No. 20-12003

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,
Plaintiffs-Appellees,

v.

RON DESANTIS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

EN BANC BRIEF OF THE STATES OF TEXAS, ARKANSAS, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, NEBRASKA, AND SOUTH CAROLINA AS AMICI CURIAE

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, undersigned counsel for amici curiae certifies that the Certificates of Interested Persons filed by Defendants-Appellants on July 14, 2020 is complete with the following exceptions:

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States across the country prohibit certain criminals from voting. These States have "sovereign interests" in "the power to create and enforce" those rules. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). This litigation, including the precedent created in *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020) (per curiam), has threatened those sovereign interests.

The district court's holding—that re-enfranchising felons who have paid their debts to society is unconstitutional discrimination against those felons who have not—puts States to a Hobson's choice. They must choose between re-enfranchising more broadly and re-enfranchising no one. This federal "pressure to change state law" entitles States to be heard in federal court. *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

The States of Texas, Arkansas, Georgia, Kentucky, Louisiana, and Mississippi, Nebraska and South Carolina submit this brief to protect States' sovereign interests in deciding voter eligibility and how to remedy alleged violations of the Constitution. *See* Fed. R. App. P. 29(a)(2).

Introduction

Florida is not alone. States across the country have similar rules for felon voting: (1) a general disenfranchisement upon conviction of a felony and (2) an exception permitting re-enfranchisement for felons who have paid their debts to society. When the district court erroneously held Florida law unconstitutional, it called into question that widespread practice.

This Court should reverse. The district court wrongly applied the Twenty-Fourth Amendment and the Due Process Clause to a re-enfranchisement law. Constitutional clauses regulating the *denial, abridgement, and deprivation* of rights simply do not apply to a state law that *restores* rights.

The district court's remedy for a non-existent equal protection violation itself violated Supreme Court precedent in two ways. First, a State found to have provided unequal treatment may choose its own remedy: either extending a discriminatory benefit to everyone or withdrawing the discriminatory benefit from everyone. If selective re-enfranchisement violates the Constitution (and it does not), each State must be allowed to choose whether to re-enfranchise more felons or no felons at all. But here, the district court made that choice itself, usurping state power.

Second, if a federal court may choose its own remedy, it must eliminate the discriminatory exception and expand the general rule, not vice-versa. Here, that would mean striking the provision authorizing selective re-enfranchisement and applying the general rule against felon voting. But the district court ordered Florida to expand the discriminatory exception and eliminate the general rule.

ARGUMENT

I. Federal Courts Should Not Put States to a Hobson's Choice on Felon Voting.

States are free to prohibit felons from voting. "[T]he exclusion of felons from the vote has an affirmative sanction in [section] 2 of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). "[I]t is well-settled that a state can disenfranchise convicted felons under Section Two of the Fourteenth Amendment," even "permanently." *Hand v. Scott*, 888 F.3d 1206, 1213 (11th Cir. 2018). That is why this Court has specifically upheld Florida's disenfranchisement of felons. *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc). But Florida, like many States, has decided to re-enfranchise certain felons who have paid their debts to society.

Here, the district court rejected Florida's measured choice. The district court's reasoning would require States to choose between much broader re-enfranchisement and no re-enfranchisement at all. The Constitution does not compel that Hobson's choice, and foisting it upon the States creates perverse incentives.

A. Like Florida, many States re-enfranchise only some felons.

Florida is not the only State that re-enfranchises some felons but excludes those felons who have not yet paid their debts to society. At least eight States appear to expressly condition re-enfranchisement on payment of legal financial obligations.[1]

[1] Ala. Code § 15-22-36.1(a)(3); Ariz. Rev. Stat. § 13-907; Ark. Const. amend. LI, § 11(d)(2)(A), (C), (D); Conn. Gen. Stat. § 9-46a(a); Fla. Const. art. VI, § 4; Fla.

Many other States may condition re-enfranchisement on payment of legal financial obligations. Some of those States use broad language, such as "completion of the sentence," that might be applied to require payment of legal financial obligations.[2] Others condition re-enfranchisement on completion of probation or parole, which themselves often require payment of legal financial obligations.[3]

Stat. § 98.0751(2)(a); Ky. Rev. Stat. § 196.045(2)(c); Tenn. Code § 40-29-202(b); Tex. Elec. Code § 11.002(a)(4)(A); Tex. Code Crim. Proc. § 43.01(a).

[2] Ga. Code § 21-2-216(b) ("completion of the sentence"); Iowa Code § 914.2 (authorizing application to the governor for a "restoration of rights of citizenship at any time following the conviction"); Iowa Executive Order No. 70 (Jan. 14, 2011), https://www.legis.iowa.gov/docs/publications/EO/966056.pdf (declaring that "the payment of restitution . . . is an important component in determining if the restoration of rights of citizenship is appropriate" and that "offenders ought to fulfill their financial obligations to pay court costs and fines"); Kan. Stat. § 21-6613(b) ("completed the terms of the authorized sentence"); Neb. Rev. Stat. § 29-112 ("completed the sentence"), *id.* § 29-112.01 ("satisfaction of the judgment and sentence"); N.M. Stat. § 31-13-1(A)(1) ("completed the terms of a suspended or deferred sentence"); Va. Code § 53.1-231.2 ("completed . . . service of any sentence"); W. Va. Code § 3-2-2(b) ("while serving his or her sentence"); W. Va. Const. art. IV, § 1 ("under conviction"); Wyo. Stat. § 7-13-105(b)(ii) ("completed all of his sentence").

[3] Alaska Stat. § 15.05.030(a) (requiring "unconditional discharge"); *id.* § 12.55.185(18) (defining "unconditional discharge" to require release from "probation and parole"); Cal. Const. art. II, § 4 ("on parole"); Cal. Elec. Code § 2101(a) ("not imprisoned or on parole"); Del. Code tit. 15, § 6104(c) (requiring full discharge), *id.* § 6102 (defining "full discharge" to require completion of parole and probation); Idaho Code § 18-310(1) ("parole or probation"); Kan. Stat. § 22-3722 ("parole or conditional release"); La. Const. art. I, § 10(A) ("under an order of imprisonment"); La. Stat. § 18.2(8) (defining "under an order of imprisonment" to include felons "on probation" and who have "been paroled"); Minn. Stat. § 609.165(1) & adv. comm. comment ("after parole or probation"); Miss. Code

However one slices the numbers, many States do not re-enfranchise felons who have not paid their legal financial obligations. The district court's reasoning casts doubt on each of those laws.

B. The district court's opinion needlessly limits States' options.

The district court's ruling puts States to a Hobson's choice. Its reasoning forces States to choose between the district court's version of felon re-enfranchisement (which includes felons who have not paid their legal financial obligations) or no felon re-enfranchisement at all.

Forcing States into that position will not necessarily lead to more felons being allowed to vote. States may decide to forgo re-enfranchisement for any felons rather than allow felons who do not pay their legal financial obligations to vote.

That type of incentive is what the Supreme Court sought to avoid in *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). In that case, inmates in jail brought an equal protection challenge to Illinois' failure to provide them with

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§ 47-7-41 ("discharged from probation"); Mo. Stat. § 115.133.2(2) ("probation or parole"); Neb. Rev. Stat. § 29-112 ("including any parole term"), *id.* § 29-2264(1) ("conditions of his or her probation"); N.J. Stat. § 19:4-1(8); N.M. Stat. § 31-13-1(A)(3) ("completed all conditions of probation or parole"); N.Y. Elec. Law § 5-106(2) ("discharged from parole"); N.C. Gen. Stat. § 13-1(1) ("unconditional discharge of . . . a probationer, or of a parolee"); S.C. Code § 7-5-120(B)(3) ("including probation and parole"); S.D. Codified Laws § 24-5-2 ("on parole"), *id.* § 24-15A-7 ("on parole"); Tex. Elec. Code § 11.002(a)(4)(A) ("including any term of . . . parole . . . probation"); Va. Code § 53.1-231.2 ("probation, parole"); W. Va. Code §§ 3-2-2(b) ("probation or parole"); Wis. Stat. § 304.078(3) ("completes the term of imprisonment or probation"); Wyo. Stat. § 7-13-105(b)(ii) ("including probation or parole").

absentee ballots. *See id.* at 803. The Court rejected their argument that the State unconstitutionally discriminated against them by providing absentee ballots to "the physically handicapped, who" could not "appear personally at the polls" but not inmates. *Id.* at 809.

Illinois had no constitutional obligation to provide mail-in ballots to anyone, but the fact that it did so voluntarily formed the basis for the plaintiffs' claims. The Court explained the pernicious effect of faulting the State for not going far enough: "Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges . . . that has provided appellants with a basis for arguing that the provisions operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise." *Id.* at 810-11 (footnote omitted). The Court did not blame Illinois for proceeding cautiously. "That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation." *Id.* at 811. Instead, the Court commended Illinois for going as far as it had and adopting a "laudable state policy." *Id.*

Florida, like other States, has chosen to re-enfranchise some felons. Like the Supreme Court, courts may laud Florida's decision, but they should not fault Florida for not going further. If federal courts require States to choose between wider re-enfranchisement and no re-enfranchisement at all, one cannot predict how many States will choose the latter.

II. The District Court Erred by Conflating Disenfranchisement and Re-Enfranchisement.

The district court misunderstood the relationship between two provisions of Florida law: (1) the general rule of felon disenfranchisement and (2) an exception allowing re-enfranchisement for felons who have paid their debts to society. That error infected every part of the district court's analysis and requires the reversal of all relief granted to the plaintiffs.

When a Floridian is convicted of a felony, he loses the right to vote. This general rule is codified in the first sentence of Article VI, Section 4(a) of the Florida Constitution: "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI, § 4(a). As this Court has recognized, "Florida's policy of criminal disenfranchisement has a long history," back to "Florida's earliest Constitution, adopted in 1838." *Johnson v. Governor*, 405 F.3d at 1218 (describing that history). Everyone, including the district court, agrees that the general rule is constitutional. *Jones v. DeSantis*, No. 4:19cv300, 2020 WL 2618062, at *3 (N.D. Fla. May 24, 2020) ("A state's authority to [disenfranchise felons] is beyond question.") (citing *Richardson*, 418 U.S. 24). As a result, no plaintiff challenges the general rule of felon disenfranchisement.

Instead, this case is about the selective re-enfranchisement of felons who have paid their debts to society. In 2018, Florida enacted an exception to the general rule of felon disenfranchisement. The second sentence of Section 4(a) now provides that "any disqualification from voting arising from a felony conviction shall terminate and

voting rights shall be restored upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4(a).

The district court's analysis improperly conflates the unchallenged general rule (felon disenfranchisement) in the first sentence with the challenged exception (selective re-enfranchisement) in the second sentence. This error taints all of the relief the plaintiffs received below.

A. The Twenty-Fourth Amendment does not apply to the restoration of voting rights.

Plaintiffs' Twenty-Fourth Amendment claim fails because that amendment does not apply to Florida's re-enfranchisement provision. The Twenty-Fourth Amendment provides that the right to vote "shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXVI, § 1. Florida does not deny or abridge the right to vote for failure to pay a tax. Instead, a felon's right to vote is denied or abridged by reason of his felony conviction. The first sentence in Section 4(a) makes this plain: "No person convicted of a felony . . . shall be qualified to vote . . . ." Fla. Const. art. VI, § 4(a).

The Sixth Circuit reads the Twenty Fourth Amendment just as this Court should. Tennessee first provided for the restoration of voting rights to felons, but later restricted restoration to felons that had "paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence" and were "current in all child support obligations." *Johnson v. Bredesen*, 624 F.3d 742, 745 (6th Cir. 2010). These limits on restoration did not violate the Twenty Fourth Amendment, the Sixth Circuit explained, because, "most fundamentally," a "re-enfranchisement

law . . . does not deny or abridge any rights; it only restores them." *Id.* at 751. "[C]onvicted felons constitutionally stripped of their voting rights by virtue of their convictions," the court went on, "possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim." *Id.* So too here. Even assuming the erroneous conclusion that payment of legal financial obligations arising from a felony conviction amounts to a tax, *but see id.*, such payments relate to the restoration, not denial or abridgment, of the right to vote, so they cannot violate the Twenty Fourth Amendment.

B. Selective re-enfranchisement deprives no one of liberty.

The plaintiffs' due process claim fails for the same reasons. The Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Assuming that eligibility to vote is "life, liberty, or property," Plaintiffs were deprived of that right after more-than-adequate process. Florida's constitutional-amendment process provided sufficient process for the adoption of generally applicable rules regarding felon disenfranchisement. *See, e.g.*, *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 244–46 (1973); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915).

The plaintiffs do not dispute the adequacy of the process that led to their felony convictions. Under the first sentence in Section 4(a), the plaintiffs were deprived of their right to vote when they were convicted. *See* Fla. Const. art. VI, § 4(a) ("No person convicted of a felony . . . shall be qualified to vote . . . ."). Unless they chose to plead guilty, the plaintiffs received full criminal trials, including a unanimous jury

of their peers convinced of their guilt beyond a reasonable doubt. And that was pre-deprivation process. The Due Process Clause could not possibly require more. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.").

Instead, the plaintiffs challenge the procedures for "*restoration* of the right to vote." *Jones*, 2020 WL 2618062, at *36 (emphasis added). And the district court faulted Florida for not making it easier to "determin[e] the amount that must be paid to make a person eligible to vote." *Id.* But the Due Process Clause does not regulate how a State *restores* liberty, only how a State *deprives* a person of liberty. *See* U.S. Const. amend. XIV, § 1 ("deprive"). The plaintiffs should direct their complaints about the procedures for restoration of voting rights to the Florida Legislature, not a federal court.

In any event, the Due Process Clause does not apply to the plaintiffs' claim for another reason. Eligibility to vote is not "life, liberty, or property" under the Fourteenth Amendment. In *Johnson v. Hood*, "voters whose ballots were rejected" argued that they "had been deprived of due process of law" because the procedures had been "arbitrary." 430 F.2d 610, 611–12 (5th Cir. 1970) (per curiam). The Fifth Circuit rejected their claim because "even an improper denial of the right to vote for a candidate for a state office achieved by state action is not a denial of a right of property or liberty secured by the due process clause." *Id.* at 612 (quotation omitted); *cf. Johnson v. Bredesen*, 624 F.3d at 752 ("[N]o authority recognizes the right to vote in federal elections as a privilege or immunity of United States citizenship."). *Johnson*

v. Hood remains binding in this Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc), and the district court should have followed it, *see, e.g.*, *Kuhn v. Thompson*, 304 F. Supp. 2d 1313, 1329 (M.D. Ala. 2004) (citing *Johnson v. Hood* and holding "Plaintiffs cannot establish that their rights to vote constitute a sufficient property interest to give rise to a Due Process claim").

C. The Equal Protection Clause does not empower federal courts to mandate that States re-enfranchise more felons.

Re-enfranchising only those felons who have completed "all terms of sentence," Fla. Const. art. VI, § 4(a), does not violate the Equal Protection Clause. *See Johnson v. Bredesen*, 624 F.3d at 746–50. But even if it did, the district court's remedy would still be improper. Under binding Supreme Court precedent, a federal court cannot compel Florida to re-enfranchise felons who have not paid their debts to society.

As the Supreme Court recently reiterated, "[w]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (quotation omitted). "How equality is accomplished . . . is a matter on which the Constitution is silent." *Id.*

The district court recognized that the Constitution did not mandate one remedy or the other. But, purporting to identify the "reasonable" outcome, the district court imposed one anyway. *Jones*, 2020 WL 2618062, at *41.

The district court erred in at least two respects. First, it should have let Florida choose the remedy. Second, if the district court were going to decide itself, it should

have extended the general rule (felon disenfranchisement) and struck the discriminatory exception (selective re-enfranchisement), as Supreme Court precedent requires.

"[T]he manner in which a State eliminates discrimination 'is an issue of state law.'" *Morales-Santana*, 137 S. Ct. at 1698 n.23 (quoting *Stanton v. Stanton*, 421 U.S. 7, 18 (1975)). As a result, the Supreme Court "ha[s] generally remanded to permit state courts to choose between extension and invalidation." *Id.* The district court should have done likewise and "le[ft] it to [the State] to select" how to remedy the purported problem with its law. *Id.* at 1686.

The district court and the earlier panel of this Court had multiple options, including (1) deferring to the Florida Supreme Court's previous decision and the popularly elected state officials represented in federal court, (2) certifying the state-law question to the Florida Supreme Court, and (3) abstaining until the state courts could resolve the issue. They did not follow any of those paths. Instead, the district court insisted on usurping State power and selecting a remedy itself by deciding what is "reasonable" and divining the will of Florida voters. *Jones*, 2020 WL 2618062, at *41.

Adding insult to injury, the district court's analysis of "what the voters intended" contradicts the Florida Supreme Court's ruling on the same issue. *Id.* at *42. The district court derided as "fanciful" "[t]he State's assertion that voters understood 'completion of all terms of sentence' to mean payment of fines, fees, costs, and restitution by those unable to pay." *Id.* at *41. But the Florida Supreme Court had already ruled that "the phrase 'all terms of sentence,' as used in article VI,

section 4, has an ordinary meaning that the voters would have understood to refer not only to durational periods but also to all [legal financial obligations] imposed in conjunction with an adjudication of guilt." *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So.3d 1070, 1084 (Fla. 2020). There is no way to square the district court's obligation to treat "the manner in which a State eliminates discrimination" as "an issue of state law," *Morales-Santana*, 137 S. Ct. at 1698 n.23, with its decision to ignore Florida's supreme court.

Moreover, even if the district court needed to pick a remedy itself, it should have followed the approach the Supreme Court has taken in recent equal-treatment cases. When a federal statute does not provide equal treatment, the Supreme Court resolves the issue by extending the general rule and eliminating the discriminatory exception, not extending the discriminatory exception and eliminating the general rule. *See, e.g.*, *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631, 2020 WL 3633780, at *12–13 (U.S. July 6, 2020) (plurality); *Morales-Santana*, 137 S. Ct. at 1698-99.

In *Morales-Santana*, the Supreme Court held that the Immigration and Nationality Act impermissibly discriminated based on sex because it "retain[ed] a longer physical-presence requirement for unwed fathers than for unwed mothers." 137 S. Ct. at 1698. The Court explained that there were "two remedial alternatives . . . when a statute benefits one class (in this case, unwed mothers and their children) . . . and excludes another from the benefit (here, unwed fathers and their children)." *Id.* First, there is "withdrawal of benefits from the favored class," and second, there is "extension of benefits to the excluded class." *Id.* "The choice between

these outcomes is governed by the legislature's intent, *as revealed by the statute at hand*." *Id.* at 1699 (emphasis added).

The Supreme Court has long held that Congress generally prefers it to "strik[e] the discriminatory exception" and "extend[] the general rule." *Id.* Thus, the Court identifies "the general rule" "as revealed by the statute at hand" by considering the structure of the statute and related provisions. *Id.* at 1699-1700; *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 417 (5th Cir. 2020) (Ho, J., concurring).

Here, the district court did not consider the difference between a "general rule" and a "discriminatory exception." It ignored textual and structural evidence about the voters' intent, "as revealed by the [law] at hand," showing that a federal court cannot order the limited exception (selective re-enfranchisement) to swallow the general rule (felon disenfranchisement). *Morales-Santana*, 137 S. Ct. at 1699.

Instead, the district court purported to "find as a fact that voters would have approved Amendment 4 by more than the required 60% had they known it would be applied in the manner required by this order." *Jones*, 2020 WL 2618062, at *41. Its unmoored analysis included determining the credibility of expert testimony on "focus groups and polling" as well as purporting to divine Floridians' religious beliefs. *Id.* ("Forgiveness . . . has long been a mainstay of the state's most popular religions."). Neither was appropriate.[4]

[4] In fact, the district court's order raises more serious constitutional concerns than felon disenfranchisement does. *See, e.g.*, *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding

To be sure, a few justices have proposed an alternative approach to remedying equal-treatment violations. Justice Thomas, for example, doubted that the *Morales-Santana* Court "ha[d] the power to" confer "citizenship on a basis other than that prescribed by Congress." 137 S. Ct. at 1701 (Thomas, J., concurring in the judgment in part). And in *American Association of Political Consultants*, Justice Gorsuch doubted the Court's power "to render unlawful conduct that Congress has explicitly made lawful." 2020 WL 3633780, at *22 (Gorsuch, J., concurring in the judgment in part and dissenting in part). But the district court's ruling conflicts with these approaches as well. Just as a federal court lacks authority to confer citizenship or render conduct unlawful, it also lacks authority to re-enfranchise felons. That is a power left to state legislatures. *See* U.S. Const. art. I, § 2, cl.1; *id.* art. I, § 4, cl. 1; *id.* amend. X.

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that "the First Amendment forbids civil courts from" interpreting "particular church doctrines and the importance of those doctrines to the religion").

Conclusion

The Court should reverse the district court's judgment.

Respectfully submitted.

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Certificate of Service

On July 20, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/Jason R. LaFond
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,899 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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