No. 24-1083

In the United States Court of Appeals
for the Third Circuit

EUGENE DAVIS, in his capacity as
Liquidating Trustee of the Venoco Liquidating Trust

Plaintiff-Appellant,

vs.

THE STATE OF CALIFORNIA and
THE CALIFORNIA STATE LANDS COMMISSION

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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Dated: June 7, 2024

/s/ Jeffrey H. Redfern
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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, occupational and educational liberty, and the free exchange of ideas. As part of that mission, IJ litigates cases seeking just compensation for Americans whose property was destroyed or seized by the government. This includes *Devillier v. Texas*, 601 U.S. 285 (2024), in which the Supreme Court unanimously held that the state of Texas could be held liable for takings claims in federal court, and *Valancourt Books, LLC v. Garland*, 82 F.4th 1222 (D.C. Cir. 2023), in which the D.C. Circuit held that the Copyright Act unconstitutionally required publishers to provide the government with free copies of their books. IJ has also litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among these cases are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly

[1] No party's counsel authored any portion of this brief. No party or person—other than Amicus—contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than the U.S. Constitution.

INTRODUCTION

"That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence." *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021). It is also axiomatic in the text, history, and tradition of the Just Compensation Clause. Put simply, "[t]he government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021).

Recently however, some federal courts have ignored this accepted principle and held that *all* exercises of the police power are categorically exempt from Fifth Amendment scrutiny. This is wrong: The Supreme Court has repeatedly rejected calls for a categorical exception because the government was responding to an emergency or public necessity. The question of whether the government owes compensation is fact-dependent and separate from the question of whether the government has a really good reason. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Here, the district court determined that Appellees' exercise of their police power was not a compensable taking, without answering the broader question of what "different contexts" or "background limitations" do not result in compensation. *In re Venoco, LLC*, No. ADV 18-50908 (JTD), 2023 WL 8596325, at

*5 (D. Del. Dec. 12, 2023). Now, this Court should take this opportunity to reject a categorical police power exception to the Fifth Amendment and align Third Circuit jurisprudence with the Supreme Court.

ARGUMENT

I. There is no categorical police power exception to the Just Compensation Clause of the Fifth Amendment.

From founding-era writings to modern Supreme Court jurisprudence, the question of whether the government owes just compensation has always been separate from the question of whether the government is lawfully acting within its police power. *See Loretto*, 458 U.S. at 425 (explaining that regardless of whether a particular governmental action is "within the State's police power . . . . [i]t is a *separate question* . . . whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." (emphasis added)); 1 William Blackstone, *Commentaries* *139–40 (explaining that natural property rights demand "full indemnification," even in cases of "public necessity"). Some federal circuits, however, flout modern Supreme Court precedent as well as text, history, and tradition, by recognizing a categorical police power exception to the Just Compensation Clause. *Compare, e.g.*, *Yawn*, 1 F.4th at 195–96 (rejecting a "per se" police power exception but denying compensation because the county's actions were neither intentional nor foreseeable), *with Johnson v. Manitowoc County*, 635

F.3d 331, 332–33, 336 (7th Cir. 2011) (dismissing Just Compensation claim in three sentences because the county's search of plaintiff's home was a use of police power). This blanket exception does not comport with "background principles of the State's law of property and nuisance," *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992), nor the Just Compensation Clause's policy of "bar[ring the] 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012) (noting that the Court has "rejected" similar arguments about the importance of the public interest "when deployed to urge blanket exemptions from the Fifth Amendment's instruction.").

Amicus expresses no view on whether Appellees' actions ultimately constitute a compensable taking. (Nor do we address whether Appellees' are entitled to compensation under principles of California state law.) We argue only that a categorical police power exception cannot be squared with over one hundred years of binding precedent. Following this precedent, a constitutional claim for just compensation "presupposes that the government has acted" reasonably. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). Said differently, the "touchstone"

of the just compensation analysis is the burden on property rights, not the importance of the governmental objective. *See id.* at 539.

A. Modern Supreme Court precedent rejects a categorical police power exception.

"That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence." *Yawn*, 1 F.4th at 195. Whether the government's action constituted a lawful exercise of the police power "is a separate question" from "whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." *Loretto*, 458 U.S. at 425. The two questions—the lawfulness of the government action and whether compensation is due—are "logically . . . distinct." *Lingle*, 544 U.S. at 543; *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing that lawful exercises of the police power can constitute takings); *First Eng. Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987) ("[The Just Compensation Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.").

"Time and again," the Supreme Court has heard calls for a categorical police power exception. *See Ark. Game & Fish Comm'n*, 568 U.S. at 36. And time

and again, the Court has affirmatively answered: No. As a general proposition, it has rejected "categorical," "blanket," or "automatic exemption[s]" based on the government's assertion that it was pursuing an important interest. *Id.* at 36–38. The "touchstone" for takings analysis is the burden on property rights, not the importance of the governmental objective. *Lingle*, 544 U.S. at 539.

Nevertheless, several federal courts have disregarded Supreme Court precedent and categorically exempted actions pursuant to the police power from Fifth Amendment scrutiny.[2] Under this exception, these courts have essentially imported tort principles into a context where they have no place. To be sure, when government agents are acting lawfully and reasonably, they cannot be held

[2] The Fourth and Fifth Circuits reject a categorical police power exception. *See Yawn*, 1 F.4th at 195; *Baker v. City of McKinney*, 84 F.4th 378 (5th Cir. 2023). The Third, Seventh, Tenth, and Federal Circuits support it, though this Court's unpublished decision is not precedential. *See Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018) (unpublished) (holding plaintiff was not entitled to compensation because the taking was "pursuant to a lawful search warrant"); *Johnson*, 635 F.3d at 336; *Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019) (unpublished); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008); *see also* 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority."). The Sixth Circuit has gone both ways. *Compare Ostipow v. Federspiel*, 824 F. App'x 336, 341 (6th Cir. 2020) (granting qualified immunity because it was not "clearly established" that the police power was subject to the Just Compensation Clause, while acknowledging that the plaintiff's claim as described "has the feel of a taking"), *with Bojicic v. DeWine*, No. 21-4123, 2022 WL 3585636, at *8 (6th Cir. Aug. 22, 2022) ("[N]o appellate court seems to have applied the police-power language so broadly as to categorically declare that no state response to a public-health emergency could be a taking.").

individually liable under tort theories. *See Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) ("[A] military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser."). But the Fifth Amendment is not concerned with wrongdoing (indeed it presumes the opposite); it is concerned with whether individuals are unfairly being asked to shoulder public burdens. *See Armstrong*, 364 U.S. at 49 (The "Fifth Amendment[] . . . bar[s the] 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.").

A categorical police power exception also creates a paradox. Specifically, because "[t]he 'public use' requirement is [] coterminous with the scope of a sovereign's police powers," *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984), such an exception would effectively eliminate all inverse condemnation claims. After all, inverse condemnation claims require that a property owner allege their property was taken for a "public use." But if they do, then their claim, by definition, would fall under the categorical police power exception. So under this approach, there are only two categories of government action—legal actions (for which the government does not owe compensation) and illegal actions (which

could theoretically be enjoined, and for which compensation is due). What's missing is the third category: Lawful action that nonetheless effects a taking.

Of course, "the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, [but] the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." *First Eng.*, 482 U.S. at 316. Take inverse condemnation claims away, and the Just Compensation Clause would only serve to validate the government's implicit eminent domain power, rather than serve as an explicit protection for property rights.

To be clear, Amicus is not arguing that courts must require compensation for *all* exercises of the police power, just as Amicus takes no position on the ultimate question in this case. There may be reasons to deny Fifth Amendment claims grounded in background principles of state property law, or in narrower exceptions within Supreme Court precedent. *See, e.g.*, *YMCA v. United States*, 395 U.S. 85, 92 (1969) (no takings liability where claimant was the "particular intended beneficiary" of government action); *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921) (no takings liability when damage caused by government action could not have been foreseen). For example, in *Yawn*, the Fourth Circuit rejected a categorical police power exception after the county's aerial pesticide spray killed

the property owners' bees, but it ultimately denied compensation because the appropriation was neither intentional nor foreseeable. 1 F.4th at 193, 195–96. The courts on the other side of the circuit split never reach this distinct question. Instead, they abruptly end their analysis after examining the government's objective.

This Court should follow the Supreme Court's "axiomatic" command and explain that federal courts must address the "separate question" of "whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." *Loretto*, 458 U.S. at 425.

B. Text, history, and tradition reject a categorical police power exception.

Although contemporary Supreme Court precedent alone is enough, text, history, and tradition also foreclose any "police power" exception to the Just Compensation Clause. Start with the text. The Just Compensation Clause is unambiguous: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 5. It does not say, "unless the government is acting pursuant to its police power." *See Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) ("The Clause provides: 'Nor shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in

compensation.'" (alteration omitted)). This means that "[t]he government must pay for what it takes." *See Cedar Point*, 594 U.S. at 148.

It is the government's burden to show that any proposed exception to the plain text of the Bill of Rights is grounded in our nation's history and tradition. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17, 24 (2022). The government has not carried that burden. In fact, history forecloses any suggestion that the Just Compensation Clause can be wished away by bare assertions of police power, emergency, or public necessity. As early as 1606, Lord Coke wrote that, when "necessary [for] defence of the realm," the King's agents could invade private property to dig for saltpeter (used to make gunpowder). Still, "after the danger is over," the King's agents had to leave the property "in so good plight as they found it" so that "the owner shall not have prejudice in his inheritance." *The Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 1295 (K.B. 1606).

Several influential legal theorists shared Lord Coke's view. For example, German jurist Samuel Pufendorf wrote: "[T]he supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however that whatever exceeds the just share of its owners must be refunded them by other citizens." 2 Samuel Pufendorf, *De Jure Naturae Et Gentium Libri Octo* 1285 (C.H. Oldfather & W.A. Oldfather, trans. 1934) (1672). Years later, Emer de Vattel similarly explained

that during wartime, when the military intentionally destroys private property, "[s]uch damages are to be made good to the individual, who should bear only his quota of the loss." Emer de Vattel, *The Law of Nations*, bk. III, ch. 15, § 232, at 617 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758). And finally, William Blackstone explained that property rights could not give way to cases of "public necessity"—even when "the legislature indulges with caution," it must give "full indemnification and equivalent for the injury." 1 William Blackstone, *Commentaries* *139–40.

The colonies integrated these views into their legal writings. For example, The Vermont Constitution of 1777 demanded compensation "when necessity requires" the state take property. The 1780 Massachusetts Constitution, too, required compensation "whenever the public exigencies" necessitate a taking.[3] And the Northwest Ordinance of 1787 provided that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

[3] Massachusetts's "reasonable compensation" clause was only added after the proposed 1778 Constitution failed because it did not "adequately protect private property." *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 510 (2004).

The Federal Constitution's Just Compensation Clause is no different. Though there are no recorded congressional debates on the clause, the earliest surviving commentary suggests that its specific purpose was "to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 1 *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* 305–06 (1803). That is, the framers supported compensation with great national emergencies in mind.

None of these framers understood the concept of a state's "police power" as we understand it today. The phrase was first used sparingly in the early to mid-nineteenth century to describe the state's residuary powers under a federalist system. *See generally* Barros, *supra*, at 473–78 (detailing early mentions of the police power in Supreme Court caselaw). But over time, as litigants challenged the validity of the states' growing regulatory authority, the definition evolved into shorthand for the state's regulatory power. *See id.* at 478–84 (chronicling the development of the term). Today, the phrase broadly refers to actions for "[p]ublic safety, public health, morality, peace and quiet, law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

It would be inaccurate to assert the framers intended to include an atextual police power exception when they neither: (1) knew what the phrase "police power" meant, nor (2) denied compensation in cases of necessity or emergency. Should there be any doubt, the Supreme Court has held for over 150 years that the government must pay even if the deprivation was both "in accordance with established law" and "necessary . . . for the public good." *Yates v. City of Milwaukee*, 77 U.S. 497, 504 (1870); *see also United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) ("[P]rivate rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."); *Mitchell*, 54 U.S. (13 How.) at 134 ("Unquestionably . . . the government is bound to make full compensation to the owner; but the officer is not a trespasser.").[4]

[4] Early state courts decisions also provided compensation in cases of necessity or emergency. *See, e.g.*, *Bishop v. Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849) ("[I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be *lawfully* taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases, while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss."); *Hale v. Lawrence*, 21 N.J.L. 714, 729 (1848) ("Whether or not, a law authorizing the destruction of private property for public benefit or safety, is to be esteemed a taking . . . such a law is nevertheless an exercise of the right of eminent domain, and if it makes no provision for compensation to the owner, the law is [] unconstitutional[.]"); *City of New York v.*

And in *Pennsylvania Coal Co. v. Mahon*—still over one hundred years ago—the Court majority explicitly rejected the dissent's call for a categorical police power exception, reasoning: "The protection of private property . . . presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." 260 U.S. at 415; *see also id.* at 416 ("We assume . . . that the [appropriation] was [based] upon the conviction that an exigency existed that would warrant it . . . . But the question at bottom is upon whom the loss of the changes desired should fall."); *id.* at 417 (Brandeis, J., dissenting). The Court further warned: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416. Thus, from the founding era to *Pennsylvania Coal* to modern Supreme Court precedent,

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Lord, 17 Wend. 285, 291 (N.Y. Sup. Ct. 1837) ("[T]he individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defence of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the sufferers would be entitled to compensation[.]"); *Jarvis v. Pinckney*, 21 S.C.L. (3 Hill) 123, 140 (1836) ("[A]s the danger to human life was great, it might be destroyed upon the principle that private property may be taken for the public use[, but] . . . it can only be done upon just compensation.").

the police power question has *always* been separate from the compensation question—whether the government appropriation "goes too far." *Id.* at 415.

C. Any categorical limitations to the Just Compensation Clause are based on longstanding, state common-law principles of property and nuisance.

The Court has repeatedly rejected any "categorical," "blanket," or "automatic exemptions" based on the government's interest. *Ark. Fish & Game Comm'n*, 568 U.S. at 36–38. There is no "magic" or "set" formula for the question of compensation, and the federal circuit courts err in creating one rooted in the state's expansive police power. *See id.* at 31; *Lingle*, 544 U.S. at 538 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

None of this is to say all exercises of the police power constitute a compensable taking. In both *Lucas* and *Cedar Point*, the Supreme Court recognized that a Just Compensation claim is limited by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029; *see also Cedar Point*, 594 U.S. at 160 ("[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."). Under these common-law principles:

> A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the

> State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at 1029.

The *Lucas* Court's focus on nuisance follows basic property law principles. Property owners have a "bundle of rights" over their property. *Id.* at 1027. When the government takes one of these rights, compensation is due. But historically, property owners have never had a right to use their property in a way that sufficiently interferes with the property rights of another. *See id.* at 1022 (citing cases).[5] This use was "*always* unlawful," so the government is not taking any existing property right when it enforces state nuisance law. *See id.* at 1030; *see also Cedar Point*, 594 U.S. at 160 ("[T]he government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place."); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 & n.20 (1987) ("[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin

[5] *See also* James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792), in *James Madison's Writings* 516 (Jack N. Rakove ed., 1999). ("[Property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*"); Giles Jacob, *A New Law Dictionary* (10th ed. London 1782) (defining property to exclude uses that would "injure his neighbour").

the nuisance-like activity."); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (explaining that because "noxious use of [] property" is "not . . . permitted," the government does not owe compensation for nuisance abatement). This focus also aligns with the Court's *Armstrong* policy: If a property owner (rather than the government) violates another's private property rights, the owner (and not society) should bear the cost.

Other limitations may exist under the same principles. For example, when the property would have been inevitably destroyed regardless of government action, no compensation is due. *See Bishop v. Mayor & City Council of Macon*, 7 Ga. 200, 202–03 (1849) ("Where the same extent of loss or injury would have been sustained by the individual, as the necessary consequence of the fire or other public calamity, if his property had not been thus taken or destroyed for the protection of others, he would hardly seem entitled to compensation. For in such case, although others have been benefited, he has in fact sustained no damage."). Nor does the government have to compensate property owners for losses they sustain due to government action that was specifically intended to benefit the owners, with only incidental public benefits. *See YMCA v. United States*, 395 U.S. 85, 92 (1969). In such a situation, the individual is not being forced to bear truly public burdens.

A categorical police power exception does not share the same longstanding common-law background. As discussed above, the concept of the "police power" was entirely foreign to the framers, and its modern definition is not in touch with their recognition of compensation during times of great emergency or necessity.

CONCLUSION

Amicus takes no position on whether Appellees' actions here fall within the "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029; *see also id.* at 1055 n.19 (Blackmun, J., dissenting) (noting the definition of "nuisance" is like an "impenetrable jungle" (citation omitted)). Our position is narrower and follows the Supreme Court: The touchstone of the Fifth Amendment's Just Compensation Clause is the burden on property rights, not the importance of the governmental objective. *See Lingle*, 544 U.S. at 539. Whether articulated as a "police power" exception, "public necessity" exception, or "emergency" exception, the history and tradition of the clause do not support a categorical limitation to compensation because the government has a good, *really* good, or *super* good reason for taking property. *See generally Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.").

This Court should take this opportunity to reject a categorical police power exception to the Fifth Amendment. And it should further explain that federal courts must address the "separate question" of "whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." *Loretto*, 458 U.S. at 425.

Dated: June 11, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify the following:

1. Every attorney whose names appear on the brief is a member of the bar of this court.
2. This brief complies with the type-volume limitation of Rule 29(a)(5) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this petition contains 4,479 words.
3. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Equity A font.
4. A virus detection program has been run on the electronic version of the petition and that no virus was detected. The virus protection program used was Bitdefender Endpoint Security Tools, version 7.9.9.381.
5. An identical copy of this petition was e-filed using the Court's CM/ECF electronic filing system.

/s/ Jeffrey H. Redfern
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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2024, I caused the foregoing BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT to be filed electronically with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Jeffrey H. Redfern
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