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SUPREME COURT OF TEXAS
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No. 17-0463

In The Supreme Court of Texas

Glassdoor, Inc., Doe 1 and Doe 2,
Petitioners

v.

Andra Group, L.P.,
Respondent

Brief of *Amicus Curiae*, Electronic Frontier Foundation, In Support of Petitioners

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On Petition for Review from the Fifth Court of Appeals
Dallas, Texas
No. 05-16-00189-CV

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STATEMENT OF INTEREST

Amicus curiae Electronic Frontier Foundation ("EFF") is a member-supported, non-profit organization that works to protect civil liberties and human rights in the digital world. Through impact litigation, direct advocacy, and technology development, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free speech, privacy, and innovation in the information society. Founded in 1990, EFF has more than 38,000 dues-paying members.

This case touches on a significant issue central to EFF's work: the First Amendment's protections for anonymous online speakers.

EFF has repeatedly represented anonymous online speakers and appeared as *amicus curiae* in cases where the First Amendment's protections for anonymous speech are at issue. *See, e.g.*, *Signature Mgm't Team, LLC v. Doe*, 876 F.3d 831 (6th Cir. 2017) (serving as *amicus curiae* in support of Doe); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (serving as *amicus curiae* in support of anonymous speaker); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe).[1]

Counsel Lisa Hobbs is preparing this brief *pro bono*. *See* TEX. R. APP. P. 11(c).

[1] A complete list of anonymous speech cases EFF has participated in is available at https://www.eff.org/issues/anonymity.

INTRODUCTION

The First Amendment requires that this Court protect anonymous online speakers. Respondent Andra Group invokes Rule 202 to force Petitioner Glassdoor to unmask individuals who anonymously posted reviews on Glassdoor's website critical of Respondent as an employer. Rule 202 represents a broad form of pre-litigation discovery, and although it provides individuals with an important tool to prove their case before filing suit, it also has the potential to be abused.

Courts across the country have recognized that the potential for abuse of their discovery tools is particularly acute when litigants seek to unmask anonymous speakers, often to intimidate or silence them rather than vindicate legitimate legal claims. To prevent this, courts have developed a series of tests to protect those speakers' First Amendment rights.

Lawmakers have also recognized that litigants sometimes use courts to target individuals for exercising their First Amendment rights, referred to as strategic lawsuits against public participation, or SLAPPs. They have responded by passing a series of laws, such as the Texas anti-SLAPP statute—the Texas Citizens Participation Act ("TCPA")—that also seek to protect speakers' First Amendment rights.

This case concerns both of the circumstances described above and implicates the First Amendment interests that courts and lawmakers have sought to protect. Thus, regardless of whether this Court endorses the application of the TCPA statute to Rule 202 petitions, or applies First Amendment protections when evaluating Rule 202

petitions that specifically seek the identities of anonymous online speakers, this Court has an obligation to ensure that Texas courts protect anonymous speakers.

As a threshold matter, *amicus* supports Glassdoor's arguments that the TCPA applies to Rule 202 petitions generally, given the straightforward definition of "legal action" in the law.[2] As a result, the non-moving party, in this case Andra Group, bears the burden of establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question"[3]—that is, the elements of the *anticipated substantive claim* against the speakers, such as defamation.[4] Thus, *amicus* agrees that the court of appeals erred in holding that the "element" was defined by Rule 202: "the likely benefit of allowing the discovery outweighed the burden or expense of the procedure" for Glassdoor.[5]

Although EFF supports and agrees with Glassdoor's core arguments regarding the TCPA, *amicus* writes separately to underscore the First Amendment's unequivocal protection for anonymous speech and urge this Court to ensure that any Rule 202 petition—or any proceeding in Texas courts—that attempts to unmask anonymous online speakers is evaluated by robust First Amendment standards. This is particularly important given that, in the words of this Court, Rule 202 is "the broadest pre-suit

[2] *See* TEX. CIV. PRAC. & REM. CODE §27.001(6); Glassdoor Br. at 14.
[3] *See* TEX. CIV. PRAC. & REM. CODE §27.005(c).
[4] Glassdoor Br. at 21–22.
[5] *Glassdoor, Inc. v. Andra Group LP*, No. 05-16-00189-CV, 2017 WL 1149668, at *7 (Tex. App.—Dallas Mar. 24, 2017, pet. granted) (mem. op.).

discovery authority in the country." *In Re John Doe ("Trooper")*, 444 S.W.3d 603, 610 (Tex. 2014).

The TCPA can be a mechanism by which robust First Amendment standards are applied to attempts to unmask anonymous online speakers because the TCPA, like all anti-SLAPP statutes, was intended to protect First Amendment interests.[6] However, should this Court hold that the TCPA does not apply to Rule 202 petitions, including those that seek the identities of anonymous online speakers, those speakers would be harmed. Moreover, even if this Court holds that the TCPA does apply to Rule 202 petitions, some anonymous online speakers might not be able to invoke the TCPA's early motion to dismiss—because their speech does not fall under the definition of expressive activity protected by the statute.[7] Under these circumstances, this Court must apply a strong First Amendment-based test for unmasking anonymous online speakers, along the lines of the tests adopted by other jurisdictions—and endorsed by a Texas appellate court. *See In Re Does 1-10*, 242 S.W.3d 805, 822 (Tex. App.—Texarkana 2007, no pet.).

[6] *See* TEX. CIV. PRAC. & REM. CODE §27.002 ("The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."). *See also* Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH L. REV. 633, 715 (2018) (stating that the TCPA provides "threshold protections for the exercise of First Amendment rights").

[7] *See* TEX. CIV. PRAC. & REM. CODE §27.005(b); §27.001.

ARGUMENT

I. The First Amendment provides strong protection for anonymous speakers.

The First Amendment protects anonymous speakers. Our founders believed that anonymous speech was an essential tool to provide critical commentary and to foster public debate. Many people today speak anonymously for the same reasons. Although anonymous speakers do not enjoy an absolute right to keep their identity secret, the First Amendment ensures that they are not unmasked without good reason. The First Amendment thus acts as a bar against vexatious litigation designed to silence, harass, or intimidate anonymous speakers. It further requires that when parties legitimately seek anonymous speakers' identities, the unmasking must be *necessary*. This is because loss of anonymity irreparably harms speakers and can impose severe consequences on their speech while also chilling other speakers.

A. The First Amendment right to anonymous speech is a historic and essential means of fostering robust debate.

The right to speak anonymously is deeply embedded in the political and expressive history of this country. Allowing individuals to express their opinions unmoored from their identity encourages participation in the public sphere by those who might otherwise be discouraged from doing so. The Supreme Court has recognized that anonymous speech is not some "pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). *See also In Re Does 1-10*, 242 S.W.3d at 819.

Anonymity is often a "shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 357. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* at 341–42. Indeed, our founders relied on anonymity in advocating for independence before the Revolutionary War and later when publishing the Federalist Papers as they debated our founding charter. *See Talley v. California*, 362 U.S. 60, 64–65 (1960).

For the same reasons, people today regularly use anonymity to speak online. Anonymity has become an essential feature of our online discourse. "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The ability to speak one's mind on the Internet without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001). *See also Doe v. Harris*, 772 F.3d 563, 580 (9th Cir. 2014) (holding that a law requiring unmasking of certain anonymous speakers chilled online speech); *Art of Living v. Does*, No. C10–05022 LHK (HRL), 2011 WL 3501830, at *2 (N.D. Cal. Aug. 10, 2011) (*Art of Living I*) ("Indeed, courts have recognized that the Internet, which is a particularly effective forum for the dissemination of anonymous speech, is a valuable forum for robust exchange and debate."); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008) (noting that with anonymous online speech, "ideas are communicated that would not otherwise come forward").

B. Plaintiffs often use litigation as a pretext to unmask, and then silence, anonymous speakers.

Litigants who do not like the content of Internet speech by anonymous speakers may seek their identities to punish or silence them, rather than vindicate substantive rights or pursue legitimate claims. As the court in *Dendrite Int'l v. Doe No. 3*, recognized, procedural protections for anonymous speakers are needed to ensure that litigants do not misuse "discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." 775 A.2d 756, 771 (N.J. App. Div. 2001). Similarly, the court in *Doe v. Cahill* stated, "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." 884 A.2d 451, 457 (Del. Sup. Ct. 2005).

Amicus has witnessed these tactics firsthand. Litigants often bring suits that seek to unmask anonymous speakers to punish, humiliate, or retaliate with the ultimate goal of silencing their speech. Courts have recognized the harm that would flow from summarily unmasking speakers without first applying a robust First Amendment-based standard—including considering whether there is an important need to obtain the speakers' identities.

For example, USA Technologies, Inc. targeted an anonymous Yahoo! message board user, "Stokklerk," who had characterized the company's high executive compensation as "legalized highway robbery" and "a soft Ponzi." Even though USA

Technologies could not prove that these posts were anything but constitutionally protected opinion, it issued a subpoena to Yahoo! to uncover Stokklerk's identity. *Amicus*, as counsel for the anonymous speaker, brought a motion to quash. The court agreed, recognizing "the Constitutional protection afforded pseudonymous speech over the internet, and the chilling effect that subpoenas would have on lawful commentary and protest." *USA Technologies*, 713 F. Supp. at 906.

In another case, Jerry Burd, the superintendent of the Sperry, Oklahoma, school district, sued anonymous speakers who criticized him on an online message board. Burd filed a subpoena seeking to unmask the speakers. When *amicus* intervened on behalf of the site operator and a registered user, Burd immediately dropped the subpoena. This indicates that Burd did not have a meritorious claim, and presumably was using the legal system simply to unmask the speakers.[8]

C. Unmasking is harmful and can chill speech.

Unmasking anonymous speakers is harmful in at least three ways.

First, the disclosure of anonymous speakers' identities can irreparably and directly harm them. *Art of Living v. Does 1-10*, No. 10–CV–05022–LHK, 2011 WL 5444622, at *9 (N.D. Cal. Nov. 9, 2011) (*Art of Living II*) (citing *McIntyre*, 514 U.S. at 342). At minimum, unmasking can hinder speakers' effectiveness because it directs attention to their identities rather than the content of their speech. In *Highfields Capital*

[8] *See Anonymity Preserved for Critics of Oklahoma School Official,* EFF Press Release (July 18, 2006), https://www.eff.org/press/archives/2006/07/18.

Mgmt., L.P. v. Doe, the court recognized that "defendant has a real First Amendment interest in having his sardonic messages reach as many people as possible—and being free to use a screen name . . . carries the promise that more people will attend to the substance of his views." 385 F. Supp. 2d 969, 980 (N.D. Cal. 2005).

Further, unmasking is harmful to speakers when their true identities are unpopular, as others may be more dismissive of the speakers' statements, and speakers may be chilled from continuing to speak publicly on that same topic. The Texarkana court of appeals acknowledged such a "chilling effect." *In Re Does 1-10*, 242 S.W.3d at 821. *See also Harris*, 772 F.3d at 581 (anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent") (internal quotations omitted). Also, when a pseudonymous speaker is unmasked, they will often lose their built-up audience, and it will often be difficult for them to rebuild a comparable audience with either their true identity or a new pseudonymous identity. Unveiling speakers' true identities thus "diminishes the free exchange of ideas guaranteed by the Constitution." *Art of Living II*, 2011 WL 5444622, at *9.

Second, unmasking the speaker can lead to serious personal consequences—for the speaker or even the speaker's family—including public shaming, retaliation, harassment, physical violence, and loss of a job. Potential job loss is relevant to this case because some of the reviewers in question are current employees, or at least were

at the time of writing.[9] *See Dendrite*, 775 A.2d at 771 (recognizing that unmasking speakers can let other people "harass, intimidate or silence critics"). In the analogous context of identifying individuals' anonymous political activities, the Supreme Court has recognized how unmasked individuals can be "vulnerable to threats, harassment, and reprisals." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 97 (1982).

Third, the harm of unmasking a specific speaker also has the potential to chill others' speech. In *Highfields*, the court held that would-be speakers on an online message board are unlikely to be prepared to bear such high costs for their speech. 385 F. Supp. 2d at 981. Thus, "when word gets out that the price tag of effective sardonic speech is this high, that speech will likely disappear." *Id.*

The harms to an anonymous speaker's First Amendment rights—and the implications for free and open debate generally—must be accounted for and protected by courts. These concerns are particularly salient here because, after Andra Group filed its Rule 202 petition against Glassdoor seeking the identities of several anonymous reviewers, posters took two of their reviews down.[10]

II. This Court should apply a robust First Amendment test to protect anonymous online speakers threatened by Rule 202 petitions.

This Court might decide that the TCPA does not apply to Rule 202 petitions; or even if it does apply, some anonymous online speakers might be unable to invoke the

[9] Glassdoor Br., App. 2.
[10] Glassdoor Br. 6–7.

TCPA's early motion to dismiss. Under these circumstances, this Court should apply a First Amendment-based test for unmasking anonymous online speakers. When a Rule 202 petition seeks the identities of anonymous online speakers specifically, the First Amendment requires a more robust test than the basic Rule 202 test.[11] *See In Re Does 1-10*, 242 S.W.3d at 822 (agreeing that "more is needed before a defendant's First Amendment rights may be eliminated" (internal quotations omitted)).

Such a test should first require Rule 202 petitioners to establish that their claims have merit and then require Texas courts to weigh the needs of the petitioner to know a speaker's true identity against the harm of unmasking the speaker. Indeed, it is possible that the true identity of a defendant is unnecessary throughout a case, and even after judgment. *See, e.g., Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831 (6th Cir. 2017) (holding that the First Amendment protections for anonymous speakers can extend beyond a grant of summary judgment against the anonymous speaker). The Texarkana court of appeals also recognized that before "piercing the constitutional shield and disclosing the identity of [an] anonymous [online speaker]," "[t]he courts must balance the right to communicate anonymously with the right to hold accountable those who engage in communications that are not protected by the First Amendment." *In Re Does 1-10*, 242 S.W.3d at 820–21.

[11] In the words of the Dallas court of appeals: "the likely benefit of allowing the discovery outweighed the burden or expense of the procedure" for the party receiving the petition, in this case, Glassdoor. 2017 WL 1149668, at *7.

Moreover, the appropriateness of weighing competing interests to protect the First Amendment right to anonymous speech is supported by the existence of balancing in the context of the qualified First Amendment discovery privilege.

A. This Court should adopt a test for unmasking anonymous speakers that specifically includes a requirement for courts to balance the *necessity* of unmasking against the harm to the speaker.

Recognizing the First Amendment rights at stake, many courts have developed a two-step test for determining when litigants—or, in this case, would-be litigants—are entitled to unmask anonymous online speakers. *Highfields*, 385 F. Supp. 2d 969. *See also Dendrite*, 775 A.2d 756.

Step one requires plaintiffs to meet some significant evidentiary burden to show the legitimacy of their case, often characterized as a *prima facie* showing, prior to the actual merits stage of the case. *Highfields*, 385 F. Supp. 2d at 975–76. Although courts have employed a variety of evidentiary standards at this step, *amicus* believes the summary judgment standard properly provides the proper protection for anonymous speakers. *Id.* at 975. This standard has been endorsed by the Texarkana court of appeals. *See In Re Does 1-10*, 242 S.W.3d at 821.

Importantly, this *prima facie* showing prong of the test to unmask anonymous online speakers was the inspiration for the strikingly similar test found in the TCPA,[12] showing that both tests were meant to protect First Amendment rights. And it is clear

[12] *See* TEX. CIV. PRAC. & REM. CODE §27.005(c); Laura Lee Prather & Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH. L. REV. 725, 748 (2015).

that both tests go to "each essential element of the claim in question," *In Re Does 1-10*, 242 S.W.3d at 822 (internal quotations omitted), or in the case of a Rule 202 petition, the *anticipated* substantive claims.

Step two requires courts, once plaintiffs meet their evidentiary burden, to balance competing interests. *See, e.g.*, *Dendrite*, 775 A.2d at 760; *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. Ct. App. 2009); *Highfields*, 385 F. Supp. 2d at 976; *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. 2007).[13]

Courts have distilled four interests they must analyze and balance to determine whether plaintiffs, even after meeting their evidentiary burden, can unmask anonymous speakers.

The plaintiffs' two interests are the strength of their case (usually as demonstrated by their evidentiary showing) and the necessity of disclosing speakers' identities. *Dendrite*, 775 A.2d at 760. The necessity inquiry includes whether there are less invasive discovery tools available that would satisfy plaintiffs' needs without unmasking anonymous speakers. *See Art of Living II*, 2011 WL 5444622 at *10 (describing discovery alternatives short of an in-person deposition that would unmask Doe, such as depositions by telephone or via written questions).

[13] Although some courts, including *Cahill,* 884 A.2d 461, have held that no further balancing is necessary should plaintiffs meet a summary judgment standard, EFF believes that the additional balancing of interests provides the most robust protections for anonymous speakers. Although the TCPA does not explicitly mandate a similar balancing test, it similarly vindicates First Amendment rights by requiring movants to show that their expressive activities fall within the statute's protections.

On the other side of the scale, courts must weigh the nature of the anonymous speech at issue in the case and the harm (or harms) that would result from loss of anonymity.

Regarding the nature of the speech at issue, "the specific circumstances surrounding the speech serve to give context to the balancing exercise." *In re Anonymous Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Courts have found that speakers have high First Amendment interests in anonymous political, religious, or literary speech. *See, e.g., Art of Living II*, 2011 WL 5444622 at *5–6 (finding critical commentary touched on matters of public concern). *Cf. Sony Music, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (finding the speech interest in downloading music to be more limited).

Courts must also weigh the harms that result from unmasking speakers—specifically the concrete consequences described above in Section I.C.—and whether the disclosure will chill the speech of others. *See Art of Living II*, 2011 WL 5444622, at *7 ("[W]here substantial First Amendment concerns are at stake, courts should determine whether a discovery request is likely to result in chilling protected activity").

Analyzing these competing interests ensures that courts properly assess the "magnitude of the harms that would be caused by competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Highfields*, 385 F. Supp. 2d at 976. Further, courts have recognized that focusing their analysis on the necessity of unmasking ensures parties have some justifiable, legitimate litigation need for the

information that outweighs the harm to an unmasked speaker. *See Art of Living II*, 2011 WL 5444622, at *6.

B. Courts have required similar balancing under the qualified First Amendment discovery privilege.

The qualified First Amendment discovery privilege recognized by this Court and others requires a balancing test similar to the anonymous online speech cases described above. Although the analysis differs from the test for unmasking anonymous online speakers, the privilege is similar in that discovering parties must show they *need* access to private associational information. Also like the test for unmasking anonymous online speakers, the qualified discovery privilege ensures that parties do not abuse discovery and improperly unmask private expressive associations without first demonstrating that they have justified the intrusion on First Amendment rights.

In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court held that requiring the NAACP to disclose its membership lists in response to discovery requests would have violated its members' First Amendment free association rights. 357 U.S. 449, 465–66 (1958). This violation was particularly troublesome because there is a "vital relationship between freedom to associate and privacy in one's associations." *Id.* at 462. Although the Court recognized that the right to freely associate was not absolute, the state of Alabama needed a "controlling justification" before obtaining NAACP membership lists via subpoena. *Id.* at 466.

The Supreme Court later recognized in *Talley* that the same First Amendment concerns at issue in *NAACP* in discovering the identities and associations of individuals were implicated by a law that prohibited anonymous speakers from distributing pamphlets in Los Angeles. 362 U.S. at 65. Specifically, "fear of reprisal might deter perfectly peaceful discussions on matters of public importance." *Id.* Thus, the privilege extends to protect both the First Amendment right of association and speech.[14]

Similarly, this Court held that a subpoena from the Texas Commission on Human Rights that sought the membership list of the Texas chapter of the Ku Klux Klan for an investigation into alleged housing discrimination, violated the group's First Amendment right to freedom of association. *Ex Parte Lowe*, 887 S.W.2d 1, 3 (Tex. 1994). The Court found that the state had not overcome the group's qualified privilege against disclosure of membership lists because the government could not show "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id.*

In this case, although Andra knows who currently or previously worked for it, it does not know which of its employees commented about the company on Glassdoor. Disclosing information about those speakers would thus reveal the private associations

[14] Other appellate courts have adopted and apply the qualified First Amendment discovery privilege. *See FEC v. Larouche Campaign*, 817 F.2d 233, 234–35 (2d Cir. 1989); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139–41 (9th Cir. 2009); *In re First Nat'l Bank*, 701 F.2d 115, 118-19 (10th Cir. 1983); *see also Snedigar v. Hoddersen*, 786 P.2d 781, 783 (Wash. Sup. Ct. 1990) (holding that the discovering party "must establish the relevancy and materiality of the information sought, and show that there are no reasonable alternative sources of information.").

of individuals who decided to speak about their experiences as Andra employees, implicating their First Amendment associational rights.

CONCLUSION

This Court has an obligation to ensure that Texas courts uphold First Amendment principles when evaluating Rule 202 petitions that seek the identities of anonymous online speakers. That could be through the application of the Texas anti-SLAPP statute to Rule 202 petitions. Additionally, for those speakers who cannot invoke the TCPA, this Court should apply a robust First Amendment-based test for seeking the identities of anonymous online speakers that includes 1) requiring the requesting party to make a *prima facie* showing based on a summary judgment standard, and 2) requiring the court to balance the necessity of unmasking against the harm to the speaker.

Dated: September 13, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I certify that this brief contains 3,985 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document..

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CERTIFICATE OF SERVICE

I certify that on September 13, 2018, I served electronically a copy of this brief on counsel of record, as listed below:

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