

# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS  
No. SJC-13646

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GREGORY RAFTERY, Plaintiff-Appellant,

v.

STATE BOARD OF RETIREMENT, Defendant-Appellee.

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On Reservation and Report of  
The Single Justice of the Supreme Judicial Court  
For Suffolk County in SJ-2024-0213

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**REPLY BRIEF OF  
PLAINTIFF-APPELLANT GREGORY RAFTERY**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ARGUMENT .....	5
I. In the context of pension forfeiture, Article 26’s text, history, and purpose support a broader interpretation than the Eighth Amendment. ....	5
A. The Declaration of Rights was not an afterthought and should be read to provide greater protection to individuals than the Eighth Amendment. ....	5
B. The Cruel or Unusual Punishments Clause protects against cruel or unusual pension forfeitures as punishments.....	6
II. The Court should adopt a standard of constitutionality for pension forfeiture under Article 26 that embodies its purpose.....	9
A. The pension forfeiture analysis with respect to the Excessive Fines Clause should encompass the individual circumstances of the conviction and offender, not simply the value of the money to be forfeited. ....	9
B. The Cruel or Unusual Punishments Clause should not be interpreted narrowly to exclude monetary punishments. ....	12
III. Mandatory total forfeiture of Raftery’s pension, accrued over his lengthy career in law enforcement, is grossly disproportional to his offense and therefore violates his Article 26 rights. ....	15
A. Requiring Raftery to forfeit his entire pension constitutes an excessive fine under Article 26.....	15
B. Forfeiture would be both cruel and unusual as punishment for Raftery’s offense.....	17
CONCLUSION .....	18
RULE 16(A) CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE .....	20

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	5
<i>Bisignani v. Justices of Lynn Div. of Dist. Ct. Dept. of Trial Ct.</i> , 100 Mass. App. Ct. 618 (2022) .....	15
<i>Cepulonis v. Commonwealth</i> , 384 Mass. 495 (1981) .....	13
<i>Commonwealth v. Chism</i> , SJC-11939, slip op. (Feb. 25, 2025) .....	16
<i>Commonwealth v. Concepcion</i> , 487 Mass. 77 (2021) .....	7, 12
<i>Commonwealth v. Intoxicating Liquors</i> , 172 Mass. 311 (1899).....	10, 11
<i>Commonwealth v. Lyles</i> , 453 Mass. 811 (2009).....	10
<i>Commonwealth v. Mattis</i> , 493 Mass. 216 (2024) .....	12, 16
<i>Commonwealth v. Novak</i> , 272 Mass. 113 (1930).....	10, 11
<i>Diatchenko v. Dist. Attorney for Suffolk Dist.</i> , 466 Mass. 655 (2013) .....	12, 16
<i>Dist. Attorney for Suffolk Dist. v. Watson</i> , 381 Mass. 648 (1980) .....	5, 12
<i>Flaherty v. Justices of the Haverhill Div. of the Dist. Ct.</i> , 83 Mass. App. Ct. 120 (2013).....	8, 15
<i>MacLean v. State Board of Retirement</i> , 432 Mass. 339 (2000) .....	9

<i>Mazzone v. Attorney Gen.</i> , 432 Mass. 515 (2000) .....	3
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	5
<i>Public Employee Retirement Administration Commission v. Bettencourt</i> , 474 Mass. 60 (2016) .....	passim
<i>Simon v. State Examiners of Electricians</i> , 395 Mass. 238 (1985) .....	3, 4
<i>State Board of Retirement v. Finneran</i> , 476 Mass. 714 (2017) .....	9, 14
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	6, 9, 14

## **Other Authorities**

<u>A Dictionary of the English Language</u> by Samuel Johnson, 1773 .....	3
Roderick L. Ireland, <i>How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues</i> , 38 VAL. U. L. REV. 405 .....	4
Scott L. Kafker, <i>State Constitutional Law Declares Its Independence: Double Protecting Rights During A Time of Federal Constitutional Upheaval</i> , HASTINGS CONST. L. Q. 115, 144 (2022) .....	1

## **Constitutional Provisions**

Mass. Const. art. 26.....	2, 4
Mass. Const. art. I, pt. I .....	1

## ARGUMENT

- I. In the context of pension forfeiture, Article 26's text, history, and purpose support a broader interpretation than the Eighth Amendment.

An independent analysis of the text, history, and purpose of Article 26's provisions show that it should be interpreted more broadly than the Eighth Amendment in the context of pension forfeiture. *See* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During A Time of Federal Constitutional Upheaval*, HASTINGS CONST. L. Q. 115, 144 (2022).

- A. The Declaration of Rights was not an afterthought and should be read to provide greater protection to individuals than the Eighth Amendment.

At the time it was ratified in 1780, the Constitution of the Commonwealth of Massachusetts contained both the Declaration of Rights and Frame of Government. Its structure paralleled its priorities. The first part, the Declaration of Rights, protected the unalienable rights of the Inhabitants of the Commonwealth against impositions by the government of the Commonwealth. Mass. Const. art. I, pt. I. The same cannot be said of the United States Constitution. At the time it was ratified, the U.S. Constitution lacked a Bill of Rights to protect citizens against government abuses. Because the Declaration of Rights in the Massachusetts Constitution was the first order of business, not a series of belated amendments,

Article 26 should be read to provide greater protection to individuals than the Eighth Amendment.

B. The Cruel or Unusual Punishments Clause protects against cruel or unusual pension forfeitures as punishments.

Mandatory total pension forfeiture constitutes a punishment under the Cruel or Unusual Punishments Clause of Article 26. *See* Mass. Const. art. 26; *Public Employee Retirement Administration Commission v. Bettencourt*, 474 Mass. 60 (2016). Article 26 provides, in relevant part, that “No magistrate *or* court of law, shall demand excessive bail *or* sureties, impose excessive fines, *or* inflict cruel *or* unusual punishments.” Mass. Const. art. 26.

The State Board of Retirement’s (“Board”) claim that mandatory total pension forfeiture is not a punishment for purposes of the Cruel or Unusual Punishments Clause, Br.30–31,<sup>1</sup> ignores the plain language of Article 26, the definition of punishment, and this Court’s decision in *Bettencourt*. 474 Mass. at 71. In *Bettencourt*, this Court held explicitly “that the forfeiture required by § 15 (4) qualifies as ‘punishment.’” *Id.* Although the case was decided in the context of the Eighth Amendment’s Excessive Fines Clause, the text of the Cruel or Unusual Punishments Clause in Article 26 plainly covers “punishments” which are cruel *or*

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<sup>1</sup> Citations to the Board’s brief, filed on February 12, 2025, appear as “Br.[page number].” Citations to the Appellant’s addendum, filed on October 31, 2024, appear as “Add.[page number].”

unusual.<sup>2</sup> See *Simon v. State Examiners of Electricians*, 395 Mass. 238, 242 (1985) (starting point of constitutional interpretation is plain language).

The 1773 definition of “punishment” bolsters this interpretation. See *Mazzone v. Attorney Gen.*, 432 Mass. 515, 526 (2000) (explaining that words are given their natural and obvious sense according to common and approved usage at the time of adoption, though historical context should not control plain meaning). In 1773, “punishment” included “any infliction or pain imposed in vengeance of a crime.” A Dictionary of the English Language by Samuel Johnson, 1773.<sup>3</sup> This definition does not limit punishment to physical punishment or incarceration.

The Board argues that the Court need not apply the Cruel or Unusual Punishments Clause of Article 26 to pension forfeiture where the cognate federal provision has never been applied to a monetary penalty. Br.33. That view, however, sheds no light on the question of whether a “punishment” is a “punishment.” See *Simon*, 395 Mass. at 242. As previously discussed, the starting point for constitutional interpretation is the plain language accompanied by historical context. *Id.* Here, Article 26’s plain language proscribes “inflict[ion of] cruel or unusual punishments.” Mass. Const. art. 26; see *id.*

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<sup>2</sup> The Court did not address Article 26 because the parties only raised claims under the Eighth Amendment. *Bettencourt*, 474 Mass. at 64 n.7.

<sup>3</sup> [https://johnsonsdictionaryonline.com/1773/punishment\\_ns](https://johnsonsdictionaryonline.com/1773/punishment_ns) (last accessed February 26, 2025).

Furthermore, the Article 26 Excessive Fines Clause is not a “well-established vehicle” for analyzing pension forfeiture because, as the Board acknowledges, Br.41 n.21, no Massachusetts appellate court has ever construed the Clause in the context of pension forfeiture. *See McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010) (declining application of one clause in the Fourteenth Amendment when another clause was already a well-established vehicle). Moreover, the Board misplaces reliance on *Alexander v. United States*, 509 U.S. 544 (1993), Br.29, because the Court has an “obligation to make an independent determination of rights, liberties, and obligations for Massachusetts.” Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 407. The Court need not follow the lead of the United States Supreme Court when rights and liberties are at stake. *See id.*; *see also Dist. Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 695 (1980) (“We are, of course, free to interpret our own Constitution differently from the manner in which the United States Supreme Court interprets basically the same language in the United States Constitution.”) (Quirico, J., dissenting). As Raftery has maintained, this Court should interpret the Cruel or Unusual Punishments Clause in a manner consistent with its text and historical context.

II. The Court should adopt a standard of constitutionality for pension forfeiture under Article 26 that embodies its purpose.

A. The pension forfeiture analysis with respect to the Excessive Fines Clause should encompass the individual circumstances of the conviction and offender, not simply the value of the money to be forfeited.

Rather than simply adopt the factors set forth in *Bajakajian*, 524 U.S. 321 (1998), this Court should interpret Article 26 of the Massachusetts Constitution to give greater protection to individual property rights, including a public employee's pension, than the Eighth Amendment. *See Bettencourt*, 474 Mass. at 67, 72. A forfeiture violates the Eighth Amendment's Excessive Fines Clause "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense." *Id.* at 72 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)) (internal quotations omitted). In determining the "amount of the forfeiture," the Court in *Bettencourt* estimated that Bettencourt would face forfeiture of \$659,000 at a minimum, plus the value of health insurance benefits. *Id.* Importantly, the Court also considered that Bettencourt had accrued his interest in the forfeited benefits over more than twenty-five years of public service. *Id.* That is, Bettencourt not only forfeited money and health insurance benefits, he forfeited the sum of these benefits in the context of having served a long career in public service. *See id.*

This Court’s decision in *Bettencourt* recognizes that “forfeiture” includes more than the value of the money forfeited. *See* 474 Mass. at 72. But the Board misapplies the *Bettencourt* test by solely focusing on factors measuring the “gravity of the offense.” Br.25. Contrary to the Board’s assertion, Br.25, as discussed above, the *Bettencourt* proportionality analysis considers factors beyond those that measure the gravity of the offense and the monetary value of the forfeiture, *see* 474 Mass. at 72. The defendant’s circumstances—including having served twenty-five years in public service—affects the proportionality analysis. *See id.*; *see also Commonwealth v. Concepcion*, 487 Mass. 77, 86 (2021) (proportionate punishment should be graduated and proportioned to both the offender and offense).

The Board contends that Raftery’s suggested focus on comparing actual monetary harm against the total forfeiture amount is not an adequate proxy for determining the gravity of the offense. Br.42–43. While it is true that this Court has rejected this approach, *see Flaherty v. Justices of the Haverhill Division of the District Court*, 83 Mass. App. Ct. 120, 124 (2013), the Board’s contention misunderstands Raftery’s argument. Raftery does not advocate that this Court disregard or overrule its prior decisions that consider the degree of harm caused by the offender, including harms that may be considered non-financial. *See, e.g., Bettencourt*, 474 Mass. at 74 (considering harmful breach of the public trust and

violation of privacy rights). Instead Raftery contends that the value of the pension forfeiture compared to the value of the monetary harm should be but one factor considered in the proportionality analysis.

The Board also ignores that Article 26's proportionality aims are more accurately reflected by the actual sentence imposed on the defendant rather than the maximum sentence for the offense. *See* Br.44.<sup>4</sup> In the Eighth Amendment context, pension forfeiture is only unconstitutional when the forfeiture is "grossly" disproportionate to the gravity of the offense. *Bettencourt*, 474 Mass. at 72; *Bajakajian*, 524 U.S. at 334. That is, the Eighth Amendment does not require exact proportionality. *See MacLean v. State Board of Retirement*, 432 Mass. 339, 350 (2000) ("Comparing the large amount of illegal gain, \$512,000, to the amount of the pension benefits, \$625,855, the forfeiture is not grossly disproportional to the plaintiff's offense."); *State Board of Retirement v. Finneran*, 476 Mass. 714, 724 (2017) (comparing fine of \$250,000 to \$433,400 worth of pension benefits, forfeiture was not an excessive fine). Raftery does not contend that Article 26 standard should require mere disproportionality.

Lastly, the Board's contention that expanding the protection of Article 26's Excessive Fines Clause would result in two tests for pension forfeiture, Br.41, does

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<sup>4</sup> The Board in fact cites no case law to support its contention that focusing on the actual sentence imposed "is contrary to all of the case law." *See* Br.44.

not account for the fact that Massachusetts courts have evaluated forfeitures under both the Excessive Fines Clause, and the Cruel or Unusual Punishments Clause, of Article 26. *See Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 316 (1899) (“Nor is there any ground for saying that the forfeiture is to be regarded as in the nature of an excessive or unusual punishment.”); *Commonwealth v. Novak*, 272 Mass. 113, 116 (1930) (“In our opinion the punishment was not cruel or unusual, nor the forfeiture imposed excessive, under article 26 of our Declaration of Rights.”). In addition, when considering cognate federal and state constitutional provisions, this Court has applied the standard more protective of individual rights. *See, e.g., Commonwealth v. Lyles*, 453 Mass. 811, 812 n.1 (2009) (“[W]e consider the challenged seizure in light of the more stringent standards of art. 14 with the understanding that, if these standards are satisfied, then so too are those of the Fourth Amendment.”). In short, expanding the protection of Article 26’s Excessive Fines Clause would not require in two separate tests; the result would be one test which is more protective of individual rights.

B. The Cruel or Unusual Punishments Clause should not be interpreted narrowly to exclude monetary punishments.

This Court’s jurisprudence does not preclude the Cruel or Unusual Punishments Clause from protecting individuals against disproportionate pension forfeitures. As early as 1899, this Court has implicitly concluded that the Cruel or Unusual Punishments Clause extends beyond the imposition of physical

punishment and incarceration. Br.35; see *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311 (1899); *Commonwealth v. Novak*, 272 Mass. 113 (1930). In *Intoxicating Liquors*, the Court considered whether the forfeiture of liquor for a violation of a state law regulating the transportation of intoxicating liquors violated the Massachusetts or federal constitutions. 172 Mass. at 314–15. Similarly, in *Novak*, the question was whether a judgment requiring forfeiture of double the amount won gambling was “cruel or unusual punishment.” 272 Mass. at 115. In both cases, the forfeiture at issue was money or property, independent of any physical punishment or incarceration. See *Intoxicating Liquors*, 172 Mass. at 314–15; *Novak*, 272 Mass. at 115. Similarly, the Court assumed that the Cruel or Unusual Punishments Clause applied to both monetary and property forfeitures. See *Intoxicating Liquors*, 172 Mass. at 316; *Novak*, 272 Mass. at 115.

Second, the Board’s claim that Article 26 and the Eighth Amendment should be interpreted coextensively, Br.35, does not consider that monetary punishment may be disproportionate as applied to certain offenders. The touchstone of Article 26’s proscription against cruel or unusual punishment, as with excessive fines, is proportionality. *Concepcion*, 487 Mass. at 86. That is, punishment should be graduated and proportioned to both the offender and offense. *Id.*; see *Commonwealth v. Mattis*, 493 Mass. 216, 225 (2024) (considering age and corresponding characteristics of emerging adults to evaluate constitutionality of

life without parole); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass. 655, 670–71 (2013) (considering offender’s age and penological justifications for juvenile homicide offenders); *Dist. Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 664 (1980) (considering severity of impact on individuals condemned to death). Put simply, an offender’s individual circumstances are relevant to both Article 26’s Cruel or Unusual Punishments Clause and the Eighth Amendment’s Cruel and Unusual Punishments Clause.

Finally, the Board argues that there is nothing unusual about forfeiture of money or property for punitive and deterrent purposes. Br.38. This argument fails to take into account that the test for disproportionality required by Article 26 has three prongs: first, an inquiry into the nature of the offense and the offender in light of the degree of harm to society; second, a comparison between the sentence imposed and punishments prescribed for the commission of more serious crimes in the Commonwealth; and third, a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions. *Cepulonis v. Commonwealth*, 384 Mass. 495, 498 (1981).

III. Mandatory total forfeiture of Raftery's pension, accrued over his lengthy career in law enforcement, is grossly disproportional to his offense and therefore violates his Article 26 rights.

A. Requiring Raftery to forfeit his entire pension constitutes an excessive fine under Article 26.

Mandatory total forfeiture of Raftery's pension is excessive because the value of the forfeiture is grossly disproportionate to the crime for which he was convicted.<sup>5</sup> First, Raftery paid full restitution to the Massachusetts State Police yet the Board seeks to withhold a minimum of \$1,025,000, plus the value of health insurance benefits, which he earned over twenty-one years of service. *See Bettencourt*, 474 Mass. at 72. Based on the State Actuary's projection, the Board will ultimately withhold at least twenty times more than the excess overtime payments received. Add. 28. In comparison, the court-ordered restitution was \$51,377.50. Add. 27–28. Where Raftery's forfeiture is larger than the restitution and mandatory fine imposed by the United States District Court by many orders of magnitude and bears no articulable correlation to the injuries suffered by the Massachusetts State Police, mandatory total forfeiture of Raftery's pension is an Excessive Fine under Article 26. *See Bajakajian*, 524 U.S. at 339–340 (holding

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<sup>5</sup> Raftery does not contest the District Court's conclusion that his offense was "serious." Br.25; Add.47. Raftery instead contends that, where the sentencing court determined that three months in prison, one year of supervised release, restitution, and a \$100 fine was sufficient to punish Raftery for his offense, it would be "excessive," "cruel," and/or "unusual" to subject him to a further loss of over one million dollars in retirement allowance payments plus the loss of health insurance.

forfeiture to be grossly disproportional under Eighth Amendment where forfeiture larger than fine “by many orders of magnitude” and forfeiture bore “no articulable correlation” to government’s injury).

The Board misplaces reliance on various of this Court’s cases by considering the forfeiture amounts without regard to gravity of the offense. *See* Br.26–27. First, Speaker Finneran falsely testified in a federal district court case about his knowledge of a redistricting plan, a plan that the court later concluded had resulted in discriminatory impact on African Americans in violation of the Voting Rights Act. 476 Mass. at 717.<sup>6</sup> Second, in *Bisignani v. Justices of Lynn Division of District Court Department of Trial Court*, 100 Mass. App. Ct. 618 (2022), Bisignani pled guilty to procurement fraud, evading public bidding laws, incurring liability and expenditure of public funds violations, and interfering with criminal and grand jury investigations. 100 Mass. App. Ct. at 620. Third, in *Flaherty*, 83 Mass. App. Ct. 120, the Appeals Court emphasized an important aggravating factor: Flaherty used paving supplies he stole from the city’s highway department in a business he ran. 83 Mass. App. Ct. at 124.

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<sup>6</sup> Speaker Finneran was indicted and convicted for his false testimony. *Id.* at 717–18. As a result, the Board ordered forfeiture of his pension pursuant to G.L. 32, § 15(4). *Id.* at 718. The pension forfeiture led to this Court’s decision in *Finneran*. *Id.* at 718–19.

Here, by contrast, Raftery's conviction was based on his submission of false documents to his employer. Add. 27–28. The societal harm that arose from his conduct was primarily to the reputation of the Massachusetts State Police, not to an entire voting population as in *Finneran*. Neither did Raftery obstruct a criminal investigation into his own conduct, as in *Bisignani*. Finally, Raftery returned the embezzled funds by way of restitution. Add. 27–28. He did not, in contrast to *Flaherty*, make off with undisclosed profit.

B. Forfeiture would be both cruel and unusual as punishment for Raftery's offense.

Mandatory total forfeiture of Raftery's pension and health insurance benefits is "cruel" and "unusual." First, it is cruel in part because, as the District Court below noted, the provisions of G.L. c. 32, § 15(4) present an "all or nothing proposition," where Raftery is completely denied a retirement allowance, and he and his family are deprived of health benefits. Moreover, complete forfeiture serves no penological justification other than harsh retribution for harm primarily affecting the reputation of the Massachusetts State Police. *See Diatchenko*, 466 Mass. at 671 (analyzing retribution, deterrence, incapacitation, and rehabilitation as reasons for punishing criminal offenders). It is also cruel because Raftery spent his career as a law enforcement officer, an occupation he no longer has the option to pursue. Furthermore, he is now at an age where the financial implications of forfeiture will last a lifetime. *See id.* at 670; *Mattis*, 493 Mass. at 225 (observing

age as a characteristic that affects constitutionality of an offender’s punishment); *see generally Commonwealth v. Chism*, SJC-11939, slip op. at 87–94 (Feb. 25, 2025).

The forfeiture is also “unusual” because Massachusetts’ total forfeiture statute is at the high end of the penological spectrum, as demonstrated by the report of the Special Commission created in the wake of *Bettencourt*. Add. 51. The Commission concluded that Massachusetts is the only non-Social Security state that makes forfeiture possible for a member convicted of a misdemeanor as well as a felony and is the only state that does not specify crimes that trigger forfeiture. Add. 57.

## CONCLUSION

As the lower court stated, § 15(4) “offers a bludgeon when a more precise instrument would be more appropriate.” Add. 48. For the aforementioned reasons, the Court should take the opportunity to establish a standard for challenges invoking the “excessive” “cruel” and “unusual” provisions occasioned by the imposition of forfeiture provisions. The Court should reverse the decision below and order prospective payment of Raftery’s retirement benefits and consequent restoration of health benefits. In the alternative, the Court should remand the case for the District Court to apply the standard this Court announces.

Respectfully submitted,

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Dated: February 26, 2025

### **RULE 16(a) CERTIFICATE OF COMPLIANCE**

I, Thomas R. Kiley, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 3,194 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word. (version: Word 16.78).

## **CERTIFICATE OF SERVICE**

I hereby certify under the penalties of perjury, that on February 26, 2025, I have made service of this brief upon the attorney of record for each party by electronic mail on:

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