IN THE SUPREME COURT OF NEW JERSEY

Docket No. 085419

TROY HAVILAND, Plaintiff/Respondent, v. JOHN DOE, A FICTITIOUS NAMED USED TO DESIGNATE AGENT, SERVANT AND/OR EMPLOYEE DEFENDANT LOURDES MEDICAL CENTER AT BURLINGTON, DEPARTMENT OF RADIOLOGY AND IMAGING AND/OR LOURDES HEALTH SYSTEM, j/s/a, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1349-19 CIVIL ACTION Sat Below: Hon. Jose L. Fuentes, P.J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa A. Firko, J.A.D.

MOTION OF AMERICAN MEDICAL ASSOCIATION AND MEDICAL SOCIETY OF NEW JERSEY FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS/APPELLANTS

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PLEASE TAKE NOTICE that, pursuant to N.J. Ct. R. 1:13-9, the American Medical Association and Medical Society of New Jersey hereby move for leave to file the enclosed brief as amici curiae in the above-referenced action.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New Jersey, and in every medical specialty.

The Medical Society of New Jersey ("MSNJ"), founded in 1766, is the oldest professional society in the United States. Today, MSNJ is the largest physician organization in New Jersey and is comprised of medical students, residents and physicians from all specialties. MSNJ's mission is to promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine. The organization and its members are dedicated to a

healthy New Jersey, working to ensure the sanctity of the physician-patient relationship. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, for the delivery of the highest quality medical care. MSNJ supports initiatives that allow the medical community to respond to patient needs and develop an ethical and compassionate environment in order to create a healthy Garden State and healthy citizens.

The AMA and MSNJ appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the medical societies of every state. The AMA Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files amicus briefs and otherwise provides support or becomes actively involved in litigation of general importance to physicians. Together, the amici represent hundreds of thousands of doctors in New Jersey and across the nation.

Amici file the accompanying brief because it is in the interests of physicians and patients, as well as public health generally, that health care facilities licensed under New Jersey's Affidavit of Merit Act are subject to liability only when a plaintiff provides a valid affidavit of merit against

that facility. The Appellate Division's ruling below to allow a plaintiff to assert a vicarious liability claim against a health care facility without an affidavit of merit undermines the Act and creates an improper disincentive for health care facilities to involve important front-line medical technicians and other employees in the delivery of health care.

The AMA and MSNJ have special interest and expertise on this issue, and the attached briefing can assist the Court in the resolution of a significant issue of public importance. Further, this application is timely, and no party will suffer prejudice if the AMA and MSNJ appear as amici curiae.

The AMA and MSNJ, therefore, respectfully request that the Court grant its motion for leave to file the attached amici curiae brief.

Respectfully submitted,

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Dated: August 18, 2021

CERTIFICATION OF SERVICE

I certify that on August 18, 2021, I electronically filed the foregoing using New Jersey's eCourts system.

The parties in this case are registered eCourts users and will be served by the eCourts system.

/s/ Philip S. Goldberg
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AMICI CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION AND MEDICAL SOCIETY OF NEW JERSEY

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PRELIMINARY STATEMENT

The American Medical Association and Medical Society of New Jersey, as amici curiae, urge the Court to overturn the ruling below and determine an affidavit of merit under N.J.S.A. 2A:53A-26 to -29 is required whenever a plaintiff seeks to subject a health care facility licensed under the Act to liability, including when the claim is based on alleged medical negligence of an employee regardless of whether an affidavit of merit is separately required for seeking liability against the employee.

INTEREST OF AMICI CURIAE

Amici file this brief because it is in the interests of physicians and patients, as well as public health generally, that New Jersey courts uphold the state's statutory requirement that an affidavit of merit is needed when seeking to subject a person or entity to liability that is listed under the Act. Amici are concerned the Appellate Division's decision renders New Jersey's affidavit of merit requirement hollow when the alleged medical negligence was conducted by categories of employees, including technicians not separately listed under the Act. The lower court's ruling to subject a licensed health care facility to liability without an affidavit of merit undermines the Act and creates an improper disincentive to involve such important front-line employees in the delivery of health care.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New Jersey, and in every medical specialty.

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medical care. MSNJ supports initiatives that allow the medical community to respond to patient needs and develop an ethical and compassionate environment in order to create a healthy Garden State and healthy citizens.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

As set forth in the Appellate Division's ruling, Mr. Haviland underwent a radiological exam on his left shoulder at Lourdes Medical Center of Burlington County ("Lourdes"). The radiological exam was conducted with and without weights. A technician employed by Lourdes instructed Mr. Haviland to hold a weight in his left hand. Mr. Haviland did and allegedly sustained injuries that required surgical repair. The complaint states the technician was acting contrary to the physician's

orders and deviated from the accepted standards of medical care. Lourdes's Answer states that using weights did not deviate from the standard of care and were appropriately used in the exam.

Mr. Haviland filed this lawsuit seeking to subject Lourdes to liability for medical negligence. However, he did not produce an affidavit of merit that the technician or Lourdes violated medical standards of care, as required by New Jersey's Affidavit of Merit Act. The trial court instructed Mr. Haviland to secure such an affidavit. Mr. Haviland argued he did not need to produce one here because he is not suing Lourdes directly--only vicariously for medical negligence of the technician and technicians are not among the persons covered under the Act. The trial court properly dismissed the case because regardless, Lourdes, as a licensed facility listed under the Act, cannot be subject to liability if an affidavit of merit is not produced.

The Appellate Division overturned this ruling, allowing Mr. Haviland to skirt the affidavit of merit requirement by seeking to subject Lourdes to vicarious, not direct, liability. This appeal considers whether an entity listed under the Affidavit of Merit Act can be subject to liability for a claim of medical negligence even though no affidavit of merit was produced merely because the plaintiff asserts indirect liability theories involving staff that are not separately listed in the Act.

LEGAL ARGUMENT

The goal of New Jersey's civil justice system in medical negligence cases is to compensate wrongfully injured patients. In pursuit of this mission, the New Jersey Legislature enacted the Affidavit of Merit Act to cover cases, including this one, where a patient seeks to subject a licensed health care facility or physician to liability for harms allegedly caused by medical negligence. It applies to "any action for damages for personal injuries . . . resulting from an alleged act of malpractice or negligence by a licensed person." N.J.S.A. 2A:53A-27.

There is no dispute that this case is a medical negligence claim under the Act, that Mr. Haviland alleges a deviation from accepted standards of medical care, and that Lourdes is a "licensed person" under the Act. N.J.S.A. 2A:53A-26(j). Accordingly, Mr. Haviland was required to provide an affidavit of merit from a qualified practitioner that "there exists a reasonable probability that the medical treatment" a Lourdes employee provided "fell outside acceptable professional standards or treatment practices." N.J.S.A. 2A:53A-27. He did not, even after given the opportunity to cure this defect, and the trial court properly dismissed his claim.

In resurrecting Mr. Haviland's claim, the Appellate Division allowed him to subject Lourdes to liability indirectly--without an affidavit of merit--where he could not do so

directly. It held Mr. Haviland could pursue Lourdes for his medical negligence claim so long as he does not sue Lourdes itself. He can sue the technician, because the technician is not separately listed in the Affidavit of Merit Act, and then collect from Lourdes through respondeat superior. This Court has previously rejected such end-runs around the Affidavit of Merit Act and should do so again here. See Jones v. Morey Piers, Inc., 230 N.J. 142 (2017) (relating to a cross-claim without an affidavit of merit against a covered person). As the Court explained in Jones, the Legislature "did not distinguish between" indirect and direct claims. Id. at 157. The statute's import should be as "clear" here as in Jones: it should govern indirect claims just "as it governs direct claims asserted by plaintiffs." Id.

Jones is particularly instructive because the Court also adopted the reasoning in Burt v. West Jersey Hosp. Sys., 339 N.J. Super. 296 (App. Div. 2001). See Jones, 230 N.J. at 168 ("[W]e consider the Appellate Division's analysis in Burt to effectively reconcile the governing statutes."). In Burt, plaintiffs sought recovery from a person covered by the Act through indirect cross claims even though the plaintiff had not provided an affidavit of merit against that covered person. The court responded that if the courts allowed plaintiffs to circumvent the Affidavit of Merit Act through indirect claims,

"the purposes of the Affidavit of Merit Act would be frustrated." Burt, 339 N.J. Super. at 310. "[T]he Legislature has provided for a dismissal of the claim with prejudice in the event of a failure to comply with the act. We believe the conclusions we have reached further that goal notwithstanding the potential effect upon [the] plaintiff." Id.

The Court should reach the same conclusion here. Indirect, vicarious liability is not a reason to evade the Affidavit of Merit Act. It would increase medical litigation in direct contravention to the Act, which does not impede genuinely meritorious lawsuits in any way. It also would create a false dichotomy. A covered health care provider should not be subject to liability for conduct solely because it hired someone else to perform the function that gave rise to a medical liability claim. Such a rule would disrupt teamwork among health care professionals, thereby hurting patient care and increasing costs. It also would create unnecessary divisions in hospitals and physician offices between covered and non-covered staff. For these reasons, amici urge the Court to reverse the ruling below.

I. THE COURT SHOULD NOT ALLOW THE AFFIDAVIT OF MERIT ACT TO BE CIRCUMVENTED THROUGH INDIRECT CLAIMS.

New Jersey's Affidavit of Merit Act was enacted to "bring common sense and equity to the State's civil litigation system" in medical negligence cases. Alan J. Cornblatt, P.S. v. Barow,

153 N.J. 218, 228 (1998) (quoting Office of the Governor statement). Its purpose has been to discourage meritless medical liability claims. See Burt, 339 N.J. Super. at 308 ("The Affidavit of Merit Act was intended . . . to insulate [health care providers] from the expense and inconvenience of litigation"). As discussed below, the vast majority of medical liability claims filed are not merited. They typically are withdrawn, thereby imposing a significant, unnecessary cost on medical providers, physicians and others integral to the State's health care system. The Act cannot achieve its public policy goals if it can be circumvented through indirect pleading.

Under the Act, a plaintiff must provide a defendant within 60 days of filing the complaint with an affidavit of merit from a qualified practitioner that "there exists a reasonable probability that the medical treatment" the defendant provided "fell outside acceptable professional standards or treatment practices." N.J.S.A. 2A:53A-27. If the plaintiff cannot meet this requirement, the claims against that defendant are dismissed for failure to state a cause of action. See N.J.S.A. 2A.53A-29. Here, Mr. Haviland was instructed to produce the required affidavits of merit against Lourdes if he sought recovery from it. Mr. Haviland failed to do so and is now barred from recovering against Lourdes based on any failure to adhere to the applicable standards of medical care during his exam.

Allowing a jury to nonetheless hear the case and subject Lourdes to liability disregards this statutory bar. A core purpose of the Act is to ensure that juries are not presented with complex matters of medical science where they may draw conclusions not supported by experts in the field. It can be understandably challenging for lay jurors to fairly "differentiate between adverse events and medical errors," which require treatment that falls below the standard of care. David Sohn, Negligence, Genuine Error, and Litigation, 6 Int'l J. Gen. Med. 49, 50 (2013). Studies have shown that when a case proceeds to trial, jurors often fill the voids in their knowledge by improperly presuming a provider must have caused a patient's alleged harms. See generally Michael A. Haskel, A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases, 42 Tort & Ins. L. J. 895 (2007). "[T]he existence of these biases suggest that it may be difficult for finders of fact to evaluate [the allegations] fairly." *Id.* at 905. Thus, the Affidavit of Merit Act provides a vital safeguard against improper litigation and liability.

Experience has shown that the filing of a lawsuit alleging malpractice is actually a poor indicator of whether malpractice has actually occurred, which is why affidavits of merit are useful. See Barry F. Schwartz & Geraldine M. Donohue, Practicing Medicine in Difficult Times: Protecting Physicians from

Malpractice Litigation 47, 49 (Jones & Bartlett Publishers, 2009). According to a Harvard Public Health Study, only about 27 percent of adverse events are caused by negligence. See Troyen A. Brennan et al., Incidence of Adverse Events and Negligence in Hospitalized Patients, 324 New Eng. J. Med. 370, 371 (1991). Nationally, more than two thirds of medical negligence claims (68.2%) are dropped, dismissed, or withdrawn. See José R. Guardado, Medical Professional Liability Insurance Indemnity Payments, Expenses, and Claim Disposition, 2006-2015, at 3 (Am. Med. Ass'n 2018).[1] The average expense of defending a physician against a medical liability claim that is dropped, dismissed, or withdrawn exceeds $30,000. Id. In the aggregate, these costs account for 38.4 percent of total defense legal expenditures in medical liability cases--a cost that jeopardizes affordable and available care. See id. at 7.

Affidavit of merit statutes have proven to be cost-effective ways of deterring such meritless claims, protecting providers from unwarranted litigation, and preserving access to affordable healthcare. They have helped health care providers avoid these unnecessary costs by "weed[ing] out those cases which otherwise are eventually dropped, withdrawn or dismissed, but without having to go through the initial, and expensive,

[1] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-liability-insurance-claim.pdf

stages of litigation." Michael C. Stinson, Medical Professional Liability – Trends in Claims and Legislative Responses, 26 Health Law. 1, 12 (Aug. 2014). These concerns are not alleviated merely because a jury is presented with a provider's liability through a vicarious, rather than a direct cause of action. To give full force and effect to New Jersey's Affidavit of Merit Act, the Court should reverse the Appellate Division's ruling and not allow the Act to be skirted through indirect claims.

II. OVERTURNING THE LOWER COURT'S RULING WILL KEEP NEW JERSEY IN THE MAINSTREAM OF AMERICAN JURISPRUDENCE.

To avoid the costs of unwarranted litigation, about half of the states have enacted affidavit or certificate of merit requirements. See Am. Med. Ass'n, State Laws Chart II: Liability Reforms (2017);[2] Nat'l Conf. of State Legislatures, Medical Liability/Malpractice Merit Affidavits and Expert Witnesses (2014).[3] They too have seen attempts to circumvent their legislations' requirements, which courts have rejected including in cases similar to the one at bar. In fact, rather than take away the statute's protections for entities listed in the Act, they have extended those protections to non-listed employees.

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[2] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/state-laws-chart-2_0.pdf

[3] http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx

In Goldman v. Halifax Med. Ctr., Inc., 662 So. 2d 367 (Fla. Ct. App. 1995), for example, a Florida appellate court determined a plaintiff was required to comply with the state medical liability statute's pre-suit notice requirement where acts of alleged negligence were performed by a hospital's radiologic technician even though the employee was not defined in the statute as a "health care provider." The court concluded, "negligence of the hospital's agents acting in the course of their employment should be treated as the negligence of the hospital." Id. at 370. To hold otherwise would lead to an "irrational result." Id. If "non-health care employers are entitled to the pre-suit conditions where their health care employees have allegedly provided negligent medical care," then health care employers are "entitled to these provisions when their health care or non-health care employees commit such acts or omissions." Id. (emphasis added).

In New York, courts have similarly concluded that a state's medical malpractice regime should apply to alleged negligence by a medical technician. See Rabinovich v. Maimonides Med. Ctr., 179 A.D.3d 88, 95 (N.Y. App. Div. 2019) (stating the "fact that a phlebotomist may have performed the blood draw, rather than a licensed physician, does not remove the plaintiff's claims from the realm of medical malpractice"); Lang-Salgado v. Mount Sinai Med. Ctr., Inc., 157 A.D.3d 532, 533 (N.Y. App. Div. 2018)

(holding patient's action against hospital to recover damages for injuries allegedly sustained as result of falling from stretcher while being positioned by x-ray technician sounded in medical malpractice); see also Zettel v. Licht, 518 N.W.2d 214 (N.D. 1994) (finding claim against medical technician who assisted radiologist time-barred pursuant to limitations period of state medical malpractice act).

As commentators have explained, "[l]ogic and common sense require that a non-health care provider employee of a corporate health care provider be subject to the statute because corporations can act only through their employees and agents. It would make no sense to include the covered entity but not the employee through which the entity must act." Craig Salnera & Karen H. Curtis, Do Statutory Pre-Suit Requirements for Medical Malpractice Claims Apply to Medical Personnel Not Specifically Included in the Definition of "Medical Health Providers" In Section 755.202(4), Florida Statutes?, 26 No. 3 Trial Advoc. Q. 28, 29 (2007). Thus, in situations similar to the case at bar, other states have extended the statute to the non-covered individuals to ensure the goal of the statute are met. These states did not, as the lower court did here, undermine the statute by removing the statutory protections from the employer.

III. THE COURT SHOULD NOT CREATE A LOOPHOLE TO THE AFFIDAVIT OF MERIT ACT THAT DISCOURAGES TEAMWORK WITH TECHNICIANS AND OTHER PROFESSIONALS.

The Court should also overturn the ruling below because of the negative impact it would have on patient care. Technicians are often critical team members in delivering health care, and this ruling would discourage providers from employing and using them in this capacity. Employers would be incentivized to use only individuals listed in the Affidavit of Merit Act to keep their liability protections. Such a scenario would harm the ability of physicians and professional staff to work together economically for the benefit of patients. The ripple effects of such a ruling would be felt wherever multi-disciplinary teams provide patient care.

This chilling of collaboration would set back decades of efforts toward enhancing teamwork. There have been significant efforts, particularly in hospitals, "to improve collaboration and team-based care." Team-Based Health Care Delivery: Lessons from the Field, Am. Hosp. Ass'n Physician Leadership Forum (2012), at 8[4]; Physician-led Team-based Care, Am. Med. Ass'n.[5] For years there have been concerns that clinicians spend too much time on tasks that could be "better performed by other

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[4] http://www.ahaphysicianforum.org/resources/leadership-development/team-based-care/team-delivery-report.pdf

[5] https://www.ama-assn.org/delivering-care/physician-led-team-based-care

staff members." Susan A. Chapman & Lisel K. Blash, New Roles for Medical Assistants in Innovative Primary Care Practices, PMID: 27859097, Health Serv Res. (Feb. 2017).[6] "[T]here is a growing acknowledgement that the current primary care workforce is not always used in a way that maximizes each profession's unique skills and training." Id. As a result, reforming health care models has been "extensively discussed" in literature, clinical forums, and policy arenas. Id.

The use of technicians, assistants, and other staff is a necessity for hospitals, clinics, and other licensed health care providers. It leads to more efficient and effective medical treatment by enabling physicians to better allocate their limited patient time. To borrow a baseball analogy, technicians, medical assistants and other staff are the ultimate utility players and increasingly relied on to serve diversified roles. See What Is a Medical Assistant?, Am. Ass'n of Med. Assistants (stating "Medical assistants are cross-trained to perform administrative and clinical duties")[7]; see also AAMA 2018-2019 Occupational Analysis of Medical Assistants, Am. Ass'n of Med.

[6] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5269548/

[7] https://www.aama-ntl.org/medical-assisting/what-is-a-medical-assistant

Assistants (listing 95 different clinical, administrative, and communication-related tasks given to medical assistants).[8]

Radiologic technicians, in particular, "are at the forefront of patient safety and quality." Patient Safety and Quality in Medical Imaging: The Radiologic Technologist's Role, Am. Soc'y of Radiologic Technologists, at 1 (2013).[9] "[T]he radiologic technologist usually is the first and often the only health care staff member who interacts with patients having medical imaging examinations." Id. at 3. They also are licensed; the use of "uncertified or unlicensed individuals to perform medical imaging and radiation therapy" is highly discouraged. ASRT Position Statements, Am. Soc'y of Radiologic Technologists.[10]

Without such technicians, medical assistants and staff, the already "mounting demands" on physicians' time would worsen, patient care would suffer, and the costs would go up. See David C. Dugdale et al., Time and the Patient–Physician Relationship, PMID: 9933493, J. Gen. Intern. Med. (Jan. 1999)[11]; Richard A. Epstein, Big Law and Big Med: The Deprofessionalization of Legal

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8 https://www.aama-ntl.org/medical-assisting/occupational-analysis

9 https://www.asrt.org/docs/default-source/research/whitepapers/patient-safety-and-quality-in-medical-imaging-the-radiologic-technologist's-role.pdf?sfvrsn=488906d0_13

10 https://www.asrt.org/main/standards-and-regulations/professional-practice/position-statements-online

11 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1496869/

and Medical Services, 38 Int'l Rev. L. & Econ. 64, 72 (2013) (noting "a full complement of physician assistants, technicians, nurses aids, and others not yet invented help convert expensive medical care into cheaper health care"). It would be inefficient and unwise to reallocate their tasks to only those employees who are covered under the Affidavit of Merit Act. It is critical that liability rules and health care goals align, which is why this Court should overturn the ruling below and ensure that the Affidavit of Merit Act cannot be circumvented so easily.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request the Court to reverse the ruling of the Appellate Division below and find that the Affidavit of Merit Act applies equally and in full force to direct and indirect claims alike.

Respectfully submitted,

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Dated: August 18, 2021

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The parties in this case are registered eCourts users and will be served by the eCourts system.

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SUPREME COURT OF NEW JERSEY
APP. DIV. # A-001349-19
SUPREME COURT # 085419

CRIMINAL ACTION

Troy Haviland,

Plaintiff,

v.

CERTIFICATION OF SERVICE

Lourdes Medical Center of
Burlington County, Inc.,

Defendant-Petitioner.

I hereby certify that the following documents, MOTION FOR LEAVE TO APPEAR AMICUS CURIAE, BRIEF IN SUPPORT OF MOTION, BRIEF IN SUPPORT OF MOTION were submitted and transmitted to the parties listed below in the following format:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Dated: 08/18/2021