No. 20-1538

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALISON PATRICIA TAYLOR,

Plaintiff – Appellant,

v.

CITY OF SAGINAW and TABITHA HOSKINS,

Defendants - Appellees

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

APPELLANT ALISON PATRICIA TAYLOR'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant is not a corporate entity and, as such, has no parent corporation and is not a publicly-held corporation owning 10% or more of stock of a party. FRAP 26.1(a).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Alison Patricia Taylor, by counsel, requests oral argument. This is a case of first impression in the country (let alone this circuit) presenting a legal issue that is novel, but easy, under the Fourth Amendment to the United States Constitution. The decision by this Circuit Court will affect not only the parties to this litigation, but will have a practical effect upon the thousands of putative class members as well as the public throughout the entire circuit. The opportunity to address these constitutional issues in greater detail to this Court, and to respond to inquiries from this Court, will aid in the decision-making process, given the existence of our modern and constitutionally-evolving society.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction to entertain and hear this case pursuant to 28 U.S.C. §§ 1331, 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the District Court's final judgment and all prior orders and decisions as a final judgment was entered on June 9, 2020. **Judgment, RE 78, PageID# 1409.** Plaintiff-Appellant timely appealed to this Court. **Notice of Appeal, RE 79, PageID# 1410.**

STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW

I. Did the District Court commit error by refusing to decide the motion for class certification before considering and deciding Defendants' motion for summary judgment?

Appellant answers: Yes.

II. Did the District Court commit error in granting summary judgment on Plaintiff's Fourth Amendment claim by invoking the administrative search exception to the warrant requirement?

Appellant answers: Yes.

INTRODUCTION

This case involves a Fourth Amendment challenge to the warrantless chalking of private citizens' tires by parking enforcement officials as the basis to later issue parking tickets. This is the second time this case comes to this Court. *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019). Due to the new errors of the District Court following remand, reversal is required.

STATEMENT OF CASE

Parking enforcement officials from the City of Saginaw (including Defendant-Appellee Tabitha Hoskins Hoskins) regularly and systematically use the placement of a chalk-like substance on one of the vehicles' four tires to surreptitiously start obtaining information to later justify the issuance of numerous parking tickets throughout the territorial limits of the City of Saginaw. **Hoskins Dep., RE 64-3, PageID# 1073-1074**; see also **Taylor Decl., RE 68-5, PageID# 1216,**

¶15. In other words, they chalk tires with the goal to issue parking tickets.

Here is an example—

Ticket, RE 68-2, PageID# 1185. When parking enforcement officials like Hoskins return to the previous "marked" vehicles, they use the prior chalk marks to confirm whether the particular vehicle has remained in the same spot for a set amount of time, and issues a ticket if the marked

vehicle remained in the same place beyond the allotted time-period. **Hoskins Dep., RE No. 64-3, PageID# 1074**; see also **Taylor Decl., RE 68-5, PageID# 1216, ¶16.** Vehicle owners never gave Defendants permission to mark the privately-owned vehicles; no law or ordinance self-enables the same. ***Id*., ¶11.** Parking enforcement officials never seek, sought, or secured consent to chalk tires of parked vehicles. ***Id*., ¶12.**

Plaintiff-Appellant Alison Patricia Taylor owns or has owned two vehicles that have, since 2014, received more than a dozen parking tickets issued by the City of Saginaw. **License Plate Records, RE 68-11, PageID# 1278-1280**; **Tickets, RE 68-2, PageID# 1157-1207**. She received the tickets after being forced to park on the street due to the lack of maintenance of the City-operated parking lot rented by her employer; there was tire-puncturing debris strewed in the normal parking areas. **Taylor Dep, RE 68-8, PageID# 1226 (pp. 20-21).**

Each ticket was issued by Appellee Tabitha Hoskins in her role as a parking enforcement officer for the City of Saginaw. **Tickets, RE 68-2, PageID# 1157-1207**. Each ticket was noted with a date and time Taylor's vehicles were first "marked" by the placement of a chalk-like substance on one of the four tires of the vehicles. ***Id.*** Appellee Hoskins documented the same with photographs[1] associated with each ticket. ***Id.*** In addition to the marks used to issue tickets, Taylor believes that her vehicle was chalked many other times as well though the City has not produced records of the same.[2]

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[1] When ticket was issued, the parking official took up to three photographs documenting the vehicle and tire with the chalk mark. **Hoskins Dep., RE 64-3, PageID# 1086-1087.**

[2] During her deposition, Ms. Hoskins suggested that she does not "always" use chalk to issue a ticket and will "sometimes" record the dates and times of observed parked vehicles manually rather than using chalk. She never provided proof of the same or produced such documents when asked for production of the same in discovery. Moreover, Taylor's counsel was able to secure more than 100,000 photographs associated with issued tickets and did a sample study to see if any over-the-limit tickets were

The Fourth Amendment protects from *unreasonable* searches. U.S. Const. amend. IV. As this Court previously explained—

> To determine whether a Fourth Amendment violation has occurred, we ask two primary questions: first, whether the alleged government conduct constitutes a search within the meaning of the Fourth Amendment; and second, whether the search was reasonable.

Taylor, 922 F.3d at 334. The first step is already complete and undisputed. By previous decision, this Court already "held that 'chalking is a search under the Fourth Amendment, specifically under the Supreme Court's decision in *Jones*."[3] **Order, RE 77, PageID# 1405** (citing *Taylor,* 922 F.3d at 332). All that remained to be answered is whether that search was a "constitutionally reasonable" one. U.S. Const. amend. IV (the

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ever issued without proof of prior chalking. **Response to Mt. for Summ. J., RE 68, PageID# 1150-1151.** Chalking occurred in *every* relevant ticket. ***Id.*** Counsel could not locate even a single example of non-use of chalking by Hoskins; Defendants offered no proof either.

[3] *United States v. Jones*, 565 U.S. 400 (2012).

Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures."). However, reasonableness is a *legal* question, not a subjective socially engineered preference of a local federal judge. See *Garrison v. Louisiana*, 379 U.S. 64, 81-82 (1964) (DOUGLAS, J., concurring) (wrongfully, the "Bill of Rights is constantly watered down through judicial 'balancing' of what the Constitution says and what judges think is needed for a well-ordered society.").

The precedent (and law of the case) is clear. In the absence of a warrant, such warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Taylor*, 922 F.3d at 334 (citing *United States v. Hockenberry*, 730 F.3d 645, 658 (6th Cir. 2013)). This is "the most basic constitutional rule in this area" of Fourth Amendment jurisprudence. E.g. *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). The burden of demonstrating an exception to the warrant requirement lies with

Defendants. *Taylor*, 922 F.3d at 334 (citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). "[S]ecuring a warrant before a search is the rule of reasonableness." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2188 (2016).

Undisputedly, no warrants were sought or obtained by the City or Hoskins prior to chalking Taylor's tires. **Hoskins Dep., RE 64-3, PageID.1100-1101**; see also **Taylor Decl., RE 68-5, PageID# 1217, ¶21**. By this action, Taylor (and the putative class) sought to have chalking declared unconstitutional under *Jones*, enjoin against the practice as part of a class action, and recover ticket payments for a damaged subclass of ticketees.

Following the prior remand by this Court, disputed discovery was undertaken and Defendant-Appellees then moved for summary judgment. See **Mt. for Summ. J., RE 64**. Looking to the second step of two-step process outlined in *Taylor*, they spun out five claimed "warrant exceptions." The District Court utilized only one, the administrative

search exception, and granted summary judgment in their favor. **Order, RE 77.** That was in error. This appeal now follows.

SUMMARY OF ARGUMENT

The District Court committed two reversable errors. First, it committed error in refusing to resolve the motion for class certification filed by Taylor and her counsel before taking up the motion for summary judgment. Second, the District Court erred in concluding the "administrative search" exception to the warrant requirement applied to the tire-chalking search of Taylor's vehicles. Reversal is required.

STANDARD OF REVIEW

This Court reviews de novo a district court's order granting summary judgment, using the same Rule 56(c) standard as the district court. *Ondricko v. MGM Grand Detroit, LLC,* 689 F.3d 642, 648 (6th Cir. 2012). Questions of law are reviewed de novo. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997).

ARGUMENT

I. The District Court erroneously refused to first resolve the motion for class certification.

With months remaining before the dispositive motion deadline, Taylor, by her counsel, filed for class certification and appointment of class counsel. **Mt. for Class Cert., RE 47, PageID# 502-521.** The District Court set the matter for a hearing three months thereafter on March 17, 2020. **Notice of Hearing, RE 50, PageID# 593**. Yet, under the case management order in place, Taylor was only allowed to file for summary judgment through March 11, 2020. **Case Mgt Order, RE 38, PageID# 347.**

As discovery began to wind down and the issue of summary judgment began to take shape, the "one-way intervention" doctrine concern revealed itself. Some courts have held it is "unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." See

Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974). As such, the "one-way intervention" doctrine requires plaintiffs to seek class certification prior to seeking summary judgment, else be barred from class certification.

Plaintiff's counsel raised the uncovered one-way intervention concern, in light of the District Court's deadlines, during the in-person February 24, 2020 settlement conference. See **Mt. to Ext. Deadline, RE 63, PageID# 996-997.** The Court invited a motion on the matter, which Taylor, by counsel, thereafter filed. In that motion, Taylor explained—

> Some circuits have held that plaintiffs can accidently preclude themselves from receiving class certification by seeking summary judgment relief before actually being certified as a class. E.g. *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975).
>
> ***
>
> If a district court inadvertently chooses to decide a plaintiff's motion for summary judgment prior to deciding class certification, the rule against one-way intervention may inadvertently preclude certification. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016). At least one appellate court "urge[s] plaintiffs to exercise caution when seeking a ruling on the merits of an individual plaintiff's claim before the district court has ruled on class certification and given notice of the ruling to absent class

members." *Id.* Notwithstanding, the Sixth Circuit has held that there is "no support for applying the prohibition on one-way intervention to Rule 23(b)(2) class certifications." *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir. 2012).[4]

This Court currently has oral argument scheduled on Plaintiff's motion for class certification on March 17, 2020 at 3:00p.m. NOH, ECF No. 50. However, the dispositive motions filing deadline is March 11, 2020. Case Mgt & Sch. Order, ECF No. 38, PageID.347. Additionally, Plaintiff has essentially already met her legal burden upon the holding of this Court that a search has occurred and it is understood and essentially undisputed that warrants were not obtained beforehand. Order, ECF No. 31, PageID.282-283. The only actual substantive question is whether an exception to the warrant requirement applies. "The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.'" *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Available exceptions are "few" and must be both "specifically established" and "well-delineated." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). They are "jealously and carefully drawn." *Id.* The burden of proving an applicable exception is solely on Defendants. *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951).

Given all this, the Court is requested to extend Plaintiff's deadline for the filing of her summary judgment motion until after the class certification motion and after Defendants' imminent motion for

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[4] Below, Taylor actively sought both a Rule 23(b)(2) class and a Rule 23(b)(3) subclass in this case. See **Mt. for Class Cert., RE 47**.

> summary judgment is resolved. It is proper under both the one-way intervention rule and the posture at which this case exists.

Mt. to Ext. Deadline, RE 63, PageID# 997-998. No opposition was made or filed by Defendant-Appellees. Yet, the District Court denied the motion because, from the District Court's perspective, Taylor had "not demonstrated that determining class certification prior to addressing dispositive motions and thus the merits of the claims would aid in a timely resolution of the case." **Order, RE 66, PageID# 1123**. As a result of that error, Taylor was functionally precluded from filing her motion for summary judgment due to the admonishment in *Costello* and the feared case-threatening effects of the one-way intervention rule.

The rule is not something Taylor and her counsel wanted to treat fast-and-loose. The doctrine expressly prevents plaintiffs from obtaining class certification if first acquiring, even if accidentally, a favorable ruling on the merits of a claim. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016). Judges "urge plaintiffs to exercise caution when

seeking a ruling on the merits of an individual plaintiff's claim before the district court has ruled on class certification and given notice of the ruling to absent class members." *Id.* Taylor heeded that advice; the District Court did not.

This Circuit has said little on the doctrine but has admonished the class certification should occur first. *Faber v. Ciox Health*, LLC, 944 F.3d 593, 604 (6th Cir. 2019). The District Court's failure to follow Rule 23's guidance, per *Faber* and *Costello*, prejudiced Taylor. While the District Court ultimately (but erroneously) granted summary judgment in favor of Defendants, the barrier erected by the District Court also functionally precluded Taylor from filing her own motion for summary judgment. The fear of any early merits finding could have potentially made class certification "delayed beyond the permissible period allowed by the rule," i.e. after a motion for summary judgment. Yet now, Taylor wants to ask this Court to effectively grant summary judgment in her and the class's favor in this Court but cannot do so because it was never able to be raised

in the District Court. This Circuit has said very, very little on when a District Court should resolve a class certification request. It is now invited to expressly provide that guidance.

II. The District Court should not have granted summary judgment in favor of Appellees based on the administrative search exception to the warrant requirement.

After *Jones*, trespassory-based search cases have a two-step process: "first, whether the alleged government conduct constitutes a search within the meaning of the Fourth Amendment; and second, whether the search was reasonable." *Taylor,* 922 F.3d at 334. The first step is already resolved. The District Court found that this Court already "held that 'chalking is a search under the Fourth Amendment, specifically under the Supreme Court's decision in *Jones*." **Order, RE 77, PageID# 1405** (citing *Taylor,* 922 F.3d at 332). That issue is not challenged on appeal.

That left "step two"—whether that 'tire chalking' search was a constitutionally reasonable one. *Taylor,* 922 F.3d at 334. The Fourth

Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.'" *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Available exceptions for governmental agents are "few" and must be both "specifically established" and "well-delineated." *Coolidge*, 403 U.S. at 455. They are "jealously and carefully drawn." *Id.*

However, reasonableness is a *legal* question. In the absence of an issued warrant, warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Taylor*, 922 F.3d at 334 (citing *Hockenberry*, 730 F.3d at 658). Here, the undisputed evidence confirms that no warrants were ever obtained by the City or Ms. Hoskins prior to chalking Taylor's tires. **Hoskins Dep., RE 64-3, PageID# 1100-1101**; see also **Taylor Decl., RE 68-5, PageID# 1217, ¶21**. Thusly, the burden

lies solely with Defendants to prove an applicable exemption. *Taylor*, 922 F.3d at 334 (citing *Jeffers*, 342 U.S. at 51).

Despite raising five different exceptions, **Mt. for Summ. J., RE 64**, the District Court looked to only one, the administrative search exception, and incorrectly granted summary judgment. However, that was in error because the administrative search exception plainly does not apply in these circumstances.

A. The District Court erred in finding a lawful warrantless search as an administrative search.

The District Court concluded that "street parking regulations are a proper exercise of a municipality's police powers" and thus falls *ipso facto* within the administrative search exception. However, that conclusion is patently erroneous based on prior precedent of this Court and other courts.

B. The administrative search exception is not applicable.

Administrative searches constitute a Fourth Amendment search which requires to government to obtain an administrative warrant or

provide a pre-cleared challenge, else the search will be deemed unreasonable. See *Dow Chem. Co. v United States*, 749 F.2d 307, 311 (6th Cir. 1984).

There are two problems with the use of the exception by the District Court for these circumstances. First, the tire-chalking in question is categorically not an administrative search. Administrative searches are generally understood to be those searches incident to administrative interests as opposed to those related to traditional law enforcement functions such as issuing traffic violations. E.g. *Camara v. Municipal Ct. of City and County of San Francisco*, 387 U.S. 523 (1967) (housing code inspection); *See v. City of Seattle*, 387 U.S. 541 (1967) (fire code inspection); *City of Los Angeles, Calif. v. Patel*, 576 U.S. __; 135 S. Ct. 2452, 2456-2457 (2015) (hotel recordkeeping compliance inspection). Second, and even if tire-chalking was an administrative-type search, absent exigent circumstances the subject of the search must *first* be offered an opportunity for precompliance review of the request by a

neutral decisionmaker prior to the imposition of penalties for refusing or opposing that proposed search. *Patel*, 135 S. Ct. at 2456-2457; *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 280 (6th Cir. 2018). The pre-search/precompliance review scheme at a minimum must give the searchee a meaningful chance to contest an administrative-search request in front of a neutral party *before* the search occurs. *Benjamin v. Stemple*, 915 F.3d 1066, 1069 (6th Cir. 2019). This Court has explained the "right to be free from a warrantless code-compliance search with no alternative pre-compliance review was clearly established" since at least *Marshall* in 1978. *Gardner v. Evans*, 920 F.3d 1038, 1056 (6th Cir. 2019) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). [5]

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[5] The District Court seemingly did not utilize any of the other exceptions raised by Defendants because none are applicable, warranted, or proven to be "specifically established and well-delineated exceptions" as is their burden to show. *Taylor*, 922 F.3d at 334. Moreover, the District Court correctly "rejected" Defendants' argument that "[t]he City did not conduct a search because it did not trespass onto a vehicle by chalking and/or it did not use chalk to obtain information."

C. The District Court confused police powers and administrative searches.

Taylor does not generally dispute that the District Court's wide observation that "regulation of parking falls within the purview of a municipality's police powers." However, the District Court then illogically leapfrogs to the conclusion that this "method of regulating parking does not violate the Fourth Amendment." That confuses two different concepts.

To be clear, Taylor is not alleging that "parking enforcement" generally cannot occur. Rather, she challenges *the tire-chalking method* of enforcement under the Fourth Amendment post-*Jones*.[6] Municipalities, even when exercising police powers, cannot utilize a method or process which the Fourth Amendment prohibits. For example,

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[6] Other courts have followed this Court's decision in *Taylor*. *Verdun v. City of San Diego*, 2020 U.S. Dist. LEXIS 49790 (SD Cal, Mar. 21, 2020); *Safaie v. City of Los Angeles*, Case No. 19-3921 (C.D. Cal. Mar. 23. 2020).

the government may regulate and even outlaw the possession and use of illicit drugs. Agents of the government cannot, however, warrantlessly kick in everyone's door in a city block to indiscriminately search for such illegal drugs within the homes of citizens. The Fourth Amendment limits *the methods* by which government official enforce laws and ordinances—even ones undisputedly within the general purview of a municipality's police powers. Chalking is a type of trespassory warrantless search which has no applicable warrant exception. This makes *that process* unconstitutional. This Court recently affirm that the Fourth Amendment's warrant requirement, in the absence of an exemption, is "not an empty formality." *Gardner,* 920 F.3d at 1056.

Rather than applying the standard outlined in *Taylor*, the District Court looked the three-factor test of *Brown v. Texas*, 443 U.S. 47, 51 (1979). However, *Brown* was not an administrative search case but was answering whether the stop of Mr. Brown with his subsequent refusal to give his name—a *seizure* case—was a wrongful initial arrest or a brief

detention short of traditional arrest. *Id.* at 50. This is the incorrect test for this private property *search* case. *Taylor*, 922 F.3d at 332 ("yes, chalking is a search for Fourth Amendment purposes").

But even if this case could debatably fit into the *Brown* seizure dichotomy, for officers to conduct the "brief detention," they must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown*, 443 U.S. at 51. There is no such suspicion of ongoing or involved criminal activity when Hoskins and the City chalks all the tires of Saginaw's citizens along city streets. *Taylor*, 922 F.3d at 334 ("No such probable cause existed here.").

Lastly, the District Court fleetingly cites to *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996). That too is of little help because *Rohrig* was solely premised on the *Katz*[7] standard of Fourth Amendment jurisprudence, a different standard than the one adopted in *Jones*. 565

[7] *Katz v. United States*, 389 U.S. 347 (1967)

U.S. at 409. After all, "the Supreme Court has articulated *two* distinct approaches to determine when conduct by a governmental agent constitutes a search." *Taylor*, 922 F.3d at 332. This case is based on the *Jones* standard, not the *Katz* standard. *Taylor*, 922 F.3d at 332 ("*Jones* provides the appropriate analytical framework for determining whether chalking constitutes a search within the meaning of the Fourth Amendment.").[8] As this case has made clear, the age of a judge singularly deciding *Katz*-styled social reasonableness is over. *Jones* is the standard and is the law of this case. *Id.* And one "virtue" of the Fourth Amendment's *Jones*-based property-rights baseline is that "it keeps easy cases easy." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). This is such a case.

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[8] "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall,* 436 U.S. at 312-313.

RELIEF REQUESTED

For all the reasons and law cited above, this Court is requested to vacate the final judgment of this District Court, reverse the Opinion dated June 9, 2020, and remand for further proceedings with instructions to decide the motion for class certification prior to deciding any further motions for summary judgment.

Date: June 12, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit Rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using TeXGyreSchola 14-point font. The principal brief, including headers and footnotes, contains 3,884 words according to the Word Count feature in the Microsoft Word program, being less than 13,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Date June 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

Date: June 12, 2020

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE.	Page Range	Description of the Document
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