

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

EARLE J. FISHER ET AL.,  
*Appellees / Plaintiffs,*

v.

TRE HARGETT ET AL.,  
*Appellants / Defendants.*

BENJAMIN WILLIAM LAY ET  
AL.,  
*Appellees / Plaintiffs,*

v.

MARK GOINS ET AL.,  
*Appellants / Defendants.*

No. M2020-00831-SC-RDM-CV  
No. M2020-00832-SC-RDM-CV

On Appeal from the Chancery  
Court for Davidson County,  
No. 20-0435-III

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**AMICUS BRIEF OF HONEST ELECTIONS PROJECT  
IN SUPPORT OF APPELLANTS/DEFENDANTS**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Honest Elections Project is an independent, nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that States put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. As part of its mission in these challenging times, the Project seeks to ensure that elections are carried out both safely and lawfully. Lawsuits that challenge duly enacted election rules during the COVID-19 pandemic drain precious resources, distract state officials, create voter confusion, and undermine the integrity of elections. The Project thus has a significant interest in this important case.

### SUMMARY OF ARGUMENT

Tennessee is one of sixteen States that encourages in-person voting by requiring an “excuse” to vote absentee. *See* NCSL, *States with No-Excuse Absentee Voting* (May 1, 2020), [bit.ly/3gjvAUU](https://bit.ly/3gjvAUU). There are many

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<sup>1</sup> Amicus adopts the State’s prior statement of the questions presented for review and statement of the relevant facts.

sound reasons to run elections this way: preventing voter fraud, minimizing common ballot errors, extending campaigns, maximizing voter information, etc. *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). Other States have made different choices, authorizing no-excuse absentee voting or even all-mail voting. *See id.* That’s fine too. In a country that values federalism, “[o]ne size need not fit all.” *Id.*

Contrary to the decision below, systems like Tennessee’s did not suddenly become unconstitutional once COVID-19 hit. The constitutional right to vote secures *one* viable way to cast a ballot. Tennesseans who cannot vote absentee have that because they can vote in person—an option the State deems safe, especially in light of the increased health and safety precautions. Tennessee has done nothing to restrict voting, and it is not responsible for the burdens associated with a virus that it did not create and cannot control.

Even under the *Anderson-Burdick* test that the chancery court applied, Tennessee’s decision to require an excuse for absentee voting remains perfectly constitutional. The interests that make Tennessee’s system constitutional in normal times also sustain it now. If anything,



COVID-19 *increases* the State’s interests in deterring fraud, restoring order, conserving resources, and minimizing confusion.

This Court should reverse the temporary injunction.

## ARGUMENT

Setting aside the equities (which also favor the State), the chancery court made two main errors of law. First, it wrongly assumed that Tennessee’s limitations on absentee voting implicate the constitutional right to vote in the first place. Second, even assuming the right to vote is implicated, the chancery court misapplied the *Anderson-Burdick* test to Tennessee’s election regime.

### **I. Because in-person voting remains available, the excuse requirement does not implicate the right to vote.**

Tennessee’s excuse requirement governs only *absentee* voting. If voters have no excuse, they can still vote in person on election day or during the two-week early voting period. Because in-person voting remains available, “the right to vote is not ‘at stake’” here. *Tex. Democratic Party v. Abbott*, 2020 WL 2982937, at \*10 (5th Cir. June 4, 2020) (quoting *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807 (1969)).

The Constitution guarantees *one* viable method of voting; “there is no constitutional right to an absentee ballot.” *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *accord Griffin*, 385 F.3d at 1130. When States impose a limitation on absentee voting, but not in-person voting, “[i]t is ... not the right to vote that is at stake ... but a claimed right to receive absentee ballots”—which is not a constitutional right at all. *McDonald*, 394 U.S. at 807. As the Fifth Circuit recently explained in a COVID-19 case, the Constitution is not violated “unless ... the state has ‘in fact absolutely prohibited’ the plaintiff from voting.” *Tex. Democratic Party*, 2020 WL 2982937, at \*10. And “permit[ting] the plaintiffs to vote in person,” as Tennessee is doing here, “is the exact opposite of ‘absolutely prohibit[ing]’ them from doing so.” *Id.*

While Plaintiffs insist that in-person voting is too difficult or dangerous during COVID-19, that rejoinder fails for at least two reasons.

**First**, “[constitutional] violations require state action,” and Tennessee is not responsible for COVID-19 or private citizens’ responses to it. *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020). While COVID-19 has dramatically changed Tennesseans’ everyday lives, these difficulties are not burdens imposed “*by the State.*” *Tex. Democratic Party*,

2020 WL 2982937, at \*10 (quoting *McDonald*, 394 U.S. at 808 n.7). These obstacles “are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic.” *Mays v. Thurston*, 2020 WL 1531359, at \*2 (E.D. Ark. Mar. 30, 2020). To date, most courts have recognized that “COVID-19 ... is not the result of any act or failure to act by the Government. And that fact is important” because “[a]ll of the election cases cited by Plaintiffs in which injunctive relief was granted involved a burden ... that was created by the Government. Not so here.” *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at \*3 n.2 (N.D. Ga. May 14, 2020); accord *Tex. Democratic Party*, 2020 WL 2982937, at \*11 (“The Constitution is not offended ... even where voting in person may be extremely difficult ... because of circumstances beyond the state’s control, such as the presence of the Virus.” (cleaned up)).

**Second**, even if the chancery court thinks otherwise, *the State* has determined that in-person voting can be done safely and effectively. According to the chancery court, the State is “provid[ing] social distancing and sanitation measures at polling places.” Op. 3. That’s putting it mildly. The State has prepared an 82-page election contingency plan, “developed after vast research regarding not only elections but the

current state of healthcare ... nationwide.” Tenn. Sec’y of State, *Tennessee Election COVID-19 Contingency Plan* (Apr. 23, 2020), [bit.ly/3ir1ReS](https://bit.ly/3ir1ReS).

Courts cannot and should not second-guess the judgment of Tennessee’s health and election experts. As the Seventh Circuit explained in the COVID-19 case in Wisconsin, questions about how to “accommodate voters’ interests while also striving to ensure their safety” are best left to election officials, who are “better positioned ... to accommodate the many intersecting interests in play in the present circumstances.” *Democratic Nat’l Comm. v. Bostelmann*, Doc. 30, No. 20-1538 (7th Cir. Apr. 3, 2020) (*DNC*). “[C]ourts make poor arbiters of public health.” *Sinner v. Jaeger*, 2020 WL 3244143, at \*6 (D.N.D. June 15, 2020). They do “not have the authority ‘to act as the state’s chief health official’ by making the decision” how best to protect “the health and safety of the community.” *Taylor v. Milwaukee Election Comm’n*, 2020 WL 1695454, at \*9 (E.D. Wis. Apr. 6, 2020). As the Chief Justice of the United States recently explained, “in areas fraught with medical and scientific uncertainties,” courts “lack[] the background, competence, and expertise” to be “second-guessing” state officials. *S. Bay United*

*Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

The chancery court’s finding about what supposedly happened in Wisconsin, *see* Op. 22, is a case in point. The court found that “Wisconsin saw multi-hour waits and lines stretching blocks.” Op. 22. But on election day, the Wisconsin Elections Commission reported that, while “lines have been long in Milwaukee and some other places,” “[w]e are not receiving reports of any major problems.” Wis. Elections Comm’n, *Update – 2:30 p.m.*, [elections.wi.gov/node/6828](https://elections.wi.gov/node/6828). And lines were long in Milwaukee and Green Bay because those cities unilaterally decided to slash the number of polling locations at the last minute—something Tennessee is not doing. *See* McCormack, *Why Were Only Five Polling Places Open in Milwaukee This Week?*, Nat’l Rev. (Apr. 10, 2020), [bit.ly/3eNH3f8](https://bit.ly/3eNH3f8). The chancery court also thought that in-person voting made more Wisconsinites catch COVID-19. *See* Op. 22. But the evidence it cited was woefully speculative. And several experts found “no increase” in COVID-19 after the election. Berry et al., *Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates*, [bit.ly/3gh6OF2](https://bit.ly/3gh6OF2). Courts should leave these questions to the experts.

**II. Even if Tennessee’s excuse requirement implicated the right to vote, it easily satisfies the *Anderson-Burdick* test.**

The chancery court applied the balancing test from the Supreme Court’s decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* test, States can conduct “substantial regulation of elections.” *Burdick*, 504 U.S. at 432 (emphasis added). *Anderson-Burdick* is a “flexible standard” that “reject[s] the contention that any law imposing a burden” on constitutional rights “is subject to strict scrutiny.” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009); *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1241 (Nev. 2006). Every election law “is going to exclude, either de jure or de facto, some people” from exercising their rights; “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin*, 385 F.3d at 1130.<sup>2</sup>

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<sup>2</sup> While this Court has left open the possibility that it analyze every law that burdens the right to vote under strict scrutiny, doing so would be unwise and ahistorical. *Burdick*’s reasons for rejecting strict scrutiny are also true for Tennessee: “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections”; “to subject every voting regulation to strict scrutiny ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” 504 U.S. at 433.

*Anderson-Burdick* requires Plaintiffs to satisfy a two-step inquiry, imposing a heavy burden at each step. First, Plaintiffs must prove that the challenged laws inflict a cognizable burden on their rights and quantify the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Common Cause/Ga.*, 554 F.3d at 1354. Second, Plaintiffs must show that the burden outweighs the State’s interests. *Timmons*, 520 U.S. at 358. Only when an election law “subject[s]” voting rights “to ‘severe’ restrictions” does a court apply strict scrutiny and assess whether the law “is narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Mine-run election laws that “impose[] only ‘reasonable, nondiscriminatory restrictions’” are “generally” justified by “the State’s important regulatory interests.” *Burdick*, 504 U.S. at 433. After all, there is no constitutional right to be free from “the usual burdens of voting.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.).

Here, all agree that Tennessee’s excuse requirement is constitutional in normal times. See Op. 4 (asking whether “*in this time of the pandemic*, the State[’s] construction and application of Tennessee law

constitutes an unreasonable and discriminatory burden” (emphasis added)). The question, then, is whether COVID-19 somehow *made* the requirement unconstitutional. Even setting aside obvious state-action problems, the answer is still no. The *Anderson-Burdick* balance has not fundamentally changed during COVID-19.

**Burden on Voters:** On the individual side of the *Anderson-Burdick* balance, Plaintiffs must introduce “evidence” to “quantify the magnitude of the burden” from the challenged laws. *Crawford*, 553 U.S. at 200. “[T]he extent of the burden ... is a factual question on which the [plaintiff] bears the burden of proof,” *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), and the plaintiff must “direct th[e] Court to ... admissible and reliable evidence that quantifies the extent and scope of the burden.” *Common Cause/Ga.*, 554 F.3d at 1354.

That evidence doesn’t exist. If “the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote,” *Crawford*, 553 U.S. at 198, then neither does making a trip to the polling place. In-person voting is no more dangerous than other activities that the State deems safe, like going to the grocery store. And



“[t]here’s no reason” why in-person voting cannot be done “within the bounds of our current situation”—for example, by wearing a mask, practicing social distancing, and increasing sanitization. *Thompson*, 959 F.3d at 810. While these precautions might be “harder” (as are many tasks during a pandemic), *id.*, inconveniences are not “severe” burdens that trigger strict scrutiny, *Crawford*, 553 U.S. at 198.

Perhaps there is some small group of voters who, despite “reasonable effort,” simply cannot vote in person on election day or during the 10-day early voting period and who have no excuse to vote absentee. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*). If that is what Plaintiffs’ case turns on, “[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.” *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Evidence that a law uniquely burdens one particular group does not justify enjoining the statute as to all voters. Rather, requests for facial, statewide relief fail when the challenged law “has a plainly legitimate sweep.” *Crawford*, 553 U.S. at 202-03; *see id.* at 206 (Scalia, J., concurring in judgment) (when assessing a burden’s severity, courts must look at the burden’s impact “categorically” upon all

voters, without “consider[ing] the peculiar circumstances of individual voters”). The “burden some voters face[]” from a challenged law cannot “prevent the state from applying the law generally.” *Frank II*, 819 F.3d at 386. Those claims must be vindicated in as-applied challenges that seek relief for “those particular persons.” *Id.* Yet the chancery court’s injunction—which effectively allows *anyone* to vote absentee—is not so tailored.

**Interests of the State:** Because the excuse requirement imposes little to no burden on voters, Tennessee’s “important regulatory interests” more than justify it. *Burdick*, 504 U.S. at 433. Limits on absentee voting, as the Seventh Circuit explained in *Wisconsin*, serve the State’s “substantial interest in combatting voter fraud.” *DNC, supra*. By requiring “in-person” verification, in-person voting serves the “unquestionably important interests” of “preventing fraud and protecting the integrity of the electoral process.” *Sinner*, 2020 WL 3244143, at \*7. “These interests are not only legitimate, they are compelling.” *Thompson*, 959 F.3d at 811.

It is no answer to say that Tennessee has other methods to deter fraud, like criminal penalties. *See Op. 17*. Tennessee does not have to

satisfy strict scrutiny here or prove narrow tailoring. *See Burdick*, 504 U.S. at 434. Under *Anderson-Burdick*'s intermediate balancing test, States can supplement post-hoc punishments with measures aimed at “prophylactically preventing fraud.” *Sinner*, 2020 WL 3244143, at \*7; *see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (“Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.”).

It is also no answer to say that absentee-voting fraud is unlikely. Op. 17-18. *Anderson-Burdick* treats the State’s purported interest as a “legislative fact,” accepted as true so long as it’s reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (*Frank I*). States are not required to submit “any record evidence in support of [their] stated interests.” *Common Cause/Ga.*, 554 F.3d at 1353; *accord ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (city need not “present evidence of past instances of voting fraud”). In fact, when responding to an *Anderson-Burdick* challenge, States can rely on “post hoc rationalizations,” can “come up with its justifications at any time,” and have no “limit[s]” on the type of “record [they] can build in order to

justify a burden placed on the right to vote.” *Mays*, 951 F.3d at 789. States can rely on examples from other jurisdictions, court decisions, general history, or sheer logic. *Common Cause/Ga.*, 554 F.3d at 1353; *Frank I*, 768 F.3d at 750. In *Crawford*, for example, the Supreme Court found Indiana’s interest in preventing in-person voter fraud compelling even though “[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.” 553 U.S. at 194.

Regardless, as Justice Stevens stated in *Crawford*, “the risk of voter fraud”—particularly with “absentee ballots”—is “real.” *Id.* at 195-96; *accord Griffin*, 385 F.3d at 1130-31 (“Voting fraud is a serious problem in U.S. elections ... and it is facilitated by absentee voting.”); *Veasey v. Perry*, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014) (finding broad “agreement that voter fraud actually takes place in abundance in connection with absentee balloting”); *Tex. Democratic Party*, 2020 WL 2982937, at \*18 (Ho, J., concurring) (“[C]ourts have repeatedly found that mail-in ballots are particularly susceptible to fraud.”). Groups from across the political spectrum “acknowledge that, when election fraud occurs, it usually arises from absentee ballots.” Morley, *Election Emergency Redlines 2* (Mar. 31, 2020), [bit.ly/3aIqiPK](https://bit.ly/3aIqiPK). “[E]lection officials can neither exercise control

over absentee ballots once they are mailed out to voters, nor ensure that they have been received and cast by the voters entitled to do so.” *Id.* at 5. Stated differently, “absentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin*, 385 F.3d at 1131.

The 2005 Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker, concluded that expanding mail-in voting “increase[s] the risks of fraud.” *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*. 35 (Sept. 2005), [bit.ly/2KF3WUE](http://bit.ly/2KF3WUE) (*Carter-Baker Report*). True, a few States already have all-mail voting. But those States took years to build the proper infrastructure; they didn’t “just flip a switch” in the middle of a pandemic. *Washington: Where Everyone Votes by Mail*, N.Y. Times (Apr. 15, 2020), [nyti.ms/3ektSII](https://nyti.ms/3ektSII). The chancery court’s confidence that Tennessee could become a no-excuse absentee voting State—rapidly, by judicial fiat, with no real time to prepare—without experiencing major problems was unfounded.

Major problems have already materialized in jurisdictions that hastily switched to mail-in voting for their Spring 2020 elections. For example, to quickly settle a case brought by the Democratic Party, Clark

County, Nevada decided to administer the State’s first ever all-mail primary. Within the first week of voting, ballots were being mailed to dead people and piles of ballots were “tossed in trash cans and littering apartment mailbox areas.” Appleton, *Primary Underway, But Argument Over Mail-In Election Continues*, Las Vegas Review-Journal (May 19, 2020), [bit.ly/31x0ncS](https://bit.ly/31x0ncS). A postal worker reported an “influx of absentee ballots”—as many as 100 in a single day—that were “no good,” often because they had been sent to recipients who had moved or died. *Id.* She reported “thousands [of ballots] sitting in crates with no additional safeguards and marked to be sent back to the county.” *Id.*

Paterson, New Jersey experienced similar problems in its May 12 election for City Council—the “first election in state history that was contested only by mail-in voting.” *Mail-In Ballot Fraud Is More Than an Embarrassment for Paterson; It’s a Roadblock to Problem Solving*, Insider NJ (May 14, 2020), [bit.ly/3bLaXOV](https://bit.ly/3bLaXOV) (*Mail-In Ballot Fraud*). To quote election-law professor Rick Hasen, “[t]here is a genuine absentee ballot fraud scandal going on in Paterson.” Dienst, *Close Results in Paterson Vote Plagued by Fraud Claims; Over 3K Ballots Seemingly Set Aside*, NBC (May 21, 2020), [bit.ly/3dp3whW](https://bit.ly/3dp3whW). Thousands of absentee ballots—

nearly one in five—have been disqualified. *See id.* Indeed, hundreds of ballots were found together in *single* mailboxes—in one case 366 ballots were picked up from the same mailbox. Wildstein, *Source: Law Enforcement Probing Paterson VBM Ballots*, New Jersey Globe (May 11, 2020), [bit.ly/2TmegWo](https://bit.ly/2TmegWo). In addition, many people’s “votes were paid for” and others “had no idea that they voted or who they voted for because someone filled out a mail-in ballot for them.” *Mail-In Ballot Fraud, supra*. Things are so bad that a court has temporarily blocked the winning candidate from taking office. Biryukov, *Judge Files Injunction to Stop Mendez Taking Paterson Council Seat*, N.J. Globe (June 30, 2020), [bit.ly/3gbdgkx](https://bit.ly/3gbdgkx). Yet these are the natural risks of hasty transitions to mail-in voting.

“[T]here is no suggestion that these widely held concerns about voter fraud will not be present during the pandemic”; to the contrary, COVID-19 makes Tennessee’s interest *heightened*, as the State’s resources are already stretched thin responding to the pandemic. *Tex. Democratic Party*, 2020 WL 2982937, at \*19 (Ho, J., concurring);. States should receive more leeway under *Anderson-Burdick*, not less, when dealing with emergencies that affect election. These crises give the State

new “important interests” like “focus[ing] their resources on recovering from the emergency, ensuring the accuracy of [electoral records] they have received, ... and otherwise minimizing the likelihood of errors or delays in voting.” Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 593 (2018).

An “election emergency” should thus “seldom warrant” changes to election laws by judicial fiat. *Id.*; see, e.g., *Williams v. DeSantis*, Doc. 12, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020) (declining to intervene in Florida’s primary election in the face of COVID-19); *Bethea v. Deal*, 2016 WL 6123241, at \*2-3 (S.D. Ga. Oct. 19, 2016) (declining to extend Georgia’s voter-registration deadline in the wake of Hurricane Matthew); Doc. 58, *ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006) (denying request to extend the deadline for counting absentee ballots received by mail in New Orleans in the wake of Hurricane Katrina). This Court should reach the same conclusion here.

\* \* \*

No doubt, “the COVID-19 pandemic constitutes an extraordinary circumstance that has resulted in profound dislocations.” *Arizonans for Fair Elections v. Hobbs*, 2020 WL 1905747, at \*3 (D. Ariz. Apr. 17, 2020). But “it is also a profound thing for a [trial] court to rewrite state election



laws.” *Id.* The chancery court should not have taken that profound step. “[T]he decision to drastically alter [the State’s] election procedures must rest with ... [election and public-health] officials, not the courts.” *Thompson*, 959 F.3d 804.

## CONCLUSION

The chancery court’s temporary injunction should be reversed.

Respectfully submitted,

Dated: July 2, 2020

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the requirements in Section 3.02(a)1 of Tennessee Supreme Court Rule 46. This brief contains 3,673 words.

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**CERTIFICATE OF SERVICE**

I filed this brief via the Court’s electronic-filing system, which will electronically serve the parties’ counsel.

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