Rather, it is about substantive economic philosophies that the department itself says "affects us all on a daily basis."

Finally, courts should take a broad and inclusive approach when determining whether academic issues are matters of public concern. For example, in confronting a similar argument, the Ninth Circuit acknowledged that academic debates "may seem trivial to some." *Demers*, 746 F.3d at 413. As an example, the Ninth Circuit pointed to a debate over the literary canon: Which books are important and worthy of study and which should be passed over may seem trivial to the uninitiated. But the Ninth Circuit reasoned that "those who conclude

that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied." *Id.* That is, students read works like the *Odyssey*, the *Divine Comedy*, or *Moby Dick* because scholars made the decision, collectively and over time, that they were worthy of study and thus, their relevance to our culture persists today. Accordingly, the Ninth Circuit cautioned judges to "hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego." *Id.*

This Court should likewise hesitate before concluding that academic disputes such as the merits of Keynesian economics versus Dynamic Stochastic General Equilibrium are not matters of public concern that may ultimately have significant consequences for how our society is governed.

CONCLUSION

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603. In order to

continue to safeguard academic freedom, courts must be mindful in forging jurisprudence governing the First Amendment rights of public employees. Because of the importance of academic freedom to our constitutional tradition, this Court should follow the Fourth, Fifth, Sixth, and Ninth Circuits and hold that the *Garcetti* framework does not apply to speech related to scholarship or teaching in higher education. Additionally, this Court should hold that scholarship and teaching on even niche academic issues is speech on a matter of public concern.

Dated: September 14, 2022

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Date: September 14, 2022

/s/ Darpana M. Sheth

Darpana M. Sheth
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

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The undersigned certifies that on September 14, 2022, an electronic copy of the Foundation for Individual Rights and Expression Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: September 14, 2022 /s/ Darpana M. Sheth

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