Nos. 14-3779; 14-3780

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KYLE LAWSON, et al.,

Appellees/Cross-Appellants,

v.

ROBERT KELLY, et al.,

Appellant/Cross-Appellee.

Appeal from the United States District Court, Western District of Missouri, The Honorable Ortrie D. Smith

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BRIEF OF APPELLANT STATE OF MISSOURI

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SUMMARY OF THE CASE

Consistent with the traditional power of states to regulate domestic relations, *see United States v. Windsor*, 133 S.Ct. 2675, 2680-81 (2013), the State of Missouri, through its legislature and its people, defined marriage as "between a man and a woman." Mo. Const. Art. I, § 33; Mo. Rev. Stat. § 451.022; *see also Banks v. Galbraith*, 51 S.W. 105, 106 (Mo. Div. 2, 1899).

Plaintiffs challenged Missouri law, asserting that the denial of marriage licenses to same-sex couples is a violation of the Fourteenth Amendment to the United States Constitution. The district court, concluding that it was only partially bound by this Court's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), held that Missouri's law defining marriage as between a man and a woman is unconstitutional under the Due Process Clause and the Equal Protection Clause.

The issues in this case are currently pending before the United States Supreme Court; therefore, the State of Missouri requests 15 minutes of oral argument per side.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITY

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Plaintiffs Kyle Lawson, *et al.*, filed a complaint against Defendant Robert T. Kelly, in his official capacity as Director of the Jackson County Department of Recorder of Deeds, requesting declaratory and injunctive relief. (Appendix "App." A1-23). In their complaint, Plaintiffs claimed a violation of the United States Constitution. (App. A1). The State of Missouri intervened.

On November 7, 2014, the district court entered an order and judgment granting in part and denying in part the State of Missouri's motion for judgment on the pleadings, and granting in part and denying in part the Plaintiffs' motion for summary judgment and motion for permanent injunction. (App. A24-43). The State of Missouri filed a timely notice of appeal from the order and judgment. (App. A44). This Court has jurisdiction under 28 U.S.C. §§ 1291 & 1294.

STATEMENT OF THE ISSUES

I. Whether the State of Missouri's definition of marriage as between a man and a woman violates the Due Process Clause.

Baker v. Nelson, 409 U.S. 810 (1972)

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006)

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)

United States v. Windsor, 133 S.Ct. 2675 (2013)

II. Whether the State of Missouri's definition of marriage as between a man and a woman violates the Equal Protection Clause.

Baker v. Nelson, 409 U.S. 810 (1972)

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006)

Washington v. Glucksberg, 521 U.S. 702 (1997)

United States v. Windsor, 133 S.Ct. 2675 (2013)

STATEMENT OF THE CASE

In 1996, the Missouri General Assembly passed Mo. Rev. Stat. § 451.022,[1/] which provides as follows:

> 1. It is the public policy of this state to recognize marriage only between a man and a woman.
> 2. Any purported marriage not between a man and a woman is invalid.
> 3. No recorder shall issue a marriage license, except to a man and a woman.

During the 2004 legislative session, the Missouri General Assembly passed a joint resolution that submitted to the people of Missouri a proposed constitutional amendment regarding the definition of marriage. 2004 SJR 29; http://www.sos.mo.gov/elections/2004ballot/ (Constitutional Amendment 2). Missourians voted on the proposed amendment on August 3, 2004, passing the amendment with 70.6 % of voters approving it. *See* Missouri Secretary of State, Official Election Returns, August 3, 2004; http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=116 (1,055,771 voting in favor of the amendment). With this vote, Missourians approved MO. CONST. ART. I,

[1/] All references to the Missouri Revised Statutes will be to the 2013 Cumulative Supplement, unless otherwise noted.

§ 33, which provides: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."

SUMMARY OF THE ARGUMENT

The State of Missouri has declined to authorize or recognize same-sex marriage. This case, however, is not about whether Missouri's decision is good policy, or whether this Court agrees or disagrees with that policy. The issue is this: is a state's decision not to authorize or recognize same-sex marriage a violation of the Fourteenth Amendment to the United States Constitution?

While a majority of the United States Supreme Court will consider and likely answer that question this term, a fair reading of controlling precedent, including *United States v. Windsor*, 133 S.Ct. 2675 (2013), indicates that the Supreme Court has yet to reach that conclusion. Until it does, controlling precedent grants Missourians the right to set policy in the area of domestic relations, guided by settled rational-basis constraints.

The Missouri Supreme Court, the Missouri General Assembly, and the source of "all political power" in Missouri – "the people," Mo. Const. Art. I, § 1 – established that "[i]n this state marriage is a civil contract by one man and one woman competent to contract." *Banks v.*

Galbraith, 51 S.W. 105, 106 (Mo. Div. 2, 1899). This policy has remained unchanged throughout Missouri's history.

In 1996, the Missouri General Assembly, which is vested with the "legislative power" of the State, Mo. Const. Art. III, § 1, as well as the Missouri Governor, who is vested with the "supreme executive power" of the State, Mo. Const. Art. IV, § 1, passed and signed into law Mo. Rev. Stat. § 451.022, providing that marriage is "between a man and a woman."

Eight years later, "the people" of the State of Missouri voted this policy into the Missouri Constitution by passing a constitutional amendment providing: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman." Mo. Const. Art. I, § 33 (adopted 2004).

The question in this case, again, is whether the State of Missouri can define the domestic relationship of marriage under its own laws and Constitution without interference by federal authority. The United States Supreme Court has said yes. *See Windsor*, 133 S.Ct. 2675 (recognizing the states' rights to define marriage); *see also Baker v. Nelson*, 409 U.S. 810 (1972) (rejecting on the merits a due process and

equal protection challenge to a state law defining marriage as between a man and a woman). And this Court has said yes. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding state law definition of marriage as between a man and a woman).

This Court, like the district court below, is bound by these controlling precedents and, therefore, should reverse the district court. *See United States v. Johnson,* 448 F.3d 1017, 1018 (8th Cir. 2006) (noting that panels are bound by prior decision of the Court unless overruled *en banc*).

ARGUMENT

Standard of Review

"Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Faibisch v. Univ. of Minn.,* 304 F.3d 797, 803 (8th Cir. 2002) (citing *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 462 (8th Cir. 2000)). Similarly, Rule 56(c) of the Federal Rules of Civil Procedure permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Here, there are no material issues of fact. Therefore, this Court reviews the matter on apeal *de novo*. *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008).

I. The Regulation of Domestic Relations, Such as Missouri's Marriage Laws, is a Matter of Exclusive State Control.

The United States Supreme Court has consistently and recently held that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Windsor*, 133 S.Ct. at 2691; *cf. Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S.Ct. 1623, 1636-37 (2014) (recognizing that our constitutional system embraces the right of the citizens to adopt policies on "difficult" subjects, including those involving sensitive and complex issues).

"The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Windsor*, 133 S.Ct. at 2691 (internal citations omitted). "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. … In order to respect this principle, the federal courts, as a

general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction." *Id.* (internal citations omitted). "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that [ ] domestic relations . . . were matters reserved to the States.'" *Id.*

On the basis of these federalism principles, the Supreme Court in *Windsor* concluded that the federal Defense of Marriage Act (DOMA) was an "intervention" in the area of "state power and authority over marriage" in its refusal to recognize certain marriages deemed lawful by the state in which the marriage was contracted. *Id.*

This Court has likewise held that "the institution of marriage has always been, in our federal system, the predominant concern of state government." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). "The Supreme Court long ago declared, and recently reaffirmed, that a State 'has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.' " *Id.* (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877).

The State of Missouri, by its elected representatives and directly through its citizens, exercised that "absolute right" when it made the policy decision to recognize marriage as exclusively between a man and a woman.

II. This Court is Bound by Controlling Precedent to Uphold Missouri's Marriage Laws.

In their complaint, Plaintiffs assert that Missouri's marriage laws violate their rights under the Equal Protection Clause and the Due Process Clause of the United States Constitution. However, in *Baker v. Nelson* and *Citizens for Equal Protection v. Bruning*, the United States Supreme Court and this Court, respectively, rejected constitutional challenges to state marriage laws defining marriage as between a man and a woman.[2/] As of this date, these cases remain controlling and are

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[2/] Several courts outside of the Eighth Circuit have considered, or are considering state marriage laws like those at issue in this case. A recent decision from the United States Court of Appeals for the Sixth Circuit held that state marriage laws defining marriage between a man and a woman are constitutional. *See DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014) (*Daughtrey, J. dissenting* and concluding that marriage laws are unconstitutional). *But see Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (holding Virginia's marriage laws unconstitutional) (*Niemeyer, J. dissenting* and concluding that Virginia's marriage laws are constitutional). This Court, of course, is bound "to apply the precedent of this Circuit." *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003).

binding on this Court. *See DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014) (concluding that *Baker v. Nelson* is still controlling).

A. Missouri's Marriage Laws Should be Upheld Under the Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439-41 (1985). A threshold determination in any equal protection analysis is whether to apply strict scrutiny, intermediate scrutiny, or rational-basis review. When a statute differentiates based on "suspect classes" – race, religion, alienage, or national origin – the statute is subject to strict scrutiny. *Id.* at 440; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Similarly, "quasi-suspect classifications," such as gender and illegitimacy "call for a heightened standard of review," referred to as intermediate scrutiny. *Id.* at 440-41.

However, neither this Court nor the Supreme Court has ever applied heightened scrutiny to sexual orientation for equal protection purposes. *See Citizens for Equal Protection v. Bruning*, 455 F.3d at 866 ("[T]he Supreme Court has never ruled that sexual orientation is a

suspect classification for equal protection purposes."); *see also Romer v. Evans*, 517 U.S. 620 (1996).

1. Rational-basis review applies.

In the absence of a suspect class or quasi-suspect class, courts apply rational-basis scrutiny in determining whether a law violates the Equal Protection Clause. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). Furthermore, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (internal citations omitted).

The Missouri Supreme Court has also applied the same rational-basis review applied by federal courts:

> When applying rational-basis review, this Court presumes that a statute has a rational basis, and the party challenging the statute must overcome this presumption by a "clear showing of arbitrariness and irrationality." Rational-basis review does not question "the wisdom, social

> desirability or economic policy underlying a statute," and a law will be upheld if it is justified by any set of facts. Instead, rational-basis review requires the challenger to "show that the law is wholly irrational."

Amick v. Dir. of Revenue, 428 S.W.3d 638, 640 (Mo. banc 2014) (internal citations omitted); *see Kansas City Premier Apartments, Inc. v. Mo. Real Estate Com'n*, 344 S.W.3d 160, 170 (Mo. banc 2011) (in rational-basis review, "all that is required is that this Court find a plausible reason for the classification in question."); *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997) (in rational-basis review, "[t]he burden is on the person attacking the classification to show that it does not rest upon any reasonable basis and is purely arbitrary.").

Additionally, rational-basis review under the Equal Protection Clause does not require detailed empirical evidence to uphold a law. Rather, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the plaintiffs brought an equal protection challenge to Nebraska's Constitution, providing:

> Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Id. at 863. This Court concluded that "for a number of reasons," Nebraska's constitutional provision "should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny." *Id.* at 866.

In its most recent case considering equal protection as it pertains to marriage laws, the United States Supreme Court also applied rational-basis review. *See Windsor*, 133 S.Ct. at 2695-96. The Court held that the only purpose of DOMA was to demean same-sex couples lawfully married in some state. *Id.* Because there was no legitimate purpose, the statute could not intrude on the right of the states to determine their own marriage laws. *Id.* This is rational-basis review, not heightened scrutiny. *Id.; See also id.* at 2706, *Scalia, J., dissenting*, ("I would review this classification only for its rationality. … As nearly

as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny….") (internal citations omitted). Under all controlling precedent, the appropriate level of scrutiny to apply to the Plaintiffs' claims is that of rational-basis review.

2. Missouri's marriage laws satisfy rational-basis review under controlling precedent.

The issue of whether marriage laws limiting marriage to one man and one woman satisfies rational-basis review is not one of first impression in this circuit. In *Baker v. Nelson*, 409 U.S. 810 (1972), the petitioners (supporters of marriage equality) appealed to the United States Supreme Court a decision by the Minnesota Supreme Court holding that its state marriage laws, which defined marriage as a man-woman union, did not violate the Due Process or Equal Protection Clause. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971).

In the jurisdictional statement filed with the United States Supreme Court in *Baker*, the petitioners contended that Minnesota's marriage laws "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment," and that those laws "violate[d] their rights under the equal protection

clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Because a Supreme Court summary dismissal is a ruling on the merits, and lower courts are "not free to disregard [it]," the *Baker* decision establishes that neither the Due Process Clause nor the Equal Protection Clause bars states from maintaining marriage as a man-woman union. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (noting that lower courts may not disregard the implications of the United States Supreme Court's summary dismissal of a case).

This Court, in *Citizens for Equal Protection*, noted the series of cases tracking the development of equal-protection jurisprudence relevant to same-sex marriage, citing with approval the Supreme Court's decision in *Baker* and analyzing *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Having reviewed the legal landscape pertinent to laws restricting the definition of marriage to a man and a woman, this Court concluded that "[w]hatever our personal views

regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.' " *Citizens for Equal Protection*, 455 F.3d at 867-68 (quoting *Romer*, 517 U.S. at 632).

Because controlling precedent has held that there is a rational basis to support Missouri's marriage laws, Plaintiffs' equal-protection claim fails as a matter of law.

B. Missouri's Marriage Laws Do Not Violate the Due Process Clause.

Plaintiffs also assert that their due process rights are violated by Missouri's marriage laws. To state a due process claim, Plaintiffs must show that the challenged law deprives them of a "fundamental right," a right that is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks omitted); *see also Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012).

A right to same-sex marriage is not "deeply rooted" in our history. Same-sex marriage was unknown in the laws of this Nation until 2003, *see Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 970 (Mass. 2003). It began as the recognition of civil unions in the early 2000s. *See,*

e.g., Vt. Stat. Ann. tit. 15, §§ 1201-02 (2000); Cal. Fam. Code §§ 297-98 (2003); N.J. Stat. Ann. § 26:8A-2 (2003). Then, in 2009 Vermont enacted legislation recognizing same-sex marriage. Vt. Stat. Ann. tit. 15, § 8. Since then, eleven other states, and the District of Columbia have enacted legislation recognizing same-sex marriage. *See Windsor*, 133 S.Ct. at 2689; *see, e.g.,* Conn. Gen. Stat. §§ 46b-20 – 46b-20a; Del. Code Ann. tit. 13, § 101; D.C. Code § 46-401. Other states allow same-sex marriage as a result of judicial intervention. *See, e.g., Goodridge*, 798 N.E.2d at 970; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Even Justice Kennedy, writing for the Supreme Court in *Windsor* recognized that:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to . . . lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]

133 S. Ct. at 2689; *see Banks v. Galbraith*, 51 S.W. at 106 (stating that marriage is between one man and one woman).

Likewise, this Court concluded in *Citizens for Equal Protection*, that "[i]n the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution." *Id.* at 870.[3/] Because controlling precedent holds that same-sex marriage is not deeply rooted in our nation's history,

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[3/] Until recently, the majority of courts that have faced the question across the country have held that there is no fundamental constitutional right to marry a person of the same sex. *See, e.g.*, *Citizens for Equal Protection*, 455 F.3d at 870-71; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1096 (D. Haw. 2012); *Smelt v. Cnty. of Orange*, 374 F.Supp.2d 861, 879 (C.D. Cal. 2005), aff'd in part, vacated in part, remanded, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Conaway v. Deane*, 932 A.2d 571, 624-29 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality opinion); *Hernandez v. Robles*, 855 N.E.2d 1, 9-10 (N.Y. 2006); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973); *Baker*, 191 N.W.2d at 186; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675-76 (Tx. App.-Dal. 2010); *Morrison v. Sadler*, 821 N.E.2d 15, 32-34 (Ind. App. 2005); *Standhardt v. Super. Ct., ex rel. County of Maricopa*, 77 P.3d 451, 460 (Ariz. App. Div. 1 2003); *Kern v. Taney*, 2010 WL 2510988 (Pa. Com. Pl. 2010); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct. 1996); *but see, e.g., Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

Plaintiffs' due process claim fails as a matter of law and Missouri law is subject to rational-basis review, as analyzed above.

The State of Missouri acknowledges that the United States Supreme Court has granted certiorari in four cases with identical issues. *See Obergefell v. Hodges*, 14-556, *Tanco v. Haslam*, 14-562, *DeBoer v. Snyder*, 14-571, and *Bourke v. Beshear*, 14-574. The Supreme Court's decision in those cases will certainly control this case. But until further guidance from the Supreme Court, this case is controlled by the precedent in *Baker* and *Citizens for Equal Protection*.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court, and enter judgment in favor of the State of Missouri.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

The undersigned hereby certifies that on this 17th day of February, 2015, one true and correct copy of the foregoing brief was served electronically, and an additional paper copy will be mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 32(a)(5) and 32(a)(6), and that the brief contains 4,672 words. The undersigned further certifies that the electronically filed brief and addendum have been scanned for viruses and are virus-free.

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