No. 22-2927

In the United States Court of Appeals for the Eighth Circuit

PARENTS DEFENDING EDUCATION,

Plaintiffs-Appellants,

v.

LINN-MAR COMMUNITY SCHOOL DISTRICT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Iowa, The Hon. C.J. Williams
(Dist. Ct. No. 1:22-cv-0078-CJW)

BRIEF OF AMICI CURIAE MOMS FOR LIBERTY AND INSTITUTE FOR FREE SPEECH IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae Moms for Liberty and the Institute for Free Speech state that they are nonprofit corporations, have no parent companies, subsidiaries, or affiliates, and no publicly held company owns more than 10 percent of either of their stock.

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INTERESTS OF *AMICI CURIAE*

Moms for Liberty is a nonprofit organization whose mission is to organize, educate and empower parents to defend their parental rights at all levels of government. Moms for Liberty believes that parents, not government school officials, are primarily responsible for guiding all facets of their children's development, and that parents have the right to direct the education and upbringing of their children. Defending children from political coercion and indoctrination is of paramount concern to Moms for Liberty.

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to securing the First Amendment rights of free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Securing access to courts, protecting people from compelled speech, and preserving free expression are core aspects of the Institute's mission.[1]

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have provided written consent to the filing of this brief.

SUMMARY OF ARGUMENT

Standing is largely a practical doctrine. When the government declares that speech is punishable, standing to challenge that decree inheres in every person who would utter the forbidden words but for the ban. Because courts, like people, generally expect the government to enforce its laws, a would-be speaker's decision to remain silent rather than risk prosecution for unlawful speech is presumptively reasonable for purposes of pre-enforcement standing.

Defendants have not carried their burden to overcome this presumption. They have not committed themselves to a policy of non-enforcement, nor has the challenged policy been abandoned long enough to be deemed a dead letter. The district court also erred by failing to credit Plaintiffs' intention to speak, especially considering that Defendants stand ready to punish even unintentional violations. Plaintiffs have standing to challenge this just-enacted speech code.

That challenge should prove successful. The First Amendment bars government from picking ideological winners and losers, silencing one side of a debate to spare the feelings of the other, and compelling people to conform their speech to a worldview antithetical to their own as they

go about their daily social interactions. Speech codes policing students' political views are an especially pernicious form of viewpoint-based censorship and compulsion, no more appropriate in grade school than in graduate school.[2]

ARGUMENT

I. THE CHALLENGED POLICY'S VERY EXISTENCE ESTABLISHES PLAINTIFFS' STANDING TO BRING FIRST AMENDMENT CLAIMS.

"The First Amendment standing inquiry is lenient and forgiving." *Dakotans For Health v. Noem*, No. 21-2428, 2022 U.S. App. LEXIS 30236, at *6-*7 (8th Cir. Nov. 1, 2022) (internal quotation marks omitted). Courts acknowledge that individuals sustain an Article III injury-in-fact when they censor their speech owing to "a credible threat of prosecution." *281 Care Comm. v. Arneson*, 766 F.3d 774, 781 (8th Cir. 2014) (citation and internal quotation marks omitted). The district court erred in discounting the severity of Defendants' threatened enforcement.

While "imaginary or wholly speculative" enforcement threats cannot sustain pre-enforcement standing, *Animal Legal Def. Fund v. Vaught*, 8

[2] Moms for Liberty also endorses Plaintiffs' parental rights claims, but of necessity, this brief is limited to exploring the First Amendment issues.

F.4th 714, 719 (8th Cir. 2021) (internal quotation marks omitted), courts presume that the government enforces the law. "Standing to challenge laws burdening expressive rights requires only a credible statement by the plaintiff of intent to commit violative acts and a *conventional background expectation* that the government will enforce the law." *United States Telecom Ass'n v. Fed. Commuc'n Comm'n*, 825 F.3d 674, 739 (D.C. Cir. 2016) (emphasis added) (internal quotation marks omitted). "[T]he threat is latent in the existence of the statute." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 336 (5th Cir. 2020) (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003)).

Defendants in pre-enforcement cases may defeat the conventional background expectation of enforcement in two ways. "It is only evidence—via official policy or a long history of disuse—that authorities actually reject a statute that undermines its chilling effect." *281 Care Comm. v. Arneson*, 638 F.3d 628 (8th Cir. 2011). The burden of establishing such evidence lies with the government. *Id.* With respect to the "official policy" option, "representation[s]" that government officials "have 'no present plan' to enforce a statute [do] not divest standing" to

pursue a pre-enforcement challenge because such a "position [is] not binding and could change." *Id.* (internal quotations marks omitted).

Defendants have not even disclaimed interest in enforcing the challenged speech code, let alone formally committed themselves to non-enforcement. To the contrary, they have just adopted the speech code despite vigorous opposition. The reasonable presumption that Defendants will enforce their newly enacted law follows naturally. Courts routinely allow challenges to statutes immediately upon their effective date, without waiting for historical evidence of prosecution. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 861 (1997) (suit brought "immediately after the President signed the statute"); *Carhart v. Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005) ("[t]he day the President signed the Act into law, plaintiffs filed suit"), *rev'd on other grounds*, 550 U.S. 124 (2007). The government does not get one or several "free" pre-enforcement prosecutions under new laws.

And newly enacted laws, by definition, lack "a long history of disuse," which government can establish "only in extreme cases approaching desuetude." *281 Care*, 638 F.3d at 628 (citation omitted) (speech chilled notwithstanding seven years of nonenforcement); *cf. Epperson v.*

Arkansas, 393 U.S. 97, 102 (1968) (standing to bring religious freedom challenge where "statute is presently more of a curiosity than a vital fact of life"). The Fifth and Eleventh Circuit's decisions affirming pre-enforcement standing to challenge recently enacted campus speech codes, *Fenves*, 979 F.3d at 338; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120-22 (11th Cir. 2022), are consistent with this Court's precedent, the Supreme Court's teachings, and common sense. They should be followed here.

Balanced against the unrebutted expectation of enforcement stands the Plaintiffs' clear intent to violate the law. As Plaintiffs demonstrate, the record belies the district court's "puzzling[]" claim that they did not offer "sufficient specificity" as to "what their children might say." Pl. Br. 25 (quoting Add.19). While courts are obliged to assure themselves of standing, they should not strain to find ambiguity where none exists. "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). "It is not hard to sustain standing for a pre-

enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Fenves*, 979 F.3d at 331.

If anything, Plaintiffs understate their risk. "A First Amendment plaintiff does not always need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *281 Care*, 638 F.3d at 629.

> The Supreme Court has made clear that . . . at least when intent is not an element of a challenged statute that prohibits some category of false speech, the likelihood of inadvertently or negligently making false statements is sufficient to establish a reasonable fear of [enforcement].

Id. (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301-02 (1979)).

That is the case here. Defendants' speech code threatens to punish any student who "intentionally *or accidentally* uses the incorrect name or pronouns to refer to a person" for the crime of "misgendering," which Defendants allege to be "a form of bullying or harassment." App.301, R. Doc. 3-11 at 49 (emphasis added). "An intentional and/*or* persistent refusal by . . . students to respect a student's gender identity is a violation of [various] school board policies." App.298, R. Doc. 3-11 at 46 (emphasis added).

Never mind the profound social, political, philosophical, or religious disagreements about gender theory. Children begin distinguishing male from female faces in early infancy. Pickron, Charisse B. & Cheries, Erik W., *Infants' Individuation of Faces by Gender*, *Brain Sciences*, (July 11, 2019) https://doi.org/10.3390/brainsci9070163. And before gender theory came along, no one had to announce their pronouns—Standard English, like many languages, provides distinct pronouns for each sex. Yet Defendants' policy is premised on the notion that "gender identity" does not inexorably follow biological sex but rather is proclaimed by the self. In other words, Defendants impose strict liability on students for "incorrect" speech that does not consciously override their innate perception of reality, or even for speech that incorrectly guesses someone else's self-perception.

This is not only a recipe for enforcement actions. It compels careful students who do not want to run the risk of speaking "incorrectly" to ask others about their gender identity—to speak in ways they otherwise would not, to engage in conversations about gender theory that would not occur but for the speech code, and to participate in the practice of accommodating and conforming to a socio-political theory that they

might not otherwise accept, or even strongly reject. The fact that Plaintiff students *intend* to speak contrary to the speech code is just icing on the standing cake. The code's strict liability for accidental violations suffices to confer standing.

II. THE FIRST AMENDMENT BARS PUBLIC SCHOOLS FROM COMPELLING STUDENTS TO CONFORM THEIR SPEECH TO THE GOVERNMENT'S GENDER IDEOLOGY.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). And under our Constitution, "individuals are certainly free *to think* and *to say* what they wish about '[one's own concept of] existence,'" even if "they are not always free to act in accordance with those thoughts." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

While students may be free to identify as having genders that do not correspond to their biological sex, other students enjoy the same right to credit their innate perceptions of reality—and to speak their minds accordingly in addressing their classmates. Students cannot be compelled to speak in a manner that confesses, accommodates, and

conforms to the truth of an ideology they reject—even if that ideology's adherents are offended by any refusal to agree with them. Defendants' speech code "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

A. Pronouns convey ideological meaning.

"[G]ender identity [is] a hotly contested matter of public concern," *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021), but the notion that "titles and pronouns carry a message," *id.* at 507, is not. Although people have strong personal preferences as to how they should be addressed and discussed, the mode of referring to others is often fraught with social and political meaning. *See, e.g.*, Joseph Epstein, *Is There a Doctor in the White House? Not if You Need an M.D.*, Wall St. J. (Dec. 11, 2020 5:56 PM), https://www.wsj.com/articles/is-there-a-doctor-in-the-white-house-not-if-you-need-an-m-d-11607727380. Americans can call themselves "Lady Gaga" or "Sir Mix-a-Lot," but titles of nobility cannot carry official imprimatur. U.S. Const., art. I, § 9, cl. 8; *id.* § 10, cl. 7. No American may be required to refer to King Charles III as "His Majesty," even though he is indisputably a king whose status as such is

not conferred by self-identification (though abdication is always his option), and even if he were the sort of king who would take umbrage at being labeled a mere "he/him."

"Pronouns are the most political parts of speech." Teresa M. Bejan, *What Quakers Can Teach Us About the Politics of Pronouns*, N.Y. Times (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/sunday/pronouns-quakers.html. Seventeenth-century Quakers rebelled against the pronoun standards of their day, which proscribed what was then the second-person plural pronoun, "you," to address a higher-class individual, while assigning "thou" and "thee" to commoners; the egalitarian and humble Quakers used "thou" and "thee" with everyone, to some people's consternation. *Id.* "[Some] Quakers produced pamphlets . . . to argue that their use of 'thee' and 'thou' was grammatically—as well as theologically and politically—correct." *Id.*

Quakers were not alone in being "sensitive to the humble pronoun's ability to reinforce hierarchies by encoding invidious distinctions into language itself." *Id.* "[I]n the latter half of the twentieth century, gendered pronouns became imbued with new meaning," as "[t]he feminist movement came to view the generic use of masculine pronouns

as 'a crucial mechanism for the conceptual invisibility of women'" and a means of reenforcing prejudice. *Meriwether*, 992 F.3d at 508-09 (citation omitted).

Today, "the use of gender-specific titles and pronouns has produced a passionate political and social debate." *Id.* at 508. The Supreme Court recognizes that "gender identity" is among the "sensitive political topics [that] are undoubtedly matters of profound 'value and concern to the public.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Speech about this topic "'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'" *Id.* (quoting *Snyder*, 562 U.S. at 452). And pronouns are the quintessential means by which people express their views about gender identity.

"All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Meriwether*, 992 F.3d at 508. "Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity." *Id.*

Because people's pronoun usage reflects their beliefs and values surrounding this contentious topic, the use of non-standard pronouns is often viewed—by speakers and listeners—as acquiescence in a socio-political theory that many people profoundly oppose. The Fifth Circuit observed that "if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality." *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020). "Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity." *Id.* (citations omitted). A court "may unintentionally convey its tacit approval of the litigant's underlying legal position" in such cases by conforming its pronoun usage to a litigant's preferences. *Id.* (citations omitted).

Defendants acknowledge this in demanding that students' speech "respect" others' proclaimed gender identity, App.298, R. Doc. 3-11 at 46, by not "misgendering" them, App.301, R. Doc. 3-11 at 49. They are not alone. In *Meriwether*, the defendant "university recognize[d] that and want[ed] its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth."

Id. at 507. "But [professor] Meriwether does not agree with that message, and he does not want to communicate it to his students." *Id.* The Sixth Circuit upheld his free speech rights to refer to students with standard pronouns.

Linn-Mar's students—Plaintiffs' children—enjoy the same right to speak in accordance with the dictates of their conscience, not the dictates of competing gender theories.

B. The First Amendment protects students' rights to express controversial viewpoints about gender, including by using pronouns dictated by their conscience.

To be sure, "[t]he perspective enforced by [Defendant's] policies is extremely popular in many communities. And the speech barred by these [policies] is rejected by many as wrong, and even dangerous. But the First Amendment applies even to—especially to—speech that is widely unpopular." *Otto v. City of Boca Raton*, 41 F.4th 1271, 1272 (11th Cir. 2022) (Grant, J., concurring in denial of rehearing en banc).

Speech that offends no one requires no constitutional protection. The entire point of securing the right to free speech is to prevent political majorities from imposing their sensitivities on others. The First Amendment addresses the "grave peril posed by a policy that effectively

polices adherence to intellectual dogma." *Cartwright*, 32 F.4th at 1129 (Marcus, J., concurring).

Censors cannot silence their ideological opponents by claiming that their words are hurtful. "[R]egulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be. It is a 'bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). "Speech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (plurality opinion). "[A] law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (quoting *Tam*, 137 S. Ct. at 1751). The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Tam*, 137 S. Ct. at 1763 (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (collecting cases); *Brunetti*, 139 S. Ct. at 2299,

2301. "Giving offense is a viewpoint." *Tam*, 137 S. Ct. at 1763 (plurality opinion).

Although speech that falls outside the First Amendment's protection often happens to be offensive, mere offensiveness is not the basis for casting speech outside the First Amendment's protection. For example, "sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities," can amount to a Title IX violation. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (citation omitted). But this standard excludes damages "for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender." *Id.* at 652. And students cannot be punished over "the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

"It is clearly established that '[s]tudents in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Crozier v. Westside Cmty. Sch. Dist.*, 973 F.3d

882, 890 (8th Cir. 2020) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)); *Tinker*, 393 U.S. at 506. Students "may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511.

The Supreme Court recently reviewed the four specific grounds for limiting student speech at school: "(1) indecent, lewd, or vulgar speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes illegal drug use, (3) speech that others may reasonably perceive as 'bear[ing] the imprimatur of the school, such as that appearing in a school sponsored newspaper . . . [and, (4)] speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Mahoney Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021) (internal quotation marks omitted).

Outside these categories, "whatever the scope of a teacher's authority to limit classroom discussion, it is clear that students 'cannot be punished merely for expressing their personal views on the school

premises—whether in the cafeteria, or on the playing field, or on the campus during the authorized hours.'" *Crozier*, 973 F.3d at 891 (quoting *Hazelwood*, 484 U.S. at 266) (other citations omitted).

A student's expression of views on gender and sexuality by reference to a biological male with he/him pronouns, or reference to a biological female with she/her pronouns—however much "discomfort and unpleasantness" might "accompany [this] unpopular viewpoint," *Tinker*, 393 U.S. at 509—does not remotely approach any of the categories of forbidden school speech. Plaintiffs must be allowed to use Standard English pronouns at school, consistent with their conscience.

Defendants should also reflect on the fact that others may be equally offended by what *they* consider to be "misgendering." Striking down a municipal ban on therapy aimed at sexual orientation change efforts, the Eleventh Circuit cautioned that "[i]f the speech restrictions in these ordinances can stand, then so can their inverse . . . counseling supporting a client's gender identification could be banned." *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020).

> It comes down to this: if the plaintiffs' perspective is not allowed here, then the defendants' perspective can be banned elsewhere. People have intense moral, religious, and spiritual views about these matters—on all sides. And that is exactly why the First Amendment

> does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender.

Id.

C. The First Amendment protects school children from being compelled to espouse views that they reject.

Apart from barring discrimination against so-called "offensive" speech, "[t]he free-speech guarantee also generally prohibits the most aggressive form of viewpoint discrimination—compelling an individual 'to utter what is not in [her] mind' and indeed what she might find deeply offensive—and the Court has enforced that prohibition, too, in the public school setting." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (quoting *Barnette*, 319 U.S. at 634). Doubtless some of Barnette's classmates, whose fathers and brothers were fighting and dying in World War II, took umbrage at their fellow students' refusal to salute the flag. But the flag represents a country whose highest law forbids compulsory flag salutes.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. "Compelling individuals to mouth support for views

they find objectionable violates that cardinal constitutional command." *Janus*, 138 S. Ct. at 2463.

Defendants operate schools, not monasteries. It is unrealistic to expect students to refrain from speaking with or about each other; their use of pronouns is inevitable. Defendants' demand that students "respect" "gender identity" and refrain from "misgendering" compels students to speak particular messages—conversations about gender theory to gauge which pronouns they must use, and then, the pronouns themselves. The district court's proposed solution, that students use "they" instead of singular sex-specific pronouns, Add.22, is no solution at all. It still forces Plaintiffs to accommodate gender theory in their speech, while exposing them to risk under the challenged policy if the subjects of their speech do not share the district court's "they" position.

This Court should follow the Sixth Circuit's opinion in *Meriwether* and enjoin the compelled use of the government's preferred pronouns. Moms for Liberty members, like the Plaintiffs here, tend to share Prof. Meriwether's views about sex and gender. How others describe and view themselves is their own business. But whether parents—or more importantly, their impressionable school children—can be compelled to

mouth the words of gender theory and acknowledge the truth of that which they believe to be fundamentally false, is of profound concern to everyone. Indeed, the issue is broader than the gender debate. A government that can force people to deny their perception of reality might force people to do anything. "The Party told you to reject the evidence of your eyes and ears. It was their final, most essential command." George Orwell, 1984 at 162 (Houghton 2003). But here, the First Amendment gives effect to the plea, "let us at least refuse to say what we do not think!" Aleksandr Solzhenitsyn, *Live Not by Lies*, Feb. 12, 1974, https://www.solzhenitsyncenter.org/live-not-by-lies.

CONCLUSION

The District Court's order should be reversed.

Dated: November 10, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because it contains 4,011 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

The electronic version of the brief has been scanned for viruses and is virus-free.

/s/ Alan Gura
Alan Gura
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on November 3, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

/s/ Alan Gura
Alan Gura
Counsel for Amicus Curiae