No. 18-3595

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAYMOND HOLLOWAY, JR.,

Plaintiff-Appellee,

v.

WILLIAM P. BARR, Attorney General of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Plaintiff Raymond Holloway, Jr. pleaded guilty in 2005 to recidivist drunk driving with a blood alcohol level of 0.16 or more. *See* 75 Pa. Cons. Stat. § 3802(c). That threshold represents twice the legal limit, and a degree of intoxication equivalent to consuming eight or more alcoholic drinks in one hour. Plaintiff's offense constitutes a Pennsylvania misdemeanor of the first degree, punishable by a maximum prison term of five years, among other penalties. Plaintiff is therefore subject to 18 U.S.C. § 922(g)(1)'s prohibition on the possession of firearms by felons and by persons convicted of misdemeanor crimes punishable by a term of imprisonment longer than two years. *See* 18 U.S.C. §§ 921(a)(20)(B), 922(g)(1).

The panel properly concluded that, because plaintiff committed a "serious" crime, Congress could constitutionally disarm him. *See Holloway v. Attorney General*, 948 F.3d 164, 172 (3d Cir. 2020). This Court in *Binderup v. Attorney General*, 836 F.3d 347 (3d Cir. 2016) (en banc), left "[n]o doubt" that "some misdemeanors are . . . 'serious' offenses," and operating a vehicle at twice the legal limit after a prior DUI unquestionably falls into that category. *Id.* at 351 (Ambro, J., joined by two judges). The panel's conclusion is correct and accords with the precedent of this Court and the Supreme Court. The panel's well-reasoned decision provides no basis for rehearing.

STATEMENT

1. Federal law has long restricted the possession of firearms by certain categories of individuals. One such disqualification, 18 U.S.C. § 922(g)(1), generally

prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," the traditional definition of a felony. For the purposes of section 922(g)(1), "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B). Thus, individuals convicted of misdemeanors punishable by more than two years remain barred from possessing firearms. Congress enacted that disqualification based on its determination that the "ease with which" firearms could be acquired by "criminals . . . and others whose possession of firearms is similarly contrary to the public interest" was "a matter of serious national concern." S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); *see* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226.

2. In 2005, plaintiff was arrested with a blood alcohol level of 0.192 and pleaded guilty to "driving under the influence at the highest rate" of alcohol. *See* 75 Pa. Cons. Stat. § 3802(c). The Pennsylvania offense prohibits driving with a blood alcohol level of 0.16 or higher—a threshold representing two times the legal limit of 0.08, and reflecting a degree of intoxication equivalent to consuming eight or more alcoholic drinks in one hour. *See* 75 Pa. Cons. Stat § 3802(a), (c); Gov't Opening Br. 1 & n.1, 6.

As his second offense in three years, plaintiff's DUI "at the highest rate of alcohol" constituted a "misdemeanor of the first degree." *See* 75 Pa. Cons. Stat. §§ 3802(c); 3803(b)(4); *see also* ECF No. 61-1, at 3 (¶¶ 15-16) (plaintiff's 2002 conviction for driving under the influence with a blood alcohol level of 0.131).[1] As such, the offense was punishable by a mandatory minimum, three-month term of imprisonment, and maximum term of five years, among other penalties. *See* 18 Pa. Cons. Stat § 1104(1); 75 Pa. Cons. Stat. § 3804(c)(2). Plaintiff served a three-month term of confinement under a work-release program, through which he was imprisoned at all times when not working. *See Holloway v. Sessions*, 349 F. Supp. 3d. 451, 455 (M.D. Pa. 2018). As a result of his 2005 offense, plaintiff's application to obtain a firearm was denied pursuant to 18 U.S.C. § 922(g)(1). *See id.*

3. Plaintiff filed this lawsuit, asserting that application of 18 U.S.C. § 922(g)(1) to him violates the Second Amendment. The district court granted plaintiff summary judgment, concluding that plaintiff distinguished himself from the class of individuals historically barred from Second Amendment protections by demonstrating that his crime was a non-serious one. *See Holloway*, 349 F. Supp. 3d at 460. The district court applied the multi-factor test from Judge Ambro's plurality opinion in *Binderup v.*

[1] Following his conviction, the charges were dismissed upon plaintiff's completion of Pennsylvania's Accelerated Rehabilitative Disposition Program. There is no dispute that the 2002 conviction constitutes a "prior offense" for mandatory sentencing purposes for subsequent DUI offenses. *See Holloway v. Sessions*, 349 F. Supp. 3d. 451, 454 n.3 (M.D. Pa. 2018) (citing 75 Pa. Cons. Stat. § 3806(a)(1)).

Attorney General, 836 F.3d 336 (3d Cir. 2016) (en banc). *See Holloway*, 349 F. Supp. 3d at 456-58. The plurality explained that great weight should be accorded to the legislature's judgment as to the gravity of the crime, and evaluated "seriousness" according to: (1) the legislature's designation of the offense as a misdemeanor or felony; (2) the maximum punishment ascribed by the legislature to the offense; (3) the violent nature of the crime; (4) the actual sentence served, and; (5) consensus by other jurisdictions on the crime's severity. *See Binderup*, 836 F.3d at 350-52 (Ambro, J., joined by two judges); *id.* at 351 ("[W]e will presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise."). The district court weighed these factors in favor of plaintiff. *See Holloway*, 349 F. Supp. 3d at 459-60. The district court further considered a Pennsylvania law restricting the transfer and purchase of firearms among individuals convicted of three DUI offenses, and found that the law demonstrated the legislature does not regard as serious plaintiff's second DUI conviction. *Id.* at 459.[2]

[2] This Court follows a two-step framework for evaluating as-applied, Second Amendment challenges, under which it first determines whether an individual has forfeited Second Amendment protections by committing a "serious" crime and, if not, considers whether the regulation survives heightened means-end scrutiny. *See Holloway v. Attorney General*, 948 F.3d 164, 171-72 (3d Cir. 2020) (citing *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)). Although not at issue on rehearing, the district court further held that plaintiff's disarmament did not satisfy intermediate scrutiny. *See Holloway*, 349 F. Supp. 3d at 461 (rejecting without explanation the government's evidence that handgun purchasers with prior alcohol-related offenses are 5.6 times more likely than those with no criminal history to commit violent and/or firearms-related crimes; that handgun purchasers with prior alcohol offenses exhibit a

4. This Court reversed the district court. The panel concluded that operating a vehicle at twice the legal blood alcohol limit is a serious offense. *See Holloway v. Attorney General*, 948 F.3d 164, 168 (3d Cir. 2020). The panel found overwhelming recognition by all branches of the federal government and the Pennsylvania legislature that "drunk driving is a serious and potentially deadly crime." *Id.* at 174 (quoting *Virginia v. Harris*, 558 U.S. 978, 979-80 (2009) (Mem.) (Roberts, C.J., dissenting from denial of writ of certiorari)). The panel emphasized that the Supreme Court's description of individuals "who drive with a BAC significantly above the . . . limit of 0.08% and recidivists" as "the most dangerous offenders" has been substantiated by the experience of the Pennsylvania legislature. *Id.* (quoting *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016)). As the panel recounted, the legislature in 2003 enacted tougher civil and criminal drunk driving penalties precisely because "thirteen individuals were killed every two weeks in Pennsylvania from alcohol-related accidents"; "[m]ore than half of all fatal alcohol-related accidents [were] caused by . . . those people whose BACs are .16 or above," and; "one-third of drunk driving arrests involve[d] repeat offenders." *Id.* at 176 (quoting H.R. Legis. Journal, 187th Gen. Assemb., Reg. Sess. 1444-45 (Pa. 2003) (statement of Rep. Harper) and S. Legis. Journal, 187th Gen. Assemb., Reg. Sess. 981 (Pa. 2003) (statement of Sen. Williams)).

"disproportionate risk for being arrested for the most serious crimes," like "murder, rape, robbery, [and] aggravated assault"; and that these disparities are not associated with other risk factors, but "principally explained" by the individuals' "history of dangerous behavior involving alcohol"). *See* Gov't Opening Br. 29; Reply Br. 13.

The panel thus found that the legislature's decision to punish plaintiff's offense with a mandatory minimum jail term, and maximum five-year term, reflected its judgment that repeatedly driving under the influence of extremely elevated blood alcohol levels is a "very serious matter." *Holloway*, 948 F.3d at 176 (quoting H.R. Legis. Journal, 187th Gen. Assemb. Reg. Sess. 1445 (remarks of Rep. Harper)). And in view of the "imminence of the danger posed by drunk drivers," which "exceed[s] that at issue in other types of cases," the panel declined to give dispositive weight to the offense's label as a misdemeanor, or the lack of a formal element of violence. *Id.* at 174 (quoting *Virginia*, 558 U.S. at 979-80 (Mem.) (Roberts, C.J., dissenting from denial of writ of certiorari)). The panel, moreover, described unanimous agreement among the States to outlaw driving under the influence, notwithstanding variance among States' enhanced penalties for plaintiff's conduct. *See id.* at 177. And in contrast to the only plaintiffs to have succeeded in an as-applied challenge to section 922(g)(1), the panel noted that plaintiff received a custodial sentence. *See id.* at 176. The panel lastly explained that Pennsylvania's disarmament statute, which extends to a "broader swath" of individuals than those subject to the federal prohibition, did not call into question the seriousness of plaintiff's offense. *Id.* at 177.

Judge Fisher dissented. As relevant here, Judge Fisher would have held that the multi-factor test favored plaintiff. *See Holloway*, 948 F.3d at 181 (Fisher, J., dissenting); *see id.* at 179-80 (agreeing that the test "is an appropriate means under our precedent of determining" seriousness and "should guide the . . . analysis"). Judge Fisher

agreed that the panel was "not bound to consider the . . . factors exclusively," but contended that the panel inappropriately weighed the "risk of harm" posed by plaintiff's offense, as opposed to "the presence of force or violence in [plaintiff's] conduct." *Id.* at 179, 185.

ARGUMENT

THE PANEL CORRECTLY HELD THAT APPLICATION OF SECTION 922(G)(1) TO PLAINTIFF DOES NOT BURDEN CONDUCT PROTECTED BY THE SECOND AMENDMENT.

1. The panel correctly determined that section 922(g)(1) does not violate the Second Amendment as applied to plaintiff. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," but "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 592, 626 (2008). The Supreme Court in *Heller* identified the right as belonging to "law-abiding, responsible citizens," *id.* at 635, and consistent with that understanding, it stated that "nothing in [its] opinion should be taken to cast doubt" on "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons," *id.* at 626 & 627 n.26. The Court described this "permissible" measure as falling within "exceptions" to the protected right to bear arms. *Id.* at 635. Two years later, it "repeat[ed]" its "assurances" that *Heller*'s holding "did not cast doubt on such longstanding regulatory measures." *See McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) (quoting *Heller*, 554 U.S. at 626).

This Court has understood *Heller* to establish that the Second Amendment generally provides no protection to individuals subject to the firearms prohibitions the Supreme Court identified as presumptively lawful. In *Binderup*, this Court held that section 922(g)(1)'s exclusion of "felons and felon-equivalents" generally "comport[s] with the Second Amendment because [it] affect[s] individuals . . . unprotected by the right to keep and bear arms." *Binderup v. Attorney General*, 836 F.3d 336, 348 (3d Cir. 2016) (en banc) (Ambro, J.). Having incorporated a common-law tradition that permits restrictions directed at citizens who are not "law-abiding" and "responsible," *Heller*, 554 U.S. at 635, the Second Amendment "does not preclude laws disarming . . . unvirtuous citizens (*i.e.* criminals)." *Id.* (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)). That category of "unvirtuous citizens," explained the Court, "is broader than violent criminals" and "covers any person who has committed a serious criminal offense, violent or nonviolent." *Id.*

The panel faithfully applied *Binderup* to conclude that operating a vehicle at twice the legal blood alcohol limit after a previous DUI is a serious offense. Both *Binderup* and common sense compel the conclusion that plaintiff's crime is a serious one. "The carnage caused by drunk drivers is well documented," *South Dakota v. Neville*, 459 U.S. 553, 558 (1983), and those "who drive with a BAC significantly above the . . . limit of 0.08% and recidivists" are "the most dangerous offenders." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016); *see also Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2536 (2019) ("[F]rom 1982 to 2016, alcohol-related accidents took roughly 10,000 to

20,000 lives in this Nation *every single year* . . . add[ing] up to more than one fatality per hour."). Indeed, it is because such persons are disproportionately responsible for alcohol-related driving fatalities that the Pennsylvania legislature chose to punish these violations with a potential maximum penalty greater than that associated with many traditional felonies. *See Holloway*, 948 F.3d at 175-76. And the legislature imposed a mandatory minimum term of confinement, which plaintiff served. *See id.* at 176. All branches of the federal government, as well as jurisdictions across the country, have recognized the reckless disregard for human life inherent in this conduct. *See id.* at 174, 177. By any of these measures, plaintiff committed a serious offense such that the Second Amendment's protections do not apply to him.

2.a. Plaintiff urges (Pet. 12-16) that his offense cannot be considered serious under the *Binderup* factors. Plaintiff acknowledges (Pet. 12-16) that the maximum sentence for his crime indicated that no constitutional concern was raised by its application here. He urges, however, that his offense is of a minor variety, and that Congress could not constitutionally conclude that it should fall within the ambit of section 922(g)(1). Legislatures and the courts do not share that view. Drunk driving—let alone repeatedly drunk driving at twice the legal limit—is one of the "numerous misdemeanors involv[ing] conduct more dangerous than many felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 & n.12 (1985). Accordingly, forty-nine jurisdictions have passed laws singling out and imposing heightened penalties for driving under the influence of blood alcohol levels ranging from 0.15 to 0.20. *See* Gov't Reply at 10

(citing ECF No. 61-1, at 8 (¶ 58)).[3] The States' collective recognition that "[p]ersons who repeatedly drive drunk present a greatly enhanced danger" to society stands in stark contrast to the absence of a cross-jurisdictional consensus in *Binderup*, where the "vast majority" of States did not criminalize plaintiff Binderup's offense of a consensual relationship with a minor. *Begay v. United States*, 553 U.S. 137, 157 (2008) (Alito, J., dissenting), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015); *Binderup*, 836 F.3d at 352 (Ambro, J., joined by two judges).

Plaintiff mistakenly urges that the panel's decision is at odds with the Court's conclusion regarding Juan Suarez, a second plaintiff whose disqualification was at issue in *Binderup*. *See* Pet. 13, 14 n.4. Plaintiff is quite wrong to state (Pet. 13) that with regard to Suarez, "the *Binderup* court held 18 U.S.C. § 922(g)(1) unconstitutional *as-applied* to someone . . . convicted of a DUI." The misdemeanor triggering Suarez's disarmament was not a conviction for DUI. It was his offense of unlawfully carrying a handgun without a license. *See Binderup*, 836 F.3d at 340 (Ambro, J.). In any event, as the panel explained, neither *Binderup* challenger served a term of confinement, in contrast to plaintiff here, who served the mandatory minimum sentence and was confined at all times when not working. *See Holloway*, 948 F.3d at 176; *Binderup*, 836

[3] Forty-six states punish certain recidivist DUI offenses as felonies, and at least thirteen states punish a second DUI offense as the functional equivalent of a felony, *i.e.* by more than one year in prison. *See* Gov't Opening Br. at 21 (citing ECF No. 61-1 (¶ 57)).

F.3d at 340 (Ambro, J.) (explaining that Suarez received a suspended sentence, and that Binderup's probation amounted to "the colloquial slap on the wrist").

The panel did not, as plaintiff maintains (Pet. 14), inappropriately "expand[]" the factors evaluated in *Binderup* "by considering the crime's 'potential for danger and risk of harm to self and others.'" And, as the dissent recognized, circuit "precedent does not require [this Court] to apply the . . . [*Binderup* plurality opinion's] factors alone." *Holloway*, 948 F.3d at 179 (Fisher, J., dissenting); *see also Binderup*, 836 F.3d at 351 (Ambro, J., joined by two judges). Plaintiff provides no basis for his contention that the panel was required to disregard the "imminence of the danger posed by drunk drivers," which "exceeds that at issue in other types of cases." *Id.* at 174 (quoting *Virginia*, 558 U.S. at 979-80 (Mem.) (Roberts, C.J., dissenting from denial of writ of certiorari)). *Binderup* left "[n]o doubt" that "some misdemeanors . . . are 'serious' offenses," and it is unclear which crimes might qualify if, as plaintiff urges, a second conviction for drunk driving at twice the legal blood alcohol limit does not. 836 F.3d at 351 (Ambro, J., joined by two judges).

Plaintiff himself urges the Court to evaluate factors beyond those considered in *Binderup*, arguing that Pennsylvania's disarmament statute suggests that the federal disqualification cannot constitutionally be applied in his case. Pet. 16. As the panel noted, however, Pennsylvania's statute appears more stringent than the federal prohibition in that it restricts the transfer and possession of firearms among individuals convicted of misdemeanor offenses punishable by fewer than two years'

imprisonment. *See Holloway*, 948 F.3d at 177 (citing 18 Pa. Cons. Stat. § 6105(c)). Moreover, while plaintiff correctly states (Pet. 16 n.8) that the Pennsylvania law "permits . . . individual[s] to maintain control over firearms already possessed," he fails to note that where, as here, an individual is convicted of a crime punishable by imprisonment of more than one year, the state statute prohibits the issuance of a license to carry firearms, and requires revocation of a citizen's preexisting license to carry firearms. *See* 18 Pa. Cons. Stat. Ann. § 6109(e)(1)(viii); *id.* § 6109(i); *see also id.* § 6109(e)(1)(xiv) (applying restriction to any "individual who is prohibited from possessing or acquiring a firearm under the statutes of the United States").

b. Plaintiff in the alternative argues for the first time (Pet. 16-20) that *Binderup* does not compel consideration of the multi-factor test described in Judge Ambro's plurality opinion. Plaintiff did not challenge those criteria before the panel. *See* Response Br. 20 ("*Binderup* identified several factors to determine whether a crime was 'serious.'"). Under *Marks v. United States*, 430 U.S. 188 (1977), Judge Ambro's plurality opinion represents the "position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193. In any event, there was no dispute among the members of the panel, or the district court for that matter, that Judge Ambro's criteria provide the appropriate "data points for determining whether a challenger's prior conviction was serious." *Holloway*, 948 F.3d at 172 n.10; *see also id.* at 180 (Fisher, J., dissenting) ("[L]ike the District Court, I believe that the multifactor test should guide the . . . analysis in this case."). While plaintiff suggests (Pet. 16, 20)

that the panel was obligated instead to follow Judge Hardiman's concurrence, that opinion (joined by four other judges) posited that only "people who have demonstrated that they are likely to commit violent crimes have no constitutional right to keep and bear arms." *Binderup*, 836 F.3d at 370 (Hardiman, J., concurring in part and concurring in the judgments). But the remaining ten of the fifteen judges on the Court rejected the notion that only violent crimes are serious. *See Holloway*, 948 F.3d at 171 (citing *Binderup*, 836 F.3d at 348-49 (Ambro, J.)); *id.* at 387 n.72 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). [4]

c. Plaintiff further advances several historical arguments already rejected by a majority of this Court. Plaintiff contends (Pet. 8, 11) that the panel's holding "contradicts history and tradition" because it failed to consider evidence of rehabilitation. But as the panel explained, *see Holloway*, 948 F.3d at 172, *Binderup* overruled the Court's previous decision in *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011) insofar as it held that "people convicted of serious crimes may regain their lost Second Amendment rights after not posing a threat to society for a period of time." *Binderup*, at 836 F.3d 336, 350 (Ambro, J.). "There is no historical support,"

[4] Plaintiff maintains that there exists "confusion over *Binderup*'s split opinions," Pet. 17, but he does not appear to question whether the *Marzzarella*, two-step framework constitutes the law of the circuit. *See supra* p. 4 n.2. Instead, he takes issue with the criteria the panel used to determine whether an offense is "serious." *See* Pet. 16 (questioning whether "Judge Ambro's multifactor test" or "Judge Hardiman's dangerous persons test" should apply).

determined the Court, "for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited." *Id.*

Plaintiff further maintains that, as a historical matter, "[p]eople were only disarmed if it was expected that their possession of a firearm would result in violence." Pet. 10. Once again, *Binderup* overruled *Barton* in this respect, and held that the "category of 'unvirtuous citizens'" subject to disarmament is "broader than violent criminals" and "covers any person who has committed a serious criminal offense, violent or nonviolent." *Binderup*, 836 F.3d at 348 (Ambro, J.).

Contrary to plaintiff's view (Pet. 11-12), the historical record demonstrates that felons and felon-equivalents are outside the scope of the Second Amendment. "*Heller* identified . . . as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *Binderup*, 836 F.3d at 349 (Ambro, J.). That report expressly recognized the permissibility of imposing a firearms disability on convicted criminals, stating that "citizens have a personal right to bear arms 'unless for *crimes committed*, or real danger of public injury.'" *Id.* (quoting 2 Bernard Schwarz, *The Bill of Rights: A Documentary History* 662, 665 (1971)). As most scholars and many circuit courts agree, the Second Amendment thus incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible," and it "'does not preclude laws disarming . . . unvirtuous citizens (*i.e.*

criminals).'" *United States v. Bena*, 664 F.3d 1180, 1182 (8th Cir. 2011); *Binderup*, 836 F.3d at 348 (Ambro, J.); *accord United States v. Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as . . . limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.").

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,896 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) according to the count of Microsoft Word 2016.

3. On May 28, 2020 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

4. This document was scanned for viruses using Microsoft Forefront Client Security, and no virus was detected.

/s/ Thais-Lyn Trayer
Thais-Lyn Trayer