United States Court of Appeals
For The Eighth Circuit
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June 12, 2024

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RE: 24-1285 Matthew Locke v. County of Hubbard, et al

Dear Counsel:

The amicus curiae brief of the amicus American Civil Liberties Union of Minnesota in support of the appellant has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Maureen W. Gornik
Acting Clerk of Court

BNW

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District Court/Agency Case Number(s): 0:23-cv-00571-WMW

Case No. 24-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MATTHEW LOCKE,

Plaintiff-Appellant,

v.

COUNTY OF HUBBARD, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Minnesota (Case No. 0:23-cv-00571-WMW)

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for amicus curiae respectfully submit the ACLU of Minnesota is a non-profit organization. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock because it has no stock. Amicus does not have a financial interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") of Minnesota is a statewide affiliate of the national ACLU, a non-partisan, non-profit organization dedicated to protecting the liberties guaranteed by the U.S. Constitution, state Constitutions, and state and federal human rights laws. The ACLU has approximately 1.5 million members nationwide. The ACLU of Minnesota has approximately 25,000 members. The ACLU and its affiliates, including the ACLU of Minnesota, have participated as counsel and amicus curiae in cases around the country involving claims brought pursuant to 42 U.S.C. § 1983 against a variety of government actors.

The ACLU of Minnesota has a particular interest in ensuring that government and state officials can be held accountable for violating the rights and liberties of Minnesotans, and that all Minnesotans have access to a remedy for governmental abuses.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties that have entered an appearance in this matter have consented to amicus' submission of this brief.

INTRODUCTION

Since its founding in 1920, protecting the rights of protestors—regardless of the cause they support—has been a core component of the ACLU's mission. The ACLU works to protect the free-speech and free-assembly rights of protestors because those rights are foundational to American democracy and political identity. As Justice Cardozo noted nearly a century ago, "freedom of thought and speech . . . [are] the matrix, the indispensable condition, of nearly every other form of freedom," and "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled in part on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Although the First Amendment's guarantee of the right to assemble and to express controversial views is an easy principle to articulate, it is a tricky one to protect. By their very nature, protests are contentious and the feelings of both those supporting and opposing protests strong. Law enforcement officers are often placed in the midst of these contentious situations, and it is their responsibility to enforce the law in a manner that involves no more force than necessary to effect an arrest. Unnecessary violence by law enforcement against protestors has a chilling effect on the exercise of vaunted First Amendment rights. Sometimes law enforcement officers handle their job gracefully and with respect for the competing interests of all involved. Other times, they do not. And when law enforcement officers overstep and use disproportionate force against protestors—including protestors who are engaged in

peaceful disobedience—it is incumbent upon this Court to correct them.

Matthew Locke engaged in peaceful protest on the morning of August 16, 2021. His protest was met with excessive and unnecessary force. The actions of the Defendants—Hubbard County, Sheriff Cory Aukes, and Chief Deputy Sheriff Scott Parks—caused lasting physical injury to Locke. Locke should be permitted to pursue his claims against the Defendants for the harm that he suffered. Holding otherwise, as the District Court did, would have a chilling effect on the First Amendment right to protest that cannot be countenanced. After all, "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969). The District Court's order granting Defendants' motion to dismiss should accordingly be reversed and Matthew Locke's claims remanded for further proceedings.

ARGUMENT

The right to protest is among the oldest and most important rights guaranteed in the United States. The First Amendment to the U.S. Constitution, ratified in 1791, protects both "freedom of speech" and "the right of the people peaceably to assemble"—the two cornerstones of a peaceful protest. U.S. Const. amend. I. The First Amendment safeguards protestors' rights to awaken passions, and to inform the public about their opinions and positions on issues of the day. America's robust tradition of free speech allows us all to effect change by making our voices heard. This is crucial to ensuring that the government remains responsive to the will of the people; it is what sets our country apart and is the reason it must be carefully and consistently nurtured.

Instead of responding to Matthew Locke's peaceful protest with proportionate force, officers used the sort of excessive force that reverberates to other protests and chills protestors from exercising their First Amendment speech and assembly rights. While Locke's claim involves excessive force in violation of the Fourth Amendment, the context of the police use of force—a peaceful protest—matters because failing to hold police accountable in this context implicates broader First Amendment values.

I. Law enforcement responded excessively to Matthew Locke engaging in peaceful political speech and conduct.

In the 233 years that have passed since the First Amendment was ratified, the Supreme Court has time and again upheld the rights of peaceful protestors, no matter the popularity of the opinions they espouse. The Supreme Court has protected the protest rights of Black men who refused to leave a segregated branch of a public library in Louisiana;[2] high school students who wore armbands protesting the Vietnam War to school in Iowa;[3] a leader of the Ku Klux Klan who spoke favorably of resorting to violence in Ohio;[4] a man who wore a jacket emblazoned with "Fuck the Draft" to a California courthouse;[5] a community group that organized boycotts and picketing of white-owned businesses in Mississippi;[6] and a demonstrator who burned the American flag on the steps of Dallas City Hall[7]—among many, many others.

Protecting the First Amendment rights of peaceful protestors has united Supreme Court justices with otherwise different ideologies. The majority opinion in *Texas v. Johnson*, for example, was authored by Justice Brennan and joined by Justice Scalia. 491 U.S. at 398. The

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[2] *Brown v. Louisiana*, 383 U.S. 131 (1966).
[3] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
[4] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).
[5] *Cohen v. California*, 403 U.S. 15 (1971).
[6] *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
[7] *Texas v. Johnson*, 491 U.S. 397 (1989).

majority opinion in *Cohen v. California* was authored by Justice Harlan and joined by Justice Marshall. 403 U.S. at 15. What united these Justices of different backgrounds and jurisprudential perspectives is the belief that the First Amendment's guarantee of the right to express one's opinions, and to do so with others, is the backbone of American freedom. The First Amendment rights of free speech and peaceful assembly are "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us," because "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* at 24. The Supreme Court has accordingly—and repeatedly—recognized and reaffirmed "a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. at 913 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This "constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." *Cohen*, 403 U.S. at 24.

Matthew Locke's case against Hubbard County, Sheriff Cory Aukes, and Chief Deputy Sheriff Scott Parks has profound First Amendment implications, despite the fact that it does not present a First

Amendment claim. Matthew Locke was part of a group of protestors opposing the construction of the Enbridge pipeline in Hubbard County, Minnesota. Add. 11; R. Doc. 1, at 2; App. 5. On the morning of August 16, 2021, Locke and two other protestors attached themselves to an idle excavator at the pipeline construction site. Add. 11; R. Doc. 1, at 2; App. 5. Locke attached himself to the excavator using a "sleeping dragon" device, which is "made by using PVC pipe, metal pipe, chicken wire, or rebar, and filled with gravel or rocks, requiring law enforcement to cut the devices off using power tools." Add. 11; R. Doc. 1, at 2; App. 5. On the day of the protests, extraction teams from both Hubbard County and Cass County were available and eventually did remove Locke and the other protestors from the sleeping dragon devices through which they were attached to the pipeline construction equipment. Add. 13; R. Doc. 1, at 4; App. 7. But before the extraction teams arrived, Sheriff Aukes and Chief Deputy Parks attempted to force Locke and the other protestors to release themselves from the sleeping dragon devices by applying pressure to sensitive nerves in their necks and heads. Add. 12; R. Doc. 1, at 3; App. 6.

Sheriff Aukes' and Chief Deputy Parks' use of pain compliance techniques against Locke and the other protestors caused excruciating pain and lasting physical damage. Add. 12-13; R. Doc. 1, at 3-4; App. 6-

7. And both the extreme pain in the moment and the persistent facial paralysis that followed Sheriff Aukes' and Chief Deputy Parks' use of force were unnecessary. Locke and the other protestors were not actively resisting arrest and "did not pose any threat of harm to anyone." Add. 12; R. Doc. 1, at 3; App. 6. Extraction teams were available and in fact removed Locke and the other protestors from the pipeline construction equipment after Sheriff Aukes' and Chief Deputy Parks' use of pain compliance techniques was unsuccessful. Add. 13; R. Doc. 1, at 4; App. 7. There was simply no need for Sheriff Aukes and Chief Deputy Parks to use pain compliance techniques against Matthew Locke and the other peaceful protestors with whom he was joined in protest.

II. Excessive law enforcement responses to peaceful protest threaten the First Amendment.

Sheriff Aukes' and Chief Deputy Parks' use of disproportionate force in response to Locke's peaceful protest was unnecessary, and also follows in line with other disproportionate and constitutionally impermissible reactions to peaceful protestors. The exercise of First Amendment rights of free speech and assembly are by their very nature contentious. Speech on political issues is not always orderly. And as Justice Douglas reminds us in *Terminiello v. Chicago*, speech that invites dispute "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or

even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U.S. 1, 4 (1949).

The Supreme Court and lower courts have repeatedly recognized the need to step in to curb government enforcement actions lest they cast a pall that chills the exercise of free speech. *See, e.g.*, *Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (declining to exercise abstention in context of First Amendment challenge to criminal law based on concern that delay "might itself effect the impermissible chilling of the very constitutional right he seeks to protect"); *see also United States v. Alvarez*, 567 U.S. 709, 723 (2012) (noting that potential criminal prosecution "casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom"); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956–57 (1984) (noting that the danger of chilling free speech weighs in favor of allowing a challenge to move forward despite preference for constitutional avoidance); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (concluding that compelled disclosure of NAACP membership list is likely to adversely affect the ability of organization and members to pursue their goals, may induce members to withdraw, and dissuade

people from joining altogether); *281 Care Comm. v. Arneson*, 766 F.3d 774, 781 (8th Cir. 2014) (concluding that decision to chill speech in face of credible threat of prosecution was objectively reasonable and sufficient to establish standing to challenge law at issue).

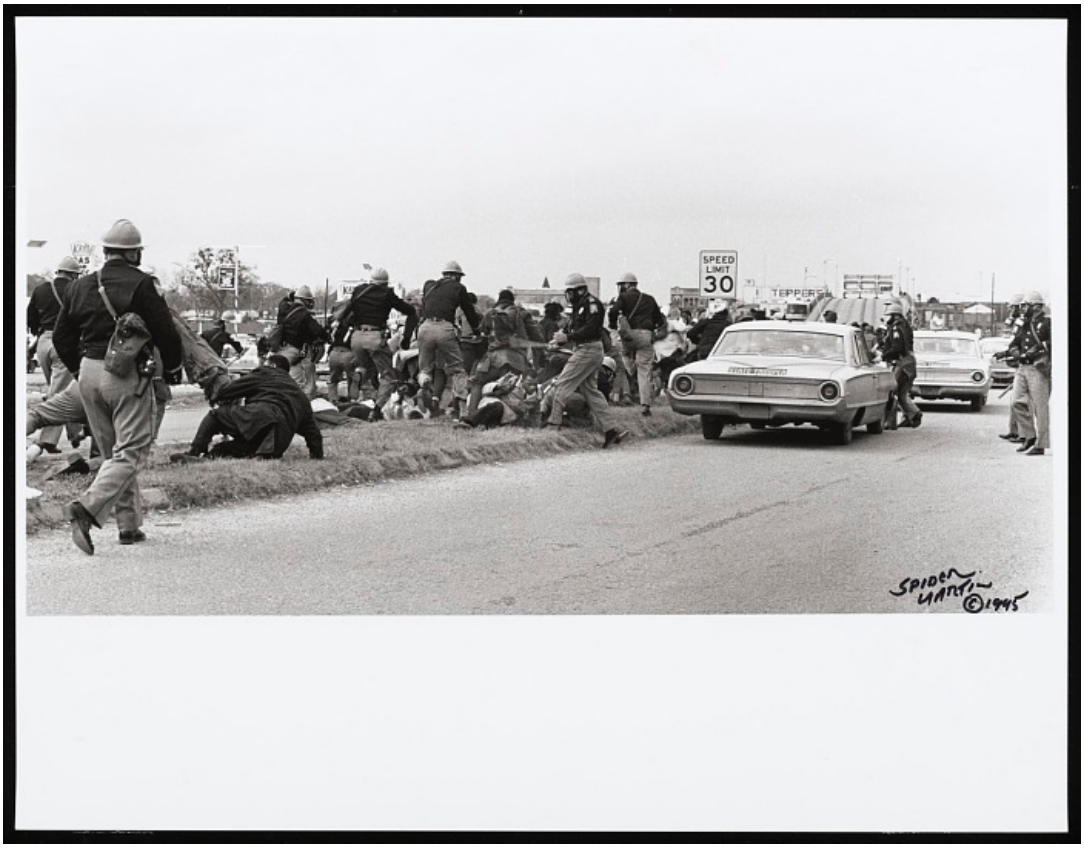
To be sure, law enforcement officers have an interest in preventing protests from turning into riots and otherwise enforcing criminal laws. But they must do so in a manner that does not unduly suppress speech. The Sixth Circuit's decision in *American-Arab Anti-Discrimination Committee v. Dearborn*, 418 F.3d 600 (6th Cir. 2005) is instructive. The *Dearborn* court assessed an ordinance criminalizing participation in a march without a permit. While acknowledging that the city has a clear interest in public safety and traffic control, the *Dearborn* court noted that those interests "must be 'exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'" *Id*. at 611. The Court further held that the risk of running afoul of the ordinance impermissibly chilled speech, finding it was "antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear." *Id.* at 612.

Despite federal courts' consistent efforts to protect Americans'

exercise of their First Amendment rights, our history is replete with examples of law enforcement officers using excessive force against protestors. Perhaps most famously, the Civil Rights movement of the 1960s was galvanized by photos documenting police use of dogs, fire hoses, and other forms of violence against peaceful protesters:

(Charles Moore, Alabama Fire Department Aims High-Pressure Water Hoses at Civil Rights Demonstrators, 1963, Collection of the Smithsonian National Museum of African American History and Culture.)

(Charles Moore, Policemen Use Police Dogs During Civil Rights Demonstrations, Birmingham Protests, 1963, Collection of the Smithsonian National Museum of African American History and Culture.)



(Spider Martin, The Beating, 1965, Collection of the Smithsonian National Museum of African American History and Culture.)

The last of these photographs depicts the "Bloody Sunday" confrontation between peaceful demonstrators and law enforcement at the Edmund Pettus Bridge in Selma, Alabama on March 7, 1965. On that day more than 600 protestors began marching from Selma to Montgomery, Alabama in support of Black voter registration. *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965). The protestors were met on the Edmund Pettus Bridge by a large contingent of law enforcement officers, who gave the protestors orders to disperse and two minutes to comply. *Id.* at 105. When the protestors failed to disperse as

ordered, the gathered law enforcement officers employed "tactics . . . similar to those recommended for use by the United States Army to quell armed rioters in occupied countries." *Id.* "The troopers, equipped with tear gas, nausea gas and cannisters of smoke, as well as billy clubs, advanced on the" protestors. *Id.* Dozens of protestors were injured, many seriously. *Id.*

After the events of Bloody Sunday, the protestors sought federal court protection to resume their protest march—and won it. *Id.* at 108-09. Although the court from which the protestors sought relief noted that a massive march along a public highway "reaches, under the particular circumstances of this case, to the outer limits of what is constitutionally allowed," the court also noted that "the wrongs and injustices inflicted upon these plaintiffs and the members of their class (part of which have been herein documented) have clearly exceeded—and continue to exceed—the outer limits of what is constitutionally permissible." *Id.* at 108. In other words, law enforcement's disproportionate use of force against peaceful protesters only underscored the need for the protesters to be permitted to engage in their planned political speech and action. Shielded by the *Williams* court's grant of a preliminary injunction, the march from Selma to Montgomery resumed days later.

As the Bloody Sunday example makes clear, the widespread practice

of law enforcement use of excessive force in response to peaceful protests is dangerous, and not only in terms of the physical injuries that protestors all-too-frequently sustain. The First Amendment itself—"the matrix, the indispensable condition, of nearly every other form of freedom," *Palko*, 302 U.S. at 327—is threatened when law enforcement officers use disproportionate force on peaceful protestors. "In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. at 920 (quotation marks and citations omitted). The Supreme Court accordingly has "not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled." *Id.* at 931-32 (quoting *N.A.A.C.P. v. Overstreet*, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting)). This is part of the Court's critical task of "avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 934.

Matthew Locke's case is thus not only about the ways in which the Fourth Amendment protects arrestees from the use of excessive force by law enforcement. Matthew Locke's case is also about the long tradition of law enforcement officers using disproportionate force against protestors, and the threat that poses to American democracy. Time and

time again, when law enforcement officers respond too aggressively to protestors, the federal judiciary has reaffirmed the importance of protecting the protestors' constitutional rights. After all, "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513.

III. This Court's jurisprudence upholds First Amendment speech and assembly rights by clearly establishing that disproportionate force against nonviolent protestors violates the Fourth Amendment.

Because Matthew Locke was engaged in peaceful civil disobedience, his claims related to the injuries inflicted by law enforcement while arresting him ultimately sound in the Fourth Amendment and related state laws, not the First Amendment. This Court has "held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022). The use of more than *de minimis* force is especially egregious when disproportionately used against nonviolent protestors engaged in civil disobedience who are not resisting arrest. *See id.* (finding it clearly established that using force against a non-fleeing and non-resisting protestor engaged in trespass was objectively unreasonable); *see also Nieters v. Holtan*, 83 F.4th 1099, 1109 (8th Cir.

2023) (viewing the totality of the circumstances in the light most favorable to the plaintiff, it was clearly established that the use of force against a journalist covering a protest, and not resisting arrest, was objectively unreasonable). To find otherwise is antithetical to our recognition of free speech and assembly as a bulwark of our democracy, and flies in the face of the longstanding history of interventions by the Supreme Court and lower courts limiting excesses casting a pall on the exercise of free speech. *See, e.g.*, *Zwickler*, 389 U.S. at 252.

Locke's complaint alleges that he was engaged in nonviolent political speech, was not suspected of a serious crime, was not threatening anyone, and was not fleeing nor resisting arrest. *See* Add. 12; R. Doc. 1, at 3; App. 6. Locke's complaint further alleges that the force used against him was unnecessary, as an extraction team was available to remove him, and that it was more than *de minimis*, as it "caus[ed] excruciating pain" and left him with lasting "facial paralysis (known as Bell's Palsy)." Add. 12-13; R. Doc. 1, at 3-4; App. 6-7. Because Locke was held in place by the sleeping dragon device, meaning that he could not flee or resist, law enforcement had no split-second decision to make, and yet they still elected a technique designed to cause excruciating pain. Shielding law enforcement officers from suit in this case would set an extraordinarily low bar for the use of force against nonviolent protestors in protest settings

far more complex than this one.

A decision upholding the District Court opinion thus has the potential to reverberate widely to other protests, and to chill future protestors from exercising their free speech rights. This context—and the broader First Amendment values it invokes—are critical to this Court's consideration. Holding law enforcement accountable for their disproportionate use of force in this case upholds not only the Fourth Amendment rights of Matthew Locke, but also the broader First Amendment rights held by all of us.

CONCLUSION

Matthew Locke was entitled to a proportionate response to the threat he posed while engaged in civil disobedience and peaceful protest. Because he was instead subjected to excessive and damaging force, he should be permitted to pursue his claims against the officers who harmed him. For the foregoing reasons, amicus ACLU of Minnesota respectfully asks that the decision of the District of Minnesota be reversed and Matthew Locke's case remanded for further proceedings.

Date: June 12, 2024

Respectfully submitted,

s/ Virginia R. McCalmont

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5) because it contains 3,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Pursuant to Circuit Rule 28A(h)(2), this brief and the attached addendum have been scanned for viruses and are virus-free.

s/ Virginia R. McCalmont

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Virginia R. McCalmont