STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN 25-137

ANDREW ROBBINS, et al.

Plaintiffs - Appellees

v.

STATE OF MAINE, et al.

Defendants - Appellants.

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Most of Plaintiffs' Brief attempts to rebut arguments that the Executive Director of the Maine Commission on Public Defense Service, in his official capacity, and each of the Commissioners of the Maine Commission on Public Defense Service in their official capacities (collectively "MCPDS") have not asserted. With respect to arguments that MCPDS has asserted, procedurally, Plaintiffs' Brief fails to show why the final judgment rule should bar consideration of MCPDS's appeal. Substantively, Plaintiffs' Brief ignores three dispositive elements of this appeal: (1) the standard under which this Court reviews the trial court's January 3, 2025 order disposing of MCPDS's and Plaintiffs' motions for summary judgment; (2) the effect of Plaintiffs' choice to pursue their Sixth Amendment claim solely under a legal standard that requires that they establish the absence of counsel at a "critical stage"; and (3) the absence of any record facts supporting a conclusion that a single named Plaintiff was denied counsel at a "critical stage" as interpreted by this Court and by caselaw from other jurisdictions – required to support class certification, liability, and the Superior Court's imposition of a permanent injunction. This Court should vacate the Superior Court's orders on appeal.

ARGUMENT

I. Plaintiffs fail to support their claim that the Superior Court's judgment is unreviewable.

A. MCPDS's Rule 54 certification request does not render the Superior Court's judgment unreviewable.

MCPDS sought certification of the Superior Court's disposition of the "Phase 1" litigation to avoid the need to address the final judgment rule as part of this appeal of the Superior Court's judgment. The Superior Court did not act on the motion pending Plaintiffs' response. M. R. Civ. P. 7(b)(7) ("*[A]fter the opposition is filed*, the court may in its discretion rule on the motion without hearing."). MCPDS filed the instant appeal to comply with the deadline for appealing the Superior Court's March 7, 2025 order imposing a remedy on Plaintiffs' "Phase 1" claim against MCPDS (Count I). M. R. App. P. 2B(c)(1) (requiring appeal within "21 days after entry into the docket of the judgment or order appealed from . . . ."). Having forfeited the opportunity to proceed on their "Phase 2" claims which a certified final judgment would have provided,[1] Plaintiffs now seek to capitalize on their tactical choice. This Court should reject Plaintiffs' citation-free argument that MCPDS's effort to obtain a Rule 54 certification constitutes anything other than an effort to focus on substantive issues controlling this appeal.

[1] 3A Maine Prac., Maine Civil Practice § A3:2 (3d ed.) ("…Rule 54(b) contemplates that the trial court's adjudication of the remaining portion of the case should proceed in the normal course while the appeal as to the previously adjudicated claims is being prosecuted.")

B. The Superior Court's procedural orders effected a Rule 21 severance.

Plaintiffs' contention that a court must expressly state its intent to sever a claim pursuant to M. R. Civ. P. 21 ignores the federal caselaw on which MCPDS relies and which Plaintiffs endorse as guidance. *Cf.* Plaintiffs' Brief at 18 n.4 ("[I]t is proper for the court to consider constructions of the federal rule . . . .") and *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 560 (1st Cir. 2003) ("[n]othing on the face of Rule 21 indicates that it must be explicitly invoked in order to have effect."). The Superior Court, by sequencing separate "Phase 1" and "Phase 2" adjudications of factually and legally distinct portions of Plaintiffs' Count I claims – and by expressly intending to apply its conclusions of law to separately pending actions – endorsed a conclusion that it severed the "Phase 1" adjudication now on appeal from the still-pending "Phase 2" claims.

C. The Superior Court's successive designation of "priority" subclass members triggers an exception to the final judgment rule.

Plaintiffs' Brief misrepresents MCPDS's argument on the applicable exception to the final judgment rule. This Court's consideration of the present appeal is required to prevent the Superior Court's sequential orders identifying particular groups of indigent criminal defendants for MCPDS to "prioritize" in order to comply with the Superior Court's broad injunctive command to immediately provide counsel to all indigent criminal defendants following initial appearance.

See, e.g., Joint Appendix ("JA") 115 ("The MCPDS Defendants are further ordered to prioritize and to make good faith efforts to actually provide counsel for the unrepresented, incarcerated defendants who, as of this same date, are listed on the so-called 'without counsel' spreadsheet, and to do so by April 3, 2025."). Moreover, the Superior Court's determination that MCPDS is bound by its judgment on the Count III habeas corpus claims, requiring MCPDS to "provide counsel for these Plaintiffs at every [habeas corpus] hearing conducted," both exceeds the Superior Court's authority and compels MCPDS to take action unauthorized by statute. JA 132; *but see* 4 M.R.S.A. § 1801 (The commission shall work to ensure the delivery of indigent legal services . . . ."); 4 M.R.S.A. § 1802(4) (defining "indigent legal services" to includes civil representation only if "the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation.").

II. Plaintiffs' argument fails to address the applicable standard of appellate review.

MCPDS's appeal challenges the Superior Court's denial of MCPDS's motion for summary judgment and grant of Plaintiffs' motion for summary judgment on the "Phase 1" claims of Count I of Appellees' Amended Complaint. MCPDS's Brief, 35-49. Plaintiffs' Brief fails to state, apply, or argue the standard of appellate review applicable to rulings on motions for summary judgment.

Summary judgment is appropriate where the parties' Rule 56 filings establish that there is no genuine issue of material fact. *Est. of Frost*, 2016 ME 132, ¶15, 146 A.3d 118. Resolution of one or more questions of law establish whether or not a fact is "material": whether the truth or falsity of that fact will affect the outcome of Plaintiffs' claim under the controlling legal standard. *Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶7, 756 A.2d 515. Accordingly, this Court reviews an order on summary judgment *de novo* for errors of law and views the evidence in the light most favorable to the non-moving party. *Id*. Here, the definition of a "critical stage" under one of the two legal avenues for establishing a violation of the Sixth Amendment establishes what facts are "material" to the resolution of Plaintiffs' claim. M. R. Civ. P. 56(c) ("Judgment shall be rendered forthwith," if summary judgment record, "show[s] that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law."). This Court reviews the Superior Court's interpretation of the legal standard that identifies the materiality of a fact – here, whether a fact supports finding a Sixth Amendment violation without any evidence of prejudice – *de novo. Burr v. Dep't of Corr.*, 2020 ME 130, ¶ 20, 240 A.3d 371; *see also Grant v. Foster Wheeler, LLC*, 2016 ME 85, ¶ 12, 140 A.3d 1242 ("We review the grant of a motion for summary judgment de novo").

Failing to identify and address the standard of appellate review, Plaintiffs' Brief relies on the fact that the Superior Court ruled in their favor instead of seeking to support the Superior Court's legal and factual conclusions at issue in this appeal. Plaintiffs' consistent reliance on mischaracterizations of MCPDS's positions – both by the Superior Court and by Plaintiffs – instead of MCPDS's actual positions below, sows confusion in an already unwieldy and procedurally convoluted record.

A. Plaintiffs' *Cronic* claim requires establishing denial of counsel at a "critical stage," and the Superior Court erred by deciding otherwise.

The Superior Court applied an incorrect standard, as a matter of law, to the parties' motions for summary judgment by ruling that a stage qualifies as "critical" under the Sixth Amendment if it involves any interest of an indigent criminal defendant that could be more efficiently addressed by competent legal counsel than by an unrepresented layperson. JA 158-167. Therefore, under the Superior Court's ruling: (i) every moment following initial appearance meets that definition of a "critical stage"; and (ii) the Sixth Amendment mandates continuous representation from initial appearance through trial.[2] *Id.* As a result, under the Superior Court's

[2] Plaintiffs' Brief argues that Superior Court's legal conclusion on the scope of the Sixth Amendment was justified by on its reliance on caselaw characterizing M. R. U. Crim. P. 44, which requires that counsel be provided "at every stage of the proceeding," as "implement[ing] the constitutional right to counsel in a criminal proceeding," Plaintiffs' Brief at 23-24 (quoting JA 153). This Court should reject the circular logic that Maine law, which must meet but can exceed federal protections, *see, e.g., State v. Rees*, 2000 ME 55, ¶ 5, 748 A.2d 976, somehow expands the scope of the Sixth Amendment right to counsel.

ruling, the evidence required for a plaintiff to prevail on a claim that an indigent criminal defendant's Sixth Amendment rights have been violated is that an indigent criminal defendant was unrepresented for any period of time – no matter how fleeting – irrespective of whether they were unrepresented at a stage when the lost opportunity to appear with counsel irremediably eliminates a defendant's right to a fair trial. *See Van v. Jones*, 475 F.3d 292, 312-315 (6th Cir. 2007) (identifying as "critical" stages "in which an opportunity may be irretrievably lost"). "In *Cronic*, the Supreme Court held that there are 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

Plaintiffs' Brief, repeats, relies on, but fails to support the Superior Court's erroneous holding that the "critical stages" relevant to Plaintiffs' claim under *Cronic* are not limited to stages when a defendants' right to a fair trial are irredeemably prejudiced. JA 157 (quoting *Lafler v. Cooper*, 566 U.S. 156 (2012)). The Superior Court's error of law, adopted by Plaintiffs, is equating the entire scope of the Sixth Amendment right to counsel with one of two ways to prove a violation of that right. *See* MCPDS's Brief, 40 ("The concept of a 'critical stage' is relevant to one of the two standards for evaluating an alleged Sixth Amendment violation . . . ." (citing *Cronic*, 466 U.S. 648 at 659)).

One standard to prove a Sixth Amendment violation involves *Strickland* and the other involves *Cronic*. A claim under the *Strickland* standard requires evidence that the absence of counsel actually prejudiced a criminal defendant. *See, e.g., Philbrook v. State*, 2017 ME 162, ¶ 6, 167 A.3d 1266 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "Prejudice" for purposes of a *Strickland* claim is not limited to the irremediable destruction of a defendant's right to a fair trial at a "critical stage." *Lafler*, 566 U.S. at 164 (rejecting contention that proof of *Strickland* prejudice is cognizable only if it occurs during a "critical stage"); *see also Philbrook*, 2017 ME 162 at ¶ 6 (noting that "[a] defendant's Sixth Amendment right to counsel 'extends to the plea-bargaining process,'" in context of *Strickland* claim requiring proof of prejudice) (quoting *Lafler*, 566 U.S. at 162)).

The other way to establish a violation of the Sixth Amendment is under the *Cronic* standard, which is an exception to *Strickland's* prejudice requirement: presuming prejudice if a criminal defendant is without counsel at a "critical stage" of the prosecution. The single Justice's decision in *Peterson v. Johnson* recognizes that the *Cronic* "critical stage" and *Strickland* prejudice standards *together* cover the extent of Sixth Amendment protections. Docket No. SJC-23-2 (Jan. 12, 2024), 21 n.16 ("This is not to suggest that entitlement to court-appointed counsel under current Sixth Amendment jurisprudence is necessarily timed to the scheduling of a

dispositional conference. The right could inhere earlier, depending on the circumstances of the case.").

The Superior Court reasoned that, because cognizable "prejudice" under the *Strickland* standard is not limited to a "critical stage", it follows that a "critical stage" under the *Cronic* standard is likewise not limited to a stage where the absence of counsel causes irremediable elimination of a defendant's right to a fair trial. This conclusion is an error of law that conflated distinct claims for Sixth Amendment violations. *See Fusi*, 621 F.3d at 6 (observing that Sixth Amendment claims pursuant to either the *Strickland* or *Cronic* standards, "while based on similar factual underpinnings, are separate and distinct."). The Superior Court's conclusion is an error of law because its premise is that the *Cronic* exception to *Strickland*'s requirement to prove prejudice from the absence of counsel under limited circumstances (i.e. critical stages) encompasses the entire scope of the Sixth Amendment right to counsel. Plaintiffs adopted this error. *See* Plaintiffs' Brief at 26 (citing *Lafler*, which applied the *Strickland* prejudice standard as defining a "critical stage" relevant to *Cronic*) and JA 157 (citing *Lafler* in support of rejecting "critical stage" as circumscribing the Sixth Amendment right to counsel). *Cronic* and Strickland *together* address the scope of the Sixth Amendment right to counsel.

Plaintiffs' position is analogous to a plaintiff attempting to meet the "breach" element of a tort claim by solely relying on negligence *per se*[3] then asserting that their failure to identify violation of a regulation or statute should not be fatal because, as a matter of tort law, it is possible to prove the "breach" element without reference to a statute or regulation. It is possible to prove breach of the duty of reasonable care without reference to a statute. *See, e.g., Yankee Pride Transp. & Logistics, Inc. v. UIG, Inc.*, 2021 ME 65, ¶ 15, 264 A.3d 1248. However, the negligence *per se* plaintiff's choice to frame their claim in a way that requires proof of violation of a statute or regulation – not the scope of the law on the general duty of reasonable care – is determinative if that plaintiff cannot present evidence of a statutory violation.

The Superior Court's adoption of Plaintiffs' framing of MCPDS's position – not MCPDS's actual argument in support of its motion for summary judgment – perhaps explains why the Superior Court found it "difficult to square the position of MCPDS defendants that pretrial events are not critical stages . . . ." JA 159. The difficulty arises from the Superior Court's premise that the Sixth Amendment establishes a right to counsel only at "critical stages". It does not – the Sixth Amendment also supports claims that a criminal defendant was prejudiced by the absence of counsel at other stages pursuant to *Strickland*. JA 288 ("The concept of

[3] *See, e.g. Elliott v. Montgomery*, 197 A. 322, 323 (Me. 1938) (describing the doctrine of negligence *per se* as "proof of violation of a statute or ordinance raises a presumption and is prima facie evidence of negligence.").

a 'critical stage is relevant to one of the two standards for evaluating an alleged Sixth Amendment violation . . . ."). By pursuing their claims *solely* under the *Cronic* standard, the only stages of a criminal prosecution relevant to Plaintiffs' Sixth Amendment claim are "critical stages."

B. There is no evidence establishing what constitutes a "reasonable time" to prepare for the alleged "critical stages" identified by the Superior Court.

A ruling on the parties' motions for summary judgment required the Superior Court to identify what constitutes a "critical stage" in Maine criminal procedure. Plaintiffs' Brief fails to account for the fact that the Superior Court's ruling on summary judgment expressly declined to resolve the crucial question of what constitutes a "reasonable time" after attachment of the right to counsel:

> The Court has concluded that the Plaintiffs' Sixth Amendment rights require continuous representation, and at critical stages identified in this Combined Order. *Given these findings, it is not necessary for the Court at this stage of the proceedings to decide what amount of delay is constitutionally 'reasonable' in appointing counsel for the Plaintiffs as part of the liability analysis.* The Court has concluded that the issue of 'unreasonable' delay should be addressed in later proceedings as part of the remedies analysis when the parties have an opportunity to argue the issue of injunctive relief in Count I, and perhaps as part of the Habeus [sic] proceedings in Count III.

JA 153 n.13 (emphasis added). The Sixth Amendment guarantees the assistance of counsel within a "reasonable time" from the attachment of the right. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 at 212 (2008). The relevant "reasonable time" is the time reasonably necessary in advance of a "critical stage" for counsel to adequately

prepare to competently represent that defendant. *Id.* (defining "reasonable time" by reference to the "adequacy of representation at [a] critical stage"). Plaintiffs' Opposition to MCPDS's motion for summary judgment failed to adduce any evidence about how much time is a "reasonable time" in advance of their discrete proposed "critical stages." As a consequence, Plaintiffs failed to support their argument that all moments following initial appearance constitute an unbroken "critical stage." JA 321-323 (qualifying Plaintiffs' six (6) statements of additional fact counting the number of days during which two (2) named Plaintiffs were without counsel). Missing that crucial element of their "critical stage" argument, Plaintiffs' failure to adduce any evidence that a Class Representative actually suffered the harm upon which the class was certified requires granting MCPDS's motion for summary judgment. *Id.*

Plaintiffs' Brief identifies no evidence in the summary judgment record tying a delay in appointment of counsel to a recognized critical stage – as opposed to Plaintiffs' aspirational "critical stage" which is the entirety of a criminal prosecution. Plaintiffs' Brief, instead, implies that any given number of days without counsel after an initial appearance is *per se* unreasonable, urging this Court to adopt an inference in their favor with respect to Plaintiffs' Motion for Summary Judgment. *Cf. Dorsey v. N. Light Health*, 2022 ME 62, ¶ 10, 288 A.3d 386 ("We consider the 'evidence and any reasonable inferences thereof in the light most favorable to the non-

prevailing party to determine whether there is a genuine issue of material fact.'" (quoting *Yankee Pride*, 2021 ME 65 at ¶ 10, 264 A.3d 1248). Consistent with the applicable standard of appellate review, this Court should reject that invitation and vacate the Superior Court's grant of summary judgment for Plaintiffs and enter summary judgment in favor of MCPDS. Plaintiffs provided no evidence material to what a "reasonable time" after attachment of their Sixth Amendment right means in Maine criminal procedure. JA 319-320. The Superior Court did not make any findings regarding the "reasonable time" element of Plaintiffs' claim notwithstanding its grant of summary judgment in Plaintiffs' favor. JA 168 ("The Court has decided that the length of time Plaintiffs have been unrepresented is material only as to the remedy that might be sought but not as to the legal issue of continuous representation and representation at critical stages of the Maine criminal process.").

The Superior Court's January 3, 2025 Order disposing of the Parties' summary judgment motions was error and should, accordingly, be vacated.

C. Plaintiffs' Brief fails to identify any facts meeting their burden on summary judgment.

Plaintiffs' failure to prove that any named Plaintiff was without counsel at a "critical stage" eliminates Plaintiffs' standing to maintain a class action and entitlement to injunctive relief: both of which require evidence of harm. *Tucker v.*

State, 484 P.3d 851, 865 (Idaho 2021) (proof of harm to at least one named plaintiff required for standing and liability).

The record on summary judgment includes Plaintiffs' Statement of Material Facts, Joint Appendix ("JA") 324-352.[4] In addition, Plaintiffs' Brief argues that, *if* their evidence on summary judgment established that there was no genuine issue of material fact that a named class representative appeared at a dispositional conference without counsel, *then* they would have met their burden of proof that the named class representative's Sixth Amendment rights were violated. *See, e.g.,* Plaintiffs' Brief at 48; JA 319-320 (asserting the number of days during which two named Plaintiffs were without counsel). The genuine issue of material fact at issue in MCPDS's motion for summary judgment is whether Plaintiffs have, in fact, introduced any evidence that any named class representative was denied counsel at a "critical stage." Plaintiffs' Brief, relies on the implied inference that seventeen days between the appointment of counsel and a dispositional conference is constitutionally "unreasonable". Plaintiffs' Brief at 46. There is zero record evidence supporting Plaintiffs' claim that seventeen days was not enough time for defense counsel to prepare for Mr. Neville's dispositional conference. Instead, the evidence in the summary judgment record regarding Mr. Neville is a recitation of the 17-day period

[4] MCPDS's Opposition to Plaintiffs' Statement of Material Fact, addressing the record support or lack thereof, for each of Plaintiffs' 173 paragraphs, is included in the Appendix. JA 353-589.

between appointment of defense counsel and that Mr. Neville's dispositional conference resulted in dismissal of a Class A robbery charge and Mr. Neville's guilty plea to a Class B and Class E charge. JA 322; JA 344 ("Plaintiff Clifford Neville was appointed counsel less than three weeks before his dispositional conference.").[5] Plaintiffs therefore rely on an favorable inference, contrary to the standard on review of Plaintiffs' motion for summary judgment, that seventeen days is a *per se* unreasonably short window because it is insufficient for counsel to competently prepare for a dispositional conference. *Dorsey*, 2022 ME 62 at ¶ 10 ("evidence and any reasonable inferences thereof" considered "in the light most favorable to the non-prevailing party").

Similarly, Plaintiffs' opposition to MCPDS's motion for summary judgment alleged but failed to support their claim that named Plaintiffs Neville or Williams were not appointed counsel within a "reasonable time" to permit adequate preparation for a "critical stage." Plaintiffs' Memorandum of Law in Opposition to

[5] While Plaintiffs' Brief does not even attempt to rely on Plaintiffs' recitations of the time between appointment of counsel and the appearance of defense counsel on behalf of named Plaintiffs Daishawn Williams, JA 321, and Ralph Buck, JA 322-323, neither statement of additional fact supports a conclusion that: (i) a named Plaintiff was without counsel at a dispositional conference, nor (ii) counsel was appointed without enough time to prepare for a dispositional conference. *See, e.g.,* JA 321 ("Appointed counsel appeared on behalf of Mr. Williams 10 weeks after Mr. Williams' Motion for Appointment of Counsel on April 12, 2024, following the withdrawal of Mr. Williams' fourth retained attorney since 2021."); JA 322-323 ("Appointed counsel appeared on behalf of Mr. Buck on May 31, 2024: 6 weeks after the court granted Mr. Buck's Motion for Appointment of Counsel on April 16, 2024 and 28 days prior to Mr. Buck's scheduled dispositional conference on June 28, 2024.").

MCPDS Motion for Summary Judgment (Dec. 13, 2024), 9 ("Because of the delays in appointment of counsel, the three Class Representatives [] were not appointed counsel within a reasonable time . . . ."); *id.* at 2 ("Defendants have forced the Subclass members to endure structural violations of their Sixth Amendment right to counsel in five independent ways: (1) Defendants have not provided counsel within a reasonable time after the initial appearance . . . ."). Plaintiffs' bare time calculations, without more, fail to meet the requirement to establish that a named Plaintiff was not appointed counsel within a reasonable time of attachment. The Superior Court should have entered summary judgment in MCPDS's favor.

The Superior Court had previously identified that whether counsel appeared for Plaintiffs within "a reasonable time" after their initial appearance was a question of law controlling liability. Order on Motion to Amend Class Definition (Sept. 26, 2024), 7 (identifying "whether the delays experienced by the Subclass are systemic and/or whether they are 'unreasonable' and therefore unconstitutional" as a "question of law common to all members of the Subclass"). However, when ruling on the parties' motions for summary judgment, the Superior Court expressly failed to render a finding on whether any named Plaintiff did not receive counsel within a "reasonable time" in its liability determination. JA 153 n. 3 ("[I]t is not necessary for the Court at this stage of the proceedings to decide what amount of delay is constitutionally 'reasonable' in appointing counsel for the Plaintiffs."). The

Superior Court reached that conclusion based on its erroneous determination that every moment after initial appearance was a "critical stage". JA 168 ("The Court has decided that the length of time Plaintiffs have been unrepresented is material only as to the remedy that might be sought but not as to the legal issue of continuous representation and representation at critical stages of the Maine criminal process."). That conclusion reflects the divergence of the Court's view of the law from established caselaw – disregarding an element of liability once its uniquely broad interpretation of "critical stage" made it meaningless. There is no record evidence supporting the necessary conclusion that a named Plaintiff was appointed counsel at a point where counsel could not adequately prepare to competently represent that defendant. *Rothgery*, 544 U.S. at 212. Without that evidence – whether supporting the objective demarcation required to support Plaintiffs' motion or evidence of unreasonableness specific to one named Plaintiff to oppose MCPDS's motion – Plaintiffs have not met their burden to prevail on their motion or viably create a genuine issue of material fact in opposition to MCPDS's motion.

CONCLUSION

For the reasons stated above and in MCPDS's opening brief, this Court should vacate the Superior Court's denial of MCPDS's motion for summary judgment and remand this matter to the Superior Court, either for entry of summary judgment in MCPDS's favor or for proceedings consistent with the requirement that Plaintiffs

present evidence that a named Plaintiff has not been appointed counsel within a "reasonable time" of attachment: an element of both Plaintiffs' claim in the Phase 1 proceedings on Count I and a requirement for Plaintiffs' to maintain their class action.

Dated: September 12, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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