No. 24-0281

In the Supreme Court of Texas

IN RE GILEAD SCIENCES, INC.,

Relator.

Original Proceeding from Cause No. 23-800
71st Judicial District Court, Harrison County, Texas

BRIEF FOR *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RELATOR

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Texas. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in this Court and courts across the country to defend these values. *See*, *e.g.*, *In re Meta Platforms, Inc.*, No. 24-0046 (Tex.); *In re Walmart, Inc.*, Nos. 21-0363, 21-0650 (Tex.); *Cessna Aircraft Co. v. Garcia*, No. 19-0381 (Tex.); *Frlekin v. Apple Inc.*, 457 P.3d 526 (Cal. 2020); *Burningham v. Wright Med. Tech., Inc.*, 448 P.3d 1283 (Utah 2019); *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018).

WLF regularly advocates for these values in qui tam litigation. *See*, *e.g.*, *Wis. Bell, Inc. v. U.S. ex rel. Heath*, No. 23-1127 (U.S.); *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023); *U.S. ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017); *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016); *Graham*

[*] No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than Washington Legal Foundation, its members, or counsel made any monetary contribution to prepare or submit this brief. *See* Tex. R. App. P. 11.

Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280 (2010).

WLF's Legal Studies division—the publishing arm of WLF—has published many articles about false-claims litigation, including articles on qui tam and preclusion issues like those presented here. *See*, *e.g.*, Stephen A. Wood, Res Judicata *in* Qui Tam *Litigation: Why Government Should Be Bound by Judgments in Non-Intervened Cases*, WLF Working Paper (Apr. 22, 2021), https://t.ly/GtOQQ; Douglas W. Baruch, John T. Boese, and Jennifer M. Wollenberg, *In False Claims Act Cases, Government Must Provide Full Discovery Regarding Materiality*, WLF Legal Opinion Letter (Dec. 7, 2018), https://t.ly/Isx7E. WLF submits this brief to share with the Court its understanding of how preclusion principles apply in qui tam actions.

INTRODUCTION

If the government chooses to share its treble-damages claims with private qui tam relators, the government must also share the consequences—and that means holding the government to the same preclusion rules that apply to any litigant. Otherwise, qui tam relators could repeatedly sue, voluntarily dismiss, and never face preclusion. But litigation must end. Giving the government a get-out-of-preclusion-free card would encourage gamesmanship, prolong meritless litigation, and impose an enormous litigation tax on Texas businesses and consumers.

The serious separation-of-powers concerns raised by qui tam litigation underscore the importance of holding the government to the same rules as other litigants. Declining to enforce ordinary preclusion rules in cases like this would incentivize the government to lay behind the log—amplifying the constitutional problems by allowing qui tam relators to endlessly file suit and forcing defendants to needlessly expend time and resources defending themselves against qui tam suits while the government slow rolls the litigation.

Those concerns are exacerbated by the growing trend of qui tam litigation as a business model for those seeking to profit off fraud

allegations. That trend is exemplified by this case, where the relator is a corporate entity created solely to bring qui tam actions. Some relators even sell part of their interest in a qui tam action to others, including litigation-funding firms. These perverse incentives only heighten the constitutional flaws with qui tam suits—and confirm why ordinary preclusion rules should apply. Those rules bar this suit.

ARGUMENT

I. The ordinary rules of preclusion should apply to the government in qui tam actions.

This case is the poster child for why ordinary preclusion rules should apply to the government in qui tam actions. This is the *fourth* qui tam suit this relator has brought against Gilead for the same Texas Medicaid Fraud Prevention Act claims based on the same allegations. *See* Gilead Br. 10–22. The relator voluntarily dismissed the three previous suits with the government's express consent. *See* MR248, 252, 277–78, 362.

As Gilead explains (at 27–52), under ordinary preclusion rules the repeated nonsuits would (and should) bar the relator's claims here. Yet the government contends (at 22–24, 36–39) that it should be exempt from those rules because (1) it didn't intervene in the previous actions; (2) it

consented only to dismissal without prejudice; and (3) applying preclusion principles would be "inconsistent with equitable principles."

But qui tam suits shouldn't give rise to special preclusion rules. It's well established that a qui tam relator brings the *government's* claim. Tex. Hum. Res. Code § 36.101(a) ("The action shall be brought in the name of the person *and of the state*") (emphasis added); 31 U.S.C. § 3730(b)(1) ("The action shall be brought in the name *of the Government*") (emphasis added); *see also In re Xerox Corp.*, 555 S.W.3d 518, 525 (Tex. 2018) (the TMFPA "deputizes private citizens to pursue a TMFPA action *on the government's behalf*") (emphasis added).

That's because a qui tam relator asserts the *government's* injury. The Texas Constitution "opens the courthouse doors only to those who have or are suffering an injury," so a plaintiff "must be *personally* injured" and "plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 155 (Tex. 2012). But a qui tam relator has suffered no harm of his own.

That a qui tam relator asserts the government's claim is made abundantly clear by the various provisions in the TMFPA designed to

protect the government's interest. For example, qui tam relators must serve the attorney general with "a copy of the petition and a written disclosure of substantially all material evidence and information." Tex. Hum. Res. Code § 36.102(a). The attorney general has six months (along with any extensions granted by the court) to review the petition and decide whether to intervene. Tex. Hum. Res. Code § 36.102(c)–(d). Both the attorney general and the court must consent in writing to the dismissal of a qui tam claim. Tex. Hum. Res. Code § 36.102(e).

But because it's the *government's* claim a qui tam relator asserts, the relator necessarily has the power to bind the *government* to a judgment—even if the government doesn't intervene. As the U.S. Supreme Court has explained, "the United States is bound by the judgment in all FCA actions regardless of its participation in the case." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009).[1]

[1] *See also*, *e.g.*, *Stoner v. Santa Clara Cnty. Off. of Educ.*, 502 F.3d 1116, 1126 (9th Cir. 2007) ("the underlying claim of fraud always belongs to the government," so the government is "bound by the relator's actions for purposes of res judicata and collateral estoppel") (quotation marks omitted); *Wojcicki v. SCANA/SCE&G*, 947 F.3d 240, 244 (4th Cir. 2020) (same); *U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 2024 WL 4349242, at *7 (M.D. Fla. Sept. 30, 2024) ("If the government does not intervene, the relator may prosecute her action to final judgment however she chooses, including litigating appeals that can become binding precedent on the government.").

That's consistent with the nature of a qui tam action as a suit on the government's behalf and the fact that the government is notified of all actions and given a chance to intervene before any preclusion occurs. For example, in the federal context, "[i]f the United States believes that its rights are jeopardized by an ongoing qui tam action, the FCA provides for intervention—including 'for good cause shown' after the expiration of the 60-day review period." *Id.* So too under the TMFPA, which provides the State with 180 days (which can be extended) to decide whether to intervene. Tex. Hum. Res. Code § 36.102(c)–(d).

The State contends (at 22–23) that even if the qui tam relator's suit is precluded, that preclusive effect doesn't extend to the State because courts generally don't bind the government to dismissals unrelated to the substance of the underlying merits—otherwise, the government would need to intervene in every qui tam suit. But the fact that the TMFPA doesn't require the government to bring and take charge of false-claims actions itself is precisely why its qui tam provisions raise serious separation-of-powers concerns. *See U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 2024 WL 4349242, at *2 (M.D. Fla. Sept. 30, 2024) (qui tam relators aren't accountable to the executive branch because they "need

not consult with the federal government before filing suit" and can "prosecute[] the action without direction" from the government).

The TMFPA already requires the State to review and analyze *every* qui tam action. *See* Tex. Hum. Res. Code § 36.104(a) (requiring the State to either "proceed with the action" or "notify the court that the state declines to take over the action"). So that's no reason to exempt the government from ordinary preclusion principles. That's especially true in cases like this one, where granting special preclusion privileges would incentivize the government to simply allow qui tam relators to repeatedly file suit with lengthy delays (in this case, six years) before taking action.

That the government finally intervened after the qui tam relator's fourth bite at the apple doesn't change anything. On the contrary, that this is the relator's fourth TMFPA suit shows exactly why ordinary preclusion principles should apply. The government had ample opportunities to intervene before but chose not to do so—it not only submitted a "statement of interest" in the 2017 first federal case, but also expressly consented to each dismissal. *See* MR248, 252, 277–78, 362; SMR108–21. It doesn't matter that the government consented to

dismissal without prejudice, either—the two-dismissal rule applies regardless. *See* Fed. R. Civ. P. 41(a)(1)(B).

The government shouldn't be allowed to facilitate a perpetual cycle of suits and nonsuits. Not applying preclusion rules in this context heightens the constitutional concerns with qui tam suits by incentivizing the government to sit back and neither pursue the action nor dismiss it. *See* Michael D. Granston, U.S. Dep't of Just., *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, at 2 (Jan. 10, 2018) (dismissal under § 3730(c)(2)(A) is "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent").

The government also objects (at 38) that it shouldn't be subject to ordinary preclusion rules because the dismissals were motivated by a desire to avoid first-to-file problems resulting from a related suit in federal court in Pennsylvania. Even if that's true, it provides even more reason to apply ordinary preclusion rules. The first-to-file bar restricts only suits by private relators, so the government was free to take action on its own—but chose not to do so. *See* Tex. Hum. Res. Code § 36.106 (limiting suits only by a "person other than the state").

And it took the Pennsylvania relator four amended complaints (and five years after the qui tam relator in this case filed its first federal-court action) to finally remove its TMFPA claim. *See In re Gilead Scis., Inc.*, 2023 WL 3262956, at *1 (Tex. App.—Texarkana May 5, 2023, no pet.). If anything, accepting the government's argument would promote gamesmanship by encouraging relators to engage in multiple seriatim filings—and exacerbate the constitutional problems with qui tam suits by encouraging the government *not* to take control of the litigation at the outset.

Three failed suits is enough. The government should be held to the same preclusion rules that apply to every other litigant—particularly given the constitutional concerns implicated by qui tam litigation.

II. The serious separation-of-powers concerns raised by qui tam suits underscore why the government shouldn't get special preclusion privileges.

The Texas Constitution expressly protects the separation of powers—a "commitment [that] predates not just statehood" but Texas's "days as a republic." *Webster v. Comm'n for Lawyer Discipline*, 2024 WL 5249494, at *4 (Tex. Dec. 31, 2024); *see* Tex. Const. art. II, § 1. Because

qui tam suits are brought by a *private* party on the State's behalf, they raise serious separation-of-powers concerns.

1. Federal courts have increasingly recognized the serious concerns qui tam suits present under the U.S. Constitution. *See*, *e.g.*, *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., joined by Barrett, J., concurring) (urging the Court to consider in an appropriate case the "substantial arguments" that qui tam actions violate Article II); *id.* at 443 (Thomas, J., dissenting) (qui tam provisions pose "serious constitutional questions"); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758 (5th Cir. 2001) (en banc) (Smith, J., dissenting) (recognizing "the encroachment on executive power" and "consequent violations of separation of powers" that come "from turning over litigation of the government's business to self-appointed relators"); *Zafirov*, 2024 WL 4349242, at *19 (qui tam suits "directly def[y] the Appointments Clause").

After all, "[u]nder [the U.S.] Constitution, *the* 'executive Power'—all of it—is 'vested in [the] President.'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (emphasis added) (quoting U.S. Const. art. II, § 1, cl. 1). That means "the choice of how to prioritize and how aggressively to

pursue legal actions against defendants who violate the law" rests "within the discretion of the Executive Branch, *not* within the purview of private plaintiffs (and their attorneys)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) (emphasis added).

In particular, "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" is "a quintessentially *executive* power." *Seila Law*, 591 U.S. at 219 (emphasis added); *see also Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (under Article II only "Officers of the United States" may "conduct[] civil litigation in the courts of the United States for vindicating public rights"). "A lawsuit is the ultimate remedy for a breach of the law." *Buckley*, 424 U.S. at 138. So "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. Const. art. II, § 3).

As with any enforcement action, determining whether to pursue a false-claims suit requires balancing several factors, including whether the suit serves the government's policy and litigation priorities and

makes good use of government resources. *See* Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, at 4–7.

Private litigants, in contrast, "are not accountable to the people," and they "are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *TransUnion*, 594 U.S. at 429. Instead, a private relator's incentive is personal financial gain. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997) (relators are "motivated primarily by prospects of monetary reward rather than the public good").

Competitors have even weaponized qui tam suits to drive their rivals from the marketplace. The most egregious example is *United States ex rel. Harman v. Trinity Industries Inc.*, 872 F.3d 645 (5th Cir. 2017), which reversed the largest judgment in FCA history—over $660 million, of which the relator would have received 30 percent plus roughly $19 million in attorneys' fees and expenses. *Id.* at 651.

In *Trinity*, the government concluded that the alleged misstatements weren't material. *Id.* at 668. But despite the government's view that the case lacked merit, it didn't intervene and dismiss. *See* Granston, *Factors for Evaluating Dismissal Pursuant to 31*

U.S.C. 3730(c)(2)(A), at 5, 8 (citing *Trinity* as an example appropriate for dismissal). The relator proceeded with the suit, planning to use the windfall to "capitalize his failed businesses and fill the market void left by" the defendant's exit from the market. *Trinity*, 872 F.3d at 669.

The *Trinity* case puts into stark relief the very real practical consequences of the serious constitutional concerns raised by qui tam litigation. Even though Article II vests the executive power in the President, the qui tam device permits relators to exercise "civil enforcement authority on behalf of the United States," with "unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ." *Zafirov*, 2024 WL 4349242, at *2, *6.

2. These constitutional infirmities are just as salient in Texas, which directly elects the attorney general and other public attorneys and expressly allocates the power to represent the State to specific constitutional officers. *See State ex rel. Durden v. Shahan*, 658 S.W.3d 300, 303 (Tex. 2022) (per curiam). Under the Texas Constitution, "representational authority is allocated between the Attorney General,

District Attorney, and County Attorney." *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 439 (Tex. 1996).

The Texas Constitution authorizes the attorney general to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party" and to "perform such other duties as may be required by law." Tex. Const. art. IV, § 22. These "other duties as may be required by law" include the attorney general's express authority to "bring an action" to enforce the TMFPA. Tex. Hum. Res. Code § 36.052(e).

The attorney general's authority to represent the State's interests in civil litigation is well established. As this Court recently reaffirmed, "the Texas Constitution endows the attorney general . . . with the authority both to file petitions in court and to assess the propriety of the representations forming the basis of the petitions that he files—authority that . . . cannot be controlled by the other branches of government." *Webster*, 2024 WL 5249494, at *1.

In suits for which representational authority is allocated to the attorney general, the decision to bring suit—or *not* to bring suit—is the attorney general's alone. *See id.* at *18 (the attorney general has "broad

discretion" to decide whether to bring suit, even when mandated to initiate suit by statute); *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924) ("The Attorney General of the state is the officer authorized by law to protect the interests of the state in matters of this kind, and to determine whether *or not* suits shall be brought in behalf of the state.") (emphasis added).

The TMFPA gives that power to *private* litigants. It allows a qui tam relator to initiate suit on behalf of the State to seek civil penalties without any authorization from or consultation with the attorney general. Tex. Hum. Res. Code §§ 36.052(a), 36.101(a), 36.102(a). And if the attorney general doesn't intervene, it lets the relator continue the action on his own—"*without* the state's participation." Tex. Hum. Res. Code § 36.104(b) (emphasis added).

But the legislature can't strip the attorney general and county and district attorneys "of their collective constitutional authority by shifting representation" of the State to someone else. *El Paso Elec. Co.*, 937 S.W.2d at 439. The TMFPA, however, allows private litigants to proceed even without the State's approval, participation, or oversight.

The attorney general—not any private plaintiff—"is the chief law officer of the State." *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943). And it's the attorney general's job—not a private litigant's—"to institute in the proper courts proceedings to enforce or protect any right of the public that is violated." *Id.* The legislature can't delegate that authority to a private plaintiff. *Cf. Hill Cnty. v. Sheppard*, 178 S.W.2d 261, 264 (Tex. 1944) ("the Legislature could not create a statutory office with authority to take over the duties of county attorney").

Intervention at this late date doesn't cure the separation-of-powers concerns. To start, "back-end executive supervision . . . does not diminish the significance of a [qui tam] relator's front-end power to bring an enforcement action against a private party" on behalf of the government. *Zafirov*, 2024 WL 4349242, at *10. In this case, it took three TMFPA actions from the same qui tam relator and six years before the State finally stepped in.

Meanwhile, the State allowed a private plaintiff to take it upon itself to litigate on the State's behalf. That's inconsistent with the Texas Constitution—and provides another reason why courts shouldn't bend

over backward to give the government special preclusion privileges in qui tam cases.

III. The expansion of qui tam suits far beyond their original purpose magnifies constitutional concerns and increases the importance of applying ordinary preclusion rules.

Used properly, statutes like the TMFPA and the FCA can be important tools for uncovering fraud. If abused, however, they can create perverse incentives that harm businesses and consumers alike. Today, the qui tam device has expanded so far beyond its original purpose—encouraging whistleblowers to come forward with inside information about fraud—that the significant risk of parasitic litigation exacerbates constitutional concerns and militates even more strongly against special preclusion rules for the government.

Congress originally enacted the FCA in 1863 to protect the government from defense contractors defrauding the Union Army—such as fraudsters who sold the Army artillery shells filled with sawdust, not gunpowder. *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 555 (2000). The FCA, which originally entitled the informer (the qui tam relator) to half

the recovery, "was designed to encourage participants in fraudulent schemes to bring the wrongdoing to light." *Id.* at 556.

Over time, however, relators began asserting claims simply by copying information from criminal indictments and "rush[ing] to file civil suits and claim *qui tam* awards." James T. Blanch, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 Harv. J.L. & Pub. Pol'y 701, 704 (1993). During World War II, Congress nearly repealed the FCA's qui tam provisions entirely—but instead sharply narrowed the Act, for example by reducing recovery amounts and prohibiting qui tam suits based on information already known to the government. Beck, 78 N.C. L. Rev. at 556–61. In England, qui tam suits were abolished altogether in 1951. *See id.* at 549, 605–08.

In 1986, Congress reversed course—again in response to defense-contractor scandals—and added several pro-relator amendments, such as increasing minimum recovery percentages and replacing the government-knowledge provision with the public-disclosure bar. *Id.* at 561–62; 31 U.S.C. § 3730(d)(1)–(2), (e)(4). States began to pass their own qui tam statutes, with Texas enacting the TMFPA in 1995. Notably, the original version of the TMFPA allowed only the attorney general to bring

suit. *See* Texas Medicaid Fraud Prevention Act, 74th Leg., R.S., ch. 824, § 1, 1995 Tex. Gen. Laws 4202, 4203–08.

When Texas amended the statute to allow for qui tam suits, it originally ensured that the case could proceed only if the State elected to intervene. Otherwise, the case was dismissed. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1153, § 4.08, 1997 Tex. Gen. Laws 4324, 4346. Only in 2007—in response to changing federal requirements—did Texas allow qui tam relators to proceed even if the State doesn't participate. *See* Act of April 25, 2007, 80th Leg., R.S., ch. 29, § 4, 2007 Tex. Gen. Laws 27, 28; *Xerox*, 555 S.W.3d at 538 (detailing the history of the TMFPA amendments, which were enacted "to eliminate barriers to obtaining an increased share of Medicaid recoveries").

The 1986 FCA amendments and the TMFPA, however, were designed to encourage suits by *insider* whistleblowers. Several provisions confirm that design. The public-disclosure bar prevents qui tam relators from bringing lawsuits based on information already publicly available in certain forms. *See* Tex. Hum. Res. Code § 36.113(b); 31 U.S.C. § 3730(e)(4)(A). The only exception is for individuals who are an "original source" of the publicly disclosed information. *See* Tex. Hum.

Res. Code § 36.113(b); 31 U.S.C. § 3730(e)(4)(A). The first-to-file bar similarly prevents qui tam relators from free-riding on others' claims. *See* Tex. Hum. Res. Code § 36.106; 31 U.S.C. § 3730(b)(5).

But as the number of qui tam suits has exploded, they're increasingly becoming less a tool for uncovering fraud and more a business model for those seeking to profit from alleged fraud. This case proves the point. The qui tam relator is a corporate entity created solely to find and bring qui tam actions. And it isn't the only one.

These qui tam relators operate by mining publicly available data. For example, the relator in this case was formed by an investor-backed business that has "scraped and extracted" data from publicly available sources and uses that information to identify potential witnesses or "informants" in a qui tam action. *See* United States' Motion to Dismiss Relator's Second Amended Complaint at 5, *U.S. ex rel. Health Choice All., LLC v. Eli Lilly & Co.*, 2019 WL 4727422 (E.D. Tex. Sept. 27, 2019) (No. 5:17-CV-00123), ECF No. 192 (quotation marks omitted).

Qui tam suits were designed to encourage whistleblowers who might not otherwise report what they know. But qui tam litigation today flips that script. These perverse incentives heighten the constitutional

flaws with qui tam suits—and illustrate why normal preclusion rules should apply.

* * *

Qui tam suits are fraught with constitutional problems and expose Texas businesses to parasitic, profit-seeking litigation. But qui tam relators assert the government's claim, not their own. The government has already had several chances to pursue TMFPA claims against Gilead. Ordinary preclusion rules should apply, and this litigation should end at last.

PRAYER

For the foregoing reasons, the Court should grant Gilead's request for mandamus relief.

Dated: January 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 4,255 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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