NO. 21-2014

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARY K. BOLEY; KANDIE SUTTER; PHYLLIS JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF SIMILARLY SITUATED PERSONS, ON BEHALF OF THE UNIVERSAL HEALTH SERVICES, INC. RETIREMENT SAVINGS PLAN,

Plaintiffs-Appellees,

v.

UNIVERSAL HEALTH SERVICES, INC.; UNIVERSAL INC., THE UHS RETIREMENT PLANS INVESTMENT COMMITTEE; DOES 1-10, WHOSE NAMES ARE UNKNOWN,

Defendants,

UNIVERSAL HEALTH SERVICES, INC. AND UNIVERSAL HEALTH SERVICES, INC. RETIREMENT PLANS INVESTMENT COMMITTEE,

Appellants.

On Appeal from the United States District
Court for the Eastern District of Pennsylvania
(Case No. 2:20-cv-2644) (District Judge Mark A. Kearney)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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August 9, 2021

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 21-2014

MARY K. BOLEY; KANDIE SUTTER; PHYLLIS JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF SIMILARLY SITUATED PERSONS, ON BEHALF OF THE UNIVERSAL HEALTH SERVICES, INC. RETIREMENT SAVINGS PLAN

v.

UNIVERSAL HEALTH SERVICES, INC.; UNIVERSAL INC., THE UHS RETIREMENT PLANS INVESTMENT COMMITTEE; DOES 1-10, WHOSE NAMES ARE UNKNOWN,

Instructions

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In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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If additional space is needed, please attach a new page.

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
n/a

/s/ John M. Masslon II
(Signature of Counsel or Party)

Dated: August 9, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provision

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statute

Rule

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* urging strict adherence to rules barring federal-court adjudication of claims brought by those who lack Article III standing. *See, e.g.*, *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020); *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice in June, the Supreme Court reversed lower courts for not dismissing lawsuits by plaintiffs lacking Article III standing. The two cases involved a broad swath of plaintiffs—individuals, States, and class representatives. Both times, the Court held that all plaintiffs must have skin in the game to have Article III standing.

These decisions did not break new ground. Rather, they were the natural extension of recent decisions like *Thole* and *Spokeo*, which

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

affirmed that courts can decide only cases or controversies. When defendants' actions do not harm plaintiffs, no case or controversy exists. If defendants violate federal law without injuring plaintiffs, the Constitution charges the Executive Branch with bringing enforcement actions.

The District Court, however, misunderstood this precedent. In its view, the Supreme Court permits uninjured plaintiffs to sue and vindicate the rights of injured individuals. It tried to distinguish *Thole* and other binding precedent in denying a partial motion to dismiss. Citing its ruling on the partial motion to dismiss in its class certification order, the District Court then rejected *Thole* in a single paragraph.

This was error for at least two reasons. First, the District Court's attempts at distinguishing *Thole* are unpersuasive. Every "distinguishing" factor is merely a distinction without a difference. This reliance on shallow distinctions manifests the District Court's misunderstanding of Supreme Court precedent. Nor did the District Court look to the logic behind *Thole*. That logic applies to 401(k) plans as much as it does to defined-benefit plans. Because *Thole* shows that

Plaintiffs lack standing to assert some claims, the District Court lacked jurisdiction to certify this class.

STATEMENT

Universal Health Services, Inc. and the UHS Retirement Plans Investment Committee (collectively, UHS) administer the Universal Health Services, Inc. Retirement Savings Plan. App. 4. Eligible employees can save for retirement by investing some of their income in the Plan. *Id.* Plan participants choose from a menu of thirty-seven investment options. *Id.* They can choose to invest in only one of those thirty-seven options or to spread their contributions over multiple options.

Like other investments, each of the thirty-seven options has certain risks and rewards. For example, safer options include money market funds while riskier options include stocks only. Plan participants' retirement accounts grow (or shrink) based on the investment's performance minus a management fee. The management fee varies from 0.015% to 1.14%. *See* App. 917.

Plaintiffs are plan participants. App. 3. Combined, the named Plaintiffs have invested in only seven of the thirty-seven investment

options. *Id.* at 4-5. Yet Plaintiffs challenged all thirty-seven of the Plan's investment options. They claim that all thirty-seven options underperformed and charged excessive fees. *Id.* at 4. The complaint alleges UHS violated its fiduciary duties of prudence and loyalty. *Id.*

UHS moved to dismiss in part, arguing that Plaintiffs lack Article III standing to challenge the thirty investment options they did not invest in. App. 72-84. After the District Court denied the motion, Plaintiffs moved for class certification. *Id.* at 490-520. The District Court certified a class of individuals who invested in any of the thirty-seven investment options. *Id.* at 25-27. This Court then granted UHS's petition for leave to appeal the class-certification order. *Id.* at 1-2.

ARGUMENT

I. A DISTRICT COURT CANNOT CERTIFY A CLASS WHOSE REPRESENTATIVES LACK ARTICLE III STANDING.

Because "federal courts are courts of limited jurisdiction," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (cleaned up), their jurisdiction is limited to "'Cases' and 'Controversies.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting U.S. Const. art. III, § 2). For a case or controversy to exist, plaintiffs must have standing. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (citation

omitted). Plaintiffs bear the burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Here they cannot satisfy that burden.

"[T]he irreducible constitutional minimum of standing consists of three elements." *Spokeo*, 136 S. Ct. at 1547 (citations omitted). A plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs fail to satisfy the first element because UHS's actions for thirty of the investment options did not injure Plaintiffs.

This is an appeal from the District Court's order certifying a class. *Cf.* Fed. R. Civ. P. 23(f) (permitting such interlocutory appeals). But that does not mean that this Court can overlook the District Court's order denying UHS's partial motion to dismiss for lack of standing. This Court need not reach Rule 23's requirements to decide that the District Court erred by certifying a class challenging thirty investment choices Plaintiffs did not invest in. Rather, the Court can—and should—hold that

the District Court erred in certifying the class because Plaintiffs lack Article III standing. *See McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 222-23 & n.10 (3d Cir. 2012).

It is immaterial that some unnamed class members could have standing to sue UHS for breaching its fiduciary duties for the thirty investment options Plaintiffs did not invest in because "standing is not dispensed in gross." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 245 (3d Cir. 2012) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). At least one named plaintiff must have standing to assert every claim in a class-action complaint—even if putative class members would have standing to bring the claims on their own behalf. *Fischer v. Governor of New Jersey*, 842 F. App'x 741, 748 (3d Cir. 2021) (citing *McNair*, 672 F.3d at 223); *accord In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1263 n.10 (11th Cir. 2021).

The Supreme Court's recent decision in *TransUnion* highlights this requirement. There, the Court held that every member of a class must have standing to assert claims against a defendant. *See TransUnion*, 141 S. Ct. at 2203-07. If even absent class members must have suffered a

concrete injury to establish Article III standing, so too must named plaintiffs.

Although *TransUnion* held that over 1,800 absent class members had standing to assert one claim, it held that those same absent class members lacked standing to assert two other claims. *TransUnion*, 141 S. Ct. at 2207-14. This shows that, even if Plaintiffs have standing to assert claims about seven investment options, they lack standing to assert standing about the other thirty options.

Thus, decisions from the Supreme Court, this Court, and other courts of appeals all show that Plaintiffs must have standing to maintain their claims about the thirty other investment options to sustain the class-certification order. Because Plaintiffs lacked standing to assert claims about those investment options, the District Court lacked jurisdiction to certify this class.

II. *THOLE* DOES NOT DIFFERENTIATE BETWEEN DEFINED-BENEFIT AND DEFINED-CONTRIBUTION PLANS.

"[D]efined benefit pension plans were popular during much of the twentieth century but are increasingly being replaced by defined contribution accounts like the ubiquitous 401(k)." Chad Burkitt, Article, *A More Secure Choice: Minnesota's Two-Pronged Approach to State Level*

Retirement Savings Programs, 40 Mitchell Hamline L.J. Pub. Pol'y & Prac. 183, 194 (2019) (citing Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 Minn. L. Rev. 938, 947 (2007)). A 401(k) is a good substitute for a pension. And that is why the Employee Retirement Income Security Act of 1974 treats the two similarly. But the District Court overlooked this similar treatment and created special rules for plaintiffs suing 401(k) fiduciaries. This was error that invites reversal.

A. The Supreme Court's Reasoning In *Thole* Applies To Defined-Contribution Plans.

In *Thole*, as here, the plaintiffs filed a putative ERISA class action. They argued that the plan fiduciaries breached their duties of loyalty and prudence; the same claims that Plaintiffs assert. The Supreme Court held that the *Thole* plaintiffs lacked Article III standing to sue the plan's fiduciaries because they lacked a pecuniary interest in the case. The District Court, however, declined to dismiss Plaintiffs' complaint for want of jurisdiction. In its view, *Thole* is distinguishable from this case because it involved a defined-benefit plan—not a 401(k) plan. This distinction, however, is meaningless when analyzing whether *Thole* applies here.

The key to *Thole*'s holding was that, win or lose, the plaintiffs would "receive the exact same monthly benefits that they are already slated to receive, not a penny [more or] less." *Thole*, 140 S. Ct. at 1619. Because all the plaintiffs would gain by winning the lawsuit was a windfall for their attorneys, they lacked a "concrete stake" in the litigation. *Id.* So they lacked Article III standing to maintain the suit. *Id.* at 1620. *Thole*'s affirmative analysis of why the plaintiffs lacked Article III standing was very short—only two paragraphs. That someone who, win or lose, will receive the same pension benefit lacks a concrete stake in the litigation is obvious.

But the Court then explained why the plaintiffs' standing arguments held no weight. First, the Court held that pension-plan participants are not analogous to trust beneficiaries. *Thole*, 140 S. Ct. at 1619-20. Because the amount pensioners will receive depends on the parties' contract—not the fiduciaries' investment decisions—they lacked Article III standing to sue for breach of fiduciary duty. *See id.* at 1620.

True, the Court grouped 401(k) plans in with private trusts when rejecting the *Thole* plaintiffs' standing arguments. *Thole*, 140 S. Ct. at 1619. But the explanation that followed shows why the District Court

erred by relying on such distinctions. The Court grouped private trusts and 401(k) plans together because, in both situations, the fiduciaries' financial decisions determine the eventual payout. A trustee that wisely invests funds can distribute more money when the trust expires. And when 401(k) fiduciaries make shrewd investment decisions, the plan participants' accounts grow. *See id.* at 1620.

That is why Plaintiffs have standing to challenge UHS's decisions for the seven investment options they selected. If UHS breached its fiduciary duties to Plaintiffs, and Plaintiffs' accounts are worth less, then Plaintiffs have an interest in the litigation. If Plaintiffs prevail, UHS must make Plaintiffs whole by increasing the value of their 401(k) accounts. This is the type of concrete injury Article III requires.

Yet Plaintiffs' 401(k) accounts will not grow or shrink by "a penny" based on the other thirty investment options' performance. *Thole*, 140 S. Ct. at 1619. Again, the performance of the seven investment options Plaintiffs chose was not linked to the performance of the other thirty.

This disconnect between Plaintiffs' claims about the thirty other investment options and their interest in the litigation is the same as the disconnect between the *Thole* plaintiffs' claims and their interest. In both

cases, the plaintiffs were indifferent about whether they won or lost. Either way, they would not gain or lose any money. The District Court thus erred by not recognizing that the trust analogy is as equally inapt here as it was in *Thole*.

The Supreme Court next rejected the *Thole* plaintiffs' argument that they could sue on the plan's behalf. Individuals cannot sue on behalf of an ERISA plan unless they themselves have suffered an injury in fact. *Thole*, 140 S. Ct. at 1620 (citing *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013)). As described above, Plaintiffs have not suffered an injury in fact linked to the thirty other investment options. So they could not sue over those options as a Plan representative.

Nor could they assert standing as an assignee. To sue in this capacity, Plaintiffs must show that the Plan appointed them as representatives with the right to sue on its behalf. *Thole*, 140 S. Ct. at 1620. Plaintiffs were not so appointed. Thus, they lack standing to sue on the Plan's behalf.

Next, the Supreme Court rejected the *Thole* plaintiffs' argument that 29 U.S.C. §§ 1132(a)(2) and (3) gave them standing. Congress's creation of a "cause of action does not affect the Article III standing

analysis." *Thole*, 140 S. Ct. at 1620. Rather, plaintiffs must suffer an injury in fact to have standing. *TransUnion*, 141 S. Ct. at 2205. And as described above, Plaintiffs have not suffered such an injury. They therefore cannot rely on Section 1132 for standing.

Finally, the Supreme Court brushed aside the plaintiffs' argument that they had standing by necessity because someone must have standing to sue for fiduciary misconduct. As the Court explained, it has "long rejected that kind of argument for Article III standing." *Thole*, 140 S. Ct. at 1621 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)). So even if Plaintiffs were the only ones who could enforce ERISA's fiduciary requirements, that would not give them standing to sue UHS.

Of course, there are thousands (if not more) of people who would have standing to challenge UHS's alleged breach of fiduciary duties for the thirty other investment options. Any Plan participant who invested in those plans could sue. They would have Article III standing because, if the fees charged were excessive, those members were financially injured by a smaller 401(k) balance. So there is even less reason to find

Plaintiffs have standing than there was in *Thole*. In short, *Thole*'s analysis applies with equal force to defined-contribution plans.

B. The District Court's Contrary Analysis Is Unpersuasive.

The District Court turned cartwheels to avoid applying *Thole* here. This misapplication of well-settled precedent requires reversal. And even if *Thole* did not dispose of this case, *TransUnion* shows the flaws in the District Court's analysis.

Distracting from the on-point *Thole* decision, the District Court relied on this Court's decision in *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019). But *Sweda* undermines the District Court's certification decision. In *Sweda*, the Court grouped the investment options into different tiers. The majority found that the plaintiffs sufficiently pled that they invested in tier 3 and 4 options. *See id.* at 334 n.10. It did not hold that the plaintiffs had standing without investing in those options. *See id.* If *Sweda*'s dicta suggests that plan participants always have standing under 29 U.S.C. § 1132(a)(2), *Thole* rejected that argument. *Thole*, 140 S. Ct. at 1620.

Judge Roth, however, thought that the *Sweda* plaintiffs did not properly plead that they invested in tier 3 and 4 options. Her analysis

therefore proceeded under that assumption. She had no trouble concluding that the plaintiffs had standing to sue over those investment options in which they participated. *See Sweda*, 923 F.3d at 345 (Roth, J., concurring and dissenting). But she also had no difficulty concluding that the plaintiffs lacked standing to challenge decisions about tier 3 and 4 options in which they did not invest. *See id.* at 344-45.

This case mirrors *Sweda*. Plaintiffs have standing to challenge UHS's fiduciary choices for the seven investment options in which they participated. Although they are unlikely to prevail on those claims, the District Court has jurisdiction to hear them. But as Judge Roth explained in *Sweda*, Plaintiffs lack standing to challenge the investment options in which they lack any financial interest. The District Court refused to undertake this analysis. Rather, it relied on portions of the opinion that assumed the plaintiffs invested in tier 3 and 4 options. Properly read, *Sweda* clarifies that the District Court lacked jurisdiction to certify this class.

The District Court cited no post-*Thole* appellate opinions. After the District Court's class-certification order, the Second Circuit considered the scope of *Thole* in *Fuente v. Preferred Home Care of N.Y. LLC*, No. 20-

3985, 2021 WL 2308786 (2d Cir. June 7, 2021) (*per curiam*). There, the plaintiffs alleged that their health care plan's fiduciaries acted improperly. The district court dismissed the case for lack of standing and the plaintiffs appealed. In affirming that dismissal, the Second Circuit applied *Thole*'s analysis to an ERISA plan other than a defined-benefit plan. *See id.* at *1-2.

Although *Fuente* did not address a 401(k) plan, the Second Circuit's decision shows that *Thole*'s reach is not limited to only defined-benefit plans. Lower federal courts must apply *Thole*'s rationale in all ERISA actions. If plaintiffs do not have a direct financial stake in a claim, they lack Article III standing to sue. Because Plaintiffs have no interest in whether UHS breached its fiduciary duties for the other thirty investment options, they lack standing to sue over those options.

After sidestepping the Supreme Court's precedent and this Court's precedent, the District Court then cited sister district court opinions to support its holding. But those district court decisions are not persuasive. For example the District Court relied on *Falberg v. Goldman Sachs Grp., Inc.*, No. 19cv9910, 2020 WL 3893285 (S.D.N.Y. July 9, 2020). The Supreme Court, however, has repudiated the Southern District of New

York's analysis. *Falberg* held that evaluating whether each plaintiff was injured was a "secondary inquiry." *Id.* at *7 (quotation omitted). *TransUnion* makes clear that whether a plaintiff suffered an individual injury is a prerequisite to Article III jurisdiction—not a secondary inquiry.

The other cases the District Court cited are even less persuasive. *Cassell v. Vanderbilt Univ.*, No. 3:16cv2086, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018) and *Clark v. Duke Univ.*, No. 1:16cv1044, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018) came two years before the Supreme Court's *Thole* decision and three years before *TransUnion*. So those courts lacked the benefit of the Supreme Court's more recent standing decisions when analyzing the plaintiffs' standing arguments. This Court should give no weight to these decisions, whose analysis *Thole* and *TransUnion* rejected. Rather, it should focus on those two Supreme Court decisions that show why Plaintiffs lack standing to assert claims about the other thirty investment options.

Finally, the District Court tried to save Plaintiffs' claims by grouping them by count. But the Supreme Court recently rejected that very analysis in *TransUnion*. The *TransUnion* plaintiffs lumped their

claims into three groups: (1) claims about improper maintenance of credit files; (2) claims about the first mailing; and (3) claims about the second mailing. The Supreme Court, unlike the District Court, did not fall for this trick. It split all three groups into smaller groups and analyzed them separately when evaluating the *TransUnion* plaintiffs' standing.

The Supreme Court cut the first group of claims into two. It distinguished between those whose credit reports were distributed to third parties and those whose credit reports were not distributed to third parties. *TransUnion*, 141 S. Ct. at 2207-13. The Court then split the second two groups of claims between the named plaintiff and the absent class members. *Id.* at 2213-14. It analyzed standing for each subgroup; it did not paint with a broad brush.

Yet the District Court painted with a broad brush. It grouped Plaintiffs' complaint by count and then analyzed whether Plaintiffs suffered an injury in fact for which they could recover in each count. This ignored the fact that each count alleged UHS violated its fiduciary duties for thirty-seven different investment options. Plaintiffs' standing to assert claims for seven of those investment options does not mean that they have standing to assert claims for the other thirty options.

A hypothetical showcases the District Court's error. A plaintiff could file a securities class action. In the first count, the plaintiff asserts that the company made two misstatements that diminished the stock's price. The first misstatement occurred in 2001 and the second occurred in 2011. If the plaintiff owned the stock from only 1999 to 2002, she would lack standing to prosecute the claim about the 2011 misstatement. Even if the 2011 statement were false, the plaintiff was not injured and would lack Article III standing. Grouping the two misstatements into a single count cannot cure this jurisdictional defect.

But that is what the District Court allowed Plaintiffs to do here. They combined claims for which they have standing and claims for which they lack standing into a single count to avoid Article III's requirements. The District Court fell for that trick and held that Plaintiffs have standing to sue about the thirty investment options in which they did not invest.

* * *

The District Court misunderstood *Thole* and used every available tool to get around applying *Thole* in this case. It relied on distinctions without a difference, cited inapposite district court opinions, and used

faulty logic to hold that Plaintiffs have standing. This Court should reject this attempt at skirting the Supreme Court's command with a definitive holding that ERISA plaintiffs lack standing to sue over investment options in which they did not participate.

CONCLUSION

This Court should reverse and remand with instructions to dismiss Plaintiffs' claims for the thirty alternative investment options for want of jurisdiction.

Respectfully submitted,

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August 9, 2021

CERTIFICATE OF COMPLIANCE

I certify that:

(1) this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) as it contains 3,596 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f);

(2) this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font; and

(3) Both attorneys whose names appear on this brief are members of this Court's bar.

/s/ John M. Masslon II
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Counsel for Amicus Curiae
Washington Legal Foundation

August 9, 2021

CERTIFICATE OF SERVICE

I certify that, on August 9, 2021, I served all counsel of record via the Court's CM/ECF system.

/s/ John M. Masslon II
John M. Masslon II
Counsel for Amicus Curiae
Washington Legal Foundation

August 9, 2021