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STATE OF MICHIGAN
IN THE SUPREME COURT

LOUIS JACKSON, MICHAEL C. BIRAC, LEE CRAFT, GAYLYNN CRAFT, RONALD HAYES, SMFJ, LLC, EVERTT HODGE, DONALD SWINNEY, STEFANIE BOYD, LISA SMITH, and KIRK BOYD,

Plaintiffs-Appellees,

v.

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, FRED ZORN, CITY OF SOUTHFIELD, KEN SIVER, and SOUTHFIELD NON-PROFIT HOUSING CORPORATION,

Defendants-Appellees,

and

OAKLAND COUNTY,

*Defendant-Appellan*t,

and

ETOILE LIBBETT, MICHAEL A. MANDELBAUM, SUSAN WARD WITKOWSKI, a/k/a SUSAN WARD and a/k/a SUSAN WITKOWSKI, and GERALD WITKOWSKI,

Defendants.

Supreme Court Case No. 166320

Court of Appeals Case No. 361397

Oakland County Circuit Court Case No. 2018-162877-NZ

AMICUS CURIAE THE BUCKEYE INSTITUTE'S BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

(*Caption continued on next page)*

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute has been vocal in its opposition to practices in Ohio and throughout the nation that allow government entities to seize real property to satisfy tax debts without compensating the property owners for the equity they have accrued.

[1] Pursuant to MCR 7.312(H)(5), no counsel for any party authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from Amicus Curiae made any monetary contribution toward the preparation or submission of this brief.

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STATEMENT OF QUESTION PRESENTED

Whether there was a violation of either Takings Clause by Oakland County under the facts of this case.

Amicus curiae answers, "yes."

Plaintiffs-Appellees answer, "yes."

Defendants-Appellants answers, "yes."

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INTRODUCTION

In determining the retroactive application of this Court's decision in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020), history should be a guide. See *Tyler v Hennepin Cnty, Minnesota*, 598 US 631, 638; 143 S Ct 1369; 215 L Ed 2d 564 (2023) (looking to historical practice to define property rights). And the history that culminated in the Fifth Amendment teaches that the Takings Clause is unconditional. Its plain language provides: "Nor shall private property be taken for public use, without just compensation." US Const Am V. Those words, which restrict and qualify the traditional government power of eminent domain, can more precisely be called the Just Compensation Clause. They carry the same meaning today that they did when they were written with quill and ink, affirming the equitable premise that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Comm'n v United States*, 568 US 23, 31; 133 S Ct 511; 184 L Ed 2d 417 (2012), quoting *Tahoe–Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 322; 122 S Ct 1465; 152 L Ed 2d 517 (2002). Indeed, the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, quoting *Armstrong v United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960). Michigan's Takings Clause, which proscribes the taking of private property "for public use without just compensation therefore being first made," shares the Fifth Amendment's august provenance and should, thus, be read in the same spirit.

The original understanding of the Just Compensation Clause, rooted in Magna Carta and applied consistently to the present day, is that when the government takes an interest in property for public use, its duty to compensate the former owner is "categorical." *Tahoe–Sierra Preservation Council, Inc*, 535 US at 322, citing *United States v Pewee Coal Co*, 341 US 114, 115;

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71 S Ct 670; 95 L Ed 809 (1951). It is "categorical" in the sense that a sovereign's proper authority to take private property exists only to the extent that the taking is necessary for a public use and that applying this principle to satisfy a debt requires that the government compensate the property owner for his or her accrued equity in that property. In other words, the sovereign's authority to appropriate property exists only when there is both necessity and compensation.

In drafting the Fifth Amendment, James Madison restated familiar and uncontroversial precepts of English law that had by then taken root in colonial statutes and common law. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L J 694 (1985). Colonial statutes, nascent state constitutions, and the Northwest Ordinance of 1787 all conditioned the sovereign's right to take property for the public good on just and contemporaneous compensation to the landowner.

Expressly included in this historical understanding of the Fifth Amendment is the principle that when the government takes property—particularly when the government takes real property to satisfy a debt—its power to take goes only so far as is necessary. The Framers' generation and 19th-century jurists rightly understood equity in real estate to be a form of personal property and thus protected from uncompensated or unwarranted takings.

The Fifth Amendment's well-established antecedents in England and colonial America highlight the primacy of the just-compensation requirement. The historical record shows that the Framers and founding generation, as well as 19th-century jurists who applied these principles, would have plainly understood equity in real estate as property subject to the Fifth Amendment's protections. This Court's decision *Rafaeli* thus did not break new ground. It simply reiterated what has for over eight centuries been a core principle of Anglo-American law.

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ARGUMENT

I. Magna Carta and colonial law established the Just Compensation requirement.

The requirement that "just compensation" must accompany any taking of private property predates the U.S. Constitution and has a pedigree stretching back nearly a millennium. The Court has observed that the roots of the Just Compensation Clause extend "back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne v Dep't of Agric*, 576 US 350, 358; 135 S Ct 2419; 192 L Ed 2d 388 (2015). Specifically, Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." *Id*. (internal citations omitted). And Chapter 31 placed an outright prohibition on "the king or his officers taking timber" from land without the owner's consent. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash L Rev 553, 564 (1972).

English jurists incorporated these protections into their decisions and commentaries on English common law. For example, Lord Coke read this limitation to imply that while the king could take certain "inheritances" from land, he could not take the land itself. *Id.* Blackstone later asserted Magna Carta's protections of property meant that "only the legislature could condemn land." *Id*. As Professor Stoebuck explains, "eminent domain"—the physical taking of land—"arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. *Id.* at 566 This distinction was significant in English law; in America, the distinction gradually blurred, and following ratification of the Constitution, disappeared entirely.

These principles of Magna Carta sailed with the first English colonists to the New World and established themselves firmly in American soil. For example, in 1641, Massachusetts adopted a provision in its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon

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some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 Am U L Rev 181, 209 (1999).

Consistent with Blackstone's distinction between the powers of the king and the powers of Parliament, most colonial legislatures did not recognize a blanket governmental obligation to compensate a property owner for the public taking of his property. Treanor, 94 Yale L J at 694. Rather, the duty to provide just compensation flowed from the specific statute authorizing the taking. Under these "purveyance statutes," legislatures often included payment as a matter of simple justice. Thus, "compensation became a feature [] through the American colonial period." Stoebuck, 47 Wash L Rev at 575. According to Stoebuck, "purveyance statutes" were "in themselves examples of the principle that government must pay for what it takes." *Id.* at 576 In other words, the colonial legislatures usually employed a "pay as you go" policy, with each statute that authorized a taking including an offsetting appropriation to compensate the land owner.

Takings by colonial governments for roads provide an interesting parallel to the practices at issue here. In the colonial period, governments often took unimproved wilderness to create highways that almost always benefitted the property and the landowner. See *id.* at 583 ("In a time when unimproved land was generally of little worth, a new road would give more value than it took."). Yet even when a project might significantly improve the value of the adjacent land, colonial legislatures still viewed compensation to landowners as a matter of fundamental fairness. For example, in 1639, the Massachusetts Bay colony amended its general highway act to provide that "'if any man suffer any extraordinary damage in his improved ground,' he would receive 'some reasonable satisfaction' from the town." Hart, *Takings and Compensation in Early America:*

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The Colonial Highway Acts in Social Context, 40 Am J Legal Hist 253, 258 (1996) (internal citation omitted).

As time passed, the legislative trend toward more liberal and universal compensation, even when the government action conferred a benefit to the property, took hold. For instance, the Massachusetts Bay colony amended its highway statute again in 1693 to require compensation not only when the government caused "extraordinary damage" but to guarantee "'reasonable satisfaction' to anyone 'thereby damaged' in his improved ground." *Id.* (internal citation omitted). Similarly, the New York colonial legislature evolved from a position of leaving the question of compensation to local governments, to adopting a 1721 highway act that required the government to pay "the true and full Value of the Land" if a highway was "laid through 'Improv'd or Inclosed Lands.'" *Id.* at 261 (internal citation omitted). Connecticut's statute largely mirrored New York's. *Id*. at 290. And in 1700, Pennsylvania revised its highway statute to provide that "where it was necessary to lay a road through 'improved lands . . . the value thereof' would be paid to the owner." *Id.* at 261 (internal citation omitted).

Although compensation for highway takings was not universal—Virginia and Maryland, for example, did not provide compensation for land taken for highways, and New York frequently amended its statute to provide more protection for highways in certain counties and less in others—the principle of no taking without compensation had taken root. *Id.* at 258–261. That the colonial legislatures typically limited those takings to "Improv'd or Inclosed Lands" rather than unimproved wilderness also shows that colonial legislators—like the Court in *Arkansas Game & Fish Commission*—understood and honored land-owners' "reasonable investment-backed decisions." See *Ark Game & Fish Comm'n*, 568 US at 38–39. In other words, land purchasers understood that land, like currency, was fungible and that they could recover their equity even if

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the land was sold to satisfy other debts. In ordering compensation for highway takings, colonial legislatures understood that it was government action—in the form of royal grants, land purchases, treaties (albeit often dishonored), and the implied government protection of paid-in equity that went with them—that made the land available for settlement in the first place.

But while pre-revolutionary colonists were largely content to trust their legislatures to provide compensation when fair, the experience of the Revolutionary War impressed on them the need for a broader and more consistent protection of property rights. Treanor, 94 Yale L J at 700–701. The Revolutionary War brought with it the seizures of property by both the British Regulars and the Continental Army. St. George Tucker, the author of the first published treatise on the United States Constitution and editor of the 1803 edition of Blackstone's Commentaries, posited that the new nation's shift to the inclusion of compensation requirements in state constitutions, the Northwest Ordinance, and the Takings Clause was due to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Tucker, *Blackstone's Commentaries: with notes of reference, to the constitution and laws, of the federal government of the United States; and of the commonwealth of Virginia* (Philadelphia: Birch & Small, 1803), pp 305–306.

Similarly, during the war, many of the newly independent states enacted legislation allowing the confiscation of loyalist property. Some Founders, including Madison, were concerned that this confiscation threatened the long-term safety of property rights in general. See Ely, *Property Rights in American History* (1997), p. 4. See also Treanor, 94 Yale L J at 709 (noting Madison's opposition to the seizure of loyalist property). Indeed, like many of his generation, John Adams saw the protection of property and the larger cause of liberty as inextricably bound:

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"[p]roperty must be secured, or liberty cannot exist." Adams, *Discourses on Davila, in* 6 Works of John Adams (Charles Adams ed., 1851), p. 280. Ironically, the exigencies of the war for liberty resulted in Americans being less "secure in their property rights between 1776 and 1787 as they had been during the Colonial period." McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (University Press of Kansas, 1985), p. 154. The Framers thus sought to restore that security, which would, in turn, both foster and fortify liberty, as it was broadly understood.

II. The Framers and succeeding generations held the Just Compensation requirement to be categorical and fundamental.

Not long after the Revolutionary War's conclusion, Madison voiced his concerns over the erosion of property rights that had attended the conflict, writing to Jefferson that "[t]he necessity of . . . guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution" and citing the need for positive steps to secure those rights in the new country. Treanor, 94 Yale L J at 709.

While the colonial right to compensation for a taking of property often relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. In essence, the Northwest Ordinance provided the first national "pre-constitutional codification of the eminent domain power." Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L Rev 49, 54 (1999).[2] In language that prefigured the Fifth Amendment, the 1787 Northwest Ordinance provided that:

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and *should the public exigencies make it necessary, for the common preservation, to take*

[2] While the Northwest Ordinance provided the first "national" statement of the Just Compensation requirement, the Vermont Constitution of 1777 and the Massachusetts Constitution of 1780 included similar categorical requirements. Treanor, 94 Yale L J at 701.

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> *any person's property*, or to demand his particular services, *full compensation shall be made for the same.*

An Ordinance for the Government of the Territory of the United States North-west of the River Ohio (1787), art 2 (emphasis added).

Significantly, the State of Michigan and Oakland County were carved out of the Northwest Territory. Limiting takings to those that are necessary and requiring full compensation for them is thus part of Michigan's origin story. When the men and women who settled Oakland County after the War of 1812—many from New York—loaded up their wagons and lit out for Michigan would have relied—at least in part—on this national policy protecting them from uncompensated government takings.

The Framers' writings following the ratification of the Fifth Amendment leave no doubt of the importance that they assigned to the protection of private property. Madison, in particular, saw broad protection for property—both real and intangible—as the proper end of government. Madison, *Property, in* 1 The Founders' Constitution (University of Chicago Press, 1977), ch 16, doc 23, available at https://tinyurl.com/34cz994u. Indeed, Madison considered the protection of property a government responsibility commensurate with the protection of individuals. The Federalist No. 54 (Madison) (Fall River Press ed., 2021), p 311 ("Government is instituted no less for protection of the property, than of the persons of individuals."). And after the experiences of the Revolutionary War, he believed it necessary "to erect strong safeguards for rights in general and for property rights in particular." Treanor, 94 Yale L J at 694. The Just Compensation Clause—although intended to have relatively narrow legal consequences—was just such a safeguard. And although Madison viewed the Fifth Amendment as a restatement of what was already unquestionably the law, he believed that the codification of these pre-existing guarantees into the Bill of Rights would serve the hortatory purpose of encouraging respect for private property:

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"Paper barriers . . . have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community." *Id.* at 710, citing Madison, *Speech Proposing the Bill of Rights, in* 12 The Papers of James Madison (C. Hobson & R. Rutland eds. 1979), pp 204–205.

Following ratification, Madison's broader vision took hold in American jurisprudence. Professor Treanor explains that "[i]n addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. . . . [T]he Fifth Amendment was a national declaration of respect for property rights." *Id.* at 714. By the 1820s, the principle of just compensation had won general acceptance. *Id.*

In the landmark case of *Gardner v Village of Newburgh*, 2 Johns Ch 162 (NY Ch, 1816), Chancellor Kent articulated the broad Madisonian view that had begun at Runnymede, crossed the ocean, survived a war, and firmly established its place as the fundamental law of the new nation:

> I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of *Pennsylvania, Delaware,* and *Ohio;* and it has been incorporated in some of the written constitutions adopted in *Europe,* (Constitutional charter of *Lewis* XVIII., and the ephemeral, but very elaborately drawn, constitution *de la Republique Française* of 1795.)
>
> But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States,* "that private property shall not be taken for public use, without just compensation."

Id.

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III. English and American law have long recognized that the government—if it takes at all—may take no more than is necessary.

Courts and commentators have explained that the sovereign's authority to take property is constrained by two equitable limitations: "'the public use requirement' and 'just compensation' rule." *Norwood v Horney,* 110 Ohio St 3d 353, 364; 853 NE 2d 1115; 2006-Ohio-3799 (2006), citing Cohen, *Eminent Domain after Kelo v. City of New London: An argument for Banning Economic Development Takings*, 29 Harv J L & Pub Policy 491, 532 (2006), Stoebuck, 47 Wash L Rev at 595. But a significant component of the public use requirement is the government's duty to refrain from taking more property than is necessary for the public purpose. *Id.*

The necessity limitation also boasts a long and respected pedigree in the historical development of takings jurisprudence. This principle of necessity, like the just compensation requirement, finds its roots in Magna Carta. Historians noted that before Magna Carta, seizure of property to fulfill debts to the Crown was a common practice: "'The sheriff and bailiffs of the district, where [the] deceased's estates lay, were in the habit of seizing everything' to secure the interests of the King" and "'sold chattels out of all proportion to the sum actually due' and often refused to disgorge the surplus." Johnson, *The Ancient Magna Carta & the Modern Rule of Law: 1215 to 2015*, 47 St Mary's L J 1, 47 (2015). Clause 26 of Magna Carta remedied that situation by requiring that when goods were seized to satisfy a debt, "the value of the goods seized had to approximate the value of the debt." *Id*. English law thus recognized "equity" in a person's real and personal property.

Indeed, Blackstone himself, in a passage undoubtedly known to the Founders, summarized the well-understood limitation on tax seizures, stating that "whenever the government seized property for delinquent taxes, it did so subject to an 'implied contract in law to . . . render back the overplus'" if the property was sold to satisfy the delinquency. 2 Blackstone, *Commentaries on the*

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Laws of England (Philadelphia: J.B. Lippincott Co., 1893), p 452. The King was due what he was owed, but nothing more.

Expounding on this principle, Michigan's most renowned jurist, Thomas Cooley, noted in his 1871 *Treatise on Constitutional Limits*—which surveyed the common law of the day—that any appropriations (takings) beyond necessity are illegitimate:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor.

Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown & Company, 2d ed, 1871), p 1147.

IV. *Rafaeli* reaffirmed long-standing principles.

Applying the twin principles that the government must pay for what it takes and can take no more than what it needs means that a government must compensate a landowner for his or her equity in property when it seizes the property for a tax debt. History and experience teach that equity is a protected property interest.

"Property interests, of course, are not created by the Constitution." *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Here, the original understanding of the Takings Clause has always included a property right to recover the surplus from a tax sale—the right to equity in the property. This Court's decision in *Rafaeli* simply reaffirmed that this has always been the case. See *Rafaeli*, 505 Mich at 454–455, citing 1 Cooley, *General Principles of Constitutional Law in*

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the United States (Boston: Little, Brown & Company, 1880), p. 336.

The colonists brought this commonsense limitation on the Crown with them to the New World, the Framers enshrined it in the Fifth Amendment, the first Congress codified it in the Northwest Ordinance, and Michigan's settlers relied on it. Cooley, this time in his treatise on the *Law of Taxation*, summarized the common law of the early Republic regarding tax sales:

> It is not for a moment to be supposed that any statute would be adopted without [payment of surplus equity] or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax is void, and a sale of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.

Cooley, *A Treatise on the Law of Taxation including the Law of Local Assessments* (Chicago: Callaghan and Company, 1876), p 344 (collecting cases). Note that Cooley's conclusion that the power to sell is exhausted when the tax was collected is consistent with the principle that a taking is only constitutional when there is just compensation. Again, equity is property.

CONCLUSION

Taken together, the original understanding of the Fifth Amendment and American common law—the understanding that Michigan's brought with them to the Western Reserve—was that private property was sacrosanct and a source of other fundamental rights. A corollary to that understanding is that equity in land was a form of private property. Accordingly, no government can take that property without just compensation. *Rafaeli* thus did not create some new right. It merely required local governments to recognize what has been the law, in one form or another, since King John met the barons on the field of Runnymede.

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Respectfully submitted,

By: */s/ Thomas J. Rheaume, Jr.*

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Dated: January 17, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief of Amicus Curiae The Buckeye Institute complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Times New Roman), and the word count for this brief is 3,995.

Respectfully submitted,

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