CASE NO. 25-50025

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAFAEL MARFIL; VERGE PRODUCTIONS, LLC; NAOMI MARFIL; KOREY A. RHOLACK; DANIEL OLVEDA; and DOUGLAS WAYNE MATHES,

Plaintiffs-Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant-Appellee.

Appeal from the United States District
Court for the Western District of Texas
District Court Case No. 6:20-CV-248
Hon. Alan D. Albright, presiding

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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April 1, 2025

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

Amicus's interest in this case arises from the lack of adequate protection that property rights and other forms of economic liberty receive under contemporary constitutional doctrine, the need for clarity and consistency in judicial enforcement of fundamental rights, and the importance of preventing state and local governments from infringing on individual liberty without evidence of a legitimate state interest.

SUMMARY OF THE ARGUMENT

Property owners in New Braunfels, Texas, have long exercised the fundamental rights to acquire and make use of their property, including the right to make their homes available for rent on a short-term basis. These rights have been protected by the Anglo-American legal system for centuries. Nevertheless, the City

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

of New Braunfels recently adopted an ordinance banning short-term rentals from all residential areas in the City. The City's purported justifications for this ban were that prohibiting short-term rentals was necessary to preserve the "residential character" of neighborhoods and to prevent nuisance behaviors, even though substantial evidence across the entire state of Texas thoroughly undermines both rationales. Nevertheless, when property owners sued the City over its unconstitutional ordinance, the district court dismissed the complaint without even granting the owners the opportunity to conduct discovery to validate their well-pleaded allegations.

This Court reversed. *Marfil v. City of New Braunfels*, 70 F.4th 893 (2023). It held that the district court's "few conclusory paragraphs" articulated an insufficient basis for ending the case, noting prior Fifth Circuit precedent holding that "factual development may often occur in these cases." *Id.* at 893. This Court vacated the ruling below and remanded for further proceedings. *Id.*

Discovery ensued, but the district court then granted summary judgment in favor of the City. Its conclusory five-page opinion held that the standard governing the case had "not changed" from when the district court had earlier ruled on it. Op. at 1. The district court rested its decision on "much of the same logic" from the dismissal stage. *Id.* It described the applicable constitutional standard as "extremely deferential," then concluded that the law at issue "seems" to satisfy rational basis

"by preserving residential character." *Id.* at 1, 3. Its opinion contained no record citations, only mentioning in passing that its determinative factual finding "is supported by . . . numerous statements from affected residents." *Id.* at 4.

Appellants explain in detail why this decision was inconsistent with constitutional protection of property rights secured under both the Fourteenth Amendment and the Texas Constitution, as well as with basic tenets of civil procedure—specifically, that case law from both the Supreme Court and this Court make it clear that, even under the deferential rational basis standard, courts must consider the actual facts pertaining to a state's purported interests, Br. at 31–32; and that the City's ordinance also violated the Texas Constitution, which provides even greater protection for property rights than its federal counterpart, Br. at 47–52.

Amicus will not retread those arguments here, but instead writes to elaborate on the extent to which property rights of the sort at issue in this case, along with related rights sounding in economic liberty, receive far less protection under prevailing constitutional doctrine then they ought to in light of the central place they hold in our nation's history and traditions. Indeed, though today infringements on such rights are generally subjected only to the highly deferential rational basis test, the rights to own and control property, make contracts, and pursue a lawful occupation are at least as well-established in our legal tradition—if not more so—

than many other judicially recognized fundamental rights that receive heightened scrutiny.

Judicial enforcement of such rights has been uneven and inconsistent throughout the nation's history. But in recent decades, the Supreme Court has repeatedly asserted that so-called "unenumerated rights" receive heightened scrutiny under the Fourteenth Amendment only if they are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). There are sensible reasons to criticize exactly how this standard has been applied, especially due to the challenge of determining the appropriate level of generality at which to define the right in question. But the property rights at issue in this case, along with related rights threatened by zoning and occupational-licensing restrictions across the country, would qualify by any reasonable definition.

Amicus recognizes, of course, that this Court is bound to apply binding precedent with direct application, whether or not that precedent is well-reasoned. We thus do not suggest that the Court should refuse to apply the rational basis standard in reversing the district court's order in this case. However, this Court has explicitly held that while rational basis review "places no affirmative evidentiary burden on the government," plaintiffs in such cases "may nonetheless negate a

seemingly plausible basis for the law by adducing evidence of irrationality." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013). Thus, even if this test is far more deferential to the state than is warranted as a matter of first principles, it is nonetheless clear that challengers can win under this standard when the evidence undermines the government's assertions that the law in question is rationally related to a legitimate state interest. That conclusion alone is sufficient to resolve the issue Appellants raise in this appeal.

There are at least two important reasons why this Court should also be mindful of the insufficient protection that economic liberty receives under modern doctrine. First, the fact that property rights like those at issue in this case already receive less robust protection than they ought to makes it all the more important to ensure that district courts do not ignore the limited but meaningful degree of protection that *does* apply under the rational basis test. In this circuit, while rational basis review may be highly deferential to the state, it is not "toothless." *Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 323 (5th Cir. 1999) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). And the Court's more recent decision in *St. Joseph Abbey* illustrates that the presumption of constitutionality in cases of economic regulation can be rebutted where the evidence is strong enough to negate any plausible state interest. 712 F.3d at 223. That beachhead, modest though it is, brings the Fifth

Circuit closer to the true constitutional standard than are other circuits, and it should not be abandoned.

Second, if members of this Court offer a candid assessment of current doctrinal shortcomings, that may serve to highlight for the Supreme Court areas of law in need of clarification and reform. This is especially important because that Court has increasingly demonstrated its willingness to reconsider precedent under an originalist, history-based approach to constitutional rights.

ARGUMENT

I. ECONOMIC LIBERTY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT, DEEPLY ROOTED IN THE NATION'S HISTORY AND TRADITIONS.

Discussion of "economic liberty" should begin by acknowledging that this term is a relatively recent invention in our legal history, as is the very concept of grouping together "economic" rights for distinct (and diminished) doctrinal protection.[2] From the Founding Era through at least the early twentieth century, the rights to acquire, own, and use property and to earn a living and enter into private contracts were seen as central examples of the "natural rights" that all people possessed, independent of the governments tasked with protecting them.[3] A

[2] *See generally* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, ECONOMIC LIBERTY AND THE CONSTITUTION: AN INTRODUCTION (Paul L. Larkin Jr. ed., 2014), available at https://static.heritage.org/2014/pdf/SR157.pdf.

[3] *Id.*; *see generally* JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 85 (1689).

comprehensive analysis of the myriad ways such natural liberties were acknowledged and protected throughout the history of the Republic is, of course, beyond the scope of any single brief.[4] But even the most cursory examination makes it plain that such freedoms were "fundamental rights . . . deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722.

First, the property and contract rights we would today characterize as "economic liberty" were central to the pre-colonial treatises and documents that shaped the Founders' political and legal philosophy. Magna Carta itself recognized both the right of all free citizens to possess and use private property[5] and the right of "any man to use any trade thereby to maintain himself and his family."[6] William Blackstone likewise acknowledged both that "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions,"[7] and that "[a]t common law every man might use

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[4] For a more extensive discussion, *see, e.g.*, TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010); David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. 287 (2016).

[5] *See Horne v. Dep't of Agric.*, 576 U.S. 351, 358 (2015) (citing W. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 329 (2d ed. 1914)).

[6] *Allen v. Tooley*, (1614) 80 Eng. Rep. 1055, 1057 (K.B.).

[7] 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

what trade he pleased."[8] John Locke, whose influence on the Founders was perhaps unparalleled,[9] famously extolled the inalienable rights of "life, liberty and estate" that it was the state's charge to protect.[10] Other influential philosophers, like Baron de Montesquieu and Adam Smith, likewise explained how property rights, free trade, and private contracting were essential for maintaining peace and economic growth.[11]

The American colonists brought this same high regard for property and contract rights across the Atlantic, and many of the earliest state constitutions made such protections explicit and unambiguous. For example, the Massachusetts, New Hampshire, Pennsylvania, and Vermont Constitutions all acknowledged that "acquiring, possessing, and protecting property" were among the natural, inalienable rights of all free people.[12] And of course, the U.S. Constitution itself, even prior to the adoption of the Bill of Rights, protected various forms of economic liberty, as well as "natural liberty" in a broader sense. Article I, Section 10 precluded states

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[8] *Id.* at *415.

[9] *See* James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 29–30 (2012).

[10] LOCKE, *supra*, §§ 85, 87.

[11] *See* MONTESQUIEU, THE SPIRIT OF THE LAWS 338 (1748) (Anne M. Cohler et al. eds., 1989); ADAM SMITH, WEALTH OF NATIONS 149 (1776) (Kathryn Sutherland ed., 2008); *see also* Ely, *supra*, at 31–32, 34.

[12] MASS. CONST. art. I, *amended by* MASS. CONST. art. CVI; N.H. CONST. art. II; PA. CONST. of 1776, ch. I, § 1; VT. CONST. of 1777, ch. I, art. I.

from passing any law "impairing the Obligation of Contracts,"[13] while Article IV guaranteed that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[14] The Fifth Amendment precluded the federal government from depriving anyone of their liberty or property without "due process of law" and protected against seizures of property for public use "without just compensation."[15] The Ninth Amendment ensured more generally that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[16]

To be sure, many of these constitutional protections are written in seemingly abstract terms. But as Justice Bushrod Washington explained in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), manifestations of natural liberty "would perhaps be more tedious than difficult to enumerate"—and would certainly include what we would today describe as "economic liberty." For example, in elucidating what was meant by "the privileges and immunities of citizens in the several states," Justice Washington included "the right to acquire and possess property of every kind" and "to take, hold and dispose of property, either real or personal," as well as

[13] U.S. CONST. art. I, § 10.

[14] *Id.* art. IV, § 2.

[15] *Id.* amend. V.

[16] *Id.* amend. IX.

the right "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.* at 551–52. Of course, the fact that economic liberty was deemed a core component of natural rights did not entail that states had no authority whatsoever to regulate such matters; to the contrary, these privileges and immunities were "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* at 552. But it does entail that such restrictions are constitutionally permissible only when the state is genuinely pursuing (in modern terms) a legitimate state interest.

Economic liberty was no less fundamental at the time of the passage of the Fourteenth Amendment. Indeed, the rights of former slaves to own property and earn a living were core components of the philosophy of abolitionism. As Frederick Douglass remarked about first earning money after escaping slavery:

> I was not long in accomplishing the job when the dear lady put into my hand two silver half dollars. To understand the emotion which swelled in my heart as I clasped this money, realizing that I had no master who could take it from me— that it was mine—that my hands were my own, and could earn more of the precious coin—one must have been in some sense himself a slave. . . . I was not only a freeman but a free-working man, and no Master Hugh stood ready at the end of the week to seize my hard earnings.[17]

[17] FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS, *reprinted in* DOUGLASS: AUTOBIOGRAPHIES 654 (Henry Louis Gates Jr. ed., 1994).

Abolitionist Senator Charles Sumner put the evil of slavery in similar terms, noting that it "compel[led] the labor of fellow-men without wages" by "excluding them from that property in their own earnings, which the law of nature allows, and civilization secures."[18] The need to protect such rights against infringement by state governments was also a core motivation for the Fourteenth Amendment itself, as the rights of property and contract were among those rights most frequently denied to freedmen.[19] John Bingham, the principal framer of the Fourteenth Amendment, made clear that the privileges or immunities of citizens included "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[20]

Through the early twentieth century, the Supreme Court consistently recognized that economic liberty was a fundamental right protected by the Fourteenth Amendment.[21] In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example,

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[18] Cong. Globe, 36th Cong., 1st Sess. 2592 (1860) (statement of Charles Sumner).

[19] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, 200–04 (1988).

[20] Cong. Globe, 42d Cong., 1st Sess. App. 86 (1871) (statement of John Bingham).

[21] To be sure, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Supreme Court adopted an incredibly narrow interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment, holding in a 5-4 decision that this provision protects only those rights "which owe their existence to the Federal

the Court held unconstitutional a San Francisco ordinance that required laundries in wooden buildings—which were primarily operated by Chinese persons—to be licensed by a city official who had complete discretion to grant or deny permits. *Id.* at 368. The Court explained that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Id.* at 370. Similarly, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the Fourteenth Amendment protects "not merely freedom from bodily restraint but also the right of the individual to contract" and "to engage in any of the common occupations of life,"

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government, its National character, its Constitution, or its laws." *Id.* at 79. By contrast, natural liberty—that is, the set of fundamental rights that predate the Constitution itself—was not protected. *Id.* There is robust scholarly consensus that the Court interpreted the Privileges or Immunities Clause too narrowly in *Slaughter-House*, *see McDonald v. City of Chicago*, 561 U.S. 742, 756–57 (2010), and at least two current Justices have stated that the Privileges or Immunities Clause is more appropriate for protecting substantive constitutional rights than the Due Process Clause. *See id.* at 805 (Thomas, J., concurring in part and concurring in the judgment); *Timbs v. Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring).

Nevertheless, regardless of whether it makes more doctrinal sense to protect economic liberty under the Due Process Clause or the Privileges or Immunities Clause (or both), the assessment of whether a right is "deeply rooted" enough to be fundamental would likely be the same. *Cf. Dobbs*, 597 U.S. at 240 n.22 (rejecting the argument that the Privileges or Immunities Clause, as opposed to the Due Process Clause, might protect a right to elective abortion because "such a right would need to be rooted in the Nation's history and tradition" either way).

because such rights were among those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399.

Of course, one of the Court's most famous (or infamous) decisions from this period was *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court held unconstitutional a statute regulating how many hours a week bakers could work on the ground that the regulation did not actually advance the health and safety rationale offered by New York. *Id.* at 64–65. But despite retrospective characterizations of the early twentieth century as the "*Lochner* Era," the Court actually upheld nearly all working-hour limits that it considered during this period.[22] In other words, the fact that the *Lochner* Court recognized liberty of contract as a fundamental constitutional right did not entail reflexive hostility toward any and all regulations of contractual relationships; it simply meant that the Court required states to demonstrate actual, legitimate interests before exercising their police powers.

It was not until its landmark decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), that the Supreme Court stepped back from recognizing economic liberty as a fundamental right. The Court asserted in *Carolene Products* that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally

[22] DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 51–52 (2011).

assumed it is of such a character as to preclude the assumption that it rests upon some rational basis." *Id.* at 152. Of course, in the years since *Carolene Products*—and in particular, since *Griswold v. Connecticut*, 381 U.S. 479 (1965)—the Supreme Court has again started treating certain "unenumerated" rights as fundamental, and therefore entitled to heightened scrutiny. But regardless of one's position as to the merits of those cases pertaining to privacy, sexual intimacy, and self-determination that were decided in the wake of *Griswold*, it is difficult to credibly claim that such rights are *more* fundamental or deeply rooted than the rights of property and contract, which are as ancient as the Anglo-American legal tradition itself.[23]

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ERROR AS A MATTER OF CIRCUIT PRECEDENT BUT ALSO ACKNOWLEDGE THE NEED TO RECONSIDER THE WEAKNESS OF DOCTRINAL PROTECTIONS FOR ECONOMIC LIBERTY MORE BROADLY.

Despite the extensive history discussed above, *amicus* again recognizes that this Court is bound to apply binding Supreme Court precedent with direct

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[23] *See Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) ("Under the Court's approach to unenumerated rights, we privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold. Scholars have suggested, however, that this may get things backwards. After all, if anything, 'the right to pursue callings and make contracts . . . have *better* historical grounding than more recent claims of right that have found judicial favor.'") (quoting James W. Ely Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 953 (2006)).

application, whether or not that precedent is well-reasoned. And for the reasons explained in detail by Appellants, faithful application of that precedent requires reversal here. But for two reasons, the Court should still resolve this case casting a skeptical eye toward the insufficient protection that economic liberty receives under current doctrine.

First, in light of how deferential the rational basis standard already is, it is crucial to prevent district courts in this circuit from watering it down further by eliding binding precedent on the need for evidentiary evaluation of the government's proffered state interests. This Court's case law—in particular, *St. Joseph Abbey*—indicates more clearly than the case law in most other circuits that the presumption of constitutionality in economic liberty cases is in fact rebuttable. *See* 712 F.3d at 226 ("The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."). Ensuring that district courts meaningfully evaluate the evidence plaintiffs present of violations of their property rights is not just a matter of ensuring compliance with Fifth Circuit precedent or the Federal Rules of Civil Procedure; it is also essential for ensuring that judicial protection of economic liberty is not reduced to an outright nullity.

Second, the Supreme Court has recently issued several major decisions evincing a clear preference for evaluating fundamental constitutional rights through

the lens of text, history, and tradition, as well as a willingness to reconsider precedent as to whether certain rights are, in fact, deeply rooted. In *New York State Rifle & Pistol Association v. Bruen*, the Court eschewed a conventional tiers-of-scrutiny framework with respect to the Second Amendment, holding instead that "the government may not simply posit that the regulation promotes an important interest," but rather must show that "the regulation is consistent with this Nation's historical tradition of firearm regulation." 597 U.S. 1, 17 (2022). And in *Dobbs*, the Court analyzed the right to elective abortion under *Glucksberg* and reversed decades of precedent on the ground that such a right was "not deeply rooted in the Nation's history and traditions." 597 U.S. at 250.

Thus, now is an especially valuable time for members of this Court to offer candid, detailed assessments of the history of economic liberty as a fundamental right. *See, e.g.*, *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring). In particular, given the central role that *Glucksberg* played in the Supreme Court's decision in *Dobbs*, it may soon be necessary for it to assess whether long-neglected rights to own and lease property, make voluntary contracts, and earn a living do pass muster under *Glucksberg*.

To be clear, *Amicus* does not necessarily suggest that *Glucksberg* is the ideal way of assessing assertions of fundamental, unenumerated rights. Most notably, *Glucksberg* does not offer much guidance as to the level of generality at which a

right can be defined. *Compare Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 701 (D.C. Cir. 2007) (en banc) (framing the question under *Glucksberg* as "whether terminally ill patients have a fundamental right to experimental drugs that have passed Phase I clinical testing") *with id.* at 716 (Rogers, J., dissenting) (framing the right at issue instead as the "right to act to save one's own life"). But this is simply another important, challenging question that could benefit from candid discussion by members of this Court, and this case is an ideal vehicle for that discussion.

CONCLUSION

For the foregoing reasons and those presented by Appellants, this Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,133 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ Thomas A. Berry

April 1, 2025

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Thomas A. Berry

April 1, 2025