

No. 20-2554

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CHRISTOPHER “CHRISSEY” SHORTER,

Plaintiff-Appellant,

v.

UNITED STATES, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, Case No. 19-CV-16627

**BRIEF OF *AMICI CURIAE* FORMER CORRECTIONS OFFICIALS IN
SUPPORT OF PLAINTIFF-APPELLANT**

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for *amici curiae* states that all parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), undersigned counsel for amici curiae states that no party or party's counsel authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus Curiae contributed money to the preparation or submission of this brief.

Dated: November 23, 2020

___/s/ T. Keith Fogg_____
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TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. Correctional Staff Are Well Aware That Transgender Prisoners and Prisoners Who Have Previously Been Victimized Are At Substantial Risk of Sexual Abuse 5	
II. Corrections Officials Have an Elemental Responsibility and Authority to Protect Particularly Vulnerable Prisoners.....	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	14
<i>Shorter v. United States</i> , No. 19-16627 (RMB-KMW), 2020 WL 4188455 (D.N.J. July 21, 2020).....	14

REGULATIONS

28 C.F.R. § 115.31	8
28 C.F.R. § 115.41	8
28 C.F.R. § 115.42(c)-(d).....	9
28 C.F.R. § 115.42(e).....	13
28 C.F.R. § 115.42(f)	9
28 C.F.R. § 115.86(d)(2).....	9

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ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES (2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf	6
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David Radziewicz & Carole A. Mattis, <i>Providing Support Services to Transgender Inmates</i> , AM. CORR. ASSOC., CORRECTIONS TODAY, July/Aug. 2018, https://perma.cc/D4JW-93VW	9
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<https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>13

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<https://www.rollingstone.com/music/music-news/elton-john-michael-stipe-defend-transgender-prisoners-rights-177320/>10

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TRANSSEXUAL, AND GENDER NONCONFORMING HEALTH CARE IN CORRECTIONAL
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Problem – A Comparative Analysis of American, Australian, and Canadian
Prison Policies Concerning the Treatment of Transgender Prisoners and a
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91 (2006).....11

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OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS
(2007), <https://srlp.org/wp-content/uploads/2012/08/WarinHere042007.pdf>.....12

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VALERIE JENNESS ET AL., UNIVERSITY OF CALIFORNIA, IRVINE CENTER FOR EVIDENCE-BASED CORRECTIONS, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007), https://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf6

INTEREST OF *AMICI CURIAE*

The *Amici Curiae* filing this brief are James E. Aiken, Eldon Vail, Steve J. Martin, Dan Pacholke, Richard Morgan, Martin F. Horn, Emmitt Sparkman, and Phil Stanley.

Amici are eight high-ranking former corrections officials with over a century of combined experience in some of the largest correctional systems in the country. Each has worked at various levels of the prison system, from entry level staff to senior positions, inclusive of positions as final responsible authority within their respective state and territorial systems. Their experience spans at least 10 jurisdictions, within each of which they worked at or oversaw numerous facilities that collectively housed thousands of prisoners.

As corrections professionals, *amici* have an interest in making sure that corrections facilities are managed in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the court of common dynamics in corrections facilities relevant to this case and the basic responsibilities of officers working in these facilities.

Amici are:

James E. Aiken is the President of James E. Aiken & Associates, Inc. and has worked in the criminal justice profession for over 49 years. Mr. Aiken served as Director of Corrections for the United States Virgin Islands and Commissioner

for the Indiana Department of Correction (adult and juvenile). He also held numerous positions with the South Carolina Department of Corrections, including as a counselor with the Comprehensive Drug Abuse Treatment Program, Deputy Regional Administrator in the Midlands Correctional Region (managing 16 prisons—minimum to super maximum security), Deputy Warden and Administrative Assistant to the Warden of the Manning Correctional Institution (medium security), Deputy Warden and Warden at the Central Correctional Institution (state penitentiary—medium, maximum and super-maximum security), and Warden of the Women’s Correctional Center (minimum, medium and maximum security). Mr. Aiken was appointed to better stabilize a number of these facilities and ensure basic sound correctional practices were established. From 2004 to 2009, he was appointed by the United States Congress to serve as a Commissioner on the National Prison Rape Elimination Commission. Mr. Aiken has also consulted with the U.S. Department of Justice, National Institute of Corrections, as well as served as a private contract provider to federal, state and county jurisdictions (jails and prisons). He has provided expert testimony in over 300 cases at the federal and state levels within 29 United States jurisdictions.

Eldon Vail served as Deputy Secretary of the Washington Department of Corrections from 1999 to 2006. He served as the Secretary of the Washington Department of Corrections from 2007 until 2011. As Secretary, he successfully

reduced violence in the state prison system and implemented a wide array of evidence-based programs, including an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary confinement. Since his retirement in 2011 he has served as a correctional consultant and expert witness over sixty times in twenty two states.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in Texas gubernatorial appointments to both a sentencing commission and a council for offenders with mental impairments. He also has served as an expert with the U.S. Department of Justice's Civil Rights Division and has worked on the development of the PREA standards. In addition, he was in the first class of PREA Auditors to be certified and provided the Department of Justice with feedback on the certification process. Mr. Martin coauthored Texas Prison, the Walls Came Tumbling Down, and has written numerous articles on criminal justice issues.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections (WDOC). He started his 33-year career as a Correctional Officer, working his way to the senior most position for the department. As the Director of Prisons he led the system wide effort to implement PREA in prisons, community corrections and work release facilities.

Richard Morgan served as Secretary of the Washington State Department of Corrections in 2016. He also was appointed twice to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012.

Martin F. Horn served as the Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Department of Correction and Probation for seven years. Mr. Horn has also served as Executive Director of the New York State Sentencing Commission.

Emmitt Sparkman is the former Deputy Commissioner of Institutions for the Mississippi Department of Corrections. His adult and juvenile corrections career spans over forty-five years. He has held line and management positions in Texas, Kentucky, and Mississippi. While serving as the Mississippi Department of Corrections Deputy Commissioner, he was instrumental in implementing reforms to reduce the use of restrictive housing.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. He has served as Superintendent of three prisons in Washington State, as Regional Administrator, and probation Officer. He is currently a consultant for jail operations.

SUMMARY OF ARGUMENT

It is widely recognized within the corrections profession that transgender inmates and inmates who have previously been victimized face a greater risk of experiencing violence and sexual assault. Training standards, screening procedures, and data collection mandated by the Prison Rape Elimination Act (“PREA”), as well as the positions of professional corrections organizations and the day-to-day experiences of corrections officers, serve to make corrections officers well aware of the commonsense reality that inmates belonging to these two vulnerable groups are especially susceptible to attacks from other inmates. Sound correctional practice requires corrections officers to take subjective and overt threats of violence directed at particularly vulnerable prisoners seriously, to investigate these threats, and to take appropriate measures to proactively protect such prisoners from harm.

ARGUMENT

I. Correctional Staff Are Well Aware That Transgender Prisoners and Prisoners Who Have Previously Been Victimized Are At Substantial Risk of Sexual Abuse

Prisons are generally dangerous environments, but the danger is especially high for transgender prisoners and prisoners who have previously been victimized. Data from the Bureau of Justice Statistics (“BJS”), a data collection agency within DOJ, indicates that these two groups are about 8 and 3 times respectively more

likely to be sexually assaulted than other prisoners.¹ Similarly, a study from the University of California, Irvine’s Center for Evidence-Based Corrections found that 59% of transgender prisoners sampled reported having experienced sexual assault during their time in prison, which was 13 times the general population sample.²

This danger has been documented by government entities. The National Prison Rape Elimination Commission (“NPREC”), a body created by Congress to study sexual abuse in prison, produced an extensive report in 2009 which found that “most male-to-female transgender individuals who are incarcerated are placed in men’s prisons . . . [which] puts them at extremely high risk for abuse.”³ It also

¹ See ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES 2 (2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (finding that between 33.1% and 39.9% of transgender prisoners across three studies reported being sexually victimized by another inmate within a year or less of being surveyed); ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 10, 18 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (finding that 12.0% of previously victimized prisoners and 4.0-4.5% of the general population reported being sexually victimized by another inmate within a year or less of being surveyed).

² VALERIE JENNESS ET AL., UNIVERSITY OF CALIFORNIA, IRVINE CENTER FOR EVIDENCE-BASED CORRECTIONS, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 42 (2007), https://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

³ NAT’L PRISON RAPE ELIMINATION COMM’N REPORT 74 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

found that those who have experienced victimization are “at increased risk of further exploitation.” *Id.* at 71. Similarly, the National Institute of Corrections, an agency within the Federal Bureau of Prisons responsible for providing assistance to corrections institutions, released a policy report on incarcerated LGBTI individuals which found that transgender women are “highly vulnerable to sexual abuse” compared to the general population.⁴

The heightened risk to these particularly vulnerable groups of prisoners is common knowledge within the corrections profession. The National Institute of Corrections has recognized, “[c]orrections officials are aware of the particular vulnerabilities LGBTI individuals face.” *Id.* at 12.

One of the primary ways the corrections community has been made aware of the elevated risk of sexual assault for transgender prisoners and prisoners who have previously been victimized is through PREA. Since PREA’s passage in 2003, standards have been promulgated pursuant to PREA’s implementation regarding training correction staff and screening inmates for risk of victimization or abuse.

PREA states that “[t]he agency shall train all employees who may have contact with inmates on . . . [t]he dynamics of sexual abuse and sexual harassment

⁴ NAT’L INST. OF CORR., POLICY REVIEW AND DEVELOPMENT GUIDE: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PERSONS IN CUSTODY 4, 11 (2d ed. 2015), https://info.nicic.gov/sites/info.nicic.gov.lgbti/files/lgbti-policy-review-guide-2_0.pdf.

in confinement.” PREA National Standards, 28 C.F.R. § 115.31. The trainings developed by the National PREA Resource Center, a cooperative agreement formed in part by the Bureau of Justice Assistance, a component of the Office of Justice Programs within the Department of Justice, are designed to fulfill this requirement.⁵ One of the trainings developed to satisfy § 115.31 explicitly states that transgender prisoners and prisoners who have previously been victimized are particularly vulnerable. *Id.* at 41. The training materials also include statistics from the BJS regarding the rates of abuse experienced by LGBTI respondents and respondents who have previously been victimized. *Id.*

PREA-mandated screening procedures also inform corrections officers of the vulnerability of these groups. PREA standards require officers to determine both “[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming” and “[w]hether the inmate has previously experienced sexual victimization” when screening for their risk status upon entering a facility. PREA National Standards, 28 C.F.R. § 115.41. Virtually every corrections officer is briefed on these screening procedures, and is therefore

⁵ NAT’L PREA RES. CTR., UNIT 3, PART 1: PREVENTION AND DETECTION OF SEXUAL ABUSE AND SEXUAL HARASSMENT PLAN 1 (2014), https://www.prearesourcecenter.org/sites/default/files/content/unit_3.1_lesson_plan.pdf.

aware that both an inmate’s transgender identity and their prior victim status indicate that they are at a greater risk of harm.

The PREA standards also require that housing assignments for transgender prisoners be made on a case-by-case basis and reassessed at least twice a year “to review any threats to safety experienced by the inmate.” 28 C.F.R. § 115.42(c)-(d). PREA also requires transgender prisoners to have an opportunity to shower separately from other prisoners. *Id.* § 115.42(f). Finally, PREA requires facilities to take into consideration whether an incidence of assault was motivated by transgender status in every sexual assault investigation. *Id.* § 115.86(d)(2).

The prevailing understanding of corrections officials that transgender inmates, in particular, face an elevated risk of harm is reflected in the publications of professional corrections organizations. For instance, the American Correctional Association, the oldest and largest trade association and accrediting body for the corrections industry, has published articles and presentations highlighting the vulnerability of transgender prisoners.⁶ Similarly, the National Commission on Correctional Health Care has issued a position statement on transgender and

⁶ See David Radziewicz & Carole A. Mattis, *Providing Support Services to Transgender Inmates*, AM. CORR. ASSOC., CORRECTIONS TODAY, July/Aug. 2018, <https://perma.cc/D4JW-93VW>; AM. CORR. ASSOC., A SPECIAL SESSION WEBINAR, TRANSGENDER CARE IN CORRECTIONS: WHERE WE ARE AND WHERE WE’RE GOING (2018), <https://perma.cc/C8W7-K263>.

gender non-conforming prisoners acknowledging that members of this group are “common targets for violence.”⁷

Corrections officials have also been informed of the substantial risk to transgender prisoners by highly publicized cases. Shortly before Ms. Shorter’s assault in October of 2015, the danger to transgender inmates in prisons was being greatly reported and discussed.⁸ One of the many high-profile cases involving the sexual abuse of transgender inmates concerned Ashley Diamond, a transgender woman who was imprisoned in 2012. Ms. Diamond was placed in a facility with violent men, who raped her at least seven times.⁹ Ms. Diamond’s case received enough attention that the U.S. Department of Justice intervened on her behalf. *Id.* The case of Samantha Hill, another imprisoned transgender woman, likewise received media attention. Ms. Hill “experienced at least eight sexual assaults

⁷ NAT’L COMM’N ON CORR. HEALTH CARE, POSITION STATEMENT: TRANSGENDER, TRANSSEXUAL, AND GENDER NONCONFORMING HEALTH CARE IN CORRECTIONAL SETTINGS 2 (Apr. 2015), <https://web.archive.org/web/20200407164105/https://www.ncchc.org/filebin/Positions/Transgender-Transsexual-and-Gender-Nonconforming-Health-Care.pdf>.

⁸ See Kory Grow, *Elton John, Michael Stipe Defend Transgender Prisoners’ Rights*, ROLLING STONE (Apr. 8, 2015, 1:14 AM), <https://www.rollingstone.com/music/music-news/elton-john-michael-stipe-defend-transgender-prisoners-rights-177320/>.

⁹ E.g., Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men’s Prison*, N.Y. TIMES, Apr. 5, 2015.

across five federal prisons.”¹⁰ At one prison, Ms. Hill described her experience being “locked in a cell with [a violent offender] 24/7,” saying “it was dreadful, it was sad, it was scary, because I knew at nighttime every night, he was going to do what he was going to do to me.” *Id.*

Corrections officials are also informed of the vulnerability of transgender prisoners and prisoners who have previously been victimized through their day-to-day work experiences. Prisons are generally unsafe environments where men often demonstrate domination and aggressive behaviors (both random and systemic) in order to control other prisoners.¹¹ These behavior patterns often are motivated by self-protection. This creates a culture in which transgender prisoners are often referred to using derogatory slurs and subjected to physical and sexual abuse due to their perceived effeminacy.¹² Given these dynamics, it is not credible that a

¹⁰ German Lopez, *Prison is Horrifying. For Transgender People, it's Hell.*, VOX (Apr. 11, 2016, 8:30 AM), <https://www.vox.com/2016/4/11/11355702/prison-transgender>.

¹¹ See, e.g., American Medical Association, *Reports to the Board of Trustees*, 24 (2018), <https://www.ama-assn.org/system/files/2019-12/a18-bot-reports.pdf>; Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem – A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 TUL. J.L. & SEXUALITY 91, 105 (2006).

¹² See, e.g., Valerie Jenness et al., *Sexual Victimization Against Transgender Women in Prison: Consent and Coercion in Context*, 57 CRIMINOLOGY 603, 617 (2020), <https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12221> (detailing that transgender prisoners “report[ed] routinely being called a ‘faggot,’ ‘punk,’ and ‘bitch.’”); Sontag, *supra* note 20 (noting that prison officials called Ashley Diamond a “he-she thing”); SYLVIA LAW RIVERA PROJECT, IT’S WAR IN HERE: A

corrections officer with even passing familiarity with their work environment would be unaware that a transgender woman with a prior history of sexual victimization, like Ms. Shorter, was at a serious and operationally predictive risk of experiencing another sexual assault. Operationally, the courts have provided prison administrators with a wide range of authority over prisoners, especially when compared to the rights and protections available to individuals in the community. This variance is partially due to the need of prison administrators to have flexibility to ensure the basic and elementary protection of staff, prisoners, and the community. It is counterproductive for prison officials' use of this discretion to result in the product is random and systemic violence and sexual victimization.

II. Corrections Officials Have an Elemental Responsibility and Authority to Protect Particularly Vulnerable Prisoners

Corrections officials have the responsibility and authority to take precautions to protect prisoners who they know or perceive are vulnerable to physical violence and/or sexual abuse. As a corrections officer, protecting particularly vulnerable groups from sexual assault is not a matter of “best practices.” Instead, it is a fundamental requirement of the job.

REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 18, 23 (2007), <https://srlp.org/wp-content/uploads/2012/08/WarinHere042007.pdf>.

The Bureau of Prisons Transgender Offender Manual states that, pursuant to the PREA National Standards, a transgender prisoner's placement may "not jeopardize the inmate's health and safety," and that "[i]n making housing unit and programming assignments, a transgender or intersex inmate's own views with respect to his/her own safety must be given serious consideration."¹³ Accordingly, sound correctional practice requires corrections officers to take threats of violence directed at particularly vulnerable prisoners seriously, to investigate these threats, and to take appropriate measures to protect such prisoners from harm.

Protecting particularly vulnerable prisoners from sexual assault also yields broader penological benefits. When corrections officers listen to the concerns of vulnerable groups and take precautions to protect them, such as monitoring their safety, they increase their legitimacy as authority figures. This also abates predator prisoners (individually and as a group) from establishing their command authority over the prison and other prisoners. Additionally, these actions signal to other prisoners that abuse will not be tolerated and increase the safety of the facility for officers and prisoners alike.

In this case, Ms. Shorter's transgender identity, past victimization, and "at-risk" status all should have signaled to corrections officers that her concerns must

¹³ FEDERAL BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL 7 (2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>; *see also* 28 C.F.R. § 115.42(e).

have been taken seriously. *See Shorter v. United States*, No. 19-16627 (RMB-KMW), 2020 WL 4188455, at *1 (D.N.J. July 21, 2020); Dkt. No. 12, at 7. On numerous occasions, Ms. Shorter expressed her concerns about her housing both informally and formally.¹⁴ Nonetheless, Ms. Shorter was placed in an unlockable two-person cell far from the officers' station. *Id.* At one point, she was even housed with a known sex offender. *Id.* The corrections officials must have known they were exposing Ms. Shorter to substantial, unnecessary risk by making these decisions. Given the risk facing Ms. Shorter, the corrections officers should have addressed her concerns with urgency and acted to prevent her from being so vulnerable to harm.

CONCLUSION

As the Supreme Court recognized in *Farmer v. Brennan*, a case involving the rape of a transgender prisoner, sexual abuse of prisoners “serves absolutely no penological purpose.” 511 U.S. 825, 852 (1994). Corrections officers are made well aware that both transgender prisoners and prisoners who have previously been victimized are at a considerably higher risk of sexual assault through PREA-

¹⁴ Ms. Shorter initially expressed concerns to Counselor Hamel about being in a cell with eleven men. After she was moved to the unlockable cell with a sex offender, she wrote a grievance to the warden requesting she be transferred, submitted an expedited transfer request (with which staff in the Psychology Department said they agreed), and finally submitted a “Notice of Filing for Preliminary Declaratory, Injunctive Relief and a Temporary Restraining Order.” *Shorter*, 2020 WL 4188455, at *1-2.

mandated trainings and standards, the positions of professional corrections organizations, and their day-to-day work experiences. Sound correctional practice requires corrections officers to take threats of violence directed at particularly vulnerable prisoners seriously, to prevent and proactively investigate these threats, and to take appropriate objective measures to reasonably protect such prisoners from harm.

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CERTIFICATE OF COMPLIANCE

I, T. Keith Fogg, hereby state that, pursuant to FRAP 32(a)(7)(B)(i), the Brief of Amicus Curiae contains no more than 3,121 words, as counted by the word processing system used to prepare the Brief.

Dated: November 23, 2020

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule of Appellate Procedure 46.1(e), I, T. Keith Fogg, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: November 23, 2020

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CERTIFICATE OF PERFORMANCE OF VIRUS CHECK

I, T. Keith Fogg hereby certify that on November 23, 2020, I caused a virus check to be performed on the electronically filed copy of this brief using the following virus software: Windows Defender, Antivirus Version 1.327.1405.0. No virus was detected.

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CERTIFICATE OF SERVICE

I, T. Keith Fogg, hereby certify that on November 23, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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