22-1115-cr

To be argued by:
SARAH BAUMGARTEL

United States Court of Appeals
For the Second Circuit

Docket No. 22-1115-cr

UNITED STATES OF AMERICA,
Appellee,

-against-

BRIAN MAIORANA,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR HEARING *EN BANC* ON BEHALF OF DEFENDANT-APPELLANT BRIAN MAIORANA

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INTRODUCTION

Appellant Brian Maiorana's opening en banc brief explains why this Court should overrule *United States v. Truscello*, 168 F.3d 61 (2d Cir. 1999), and hold that a defendant must be specifically notified, at his sentencing hearing, in his presence, of all non-mandatory conditions of supervised release imposed as part of the sentence.[1] Overruling *Truscello* would bring this Circuit's law in line with that of most other circuits. It would better protect defendants' due process rights and the public's interest in observing criminal proceedings. And it would encourage sentencing courts to undertake the individualized assessment required by statute before imposing any discretionary condition of supervised release.

In response, the government advances three primary arguments for upholding *Truscello*. The government asserts that principles of *stare decisis* counsel against overruling *Truscello*; that the Circuit's current oral pronouncement rule is adequate, and that Maiorana's proposed rule would

[1] Maiorana's opening en banc brief is cited "EB." The government's May 16, 2025 response it cited "GB." The en banc appendix is cited "A."

not be meaningfully better; and that Maiorana's proposed rule would have made no difference in his own case. None of these points are correct.

ARGUMENT

I. *Stare decisis* does not require continued adherence to *Truscello*.

The government makes the unremarkable point that, in a system of law, courts should generally adhere to precedent. GB 28-35. But, as the government also recognizes, *stare decisis* "is not an inexorable command." GB 35 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). A court should not apply "*stare decisis* mechanically to prohibit overruling" an earlier decision. *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 310 (2d Cir. 2007) (quoting *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 695 (1978)). "[W]hen governing decisions are unworkable or are badly reasoned," a court should not be "constrained to follow precedent." *Payne*, 501 U.S. at 827-28 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)); *see also United States v. Ortiz*, 143 F.3d 728, 729 (2d Cir. 1998) (overruling precedent based on persuasive new arguments that a prior case "was incorrectly decided").

Generally, in revisiting precedent, a court should consider (i) the quality of the prior decision's reasoning; (ii) the workability of the rule

established; (iii) the prior decision's consistency with other related decisions; (iv) legal developments since the decision; and (v) reliance on the decision. *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020); *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 203 (2019). "The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). That is because in this context, a court itself—and not the legislature—must usually correct a prior bad decision. *See, e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 63 (1996); *Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009). It is also because changes in criminal procedural rules do not implicate the reliance interests of private parties or alter the laws that "serve as a guide" to private behavior. *See Knick*, 588 U.S. at 205.

These considerations all support overruling *Truscello*, and largely track the arguments in Maiorana's opening en banc brief: *Truscello* was poorly reasoned and has proven difficult to apply. EB 28-30, 33-36. *Truscello* is at odds with the law in most other circuits and has become more of an outlier

over time. EB 25-26. And, contrary to the government's suggestion, there is no true "reliance" on *Truscello*.

A. *Truscello* was poorly reasoned and has proven unworkable.

Maiorana's en banc brief details the problems with *Truscello* and with the confusing oral pronouncement regime it has spawned in this Circuit. EB 28-36.

While the law requires criminal sentences to be orally pronounced, in a defendant's presence, *Truscello* created an exception to this rule for certain conditions of supervised release. EB 16-25. This exception has expanded, erratically, over time. EB 23-24, 33-36.

The theory of *Truscello* and its progeny is that certain discretionary conditions are "generally" appropriate in every case, "necessary" to supervised release, or "presumed suitable in all cases," such that these conditions do not need to be announced at sentencing; they are simply "implicit" in the concept of supervised release. *See Truscello*, 168 F.3d at 63-64; *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002); EB 22-24.

The problem is that *Truscello* and its progeny are unmoored from anything in the supervised release statute. Section 3583(d) of Title 18 sets out a limited number of mandatory conditions that must be imposed as part of supervised release. EB 20-21. Any additional condition is discretionary and is supposed to be imposed only after an individualized consideration of the "history and characteristics of the defendant" being sentenced. *See* 18 U.S.C. § 3583(d)(1); EB 20-21. In other words, apart from a few mandatory conditions, the supervised release statute does not permit a court to "presume[]" that additional conditions are "necessary" or "generally" appropriate in every case. So, at the outset, *Truscello*'s reasoning lacks support in the text of the governing statute.

Indeed, while the government initially claims that *Truscello* is "not untethered from the [supervised release] statute," GB 10, it later admits that *Truscello* "declined to structure its approach according to the mandatory-versus-discretionary distinction drawn in the text of § 3583(d)," GB 13.

The result is a judge-made rule that has proven unworkable. EB 33-35. The government's own attempts to summarize *Truscello*'s rule only

underscore the rule's incoherence. Per the government, *Truscello* and its progeny hold that oral pronouncement is not required for conditions that are "generally appropriate in all cases," "plainly appropriate to specific defendants," "otherwise essential to the functioning of the system of supervised release," "routine," "administrative," "basic," or which "do not implicate defendants' fundamental rights."[2] GB 2, 15-16, 21, 34. In contrast, oral pronouncement is required for conditions that are not "necessary," not "foreseeable," or "non-routine and burdensome." GB 16, 21.

And under *Truscello*'s regime, who decides which conditions are "generally appropriate," "plainly appropriate," "necessary," "essential," and "routine"? Not Congress: The statutory framework distinguishes only mandatory versus discretionary conditions. Section 3583(d) does not

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[2] The government invents from whole cloth this idea that certain common supervision conditions do not "implicate defendants' fundamental rights," GB 34. This is wrong. Take two simple examples: Individuals have fundamental constitutional rights to travel interstate and to associate with others for a common purpose. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974); *Robert v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Yet so-called "standard" supervision conditions impinge both rights.

characterize any conditions as "generally appropriate," "plainly appropriate," "basic," "routine," or not "burdensome."

Nor does the Sentencing Commission decide: As the government acknowledges, since *Truscello*, this Court has declined to predicate its oral pronouncement rules on "the way certain conditions are classified in the [Sentencing] Guidelines." GB 13-14; *see also id.* 15 (noting this Court has "dispensed with the oral pronouncement of conditions" "regardless of how the Sentencing Commission has chosen to characterize the conditions").

Not even sentencing courts themselves decide: Even if a sentencing court determines that it need not pronounce a certain condition perceived to be "basic" or "routine," this Court will reverse that decision if it believes the lower court has miscategorized the condition. *See, e.g.*, *United States v. Washington*, 904 F.3d 204, 208 (2d Cir. 2018) (polygraph testing); *United States v. Meadows*, No. 22-3155, 2025 WL 786380, at *5 (2d Cir. Mar. 12, 2025) (summary order) (electronic search and drug treatment conditions); *United States v. Singh*, 726 F. App'x 845, 850 (2d Cir. 2018) (summary order) (financial disclosures).

Instead, under *Truscello*, this Court itself has been left to mediate, on an ad hoc basis, these various categorical distinctions. Predictably, this has led to a lack of clarity and uniformity among district courts—and even among different panels of this Circuit—as to which conditions must be orally pronounced versus not. EB 33-35.

The government advocates sticking with *Truscello* because it has been "repeatedly—and recently" cited by this Court, GB 31. But part of why this Court finds itself having to repeatedly cite *Truscello* some 25 years later is that the vagueness of *Truscello*'s rule makes it difficult for lower courts to administer. As a result, this Court keeps being called upon to adjudicate which conditions must be orally pronounced.

Overruling *Truscello*, and instead requiring oral pronouncement of all non-mandatory conditions, would create a bright-line rule, based on the governing statute, that would be easier for lower courts to follow.

B. Developments since *Truscello* support abandoning its rule.

Another consideration in deciding whether to overrule a precedent is legal developments since the prior case was decided. Again, this factor

favors overruling *Truscello*, an outlier that has only "become lonelier with time," *Ramos*, 590 U.S. at 111. Today nine circuits apply a different rule—the rule Maiorana advocates. EB 25-27.

And in adopting this different rule, multiple circuits have explicitly rejected this Court's reasoning in *Truscello* and its progeny. *See, e.g.*, *United States v. Thompson*, 777 F.3d 368, 378 (7th Cir. 2015) ("It is not correct, however, as has been suggested, that all the standard conditions are 'basic administrative requirement[s] essential to the functioning of the supervised release system.' *United States v. Truscello*[.]"); *United States v. Diggles*, 957 F.3d 551, 557 (5th Cir. 2020) (en banc) (repudiating prior Fifth Circuit decisions that followed *United States v. Asuncion-Pimental*); *United States v. Rogers*, 961 F.3d 291, 298-99 (4th Cir. 2020) (agreeing with the Fifth Circuit that Second Circuit's sometimes "byzantine distinctions" between different categories of discretionary conditions "miss the point," because "[e]ither conditions are mandated by statute, or they are not" and if they are not, "then we cannot deem them 'implicit' in every oral sentence imposing a term of supervised release"); *United States v. Geddes*, 71 F.4th 1206, 1215 n.4 (10th Cir. 2023)

("[w]e acknowledge and decline to follow the Second Circuit's holding in *United States v. Truscello*"); *United States v. Matthews*, 54 F.4th 1, 5-6 (D.C. Cir. 2022) (stating "[w]e respectfully disagree" with *Truscello* that certain "standard conditions need not be orally pronounced because they are 'implicit in an oral sentence imposing supervised release'" or "form the administrative backbone of supervised release").

This sort of express rejection of a decision by this Court's sister circuits has previously led it to overturn precedent, *see, e.g.*, *United States v. Bedi*, 15 F.4th 222, 231 (2d Cir. 2021), and the Court should do so again here. Moreover, given the consistency of these other circuits' holdings, and their rejection of *Truscello*, the government's assertion that this Court is not really an "outlier" on this issue and that there is no true "split" between this Circuit and others, *see* GB 17, 19, simply ignores reality.

On top of these legal developments, social science research over the last two decades has fatally undermined *Truscello*'s reasoning. *Truscello* is premised on the idea that numerous discretionary supervision conditions

are "essential to the functioning" of supervised release and "clearly necessary" in every case. *See Truscello*, 168 F.3d at 63-64.

But that is wrong. *See* EB 40-43. Several amici have submitted briefs to this Court in support of overturning *Truscello*, including an organization called Executives Transforming Probation and Parole (EXiT), a coalition of "former and current supervision executives" and others committed to improving community supervision systems.[3] *See* Brief for Executives Transforming Probation and Parole et al. as *Amicus Curiae* 2. EXiT's brief, joined by the ACLU and the NYCLU, explains that many discretionary supervision conditions, including the sort of "standard" conditions covered by *Truscello*, are not necessary for effective community supervision and are not appropriate for every defendant. *See id.* 5-8. In fact, research developed over the last 25 years shows that "imposing a high number of standard conditions counterproductively *impedes* successful reentry." *Id.* 5. This

[3] Amici who support overruling *Truscello* include Executives Transforming Probation and Parole (EXiT), the American Civil Liberties Union (ACLU), the New York Civil Liberties Union (NYCLU), the Federal Defender's Office for the District of Connecticut, and Clinical Law Professors.

research has led EXiT "and other leading supervision experts to advocate for downsizing supervision conditions," to ensure that conditions are adequately "tailored to the individual's offense behavior, needs, and goals. … This evidence-based, common-sense approach protects public safety while reducing barriers to successful reentry."[4] *Id.* 6-7.

In other words, research has led supervision experts to advocate for more individualized, narrow tailoring of conditions, and taught them not to assume that a litany of "standard" supervision conditions is necessary and should be imposed on every defendant. This research is entirely consistent with the legal framework established by the federal supervised release statute, 18 U.S.C. § 3583(d), which requires an individualized assessment before imposing any discretionary supervision condition. But it undermines the reasoning of *Truscello*.

[4] EXiT, the ACLU, and the NYCLU also explain some of the burdens so-called "standard" conditions can create for individuals on supervised release. *Id.* 8-19.

C. There are no significant "reliance" concerns associated with changing a rule of federal criminal procedure.

Finally with respect to *stare decisis*, the government is wrong that district courts' "reliance" on *Truscello* should prevent overruling this decision. *See* GB 30 (arguing *Truscello* has been "relied upon by district courts throughout the Circuit"); *id.* 31 ("district courts have relied on *Truscello* for over two-and-a-half decades").

When courts discuss "reliance" as a reason to adhere to precedent, they generally mean the reliance of private parties; they do not mean the fact that courts have thus far followed an existing procedural rule. As the Supreme Court explained, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved …; the opposite is true in cases … involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828 (internal citations omitted); *accord Ramos*, 590 U.S. at 107 (explaining that reliance concerns generally relate to "prospective economic, regulatory, or social disruption"); *Pearson*, 555 U.S. at 233 (finding that "[r]evisiting precedent is particularly appropriate" where "the precedent consists of a judge-made rule" that does not impact

"cases involving property and contract rights"). A court may more readily reverse a decision related to criminal procedure, like *Truscello*, because such reversal does not implicate the reliance interests of private parties: no one "has signed a contract, entered a marriage, purchased a home, or opened a business based" on the old procedural rule. *See Ramos*, 590 U.S. at 107.

And while a new rule potentially affects pending criminal cases, as "new rules of criminal procedure[] usually do," that is not a good reason to avoid correcting a bad precedent or to decline to vindicate the fundamental constitutional rights of criminal defendants. *See id.* at 108-10. Moreover, because new rules of criminal procedure generally do not apply retroactively, *see, e.g.*, *id.*, the impact of this sort of rule change is limited.

In sum, all the factors courts consider in revisiting precedent militate in favor of overruling *Truscello*.

II. Overruling *Truscello* would improve sentencing procedures and encourage individualized consideration of supervision conditions.

Apart from *stare decisis*, the government advances a hodgepodge of other arguments in support of upholding *Truscello*. Some are contradictory; none are convincing.

In discussing *stare decisis* concerns, the government argues that district courts have relied on *Truscello* and "faithfully" applied it by "declining to orally impose standard conditions of supervised release." *See* GB 30-32. But elsewhere in its brief, the government asserts that overruling *Truscello* would be pointless and "mostly preserve the status quo," because Maiorana's proposed oral pronouncement rule is already "being implemented today around the Circuit" by some district courts, GB 24, and ruling for Maiorana would "merely accelerat[e]" this process, GB 22.

This sounds more like an argument in favor of Maiorana's position than against it. Some courts in this Circuit do already go beyond the bare requirements of *Truscello* and orally pronounce all discretionary supervision conditions. This underscores that Maiorana's proposed rule is not unduly burdensome and that it could be easily implemented by other courts.

And importantly, while some courts in this Circuit do pronounce all discretionary conditions, others do not. The purpose of overruling *Truscello* *would* be to accelerate lower courts' uniform adoption of a broader oral pronouncement rule, to better protect defendants' due process rights.

The government next frets that overruling *Truscello* would do both too much and not enough. On the one hand, the government laments that this would make sentencings less efficient by increasing "the amount of verbiage a district judge has to recite," and that courts should not have to "recite every [] condition verbatim." GB 33-34. On the other hand, the government disputes that Maiorana's rule would have the salutary effects he claims because he does not contend that district courts should be required to recite every imposed condition verbatim. *See* GB 2, 34 n.7.

Contrary to these complaints, and as other circuits have recognized, Maiorana's proposed rule strikes the appropriate balance: it encourages judges to undertake the individualized consideration required by statute before imposing any discretionary condition; it ensures defendants have adequate, specific notice of any proposed conditions, along with a meaningful opportunity to make timely objections; and it provides a mechanism for judges to impose conditions in an efficient manner.

Relatedly, the government speculates that overruling *Truscello* would not actually "encourage[e] [sentencing judges] to make individualized

assessments of defendants' needs for supervised release," arguing that "nothing indicat[es] that judges in this Circuit are neglecting that responsibility" now. GB 25.

To start, the limited available data indicates that judges likely are neglecting this statutory duty: as amicus explains, data regarding the imposition of supervised release suggests that "rather than tailoring non-mandatory conditions of supervised release, historically many sentencing courts reflexively imposed the entire list [of 'standard' conditions] without regard to whether all of the conditions are necessary in a particular case." Brief for Federal Defender's Office for the District of Connecticut as *Amicus Curiae* 7 (describing data from the Sentencing Commission and a 2025 study by the Arthur Liman Center for Public Interest Law at Yale Law School).[5]

And the critical point here, which the government ignores, is that *Truscello* fosters such dereliction. *Truscello* itself characterizes numerous

[5] This study, *Collecting Conditions: A Snapshot Of Supervised Release In 2023 In The U.S. District Court For The District Of Connecticut*, is available at the Liman Center's webpage: https://law.yale.edu/centers-workshops/arthur-liman-center-public-interest-law.

discretionary conditions as mere "boilerplate" that is "almost uniformly imposed." 168 F.3d at 63. And by allowing judges to impose these conditions for the first time in a written judgment, without oral pronouncement, *Truscello* creates a system where the conditions may never be addressed or even identified at the defendant's sentencing hearing.

Overruling *Truscello* would thus repudiate the idea that discretionary conditions are simply "boilerplate" and help prompt sentencing courts and the parties to engage in the more meaningful, individualized consideration of discretionary conditions that § 3583(d) requires. Experience shows that this sort of individualized consideration of conditions at the sentencing hearing can help avoid imposition of unnecessary or unduly burdensome conditions, and can contribute to lower rates of violations and greater success on supervised release. *See* Brief for Federal Defender's Office for the District of Connecticut as *Amicus Curiae* 12-13.

The government also argues that Maiorana's proposed oral pronouncement rule is "unclear" and will invite a regime that "remains a mystery." GB 23.

But there is nothing mysterious about a legal rule that has been implemented by nine other circuits; a rule that is thus already used by nearly all federal sentencing courts. These other circuits have described in detail how the rule works. *See* EB 25-26, 36-37. And as discussed in the next section, Maiorana's own case shows how adopting this majority rule would make a difference to defendants in this Circuit.

III. Maiorana's case shows the importance of overruling *Truscello*.

Towards the end of its response, the government asserts that overruling *Truscello* "would be particularly futile in this case," because it claims Maiorana's proposed rule would not have benefited him. GB 36. To the contrary, Maiorana's case shows why overruling *Truscello* is necessary and how a different legal regime would improve sentencing procedures within the Circuit.

Maiorana did not receive any specific notice of all the supervision conditions his sentencing court was contemplating, and most of the imposed conditions were not pronounced at his sentencing hearing. Instead, they appeared for the first time in his written judgment.

Contra the government, GB 36, Maiorana's plea agreement did not inform him of the supervised release conditions that would be imposed. The plea agreement stated only that, as a result of pleading guilty, Maiorana faced a maximum possible term of three years of supervised release, followed by up to two more years in prison "if a condition of release is violated"; the agreement did not specify which, if any, supervision conditions would be imposed on Maiorana. A.17.

Similarly, at his plea allocution, Maiorana was told only that, based on his guilty plea, he could be sentenced to supervised release, which "may" include "restrictions on [his] liberty, including travel limitations, requirements that [he] report to a probation officer, prohibition on carrying guns and other weapons, and other restrictions." A.53. Like the rest of the plea allocution, this warning was designed to inform Maiorana of the potential maximum penalties he faced by pleading guilty. The magistrate judge conducting this allocution did not (and could not) tell Maiorana what his actual sentence would be. The government's suggestion that a Rule 11

plea colloquy can somehow substitute for the actual pronouncement and imposition of sentence, *see* GB 6-7, 36, is baseless.

Further, although this Court has encouraged district courts to disclose contemplated supervision conditions to defendants and their counsel in advance of sentencing, some courts still do not do this. Maiorana's sentencing court did not provide him or his counsel with advance notice of the supervision conditions the court was considering. Nor did Maiorana's presentence report list these conditions: although the report included six proposed "special conditions," it did not include any additional proposed conditions; in particular, it did not include the 13 "standard," discretionary conditions that were ultimately added in Maiorana's written judgment.

These 13 discretionary conditions also were never discussed or clearly imposed during Maiorana's sentencing hearing. The court stated that there would be unspecified "general conditions" that would be "part and parcel of the judgment." A.106. But the court did not reference the Sentencing Guidelines' "standard" conditions, U.S.S.G. § 5D1.3, or otherwise identify the 13 discretionary conditions that it later included in the written judgment.

Nonetheless, according to the government, under *Truscello* this procedure was fine: it does not matter that Maiorana did not receive specific notice of these conditions, and that the district court did not orally impose them; the conditions are simply inherent in any term of supervised release.

In contrast, under Maiorana's proposed rule, this procedure would be inadequate. The district court's vague reference to additional "general" conditions would not be sufficient to constitute an oral pronouncement of the 13 detailed conditions that later appeared in the written judgment.

Under Maiorana's proposed rule—the rule followed by most other circuits—to lawfully impose these additional discretionary conditions, the judge would need to specifically consider whether each condition was appropriate for Maiorana as an individual, and orally impose each condition at the sentencing hearing, in his presence.

To orally impose these conditions, the court could read them aloud at sentencing. Or, if each proposed condition had been included in the presentence report or another document provided to Maiorana and his counsel in advance of sentencing, the judge could alternatively impose the

conditions by specifically referencing them in this document. For example, at the sentencing hearing, the court could verify that Maiorana had reviewed the presentence report, and the proposed conditions included in the report; ask if there were any objections to the proposed conditions; and state that he was imposing the conditions listed at particular pages or paragraphs of the presentence report. There's nothing mysterious about it.

CONCLUSION

In pressing this Court to adhere to *Truscello*, the government asserts that the Court should not "reopen for debate what details of a defendant's post-release experience are significant enough to implicate his rights." GB 34. This bizarre statement suggests that some supervised release conditions are not "significant enough to implicate [a defendant's] rights." But of course, every supervised release condition implicates a defendant's rights. These conditions touch every aspect of a defendant's post-prison life, constraining where he may travel, where he lives, who he may associate with, and how he spends his time. And regardless whether a condition is categorized as special, not-so-special, or standard, all conditions, once

imposed, carry the same force of law: a defendant is required to adhere to the condition, often for years, and can be reimprisoned for additional years if he does not.

Supervised release conditions are thus a significant component of a defendant's sentence. They should not be treated as mere afterthoughts, which somehow do not "implicate" the defendant's "rights."

For the reasons detailed in Maiorana's opening en banc brief and this reply, the Court should overrule *Truscello* and hold that a sentencing court must orally pronounce any discretionary condition of supervised release imposed as part of a sentence.

Dated: New York, New York
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Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of this Brief has been served electronically on the United States Attorney/E.D.N.Y.; Attention: **ANDREW M. RODDIN, ESQ**., Assistant United States Attorney, 271 Cadman Plaza East, Brooklyn, NY 11201.

Dated: New York, New York
May 23, 2025

/s/ Sarah Baumgartel
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32 because this brief contains 4,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 2. This brief complies with the typeface and style requirements of Fed. R. App. P. 32 because this brief has been prepared in a monospaced typeface using Microsoft Word with 14 characters per inch in Palatino Linotype type style.

Dated: New York, New York
May 23, 2025

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