No. 12-2561

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARICA R. JOHNSON,

Plaintiff-Appellant,

v.

KOPPERS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 1:10-cv-03404

The Honorable Joan H. Lefkow, Presiding Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT MARICA R. JOHNSON

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ARGUMENT

Marica Johnson produced evidence that, if evaluated in a light most favorable to her, precluded summary judgment to Koppers under both the direct and indirect theories of liability. In response, Koppers challenges not the evidence but the inferences to be drawn from that evidence, essentially asking this Court to assume the veracity of its narrative and the credibility of its witnesses. So when Johnson claims that O'Connell's false epithets showed discriminatory animus, Koppers responds that her claim is speculative because O'Connell did not testify that he bore such animus. And when Johnson argues that O'Connell's animus contaminated Wagner's investigation to proximately cause her firing, Koppers points only to Wagner's deposition testimony (contradicted by his earlier contemporaneous notes) claiming he did not rely on O'Connell's version. Finally, when Johnson shows that O'Connell twice threatened her life without any formal punishment but she was suspended for arguing with a security guard, Koppers argues in the most circular fashion that the two were not similarly situated because their disciplinary histories differed. But Koppers's approach is exactly backwards: on summary judgment the district court should have made inferences in Johnson's favor, not Koppers's. This Court should reverse.

I. The district court improperly concluded that Koppers did not engage in direct discrimination against Johnson under a cat's paw theory.

The district court erred when it denied summary judgment to Johnson and granted summary judgment to Koppers on the cat's paw claim. As a threshold

matter, Koppers now concedes that cat's paw liability can result from a coworker's (rather than from a supervisor's) actions. *Compare* (Appellee Br. 14–15) (discussing cat's paw theory as applied to O'Connell), *with* (R. 48 at 8–10) (Koppers's summary judgment brief in district court arguing that O'Connell—a co-worker—could not serve as a basis for Koppers's cat's paw liability). Thus, the only questions now facing this Court are: (1) whether Johnson's evidence of O'Connell's discriminatory animus was legally sufficient to withstand or to warrant summary judgment; and (2) whether O'Connell's actions were a proximate cause of Johnson's firing.

A. The district court erred in deciding that the evidence Johnson provided did not show that O'Connell's animosity was "based on her race and gender."

Turning to the first question, the district court erred when it concluded that O'Connell did not exhibit the type of race-and-gender-based stereotyping that could serve as proof of discriminatory animus. The district court recognized the viability of projection as a legal theory for establishing discriminatory animus. *See* (A14–15) (district court reciting Johnson's projection theory and stating that "it is true that ambiguous statements may provide evidence sufficient to survive a summary judgment motion").

On appeal—for the first time—Koppers tries to eliminate the projection theory from the case with two faulty arguments. First, Koppers claims waiver, (Appellee Br. 20–21), but if any waiver occurred here, it lies on Koppers's shoulders. Although Johnson did not use the term "projection" until the end of the case, from her summary judgment motion on, she consistently claimed that O'Connell's false accusations of race and gender-based epithets were proof that he harbored

discriminatory animus, (R. 40 at 12; R. 53 at 7–8), a theory that the district court addressed in both its original and amended opinions (A14–15; R.61 at 13–14). The label may not have been added until later in the case, but the substance was present throughout. As such, Johnson did not waive her projection theory. Koppers, on the other hand, never argued below that projection could not serve as a basis for discriminatory animus; it instead claimed that O'Connell's false epithets did not establish it, (R. 48 at 10), a theme it echoes here on appeal, (Appellee Br. 16) (acknowledging the district court's language and concluding that the court's rejection of Johnson's projection theory was "based on the evidence in this case" rather than its legal viability). Indeed, the litany of scientific literature Johnson provided in her opening brief established the decades-long acceptance of the theory, (Appellant Br. 20–21), a fact Koppers never challenged on appeal.

Koppers now tries to cover its failure to object below with its second argument, a novel evidence-foundation theory that would have required Johnson's appointed counsel to seek out and retain an expert witness. (Appellee Br. 19–20) (stating that Johnson raised a projection theory "but failed to provide any expert testimony during discovery to support this contention"). Koppers suggests that an expert was required to explain "[t]he symptoms and behaviors exhibited by a person who is suffering from the psychoanalytical defense mechanism of projection" so that "jurors could draw a connection (or note the absence of connection) between the behaviors of O'Connell and the symptoms exhibited by a person who was projecting racial animosity." *See* (Appellee Br. 20.)

But this inquiry was irrelevant for a few reasons. First, projection is not an illness with variable symptoms that require expert diagnosis; it is an automatic psychological response. George E. Vaillant, *Ego Mechanisms of Defense: A Guide for Clinicians and Researchers* 274 (1992) (characterizing projection as unconscious). Second, the "behaviors" of projection were clear from the record: O'Connell attributed false race-and-gender-based epithets to Johnson, who was of the opposite race and gender. Third, there was and could be no evidence of O'Connell's "behaviors" or "symptoms" because he refused to be deposed. So even if such things could be relevant in some cases they could not in this case and expert testimony would not have shed light on anything but broad generalities. Thus retaining an expert to develop these facts at the summary judgment stage was neither required, nor would it have been a prudent use of the limited resources allocated to counsel in pro bono appointments. *See* Regulations Governing the Prepayment & Reimbursement of Expenses of Court Appointed Counsel in Pro Bono Cases from the District Court Fund, United States District Court, Northern District of Illinois, D.C.F. Reg. 2B (Apr. 1, 1991), *available at* http://www.ilnd.uscourts.gov/home/LEGAL/NewRules/dcf_e.pdf (citing a $3000 limit on reimbursable expenses in civil pro bono litigation).

The actual question facing the district court was whether evidence that O'Connell falsely attributed race and gender-based epithets to the plaintiff could allow a jury to find that he harbored a discriminatory animus. The district court's fundamental error was in how it answered that question. It erroneously concluded

that the jury should not be given the opportunity to decide whether O'Connell's false accusations that Johnson called him a "white motherfucker" and a "faggot insulin dick" showed his discriminatory animus against her. (A14–15.) First, and most significantly, both the district court and Koppers gloss over the false nature of O'Connell's accusations, a crucial fact in this case.[1] The district court further erred in failing to recognize that of all the bad things O'Connell could have made up about Johnson to get her fired—that she was an incompetent employee, that she stole office supplies, that she jeopardized the safety of the facility—he instead chose to fabricate race-and-gender-based slurs. As noted in the opening brief, discriminatory animus could not be questioned if O'Connell had called Johnson a "black bitch." (Appellant Br. 19.) His false accusation that she called him a "white motherfucker" is the exact same animus, simply cloaked in projection. Read in the light most favorable to Johnson, such an inference is no mere "flight[] of fancy" and certainly "not so incredible or implausible . . . that a reasonable jury could not find in" Johnson's favor. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 507–08 (7th Cir. 2010). The district court erred in ignoring the race-and-gender-based implications of O'Connell's conduct, and in invading the province of a jury to decide this question.

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[1] Not once in Koppers's discussion of O'Connell's animus does it acknowledge that his accusations were false. *See* (Appellee Br. 15–19.) But the parties and this Court must accept O'Connell's accusations as false because without his testimony, there is no admissible evidence to refute Johnson's adamants sworn denial of having made those statements. Once the falsity is accepted as a fact construed in Johnson's favor, the inference of animus easily follows as the only rational explanation for him inventing damaging statements and projecting them onto Johnson.

B. O'Connell's discriminatory animus proximately caused Johnson's termination.

O'Connell's false accusations and discriminatory animus proximately caused Johnson's termination. Moreover, contrary to Koppers's suggestion, this causal link was not broken by Koppers's independent investigation. What *Staub v. Proctor Hospital* requires for proximate cause, and nothing more, is simply some direct relationship between the discriminatory animus and the adverse employment action. 131 S. Ct. 1186, 1192 (2011). Under *Staub*, proximate cause only excludes "those links that are too remote, purely contingent, or indirect." *Id.* at 1192 (internal quotation marks omitted). The causal link between the coworker's animus and the adverse employment action can only be broken by a subsequent "superseding cause"—an unforeseeable, independent cause. *Id.* Nothing independent from O'Connell's accusations broke the causal chain and disentangled Johnson's termination from his animus.

Koppers misconstrues *Staub's* "superseding cause" language as well as the facts of this case by claimining it is absolved of liability if it "shows" that Wagner "had a lawful motive uncontaminated by the monkey that would have led [him] to fire [Johnson] even without the monkey's interference." (Appellee Br. 14) (quoting *Cook v. IPC Int'l Corp.*, 673 F.3d 625 (7th Cir. 2012)). First, both *Staub* and *Cook* followed a jury trial and verdict. Koppers cannot "show" or "prove" (as the *Staub* Court required) Wagner's lawful motive at summary judgment, for that would require crediting his testimony in a way that is inappropriate at this stage of the

litigation. For this reason alone—the fact that all inferences are viewed in Johnson's favor—the language on which Koppers relies is inapposite.

Even if it were not, though, Koppers could not and did not show that Wagner's decision to fire Johnson was "uncontaminated" by O'Connell. While Wagner alleges that he did not base his decision to fire Johnson *solely* on O'Connell's story, O'Connell's discriminatory motive and the "legitimate" decision to terminate Johnson were inseparable because O'Connell was involved in virtually every step. Koppers's termination letter lists O'Connell's claim—a claim Johnson disputed under oath as false—that Johnson pushed him and acted in a threatening manner as the basis of its decision to fire Johnson. (A32–33; A70.) The letter also states that Johnson was fired because of her disciplinary record, including the radio incident in which O'Connell revealed his racial animus via the false allegations of race and sex-based epithets. (A63–64; A71–72.)

For the same reasons, Koppers's "independent investigation" of the alleged push, which led to Johnson's termination, was not a superseding cause because it explicitly incorporated O'Connell's story. (A32–33; A69.) It also relied on Wells and Kenyatta's stories, who were spied collaborating with O'Connell in the wake of the incident. (A37.) Wagner's credibility likewise was at issue because, unlike other cases where the firing supervisor is truly independent of the monkey, *see, e.g.*, *Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 547–48 (7th Cir. 1997) (illustrating factors that demonstrate the independence of the decisionmaker), Wagner was on notice that O'Connell had fabricated stories about Johnson in the past. Thus, it was

for the jury to decide, and not Wagner (or Koppers crediting Wagner), whether Wagner's decision was uncontaminated.

Finally, Koppers grossly mischaracterizes this Court's decision in *Cook* and the post-*Staub* "state of the law" when it relies on the following passage to absolve itself from liability: "[i]f the defendant in turn proves that it would have fired her anyway, for a lawful reason, then she has not been hurt by the illicit motive and cannot recover damages." (Appellee Br. 23) (quoting *Cook*, 673 F.3d at 629). Had Koppers included the remainder of the sentence, it would have had to acknowledge that employers nonetheless remain liable in mixed-motive cases, though the nature of the remedy changes. *See Cook*, 673 F.3d at 629 (noting that although a plaintiff cannot recover *damages* in a mixed-motive case, "an injunction, a declaratory judgment, or an award of attorneys' fees is permissible") (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i), (ii); *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 757 (6th Cir. 2012) (stating that if a plaintiff can show that race was a motivating factor in his discharge, "UPS is liable, although [the plaintiff's] remedies are limited if UPS can establish that it would have taken the same action in the absence of the impermissible motivating factor"). Because Johnson showed that O'Connell contributed to her termination, summary judgment in Koppers's favor was inappropriate.

II. The district court should not have granted summary judgment to Koppers on Johnson's indirect claim.

A. Koppers cannot overcome affirmative evidence of Johnson's proficient performance by pointing to disputed violations of its code of conduct.

Koppers cannot prevail on summary judgment when its only evidence requires credibility determinations that are inappropriate at this stage of the litigation. The only incident on which Koppers may rely is the alleged push that served as the basis for Johnson's termination.[2] But misconduct contemporaneous with an adverse employment action cannot be used to establish an employee's failure to satisfy her employer's legitimate expectations when it is disputed or turns on a witness's credibility. *See Gordon v. United Airlines, Inc.*, 246 F.3d 878, 887 (7th Cir. 2001) (holding a material issue of fact existed as to the legitimate-expectations prong because plaintiff's testimony contradicted his employer's). Johnson denied shoving O'Connell, (A68), which materially distinguishes her case from the authority on which Koppers relies to claim that code-of-conduct violations are per se evidence that the plaintiff has not met the legitimate-expectations prong (Appellee Br. 25–27). In each of Koppers's cited cases, the plaintiff admitted to engaging in

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[2] Although Koppers continually invokes Johnson's disciplinary history—specifically the 2006 guard shack incident, (A60–61)—as proof that Johnson was not meeting its legitimate expectations, (Appellee Br. 26), the only relevant time frame for this inquiry is the one surrounding Johnson's firing. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991). Even if Johnson's disciplinary history is relevant to the legitimate-expectations prong, this analysis merges with the similarly situated prong because Johnson alleged a discriminatory application of Koppers's disciplinary policy. (Appellant Br. 31–32), *Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827, 831 (7th Cir. 2007). Because O'Connell was similarly situated and was treated less severely, Koppers cannot use Johnson's disciplinary record to show she did not meet its legitimate expectations. (*See* Appellant Br. 25–32); *see* also Section II(B) *infra*.

the conduct at issue. *See Gates v. Caterpillar, Inc.*, 513 F.3d 680, 689 (7th Cir. 2008); *Anders v. Waste Mgmt. of Wis.*, 463 F.3d 670, 676 (7th Cir. 2006); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 666, 671–72 (7th Cir. 2006). In this case, the conclusion that Johnson satisfied Koppers's legitimate expectations is fortified by the affirmative evidence showing that she was proficient at her job duties. (A82.) Given the disputed nature of the shove, a jury should have been allowed to make the credibility determinations required to resolve these genuine issues of material fact concerning the legitimate-expectations prong.

Genuine issues of material fact exist not only as to whether Johnson violated the workplace policies, but also as to whether Wagner honestly believed that she did so. Koppers's *ipse dixit* approach simply assumes the truth of these two critical facts, which again cannot suffice for purposes of summary judgment. Several pieces of evidence in the record cast doubt on any inference that Wagner honestly believed that Johnson had pushed O'Connell. Wagner knew of: (1) O'Connell's penchant for falsely accusing Johnson, (A30; A35); (2) a suspicious meeting between O'Connell and the other "witness" to the alleged push, (A37); and (3) inconsistencies between stories about the alleged push, (A42; A88). Because Johnson has raised material issues of fact on the pretext question, *see* Section II(C) *infra*, she should survive summary judgment on the legitimate expectations prong as well*, see Everroad v. Scott Truck Sys., Inc.*, 604 F.3d 471, 477–78 (7th Cir. 2010) (merging the legitimate expectations and pretext inquiries because employer's alleged reason for firing the plaintiff was a failure to meet its legitimate expectations).

B. Koppers's disparate treatment of O'Connell, a similarly situated employee, would allow a jury to reasonably infer discrimination.

In Koppers's own words, "Johnson and O'Connell had many of the same characteristics as it relates to their job and performance." (Appellee Br. 28.) But during the five-year span of their contentious working relationship, Koppers consistently treated O'Connell more favorably by letting him off the hook without discipline, while formally punishing Johnson. (Appellant Br. 5–6 n.2.)

Koppers raises two insufficient arguments to defeat this prong. First, it claims that O'Connell and Johnson did not possess "a comparable set of failings." (Appellee Br. 28.) But any claim that O'Connell's death threat was not equal to whatever disciplinary infractions Johnson committed is wrong. Koppers wisely steers clear of any such argument; its only response on this point is to recite irrelevant facts that patently avoid reference to the severity of O'Connell's conduct. (Appellee Br. 28) (noting that Johnson did not initially report the threat, that Johnson was not afraid of O'Connell, and that there was no evidence that O'Connell ever made a threat after that). There is no doubt that O'Connell's threats were severe, and O'Connell was never punished for making them.

Koppers also hints that Johnson's disciplinary history can be invoked to differentiate the two. (Appellee Br. 29) ("[Johnson and O'Connell] were disciplined under significantly different circumstances. Johnson was terminated after other disciplinary issues.") (citation omitted). But Koppers cannot rely on that fact because it was a product of discrimination, as discussed in the opening brief. (Appellant Br. 31–32.) Even when neither Johnson nor O'Connell had received

discipline for threatening behavior, Koppers still treated O'Connell more favorably. *Compare* (A62) (guard shack), *with* (A84) (death threats).)[3] There are no meaningful differences that distinguish the similarly situated Johnson and O'Connell.

Finally, Koppers says the two were subject to different decisionmakers, which according to Koppers defeats Johnson's prima facie case. Johnson's opening brief unequivocally established that O'Connell was treated more favorably than Johnson throughout their tenure in the plant, most often by the exact same decisionmaker. (Appellant Br. 28–30.)[4] So Koppers cannot wriggle out from under that clear showing of favoritism by directing this Court to take a snapshot on the day she was fired and allow the roulette wheel of managerial shuffling to dictate whether a plaintiff like Johnson has satisfied her initial burden. Any such approach would undermine this Court's flexible standard and its goal of ferreting out discrimination, and replace it with the rigid and mechanized inquiry disfavored by the Supreme Court. *See Coleman v. Donahoe*, 667 F.3d 835, 841, 846 (7th Cir. 2012) (*citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

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[3] Traczek justified his disparate treatment of O'Connell and Johnson by claiming there was objective evidence of the guard shack incident, (A168), but not the death threats, (R. 42, Ex. 19, Traczek Dep. at 84). Yet a third-party did witness O'Connell's death threats (A119) (coworker Rosalind Morris reported O'Connell had told her he could have Johnson killed); Traczek never investigated enough to learn about it, highlighting the disparate treatment. *Compare* (A168) (facts relating to thorough investigation of Johnson), *with* (A166–67; A180) (facts showing paltry investigation of O'Connell).

[4] This argument was not waived because whether O'Connell and Johnson were similarly situated was raised before the district court, which explicitly considered the effect of Traczek's involvement in the termination decision. (A18–19); *Bailey v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 374*, 175 F.3d 526, 529–30 (7th Cir. 1999) (holding that an argument inartfully raised before the district court was not waived because the district court considered its merits); *but cf.* (Appellee Br. 29–30) (claiming that Johnson waived any argument that Traczek was involved in the decision to fire her).

In the end, no matter which way this Court looks at the issue, O'Connell and Johnson were similarly situated individuals with a comparable set of failings who were treated differently by Koppers. From 2003 until 2008, both Johnson and O'Connell allegedly violated Koppers's policy against threatening and disruptive behavior on three occasions. (Appellant Br. 5–6 n.2.) Johnson was suspended and then fired. O'Connell emerged with an unblemished record. It was the same people, Traczek and Wagner, involved in all of these decisions, and a flexible analysis of this complicated situation reveals that a jury can reasonably infer discrimination based on impermissible animus.

C. A reasonable jury could infer from specific evidence that Koppers did not believe its stated reasons for firing Johnson.

A material issue of fact exists as to whether Koppers's reasons for terminating Johnson were pretext. Contrary to Koppers's position that the record is devoid of evidence that Wagner doubted O'Connell's version of the alleged push, (Appellee Br. 32), evidence established the following facts: (1) Wagner knew O'Connell disliked Johnson, (A157); (2) Wagner knew O'Connell had previously falsely accused Johnson, (A30; A35); (3) Wagner did not use some of O'Connell's accusations as reasons for terminating Johnson, (A71); (4) Wagner knew the witnesses he chose to credit had been seen collaborating with O'Connell, (A37); and (5) Wagner knew there were inconsistencies between various stories surrounding the alleged push, (A42; A88) (O'Connell accused Johnson of pushing him as she entered the building while Kenyatta accused Johnson of pushing O'Connell after she left the building). Far from a random series of facts, (Appellee Br. 34), they

establish at a minimum a genuine issue as to whether Wagner honestly believed O'Connell's story about the alleged push.

Koppers repeatedly points to Wagner's deposition testimony, where he tries to explain away the impact of his previous, contemporaneously recorded impressions and contrary evidence in the record. (Appellee Br. 23, 33–34.) But at summary judgment, testimony does not eliminate material issues of fact if there is contradictory testimony or documentary evidence. *See Curry v. Menard, Inc.*, 270 F.3d 473, 479 (7th Cir. 2001) (holding evidentiary inconsistencies created a triable issue of fact on the pretext question). As the examples below illustrate, Wagner's attempts to explain away incriminating documents fail to resolve the factual disputes that require a trial.

Wagner's contemporaneous notes of his interviews following the alleged push show that at least one witness, Tim Wright, believed O'Connell, Kenyatta, and Wells were fabricating a story to frame Johnson.[5] (A37.) Wagner's later deposition testimony, where he claims the three men were innocently discussing whether to call the police, (A156), cannot eliminate this obvious material issue of fact. Likewise, Wagner's contemporaneous notes also reveal a contradiction between Kenyatta's version of the alleged push and O'Connell's, (A42), that is not neutralized by his post-hoc claim that he saw no conflict between the stories, (A154). The same goes for Wagner's contemporaneous warning to O'Connell that his

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[5] To the extent Koppers is arguing that Wright was not a party to the conversation, (Appellee Br. 23), Wagner's contemporaneous notes suggest otherwise. Wright was party enough to the conversation to judge that Wells, Wright, and O'Connell were not discussing facts and were "against Johnson." (A37.)

false accusations needed to stop immediately. (A30.) The issue of fact it creates is not suddenly eliminated because Wagner later said he did not mean the words on the page.[6] *See* (A147; A161.)

Johnson is entitled to the inference that Wagner's mental impressions, memorialized shortly after the various incidents, are more reliable than his employer-slanted deposition testimony years later, and those mental impressions cast doubt on whether he honestly believed Johnson pushed O'Connell. Accepting Koppers's approach to this conflicting testimony would require the court to make a credibility determination in Wagner's favor and choose between competing inferences. Those are tasks reserved for the jury. *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1041 (7th Cir. 1993).

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[6] Wagner's claim that the language he used in the warning was a direct excerpt of the policy, (A143–44), is not supported by the record. The policy forbids general dishonesty, (A49), while Wagner cautioned O'Connell that his false accusations need to stop immediately, (A30). When asked to point out which part of the policy he quoted, Wagner could not find it. (A147.)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's grant of summary judgment and remand for further proceedings.

Respectfully Submitted,

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Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Marica R. Johnson, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on January 22, 2013, which will send the filing to the persons listed below.

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No.12-2561

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARICA R. JOHNSON Plaintiff-Appellant, v. KOPPERS, INC. Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 1:10-cv-03404 The Honorable Joan H. Lefkow

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Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,066 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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