APPEAL NO. 23-3398

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STEVEN MELTON,

Plaintiff-Appellant,

v.

CITY OF FORREST CITY, ARKANSAS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 21-CV-00194-DPM

BRIEF OF THE DOUGLASS LEADERSHIP INSTITUTE, THE RADIANCE FOUNDATION, AND SPEAK FOR LIFE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT FOR REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

I. Douglass Leadership Institute (DLI)

The life of the nation is secure only while the nation is honest, truthful, and virtuous.

–Frederick Douglass

The Douglass Leadership Institute is a national education nonprofit organization that does Christian work based on the life and legacy of Frederick Douglass. DLI supports the strength of the Black family, sensible criminal justice reform, and economic and educational opportunity for all. DLI provides uniquely tailored programs and resources to a network of like-minded pastors and faith leaders across the country so that men and women of faith can be equipped to lead positive change in their communities, as well as on the state and national level. DLI understands that America is a land of liberty where natural rights of individuals precede and supersede the power of the state. DLI appreciates that the United States is a constitutional republic in which government power is limited and employed for the purpose of providing legitimate public goods rather than for the benefit of insiders and narrow interest groups.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Federal Rule of Appellate Procedure 29, and all parties consented to its filing.

DLI stands for and with Black America. Its advocacy includes defending the most vulnerable: black babies still in the womb. It wants to preserve the freedom for all—including public employees—to defend the sanctity of life. Without robust public dialogue, DLI believes Americans will have little opportunity to solve the challenges facing our nation.

II. The Radiance Foundation

Equally clear is the right to hear. To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker. It is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money.

–Frederick Douglass

The Radiance Foundation is a faith-based, educational, life-affirming 501c3 nonprofit organization. Through creative ad campaigns, powerful multimedia talks, factivism journalism, and compassionate community outreaches, The Radiance Foundation affirms that every human life has God-given purpose.

Radiance has worked for 14 years to end the violent injustice of abortion and its disproportionate effect on black babies. It understands that abortion destroys people physically, emotionally, culturally, and spiritually. It's not healthcare. It's fake health. So Radiance has created fearless and compassionate content to address the epic human rights injustice of our day. Radiance also believes that we are one human race

(Acts 17:26). Categorizing ourselves by the disastrous human construct of "race" has never benefitted humanity. It's only brought discrimination, destruction, and death.

The First Amendment provides the foundation for Radiance's advocacy against abortion and racism. Without this pillar of a free society, Radiance could not spread its pro-life and pro-equality messages, such as by calling out the NAACP for morphing into the National Association for the Abortion of Colored People. *See Radiance Found., Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2015).

III. Speak for Life

Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist.

–Frederick Douglass

Speak for Life (SFL) is a pro-life nonprofit dedicated to education, enlightenment, enlarging, and empowerment. To those ends, it focuses on student outreach, speaking, and leadership development. Speak for Life is developing small group curriculum for students K-12 in order to help build a Biblical worldview of the sanctity of life. Its founder, Dr. Alveda King, travels the nation speaking for life on college campuses, at churches, and at pregnancy resource centers. The SFL team also hosts training events to mobilize and resource new pro-life leaders.

Dr. King, daughter of the late slain civil rights activist Rev. A. D. King and the niece of Dr. Martin Luther King, Jr., founded Speak for

Life to mobilize an army of pro-life advocates that will boldly stand for the sanctity of life from the womb to the tomb. She has spent over half of her life defending the sanctity of life because she believes that the greatest civil rights imperative of today is to defend the right to life. Unfortunately, we live in a nation where millions of babies will never have the chance to live. SFL exists to right this injustice.

BACKGROUND

In June 2020, like countless Americans, Steve Melton took to Facebook to share his views on important topics. He posted an illustration of the black silhouette of a baby in the womb with a noose around his or her neck. App.147; R. Doc. 36 at 1. The caption read, "I can't breathe!" *Id.* Melton—an evangelical Christian—made the post to express his opposition to abortion. App.49; R. Doc. 21-1 at 2. Melton's friend later told him he found the post offensive because he perceived the image as a black baby with a noose around his or her neck. App.80; R. Doc. 21-4 at 5. So Melton deleted the post. *Id.* That should have ended the matter.

But instead of allowing citizens to dialogue on their differences, the government stepped in. It decided that it didn't like Melton's views. App.50–51; R. Doc. 21-1 at 3–4. Mr. Melton served as a firefighter for the Defendant City of Forrest City. App.48–49; R. Doc. 21-1 at 1–2. And the City found that his opinion—expressed on his personal social media

while off duty—meant he could no longer work as a firefighter, despite an "exemplary" record. *See* App.49; R. Doc. 21-1 at 2.

The district court allowed the government to do something it could otherwise almost never do—punish a citizen for his private speech. *See* App.155–56; R. Doc. 36 at 9–10. The court recognized that "no actual disruptions to fire department training or service calls" occurred because of Mr. Melton's speech. App.153; R. Doc. 36 at 7. It also acknowledged that no current co-workers "complained to Melton about the post," so "no evidence" showed "friction among current fire fighters." App.155; R. Doc. 36 at 9.

Instead, the court relied almost exclusively on hearsay evidence purporting to show the subjective offense of a few people. It credited Defendant Mayor Cedric Williams's opinion that he found the post "offensive" because he saw "a noose around a Black baby's neck" and fielded calls from people "outraged" by the Facebook post who didn't want Mr. Melton to respond to an emergency at their houses. App.148; R. Doc. 36 at 2; App.121, 124; R. Doc. 24-10 at 5, 8. City council members called Mayor Williams about the post and two retired firefighters—in response to questions by Mayor Williams—said they were taken aback by the posts. App.90; R. Doc. 24 at 5. The district court ruled that the personal offense of the Mayor and hecklers in the community superseded Mr. Melton's right to speak privately on a topic of public concern.

SUMMARY OF ARGUMENT

Free speech enables us to secure what our founding charter recognizes as "unalienable Rights"—"Life, Liberty and the pursuit of Happiness." Decl. of Independence. When the government decides appropriate topics for public debate, everyone loses. The eugenics movement in the early 20th century sought to eliminate black babies and create a perfect race. And abortion writ large disproportionally devastates black communities. Free speech and public debate revealed the evils inherent in discriminatory abortions. Open dialogue first led states to outlaw eugenic abortions. And then the Supreme Court returned the issue of abortion to the people—backed by robust public dialogue—to decide.

The First Amendment's absolute bar on viewpoint discrimination protects the full-bodied discussions necessary for representative democracy to function. It recognizes each person's inherent dignity by preserving the individual's choice to express his or her own views. It upholds the foundation of our representative government by allowing the people to discuss their views and translate those views into public policy.

The First Amendment's viewpoint neutrality principle applies with equal force to public employees. Those employees—teachers, police officers, and firefighters—will often have the most informed opinions on important topics. And they must have the freedom to dialogue on

important issues when not at work. If hecklers in the community can hold public employees' jobs hostage by complaining about views that cause subjective offense, all manner of public employees may choose to keep their views to themselves. Both official censorship and self-censorship abort public dialogue and distort the marketplace of ideas. Allowing viewpoint discrimination eliminates the freedom for many to discuss important issues—like race and abortion—central to our self-governing society. Yet that discussion is exactly what the First Amendment exists to protect. To vindicate the freedom for public employees to discuss important topics, this Court should reverse and direct that summary judgment be entered for Mr. Melton.

ARGUMENT

I. Abortion disproportionally devastates the black community, and robust dialogue has revealed solutions to the problem.

Historically, eugenicists have pushed birth control and abortion on black women. Margaret Sanger, the founder of Planned Parenthood, saw the "greatest present menace to civilization" as "the unbalance between the birth rate of the 'unfit' and the 'fit.'" *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 (2019) (per curiam) (Thomas, J., concurring) (cleaned up). That "menace" presented an even greater threat to the United States because "equality of political power has been bestowed upon the lowest elements of our population." *Id.*

(cleaned up). So Sanger proposed birth control "to assist the race toward the elimination of the unfit." *Id.*

For Sanger, the unfit largely consisted of black people. In 1930, Sanger opened a birth-control clinic in Harlem. *Id.* at 1788. Nine years later, she began the "Negro Project" "to promote birth control in poor, Southern black communities." *Id.* Sanger labeled blacks "the great problem of the South" because of their perceived "economic, health, and social problems." *Id.* And she sought out black ministers to push her eugenics because she didn't "want word to go out" that she "want[ed] to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members." *Id.*

Today, abortion—and Planned Parenthood—continue to target black babies on a massive scale. Black women are 3.5 times more likely to have an abortion than white women. *Id.* at 1791. In some areas of New York City, black children have a greater chance of being aborted than being born. *Id.*[2] Those children also have an 8 times greater risk of abortion than white children in the same area. *Id.* Within this Circuit, black Missouri women were, pre-*Dobbs*, 1.5 times more likely to have

[2] *Accord* New York State Dep't of Health, *Vital Statistics of New York State Table 23: Induced Abortion and Abortion Ratios by Race/Ethnicity and Resident County, New York State – 2020*, https://www.health.ny.gov/statistics/vital_statistics/2020/table23.htm.

repeat abortions than white women. Mo. Stat. § 188.038(1)(4). Thus, "insofar as abortion is viewed as a method of 'family planning,' black people do indeed take the brunt of the 'planning.'" *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (cleaned up).

Free speech has served as the antidote first to eugenic abortions and then to the nationalized abortion regime. Public dialogue about racial motives behind abortion allowed the people to confront discriminatory abortions head on. For example, in passing its ban on eugenic abortions, the Missouri General Assembly recognized and "rejected" the "historical relationship of bias or discrimination by some family planning programs." Mo. Stat. § 188.038(1)(3). And it emphasized that our founding document guaranteeing each person's "certain unalienable Rights" required "[e]nding any current bias or discrimination against pregnant women" and "their unborn children." *Id.* § 188.038(1)(2). The Supreme Court also acknowledged the decades of debate over abortion when it returned the issue to the "legislative process" and its reliance on "public opinion, lobbying legislators, voting, and running for office." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 289 (2022). In short, robust public dialogue—free from government censorship—allows our representative democracy to function.

II. The government cannot allow hecklers to veto public employee views, including on abortion; such viewpoint discrimination is per se unconstitutional.

Viewpoint discrimination strikes at the heart of the First Amendment's protection of robust public discourse. "Any" content-based restriction "completely undercut[s]" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). The prohibition on viewpoint and content discrimination "put[s] the decision as to what views shall be voiced" where it should be—"into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). Indeed, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.*

To protect our public discussions, the Supreme Court has reaffirmed time and again the "bedrock principle" that speech may not be suppressed simply because it expresses ideas some find "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Government action that "discriminates on the basis of viewpoint" necessarily "collide[s]" with the First Amendment. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Viewpoint discrimination therefore "must be invalidated." *Id.* at 2302.

The bar on viewpoint discrimination applies equally to public employee speech. The Supreme Court has "long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional

right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (cleaned up). That's because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (cleaned up). Consistent with free speech protections writ large, public employee "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* (cleaned up). After all, public employees are "most likely to have informed and definite opinions" about how government should function, so "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

The Supreme Court has admonished courts to remain "[v]igilan[t]" lest "public employers … use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *accord Pickering*, 391 U.S. at 568. "Concern over viewpoint discrimination is the very reason *Pickering* rejected the older rule that the First Amendment does not protect government-employee speech." *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 108 (3d Cir. 2022); *accord James v. Tex. Collin Cnty.*, 535 F.3d 365, 380 (5th Cir. 2008). So "public employers do not have a free hand to engage in viewpoint

discrimination toward their employees." *Amalgamated Transit*, 39 F.4th at 109.

Retaliating against employees for speech subjectively offensive to others impermissibly discriminates based on viewpoint. The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 582 U.S. 218, 244 (2017) (plurality) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Regulating "offensive" speech is the "essence of viewpoint discrimination" because that censorship "reflects the Government's disapproval of a subset of messages it finds offensive." *Iancu*, 139 S. Ct. at 2299 (cleaned up). And "[g]iving offense is a viewpoint." *Matal*, 582 U.S. at 243. "[T]he discomfort and unpleasantness that always accompany an unpopular viewpoint" cannot justify censorship. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

This Court has recognized as much. It has held that a city could not fire a police and fire dispatcher for criticizing "city council polic[ies]." *Casey v. City of Cabool*, 12 F.3d 799, 802 (8th Cir. 1993). It acknowledged that the city administrator, mayor, city clerk, and majority of the city council "may have taken great offense upon hearing" the criticism, but it held that "offensiveness is irrelevant" to the issue of public concern and accorded no weight to offense in its *Pickering* balancing. *Id.* at 803–04.

Fourteen years later, this Court reaffirmed *Casey*. *See Lindsey v. City of Orrick*, 491 F.3d 892, 896 (8th Cir. 2007). There, a city's public works director repeatedly criticized—in the words of a city official "basically attacked"—the city council for purportedly violating state law. *Id.* Citing *Casey*, this Court held that criticism provides no basis to terminate a public employee. *Id.* at 898–901. "The inappropriate or controversial nature of a statement" has no bearing on whether it touches a matter of public concern. *Id.* at 899. Likewise, the city could not use inappropriate or controversial statements to "trigger the *Pickering* balancing test" because it had not offered evidence showing—"with specificity"—that "the speech at issue created workplace disharmony, impeded the plaintiff's performance or impaired working relationships." *Id.* at 900; *accord Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 910 (9th Cir. 2021) (summarizing *Lindsey* as holding that "where the employer provides evidence of a negative reaction to speech, courts require evidence that it will disrupt the workplace"). This Court's disregard of subjective offense upheld the First Amendment's core: "'[d]ebate on public issues should be uninhibited, robust, and wide-open, and may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Lindsey*, 491 F.3d at 899 (quoting *Rankin*, 483 U.S. at 387) (cleaned up).

Here, the City fired Mr. Melton because Mayor Williams and a few others at City Hall took "offense" to Mr. Melton's pro-life view; some

expressed "outrage." Mr. Melton testified that he had no racial motive behind his post. App.80; R. Doc. 21-4 at 5. But Mayor Williams and others interpreted his post as showing a black baby with a noose around his or her neck. App.80; R. Doc. 21-4 at 5; App.121; R. Doc. 24-10 at 5. They saw a black pro-life message and fired Mr. Melton because of it. That evidence shows the City fired Mr. Melton because of the viewpoint of his social media post. *See Iancu*, 139 S. Ct. at 2299; *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."). The government allowed subjective offense to justify its discipline. It effected an impermissible heckler's veto—"the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). It picked which views its employees could express on their own time, away from work.

Freedom to express opinions on topics of public concern cannot turn on the happenstance of public employment. The government short-circuits public discourse no less when it terminates an employee for his views than when it punishes any other citizen. Public employee or not, retaliation for one's views "undercut[s]" our "profound national commitment" to robust and wide-open public discourse. *Mosley*, 408

U.S. at 96. For that reason, the First Amendment prohibits viewpoint discrimination—regardless of public employment status.

III. Disagreement with the content of speech cannot justify adverse action.

The government cannot restrict "disfavored or unpopular speech in the name of preventing disruption, when the only disruption [is] the effect controversial speech has on those who disagree with it *because they disagree with it*." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022); *accord Berger*, 779 F.2d at 1001. This Court applies *Pickering* balancing only when the government "first establishe[s] that the speech in question created a disruption in the workplace." *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d 522, 526 (8th Cir. 2001). The government "must demonstrate with specificity that the speech created disharmony in the workplace, impeded the plaintiff's ability to perform his duties, or impaired working relationships with other employees." *Id.* at 527 (cleaned up).

Mere offense at a viewpoint cannot meet the government's *Pickering* burden. Offense-based terminations effect a heckler's veto. *Berger*, 779 F.2d at 1001. That viewpoint discrimination is per se unconstitutional. *Supra* Part II. But—at the very least—mere offense at speech does not evince *Pickering* disruption. Feeling "hurt," "furious," "outraged," "upset," "intimidated," "shocked," "angry," "scared," "frustrated," and unsafe all show that the "only disruption was the

effect controversial speech [had] on those who disagree with it." *Dodge*, 56 F.4th at 782, 786; *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004). Disagreement with speech itself shows no disruption. That disagreement is a natural outgrowth of our free speech freedoms—which preserve individual dignity by protecting each individual's voice. *See Cohen*, 403 U.S. at 24.

This Court has held that purported disruption from public offense or outrage does not qualify as *Pickering* disruption. Citizens "express[ing] outrage [and] concern" and supervisors "angry" about two police officers' speech did not even trigger *Pickering* balancing. *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000). Those "vague and conclusory statements do not demonstrate with any specificity that the speech created disharmony in the workplace, impeded the plaintiffs' ability to perform their duties, or impaired working relationships with other employees." *Id.* at 912–13; *accord, e.g., Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989) ("The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future.").

Similarly, another employee's complaints about "inappropriate," "insensitive," and "upsetting" pictures could not meet the government's *Pickering* burden in *Burnham v. Ianni*, 119 F.3d 668, 672, 680 (8th Cir. 1997). This Court was unequivocal that such evidence could not

outweigh free speech protections: it has "never granted any deference to a government supervisor's bald assertions of harm based on conclusory hearsay and rank speculation." *Id.* at 680.

Allowing a heckler's veto to suppress the speech of public employees targets views perceived to be unpopular and monopolizes the marketplace of ideas. The "free exchange" of ideas "facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). Courts must vigilantly defend potentially "unpopular ideas, for popular ideas have less need for protection." *Id.*

The evidence here shows no *Pickering* disruption. As the district court recognized, no workplace disharmony occurred. App.155; R. Doc. 36 at 9. Indeed, *no* colleague complained about Mr. Melton's post. *Id.* Unidentified members of the community claimed they didn't want Mr. Melton to respond to an emergency at their houses because his views "outraged" them. App.124; R. Doc. 24-10 at 8. But the views he expressed have no bearing on his ability to fight fires—which was undisputedly "exemplary." App.49; R. Doc. 21-1 at 2; *see Sexton*, 210 F.3d at 912.

As Mayor Williams conceded, Mr. Melton's speech in no way inhibited providing emergency services: it "didn't keep any fires from being put out." App.134; R. Doc. 24-10 at 18. And Mayor Williams's and

other supervisors' "offense" at Mr. Melton's views proves only that. Offense does not provide a justification for termination. Disagreement with others' views is "par for the course" in public dialogue and "cannot itself be a basis for finding disruption of a kind that outweighs the speaker's First Amendment rights." *Dodge*, 56 F.4th at 783. Because no *Pickering* disruption occurred, this Court should grant summary judgment on the retaliation claim to Mr. Melton.

CONCLUSION

Without the First Amendment's protection for all viewpoints, the government's fiat would end "national controversy" by requiring "a common mandate." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992). The loss of free speech would deprive the people of the ability to govern themselves. As Frederick Douglass understood, free speech "of all rights, is the dread of tyrants." Frederick Douglass, A Plea for Free Speech in Boston (1860).

Public discussion shone light on the evils inherent in discriminatory abortions. It motivated states to ban eugenic abortions and now allows the citizens of each state to debate and decide abortion policy. Freedom to express our views will align our nation ever more closely with the protection of our unalienable rights—public employees not excluded. But, as history has shown, we must remain vigilant against government favoritism to certain ideas. For that reason, this Court should recognize that hecklers cannot shut down public employee

speech. It should reverse and direct that summary judgment be entered for Mr. Melton on his First Amendment retaliation claim.

Respectfully submitted,

Dated: February 1, 2024

By: */s/ Mathew W. Hoffmann*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,165 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as determined by the word counting feature of Microsoft Office 365.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

Dated: February 1, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Mathew W. Hoffmann
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