

# 23-0600-CV

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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SUSAN GIORDANO, ANGELENE HAYES, YING-LIANG WANG,  
ANJA BEACHUM, on behalf of themselves and others similarly situated,  
*Plaintiffs-Appellants,*

– v. –

SAKS & COMPANY LLC, SAKS INCORPORATED, SAKS FIFTH AVENUE  
LLC, LOUIS VUITTON USA INC., LORO PIANA & C. INC., GUCCI  
AMERICA, INC., PRADA USA CORP., BRUNELLO CUCINELLI USA, INC.,  
*Defendants-Appellees,*  
FENDI NORTH AMERICA, INC.,  
*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK (No. 1:20-cv-00833-MKB-CLP)

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**BRIEF OF AMICI CURIAE THE RESTAURANT LAW CENTER AND  
THE RETAIL LITIGATION CENTER IN SUPPORT OF  
DEFENDANTS-APPELLEES AND AFFIRMANCE**

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## DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Restaurant Law Center and the Retail Litigation Center, by and through their undersigned attorneys, hereby certify that neither of them has any parent corporation and that no publicly held corporation owns 10% or more of either of their stock.

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## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing over 15 million people—approximately ten percent of the U.S. workforce, making it the second-largest private-sector employer in the United States. Through regular participation in *amicus* briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry’s perspective on legal issues impacting its members.

The Retail Litigation Center is a 501(c)(6) nonprofit organization that represents national and regional retailers, including many of the country’s largest and most innovative retailers, across a breadth of retail verticals. The Retail Litigation Center is the only trade organization solely dedicated to representing the retail industry in the courts. The Retail Litigation Center’s members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The Retail Litigation Center offers retail-industry perspectives to courts on important

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the Retail Litigation Center has filed more than 200 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been favorably cited by multiple courts, including the U.S. Supreme Court. *See, e.g., S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The Restaurant Law Center and the Retail Litigation Center have a significant interest in how to define relevant product and labor markets, particularly for labor markets that include luxury retail stores. *Amici* therefore write to provide this Court with important context related to those issues and to offer practical perspectives as to why Plaintiffs did not—and could not—plausibly allege a nationwide market for luxury retail labor.

## INTRODUCTION

Rule of reason antitrust claims require “an accurate definition of the relevant market,” because without one “there is no way to measure [defendants’] ability to lessen or destroy competition.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (citation omitted). Plaintiffs here have failed this fundamental requirement. They claim that luxury retail stores paying \$17 per hour compete for labor only with other luxury retail stores, and—in an apparent effort to expand the



putative class definition and artificially increase any alleged damages—they assert that luxury retail stores in different parts of the country compete against each other in a nationwide market for the same workers. That is, Plaintiffs’ proposed product market excludes employment at other types of retail stores and in other industries—like the restaurant industry—that pay about the same or more and have similar job responsibilities and qualifications. And Plaintiffs’ proposed geographic market implausibly assumes that, for example, the Bergdorf Goodman in New York City competes for the same workers as the Saks Fifth Avenue (“Saks”) store in Palm Beach, Florida. Judicial experience, common sense, and the absence of supporting factual allegations compel rejection of Plaintiffs’ underinclusive product market and overinclusive geographic market. The district court erred in holding otherwise.

The proffered product market limited to luxury retail labor fares no better. To support it, Plaintiffs must allege facts plausibly suggesting that most employees currently working at luxury retail stores, if offered higher pay, would not accept a job with similar qualifications and responsibilities if that job were not at a luxury retail store. Yet, as common sense would dictate, their allegations suggest the opposite. Multiple Plaintiffs allege that they switched from a luxury retail job to a job in another industry. These factual allegations are consistent with data that show it is common for workers to switch from a retail job to a similar-

paying job in another industry. The absence of a plausible product market on its own requires dismissal.

The geographic scope of a labor market in which workers earn \$17 per hour will almost never be nationwide. The reason is simple. Restaurant and retail workers are required, by the nature of their jobs, to be in-person and on-site for every shift. Workers in this wage band—including those in the retail and restaurant industries—are typically precluded by cost from taking a job far away from where they live. Plaintiffs do not allege facts suggesting otherwise. There are, for example, no allegations that any of the individuals who brought this suit considered a luxury retail job outside of their region. To the contrary, the only allegations about Plaintiffs potentially switching employers concern different jobs in the same city (or the same mall). This makes sense. Service jobs that pay about the same or more as luxury retail are ubiquitous within every town or region across America, so lower-wage service workers do not have to travel far for work. Plaintiffs' proffered nationwide geographic market thus also fails, which provides another independent ground for dismissal.

Allowing Plaintiffs' claim to survive a motion to dismiss without a plausibly alleged relevant market would have real and substantial negative consequences for businesses across a wide range of industries, including the restaurant and retail industries. The Supreme Court has long recognized the

“unusually high cost . . . of discovery in antitrust cases.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). Combined with the prospect of treble damages, the potential for subjecting defendants to costly and unpredictable litigation will attract frivolous claims by plaintiffs’ lawyers seeking to leverage the *in terrorem* effect into a settlement. Meaningfully evaluating the allegations of an antitrust complaint at the outset—as this Court’s precedent requires—is an effective way to prevent such abuses.

Accordingly, in affirming dismissal of Plaintiffs’ claim for the reasons set forth in Defendants’ briefing, the Court should also dismiss it for failure to allege a plausible relevant product or geographic market.

### **RELEVANT FACTUAL ALLEGATIONS**

Plaintiffs allege the following facts relevant to defining an antitrust market: Plaintiff Susan Giordano, a resident of Queens, New York, worked as a sales associate at the Saks store in New York City. A-40 at ¶ 8; A-63 at ¶ 155. While employed at Saks, Ms. Giordano applied for jobs at Loro Piana and Brunello Cucinelli boutiques, also in New York City. A-63 at ¶ 157; A-64 at ¶ 159; A-65 at ¶ 169. Ultimately, Ms. Giordano obtained a position at “a smaller luxury retailer,” but Plaintiffs do not allege which retailer or where the store that employed Ms. Giordano was located. A-67 at ¶ 185.

Plaintiff Angelene Hayes worked as a sales consultant at a Saks store in Beachwood, Ohio, earning \$17 per hour. A-57 at ¶ 106; A-61 at ¶ 135. While employed by Saks, Ms. Hayes inquired about a potential job at Gucci. A-58 at ¶ 113. Plaintiffs do not allege the location of the Gucci store to which Ms. Hayes applied. Ms. Hayes also sought employment at a Louis Vuitton store in the same mall as the Saks store where she worked. A-59 at ¶ 121; A-78. After her employment with Saks ended, Ms. Hayes accepted an entry level position at a medical office. A-61 at ¶ 138. Plaintiffs do not allege where that medical office was located.

Plaintiff Ying-Liang Wang worked as a sales associate at the same Beachwood, Ohio Saks store as Ms. Hayes. A-40 at ¶ 10; A-62 at ¶ 140. Ms. Wang earned approximately \$65,000 annually while employed by Saks. A-63 at ¶ 154.

Plaintiff Anja Beachum worked as a sales associate and style advisor at a Saks store in Troy, Michigan. A-67 at ¶ 187. While working at Saks, Ms. Beachum applied for a job at the Louis Vuitton boutique located in the same mall as her Saks store. A-68 at ¶ 190. Ms. Beachum ultimately “left the Luxury Retail Employee labor market.” A-68 at ¶ 191.

## ARGUMENT

Plaintiffs' failure to plausibly allege a relevant product market and their failure to plausibly allege a relevant geographic market each requires dismissal of their claim. "For antitrust purposes, the concept of a market has two components: a product and a geographic market." *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 52 (2d Cir. 2016). A relevant product market "must be defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Madison 92<sup>nd</sup> St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 F. App'x 23, 28 (2d Cir. 2015) (citation omitted). Labor markets, like the market at issue here, are "comprised of [employers] who are seen by [employees] as being reasonably good substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001). "Courts generally measure a market's geographic scope . . . by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product." *Concord*, 817 F.3d at 53 (citation omitted).

Plaintiffs' alleged product market limited to luxury retail labor is underinclusive because it excludes jobs that employees consider reasonably interchangeable. And their alleged nationwide geographic market is implausibly overinclusive because it contains luxury retail stores in different parts of the

country that typically do not compete with each other for labor. Failure to plead a plausible relevant market renders it impossible to determine whether Saks and its purported co-conspirators possess market power, and thus whether their actions could plausibly cause the marketwide competitive harm needed to state a rule of reason claim. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018). The Court should thus affirm dismissal of Plaintiffs’ claim for failure to allege a plausible relevant market.

**I. PLAINTIFFS’ PROPOSED PRODUCT MARKET LIMITED TO LUXURY RETAIL LABOR IS NOT PLAUSIBLE**

A rule of reason claim should be dismissed where, as here, a plaintiff alleges “a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor.” *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008). This Court has thus affirmed Rule 12 dismissals where a proposed product market implausibly excludes substitute products or services. In *Chapman*, the Court affirmed dismissal where plaintiffs proposed a product market limited to “restraint training services to private child care providers located within the State of New York,” because the product was “marketed to and utilized by various organizations, institutions, and agencies that are not child care providers.” *Id.* Likewise, in *Hack*, the Court held that despite its “unique[ness],” a Yale education is not in its own product market because “there are many institutions of higher

learning providing superb educational opportunities.” *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000).

These principles also require dismissal of antitrust claims alleging implausibly narrow labor markets that exclude employers “who are seen by [employees] as being reasonably good substitutes.” *Todd*, 275 F.3d at 202. In *Madison*, for example, the Court rejected a product market limited to “[l]abor services provided by nonmanagerial [h]otel employees working or seeking work in Marriott-managed hotels . . . in New York City” because if other hotels suddenly doubled the wages they paid to their employees, it is “beyond doubt” that Marriott hotels would also have to increase their wages. 624 F. App’x at 29 (first and third alterations in original). That is, because employees would switch to a job at a different hotel for higher pay, the market could not be limited to a single type of job at a single hotel chain. *Id.*

Dismissal is likewise appropriate here because the alleged luxury retail labor market excludes the plethora of obvious available substitute positions at other types of retailers and in other industries—including restaurants—that offer jobs with similar pay, qualifications, and responsibilities. As an initial matter, compensation for retail workers and workers in many other industries is comparable. Plaintiff Hayes’s alleged \$17 per hour wage from Saks, A-61 at ¶ 135, is in line with the national estimated mean hourly wage for all retail

salespersons—even those not in “luxury retail”—calculated by U.S. Bureau of Labor Statistics (“BLS”) at \$16.70. BLS, *Occupational Employment and Wages, May 2022, 41-2031 Retail Salespersons*, <https://www.bls.gov/oes/current/oes412031.htm> (last updated Apr. 25, 2023) [hereinafter BLS, *Retail Salespersons*]. In fact, according to data provided by Glassdoor, retail employees at so-called “luxury” stores like Saks (\$17.65) and Neiman Marcus (\$17.18) earn about as much on an hourly basis as employees at non-luxury stores such as Trader Joes (\$16.91), Costco (\$18.02), and Patagonia (\$20.04). Dominick Reuter, *Here Are 15 of the Highest-Paid Entry-Level Retail Jobs in the US at Brands Like Buc-ee’s, Costco, and Patagonia*, Bus. Insider (Mar. 7, 2023, 1:49 PM), <https://www.businessinsider.com/highest-paid-retail-jobs-in-the-us-2019-6>. Average wages for retail workers are also similar to the national estimated mean hourly wage of \$15.87 for restaurant waitstaff. BLS, *Occupational Employment and Wages, May 2022, 35-3031 Waiters and Waitresses*, <https://www.bls.gov/oes/current/oes353031.htm> (last updated Apr. 25, 2023) [hereinafter BLS, *Waiters and Waitresses*]. When looking at the 75<sup>th</sup> percentile for wages for retail sales staff and waiters, any differences in compensation shrink further, with estimated hourly wages of \$17.35 for retail salespersons and \$17.50 for waitstaff. See BLS, *Retail Salespersons, supra*; BLS, *Waiters and Waitresses, supra*.



Nor does the calculus change when considering Plaintiffs' only other allegation about luxury retail wages, Ms. Wang's purported annual earnings of \$65,000 at Saks, which is equivalent to an hourly wage of about \$31.25. A-63 at ¶ 154. Such allegations do not meaningfully differentiate Plaintiffs' payment prospects from similar positions in the restaurant industry. As calculated by the National Restaurant Association in 2023, waitstaff at full service restaurants earn a median wage of \$27.00 an hour, with an upper quartile of such employees earning \$41.50 an hour. Nat'l Rest. Ass'n, *National Statistics*, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/> (last visited Oct. 10, 2023). Over one-quarter of the positions at full service restaurants thus pay as much as—or more than—Plaintiffs allege they could earn at Saks, and the complaint provides no plausible explanation for why these positions are not reasonable substitutes for luxury retail work.

The similar earning potential of higher-wage luxury retail employees and full service restaurant workers also shows why the district court was wrong to find a plausibly alleged luxury retail labor market because “luxury retail employees have specialized skills and training.” A-247. Where this Court has found a plausibly alleged, single-industry labor market, plaintiffs pleaded facts showing that “a slight decrease in salary . . . would not cause . . . employees to leave the industry because they would have difficulty finding compensation fully reflecting

the value of their experience elsewhere.” *Todd*, 275 F.3d at 204. That is, they would have to take a pay cut if they left their industry. But Plaintiffs do not allege they received reduced pay when they left luxury retail employment, *see infra*, and the empirical evidence discussed above shows they likely would not.

In addition to similar wages, qualifications, and responsibilities, high turnover rates in retail and other industries support the intuition that workers switch from luxury retail to other types of jobs. In 2022, turnover rates for hourly in-store retail positions was 75.8%. *See* Press Release, *Retail Employee Turnover on the Rise*, Korn Ferry, (Nov. 15, 2022), <https://www.kornferry.com/about-us/press/retail-employee-turnover-on-the-rise>. For the restaurant industry, “quit rates” are estimated at levels as high as 130% to 150% for fast service restaurants. *See* Eric Rosenbaum, *Panera Is Losing Nearly 100% of Its Workers Every Year as Fast-Food Turnover Crisis Worsens*, CNBC (Aug. 29, 2019, 8:45 AM), <https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html>. Workers leave these positions for other jobs, yet Plaintiffs allege no facts to counter the commonsense notion that some significant amount of these workers leave luxury retail for similar-paying jobs in different industries, and vice versa. Nor could they, as a 2022 survey of US frontline retail employees revealed that “nearly half of the frontline retail employees who want to leave their current jobs plan to seek employment outside

the retail sector.” See David Fuller, et al., *How Retailers Can Attract And Retain Frontline Talent Amid The Great Attrition*, McKinsey & Co. (Aug. 17, 2022), <https://www.mckinsey.com/industries/retail/our-insights/how-retailers-can-attract-and-retain-frontline-talent-amid-the-great-attrition>.

Plaintiffs’ factual allegations are consistent with the above real-world data about the interchangeability of luxury retail jobs and other jobs with similar qualifications, responsibilities, and pay. Their own complaint sets luxury retail wages at a similar level as those in other industries. More significantly, it contains multiple examples of workers switching away from luxury retail into different industries: *two of the four* named Plaintiffs did precisely that. Ms. Hayes “accept[ed] an entry level position at a small medical office,” A-61 at ¶ 138, while Ms. Beachum alleges she “left the Luxury Retail Employee labor market.” A-68 at ¶ 191. Such allegations directly contradict the conclusion that luxury retail employees sell their labor in a distinct product market and do not consider other jobs to be reasonable substitutes. Indeed, Plaintiffs cannot even plead that they *as individuals* view luxury retail employment as non-interchangeable with similar positions at other kinds of employers.

Accordingly, Plaintiffs’ attempt to plead a relevant product market limited to luxury retail labor is insufficient as a matter of law, and their claim should be dismissed for this reason.

## II. PLAINTIFFS' PROPOSED NATIONWIDE GEOGRAPHIC MARKET IS NOT PLAUSIBLE

Plaintiffs have failed to allege any facts that could support their proffered nationwide geographic market, which also contradicts common sense and empirical evidence about how far people earning wages at a typical retail level will travel for work or relocate their places of residence for employment. Even “for goods sold nationwide,” this Court has recognized that the geographic market will be local or regional “if purchasers cannot practicably turn to areas outside of their own area for supply of the relevant product.” *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 228, 230-31 (2d Cir. 2006), *overruled on other grounds*. This is particularly relevant “[i]n certain service industries, [because] the geographic market may be confined by the fact that it can be impractical for consumers to travel great distances to procure particular services.” *Id.* at 228. “[B]anking services,” “tickets to movie theater showings,” and “live rock concert tickets” are all examples of services for which travel time and cost mean markets must be local or regional, not nationwide. *Id.*<sup>2</sup>

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<sup>2</sup> A complaint alleging an overbroad market—as Plaintiffs’ proposed nationwide market is here—should be dismissed because it does not provide “notice” or sufficient “detail about the geographic scale on which competition actually occurs,” rendering it impossible to assess a firm’s power in any individual relevant market. *Sky Angel U.S., LLC v. Nat’l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 104 (D.D.C. 2013).

Retail labor is another such service. The labor market is often defined by how far workers are willing to travel for work. See Suresh Naidu, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 575 (2018). A wealth of empirical studies<sup>3</sup> shows that because people are generally not willing to travel far distances for work, in many industries a nationwide geographic market for employment is implausible. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 550b (5th ed. 2022).

The methodology used by BLS to collect employment statistics, and the statistics themselves, reflect a more limited geographic scope of most labor markets, including retail labor. BLS calculates metrics for employment data by examining the “economically integrated geographic area within which individuals can reside and find employment within a reasonable distance or can readily change employment without changing their place of residence.” BLS, *Local Area Unemployment Statistics Geographic Concepts*, <https://www.bls.gov/lau/laugeo.htm> (last updated Mar. 20, 2020). Applying this

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<sup>3</sup> See, e.g., Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10(3) Am. Econ. J. Macro. 42 (2018); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031, 1048 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3124483](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124483); David Card, et al., *Location, Location, Location (CES 21-32)*, Ctr. for Econ. Stud., at 36 (Oct. 2021); Alain Bertaud, *Cities as Labor Markets*, NYU Marron Inst. of Urban Mgmt., at 10 (Feb. 19, 2014), [https://marroninstitute.nyu.edu/uploads/content/Cities\\_as\\_Labor\\_Markets.pdf](https://marroninstitute.nyu.edu/uploads/content/Cities_as_Labor_Markets.pdf).

methodology, BLS's statistics reveal significant variation in retail wages across the country, which puts the lie to Plaintiffs' proposed nationwide geographic market. For example, BLS calculates mean hourly wages for retail sales workers in the San Francisco-Oakland-Hayward metropolitan area at \$21.47, while retail sales workers in the Northeast Mississippi nonmetropolitan area earn hourly mean wages of \$13.23. BLS, *Retail Salespersons*, *supra*. If these employers were operating in a single nationwide labor market, employers in one region would not be able to pay their workers half as much as those in other regions. The lower-paying employers would simply lose their workforce as their employees moved across the country for the higher-paying retail sales jobs.

Consistent with real-world empirical analysis and common sense, Plaintiffs' own complaint *confirms* that the geographic market for luxury retail labor is not nationwide. *No* Plaintiff alleges she sought employment outside of the city where she either lived or worked. To the contrary, two Plaintiffs, Ms. Hayes and Ms. Beachum, allege they looked for new employment in other stores in the very same malls in which they already worked. A-57 at ¶ 106; A-59 at ¶ 121; A-68 at ¶ 190; A-78. And another Plaintiff, Ms. Giordano, alleges that while working at the Saks store in New York City, she sought employment only at other retailers in New York City. A-63 at ¶ 157. Plaintiffs thus fail to allege facts plausibly suggesting a nationwide luxury retail labor market. This alone requires dismissal.

Notwithstanding these allegations and the real-world data discussed above, the district court held that the complaint alleged a plausible nationwide labor market because luxury retail employees receive “extensive training” and because one plaintiff earned \$65,000 per year, which “is higher than the U.S. median salary.” A-247-49. This holding was erroneous. These allegations do not address the key question in defining the geographic scope of a labor market: how far will luxury retail workers travel for a job. *Areeda & Hovenkamp, supra*, ¶ 550b. Because real-world economic analysis, common sense, and Plaintiffs’ own allegations regarding their job search demonstrate that luxury retail workers would not travel across the country for employment, the alleged nationwide geographic market is implausible, and this Court should affirm dismissal of Plaintiffs’ claim for this reason as well.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court’s decision.

Dated: November 3, 2023

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## **CERTIFICATE OF COMPLIANCE**

This amicus brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) and Second Circuit Local Rules 29.1(c) and 32.1(a)(4)(A), because this brief contains 3,784 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in fourteen-point Times New Roman font.

Dated: November 3, 2023

*s/ Matthew Martino*

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## CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

*s/ Matthew Martino*

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