No. 20-3599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL A. WOOD,

Plaintiff-Appellant

v.

SERGEANT CHAD EUBANKS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio
No. 3:18-CV-00168

Brief of *Amicus Curiae* the American Civil Liberties Union of Ohio Foundation in Support of Plaintiff-Appellant Michael A. Wood

David J. Carey
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972
dcarey@acluohio.org

Elizabeth Bonham
Freda J. Levenson
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION
4506 Chester Ave.
Cleveland, OH 44103
(614) 586-1972
ebonham@acluohio.org
flevenson@acluohio.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the American Civil Liberties Union of Ohio Foundation is a nonprofit entity that does not have a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in *amicus curiae*.

/s/ David J. Carey
David J. Carey

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INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Ohio Foundation ("ACLU of Ohio") is a nonprofit, nonpartisan membership organization devoted to protecting the basic civil rights and liberties of all Americans. For nearly a century, the ACLU of Ohio and its national affiliate organization, the American Civil Liberties Union, have litigated questions involving civil liberties in the state and federal courts, helping to establish dozens of precedents that today form part of the basic framework of our constitutional jurisprudence. The right to free expression generally, as well as protection against governmental restrictions of speech based on its content in particular, are of special concern to the ACLU, which has been at the forefront of numerous state and federal cases addressing these rights and interests. These rights are directly threatened by the District Court's decision in this case.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel certifies that no counsel for a party authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person or entity other than the ACLU of Ohio, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Over the decades since the fighting-words exception to First Amendment protection was established in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), the Supreme Court, this Court, and other federal courts have developed a robust body of case law both clarifying and—inexorably—narrowing it. Strong consensus among federal courts provides that the exception is at its narrowest with speech directed to law enforcement officials, who are trained and expected to exercise restraint rather than responding to insults with immediate violence.

Under that federal precedent, Appellant Michael Wood's statements to and around Clark County law enforcement were well within the bounds of clearly established First Amendment protection, and so the officers lacked probable cause to arrest him. In finding otherwise, the District Court did not merely misread that precedent. It failed to consult it at all. Its free speech analysis relied solely on state court decisions, and allowed these to supplant binding federal law on the question of whether the arresting officers had probable cause to arrest Mr. Wood.

That approach is backwards, of course. Constitutional supremacy requires that there can be no probable cause to arrest someone for First Amendment protected speech, which is a question of federal rather than state law. In this case, the District Court's error was both determinative and dangerous. Ohio courts frequently apply a broader fighting words exception—and thus, a less robust degree of protection for

speech—than federal First Amendment jurisprudence requires in factual contexts like this one. By relying exclusively on state cases, the District Court not only reached the wrong result in this instance, but imported faulty analysis from state court into the federal courts on a federal constitutional question.

The ACLU of Ohio urges this Court to reverse, and to clarify that federal First Amendment doctrine—which is, correctly, more protective than the state law cited by the District Court—is binding on the issue of whether Mr. Wood's speech was protected by the First Amendment, and accordingly on whether his arrest was lawful.

ARGUMENT

I. The District Court Erred By Deferring to State Courts on Federal Questions of Probable Cause and Free Speech Protection

Mr. Wood's Fourth Amendment claim is before this Court on appeal from a qualified immunity ruling that granted summary judgment for the defendant police officers. In this posture, the Court is to examine, *de novo*, the legal question of whether the officers violated Mr. Wood's constitutional right to be free from unlawful arrest and if so, whether the right was clearly established at the time. *See, e.g. Jones v. City of Elyria,* 947 F.3d 905, 913 (6th Cir. 2020). Here, Mr. Wood's Fourth Amendment false arrest claim is premised upon a question of clearly established First Amendment law: whether Mr. Wood's speech—the basis both for his ejection from the county fairgrounds where he came to criticize his government,

and for his subsequent arrest—was constitutionally protected. If it was, then there could be no probable cause for his arrest, a conclusion which requires reversal.

The Magistrate Judge's analysis of Mr. Wood's false arrest claim was correct and the District Court's was wrong. The District Court applied state law in analyzing whether probable cause exists for an arrest and whether the First Amendment protects speech under state law. But both questions are both properly questions of federal law. The Magistrate, who determined these questions in terms of federal law, was not mistaken. *Compare* Report and Recommendation, R. 39, PAGEID # 314–319, *with* Opinion, R. 60, PAGEID # 555–561.

The District Court did begin its analysis of Mr. Wood's false arrest claim with the correct threshold question of whether Mr. Wood could demonstrate lack of probable cause. Opinion, R. 60, PAGEID # 555. *See also* Report and Recommendation, R. 39, PAGEID # 310; *Harmon v. Hamilton County,* 675 F. App'x. 532, 542–43 (6th Cir. 2017) (citations omitted). But then it made a preliminary error. Citing two non-binding cases, it conflated federal probable cause analysis with state criminal law analysis:

> The issue of probable cause (or arguable probable cause) turns on whether a reasonable officer could interpret Ohio's disorderly conduct statute to confer probable cause to arrest Plaintiff.

R. 60, PAGEID # 556. This mistaken premise was the first step in its derailment of its analysis of the false arrest claim, which went awry in two ways.

One error was conducting the probable cause analysis exclusively under Ohio law. Although "[s]tate law defines the offense for which an officer may arrest a person … federal law dictates whether probable cause existed for an arrest." *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210, 215 (6th Cir. 2011). *See also D.D. v. Scheeler*, 645 F. App'x. 418, 424–25 (6th Cir. 2016) (overturning probable cause determination using this principle); *Scheffler v. Lee*, 752 F. App'x. 239, 244 (6th Cir. 2018) (same). In the case at hand, where the only purported basis for Mr. Wood's arrest was his speech, the probable cause analysis for the false arrest claim is contingent on whether his speech was protected by the First Amendment. If it was—and it was—there could be no probable cause regardless of whether state law purported to criminalize Mr. Wood's conduct. *See, e.g.*, *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997). Put another way, the District Court never needed to reach the issue of whether Mr. Wood violated the letter of state law; the fact that his speech was protected by the First Amendment is the end of the probable cause inquiry.

The District Court did note this basic principle. *See* R. 60, PAGEID # 556 ("[i]t is—and was at the time of Plaintiff's arrest—well established that 'an officer may not base his probable cause determination on speech protected by the First Amendment'") (quoting *Kinkus v. Vill. of Yorkville*, 453 F. Supp. 2d 1009, 1014 (S.D. Ohio 2006)). But despite having done so, it then failed to conduct any analysis of Mr. Wood's federal constitutional rights. Instead, it merely noted that the state

statute "has been interpreted … to be consistent with the First Amendment," R. 60 at PAGEID # 557, and went on to couch its analysis in the statute only. Though it is true that state and federal courts have "narrowly construed" Ohio's disorderly conduct statute "so as to maintain its constitutionality," *Carr v. Bradley,* No. 2:07-cv-01053, 2009 WL 937145, at *2 (S.D. Ohio Apr. 2, 2009), this does not insulate the statute from ever being applied in a way that violates the First Amendment. The federal court still had an obligation to conduct its own constitutional analysis. Having conflated the disorderly conduct statute with the First Amendment itself, the District Court went on to ignore the latter, applying a purely state-law analysis to what is properly an independent constitutional question.

The District Court's state law analysis also contained a second error: the Court improperly deferred to state law on a constitutional question embedded within the state law. Although Ohio's disorderly conduct statute has been found facially constitutional, at least so long as it is not applied in a manner that exceeds the First Amendment standard for fighting words, *see, e.g.*, *State v. Hoffman*, 57 Ohio St.2d 129, 387 N.E.2d 239, 242 (Ohio 1979), this does not mean that state case law controls the reach of that statute in federal court. Quite the opposite, in fact: when a disorderly conduct arrest is based on speech, the federal court must analyze whether that speech is protected under the federal constitution. If a state's interpretation of its law cannot be reconciled with the First Amendment, the state interpretation must

give way. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 376 (2003) (state court interpretation of state statute violated the First Amendment); *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (state court's construction of state statute violated the First Amendment).

Whether such a conflict has occurred in a particular instance is a question of federal law, not state. *See, e.g. Jolivette v. Husted*, 694 F.3d 760, 773 (6th Cir. 2012) (Merritt, J. dissenting) (when state case law implicates First Amendment, a federal question arises). Here, the District Court disregarded federal supremacy on the embedded constitutional issue, resting instead on state decisions. *See* R. 60 at PAGEID # 558–59. But federal courts owe state courts no deference on an issue of federal constitutional interpretation. *E.g.*, *Commodities Export Co. v. Detroit Intern. Bridge Co.*, 695 F.3d 518, 528 (6th Cir. 2012) (citing *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 455 (6th Cir. 2007) ("a state court's opinion on an issue of federal law … is entitled to no deference whatsoever"). "When state law creates a cause of action, the state is free to define [it] … unless, of course, the state rule is in conflict with federal law." *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) (citing U.S. Const., Art. VI, cl. 2). A federal court cannot find probable cause just because a state court would. To the contrary, the federal court is bound by the "reasonableness" requirement of the federal Fourth Amendment and, here, the speech protections of the First. *See Wright v. City of Euclid*, 962 F.3d 852, 873–75 (6th Cir. 2020)

(overturning probable cause finding, citing federal constitutional standards); *Jones*, 947 F.3d at 914 (same).

With these double errors, the District Court twice sidestepped federal First Amendment jurisprudence. As discussed below in Section II, that jurisprudence would have dictated the opposite result: Mr. Wood's speech was protected, and so his Fourth Amendment false arrest claim cannot fail on qualified immunity grounds at summary judgment. This Court "will not grant immunity to a defendant if no reasonably competent peace officer would have found probable cause." *Leonard v. Robinson,* 477 F.3d 347, 255 (6th Cir. 2007).[1]

II. The District Court's Error Brought Erroneous State Court Analysis Into the Federal Courts

Federal courts raise the already-high bar for ordinary fighting words considerably in factual scenarios that, like this one, involve words directed at the police. The possibility that speech to police constitutes fighting words is all but

[1] The ACLU of Ohio submits that the District Court also erred in its analysis of Mr. Wood's First Amendment retaliation claim. *See* R. 60, PAGEID # 560–61. The District Court ignored the first element of that claim: whether Mr. Wood's speech was protected. *Id.*; *see Novak v. City of Parma*, 932 F.3d 421, 429 (6th Cir. 2019) ("a retaliation claim is like a flow chart—once you decide one issue, it leads to the next"). The speech at issue for that claim is only the smaller subset that occurred prior to Mr. Wood's being asked to leave: his wearing a shirt with the phrase "Fuck the Police." *See* R. 39 at PAGEID # 323; R. 60 at PAGEID # 561. That is protected expression in this Circuit. *See, e.g.*, *D.D.*, 645 F. App'x at 420. Moreover, as the Magistrate below correctly observed, fact issues remain for trial as to the second and third elements. *See* R. 39 at PAGEID # 323–25. This Court should reverse.

nonexistent in modern First Amendment doctrine. Ohio state law, on the other hand, and upon which the District Court erroneously relied, confers an outdated and substantially less stringent degree of protection to speech. By following Ohio state law, the District Court did not merely ignore binding federal precedent, it also imported a line of mistaken decisions from state court into federal.

A. For Good Reason, Federal First Amendment Precedent Carefully Protects Coarse Criticism of Law Enforcement

The fighting words exception exists solely to keep the peace, and so must be limited to speech that tends to provoke immediate violence. *See, e.g.*, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573–74 (1942); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). This underlying policy finds its narrowest application in speech criticizing public officials, which is "a fundamental First Amendment value," *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002), and is even narrower still in speech to police officers, who "in the face of verbal challenges … must respond with restraint." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 471 (1987). *See also Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring) (profane name-calling, even where it would be fighting words if directed to another citizen, "may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint").

This Court and its sister circuits have been duly reluctant to find fighting words in critical expressions directed at police, very much including profanity and

insults. *See, e.g.*, *Kennedy*, 635 F.3d at 215–16 ("the First Amendment requires that police tolerate coarse criticism"); *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002) ("*Chaplinsky*'s fighting words doctrine has become very limited," particularly in the police context); *United States v. Poocha*, 259 F.3d 1077, 1081 (9th Cir. 2001) ("fighting words is at its narrowest, if indeed it exists at all" in speech to public officials); *Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir. 2003) ("the First Amendment protects even profanity-laden speech directed at police officers"); *Buffkins v. City of Omaha*, 992 F.2d 465, 467–68 (8th Cir. 1990) (calling a police officer profane names "could not reasonably have prompted a violent response").

Critically—and as discussed in Section II.B below, unlike in Ohio courts—federal courts' protection of speech does not dissipate when insults are directly aimed at individual officers, rather than simply stated near them. In *Greene*, for example, the plaintiff was arrested for calling a police lieutenant an "asshole" and "really stupid," in a voice "loud enough to attract the attention of other people in the lobby" of a police station. 310 F.3d at 893. Finding these not to be fighting words, this Court observed that "it is hard to imagine [the plaintiff's] words inciting a breach of the peace by a police officer whose sworn duty it was to uphold the law." *Id.* at 896. *See also, e.g.*, *Barnes v. Wright*, 449 F.3d 709, 717–718 (6th Cir. 2006) ("irate" individual described by an officer as "using [foul] language, cussin', ranting and raving" at police was not uttering fighting words); *Kennedy*, 635 F.3d at 218 n.5

("Even crass language used to insult police officers does not fall within the 'very limited' unprotected category of 'fighting words.'"); *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) ("[a]ny reasonable officer would know that a citizen who raises her middle finger [to an officer] engages in speech protected by the First Amendment")[2]; *D.D.,* 645 F. App'x at 420 (saying "fuck the police" to officers, and calling them "useless" and "idiots" did not amount to fighting words).

This case is straightforward under these principles. Mr. Wood's indecorous language leading up to his arrest barely approaches the extreme level of fighting words as defined by *Hill*, *Greene*, *Barnes*, *Cruise-Gulyas*, and similar precedent. This is especially true in context: Mr. Wood was leaving the area as he had been instructed to do. Many of the comments emphasized by Appellees and the District Court were delivered over his shoulder or in brief asides as he walked out, while six officers shadowed his steps in an intimidating fashion. *See Schenck v. United States*, 249 U.S. 47, 52 (1919) ("the character of every act depends upon the circumstances in which it is done") (Holmes, J.). It is also relevant that Mr. Wood was not speaking solely in meaningless invective. In at least some instances, he made substantive

[2] Although Mr. Wood's arrest in this case preceded the *Cruise-Gulyas* decision, the clearly established principles relied upon in *Cruise-Gulyas* are far older than either. *See* 918 F.3d at 497 (citing *Sandul*, 119 F.3d at 1255, and *Cohen v. California*, 403 U.S. 15, 19 (1971)). A reasonable officer in 2016 would have been well aware of them. *See id.*

criticisms of the Clark County Sheriff's Office, which had been the subject of a state investigation, and which Mr. Wood would later describe as a "cesspool." Appellant's Br., ECF No. 13 at pp. 11–12 (deposition testimony). Criticisms of public officials are surely of high First Amendment value, even when interspersed with profanity. *See Arnett*, 281 F.3d at 560; *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of the government is at the very center of the constitutionally protected area of free discussion").

Ironically, courts' expectations of officers that are implicit in cases like *Hill*, *Greene*, and *Barnes*—at least insofar as officers are expected to refrain from responding to mere insults with hot-blooded violence—were vindicated here. There is no hint on body camera footage that Mr. Wood's statements actually moved the police to immediately breach the peace. On the contrary, as Mr. Wood was leaving, the officers expressed only mild irritation that he had not yet been silenced. Yates Cam 4:40–50 ("he's still talking the whole way out the door, he's still talking."). The decision to arrest him by force was a conscious choice, not an uncontrolled reaction. *See* Yates Cam 5:45–46. Though certainly not dispositive on its own, the listener response here can and does buttress the conclusion that Mr. Wood's speech was not so beyond the pale as to tend to provoke a violent response from professional law enforcement. *See Cohen v. California*, 403 U.S. 15, 20 (1971) ("[t]here is … no

showing that anyone who saw Cohen was in fact violently aroused"); *Sandul*, 119 F.3d at 1255 (similar).

This sequence of events also illustrates the danger in any attempt to curb the expectations of officer restraint described in *Hill* and its progeny. Law enforcement officers, who by virtue of training are at little actual risk of being provoked to violence, could attempt to use the power of arrest and the excuse of "fighting words" to punish someone who is merely insulting or annoying them. Granting them such a tool would do nothing to preserve the peace, but would give officers a potent means of silencing harsh criticism. Fighting words doctrine cannot and should not be used to justify an arrest "if the officer's true motivation was to punish a slight to his dignity." *Greene*, 310 F.3d at 897.

B. Ohio State Courts Routinely Misapply Fighting Words Doctrine, and the District Court Adopted Their Errors

By erroneously relying on state disorderly conduct cases in its probable cause analysis, the District Court invoked a body of precedent that is, in several respects, irreconcilable with current First Amendment doctrine. *See* Summary Judgment Order, R. 60 at PAGEID # 557–58 (discussing state law, beginning with *Cincinnati v. Karlan*, 39 Ohio St. 2d 107, 314 N.E.2d 162 (Ohio 1974)). *Karlan*, for example, is obsolete for at least two reasons. First, it makes no mention of a heightened fighting-words standard in the context of police; the Supreme Court would not decide *Hill* until over a decade later. Second, in the almost half-century since

Kaplan, "[s]tandards of decorum have changed dramatically … and indelicacy no longer places speech beyond the protection of the First Amendment." *Greene*, 310 F.3d at 896.

Other state cases cited below offer no analysis of the First Amendment or fighting words at all, rendering them inapposite to the question of whether Mr. Wood's speech was protected. *State v. Farnsworth*, No. 2109-M, 1992 WL 209366, at *2, 8 (Ohio Ct. App. Aug. 26, 1992) (conclusory discussion not resting on fighting words, but on whether the "profane remarks were disturbing the near-by beach patrons," and noting that the officer would have had probable cause entirely apart from speech); *State v. Kleeberger*, No. 90FU000001, 1990 WL 187286, at *1–3 (Ohio Ct. App. Nov. 30, 1990) (no First Amendment analysis, arrest occurred when the police chief "shook his finger at" the defendant, who "shoved the chief's finger away"). At least one case, again pre-*Hill*, expressly repudiates a heightened standard for fighting words in speech to police. *Vill. of N. Randall v. Watkins*, No. 41843, 1980 WL 355261, at *3 (Ohio Ct. App. Oct. 9, 1980) ("we decline to except epithets directed at police officers from that category of speech unprotected per se as fighting words").

But perhaps the most persistent misconception that the District Court adopted from Ohio precedent is from *Ohio v. Wood*, 112 Ohio App. 3d 621, 679 N.E.2d 735 (Ohio Ct. App. 1996). *See* R. 60 at PAGEID # 558–59 (citing *Wood* and cases

following it). The *Wood* court acknowledged a heightened standard for fighting words in the context of police, at least in theory, *see id.* at 739, but then failed to apply it. Instead, it focused on a purportedly core distinction between language that was "non-personal and not directed to the particular officer and language which was intentionally directed to the particular officer." *Id.* It affirmed the defendant's conviction for gesturing with his middle finger and saying "fuck you" to officers, based primarily on the fact that the profane expression was directed to the particular officers. *Id.* at 740.

Wood was wrongly decided under this Court's jurisprudence, or at minimum, it is no longer good law under twenty-first century First Amendment doctrine. *See supra* (*Greene*, *Barnes*, *Kennedy*, *D.D.*, *Cruise-Gulyas*, *Sandul*). Despite this, Ohio courts have widely adopted the *Wood* distinction, finding profane language around an officer and direct statements to an officer to be the hallmarks of fighting words. "In cases where a police officer is the offended party, profane words specifically and intentionally directed to a particular officer usually constitute fighting words, while an inappropriate and vulgar commentary about the situation, without more, is not punishable." *City of Hamilton v. Johnson*, No. CA99-02-025, 1999 WL 1087024 (Ohio Ct. App. Dec. 3, 1999). *See also, e.g.*, *State v. Harvey*, No. 9-19-34, 2020 WL 525933, at *4 (Ohio Ct. App. Feb. 3, 2020) (citing *Wood* to observe that saying "fuck you" or extending a digit to a police officer could be fighting words); *City of Akron*

v. Lorenzo, No. 20475, 2001 WL 1142802, at *3 (Ohio Ct. App. Sept. 26, 2001) (affirming conviction for saying "fuck Akron police" and "fuck you" to police). Several of the cases relied upon by the District Court in this case, in addition to *Wood* itself, turn on this distinction. *See State v. Hale*, 110 N.E. 3d 890, 894 (Ohio Ct. App. 2018) (under *Wood*, profane insults such as "fuck you" and "suck my dick" could be fighting words); *City of Kent v. Dawson*, No. 2000-P-0094, 2001 WL 637475, at *2–3 (Ohio Ct. App. Jun. 8, 2001) (similar); *In re Lutseck*, No. 99-T-0130, 2000 WL 1915774, at *1 (Ohio Ct. App. Dec. 29, 2000) (similar).

The District Court thus erred, not only by failing to apply the correct law, but by relying on state precedent that ignores well-established First Amendment protections for speech like Mr. Wood's. This Court should reverse, highlighting both the nature of the District Court's error in deferring to state decisions, and the substantive wrongness of *Ohio v. Wood* and its progeny.

CONCLUSION

For the foregoing reasons, the District Court's grant of summary judgment for the defendant officers should be reversed, at minimum as to Mr. Wood's Fourth Amendment false arrest claim and his First Amendment retaliation claim.

Dated: March 12, 2021

Respectfully submitted,

/s/ David J. Carey

David J. Carey
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972
dcarey@acluohio.org

Elizabeth Bonham
Freda J. Levenson
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION
4506 Chester Ave.
Cleveland, OH 44103
(614) 586-1972
ebonham@acluohio.org
flevenson@acluohio.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1), it contains 4,085 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Times New Roman font.

Dated: March 12, 2021

/s/ David J. Carey
David J. Carey

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit, causing notice of such filing to be served upon all parties registered on the CM/ECF system.

/s/ David J. Carey
David J. Carey