

NO. 22-5622

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In The

**Supreme Court of the United States**

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T. MATTHEW PHILLIPS,

*Petitioner,*

v.

AMBER PHILLIPS n/k/a AMBER KORPAK,

*Respondent.*

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On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Eighth Circuit

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**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF QUESTION  
PRESENTED**

Petitioner claims the standard of proof necessary to establish domestic violence in a civil setting is “beyond a reasonable doubt.” The question presented is whether the intermediate standard of proof -- clear and convincing -- is appropriate in custody proceedings when determining whether a parent engaged in domestic violence against the child or the other parent.

**A LIST OF ALL PARTIES TO THE PROCEEDING**

The parties involved are listed in the caption.  
Respondent is a natural person.

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## **JURISDICTIONAL STATEMENT**

Respondent adopts Petitioner's Jurisdictional Statement.

## **RELEVANT STATUTORY PROVISIONS**

### **NRS 33.018 Acts which constitute domestic violence; exceptions.**

1. Domestic violence occurs when a person commits one of the following acts against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:

- (a) A battery.
- (b) An assault.
- (c) Coercion pursuant to NRS 207.190.
- (d) A sexual assault.

(e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:

- (1) Stalking.
- (2) Arson.
- (3) Trespassing.
- (4) Larceny.
- (5) Destruction of private property.
- (6) Carrying a concealed weapon without a permit.
- (7) Injuring or killing an animal.
- (8) Burglary.
- (9) An invasion of the home.

- (f) A false imprisonment.
- (g) Pandering.

**NRS 33.020 Requirements for issuance of temporary and extended orders; availability of court; court clerk to inform protected party upon transfer of information to Central Repository.**

1. If it appears to the satisfaction of the court from specific facts shown by a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence, the court may grant a temporary or extended order. A court shall only consider whether the act of domestic violence or the threat thereof satisfies the requirements of NRS 33.018 without considering any other factor in its determination to grant the temporary or extended order.

2. A temporary or extended order must not be granted to the applicant or the adverse party unless the applicant or the adverse party has requested the order and has filed a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence. If the applicant reasonably believes that disclosing his or her address and contact information in the application would jeopardize his or her safety, the applicant may decline to disclose his or her address and contact information in the application. If the applicant declines to disclose his or her address and contact information in the application, then such information:

(a) Must be disclosed to the court and, for criminal justice purposes, to any other authorized agency of criminal justice to allow the agency of criminal justice to carry out any duty required pursuant to NRS 33.017 to 33.100, inclusive;

(b) Must be maintained in a separate, confidential, electronic document or database which is not publicly accessible; and

(c) Must not be released, disclosed or made accessible to the public, except as authorized by the court.

3. The court may require the applicant or the adverse party, or both, to appear before the court before determining whether to grant the temporary or extended order.

4. A temporary order may be granted with or without notice to the adverse party. An extended order may only be granted after notice to the adverse party and a hearing on the application.

5. A hearing on an application for an extended order must be held within 45 days after the date on which the application for the extended order is filed. If the adverse party has not been served pursuant to NRS 33.060 or 33.065 and fails to appear at the hearing, the court may, upon a showing that law enforcement, after due diligence, has been unable to serve the adverse party or that the adverse party has sought to avoid service by concealment, set a date for a second hearing which must be held within 90 days after the date on which the first hearing was scheduled.

6. If the adverse party has not been served pursuant to NRS 33.060 or 33.065 and fails to appear on the date set for a second hearing on an application for an extended order pursuant to subsection 5, the court may, upon a showing that law enforcement, after due diligence, has been unable to serve the adverse party or that the adverse

party has sought to avoid service by concealment, set a date for a third hearing which must be held within 90 days after the date on which the second hearing was scheduled.

7. The court shall rule upon an application for a temporary order within 1 judicial day after it is filed.

8. If it appears to the satisfaction of the court from specific facts communicated by telephone to the court by an alleged victim that an act of domestic violence has occurred and the alleged perpetrator of the domestic violence has been arrested and is presently in custody pursuant to NRS 171.137, the court may grant a temporary order. Before approving an order under such circumstances, the court shall confirm with the appropriate law enforcement agency that the applicant is an alleged victim and that the alleged perpetrator is in custody. Upon approval by the court, the signed order may be transmitted to the facility where the alleged perpetrator is in custody by electronic or telephonic transmission to a facsimile machine. If such an order is received by the facility holding the alleged perpetrator while the alleged perpetrator is still in custody, the order must be personally served by an authorized employee of the facility before the alleged perpetrator is released. The court shall mail a copy of each order issued pursuant to this subsection to the alleged victim named in the order and cause the original order to be filed with the court clerk on the first judicial day after it is issued.

9. In a county whose population is 52,000 or more, the court shall be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 8.

10. In a county whose population is less than 52,000, the court may be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 8.

11. The clerk of the court shall inform the protected party upon the successful transfer of information concerning the registration to the Central Repository for Nevada Records of Criminal History as required pursuant to NRS 33.095.

12. As used in this section, “agency of criminal justice” has the meaning ascribed to it in NRS 179A.030.

**NRS 125C.0035 Best interests of child: Joint physical custody; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.**

1. In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child. If it appears to the court that joint physical custody would be in the best interest of the child, the court may grant physical custody to the parties jointly.  
\* \* \*

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.

(b) Any nomination of a guardian for the child by a parent.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

(l) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.

5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking physical custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint physical custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

\* \* \*

10. As used in this section:

(a) “Abduction” means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

(b) “Domestic violence” means the commission of any act described in NRS 33.018.

**NRS 125C.230 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.**

1. Except as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

## STATEMENT OF THE CASE

Todd Matthew Phillips (“Phillips”) challenges the Nevada Supreme Court’s decision to affirm a December 19, 2020 Decision and Order (“Order”) issued by the Family Division of Nevada’s Eighth Judicial District Court. The case concerned physical custody, legal custody, and visitation of the minor child of Amber Phillips n/k/a Amber Korpak (“Korpak”) and Phillips born on November 8, 2005 (“Son”).

While the limited case-specific facts provided in Phillips’ Statement of Facts are largely correct, there are several important and revealing omissions. One overt error is that the Trial Court conducted a two-day trial, December 20, 2019, and October 19, 2020, rather than a single day.

More importantly, Phillips did not comply with Supreme Court Rule 14 (1)(i)(i) because he did not provide a complete, or even adequate, record of the proceedings or findings made by the Nevada courts. Phillips only provides two (2) pages of the sixty-eight (68) page Trial Court’s Order (one of which is the caption). He did not provide the temporary order of protection (“TPO”) or extended protection order (“EPO”) issued by the hearing master, or the order of the district court judge assigned to the case (“PO Court”) adopting these findings.

The following critical facts supplement those provided by Phillips:

On September 16, 2018, Korpak and Son moved out of the marital residence after verbal/emotional abuse by Phillips. See RespAppx 79-82, 104. This was done under supervision of the local police who were called when



Phillips confronted Son about his desire to leave with Korpak. RespAppx 81-82.

On or about September 17, 2018, before the separate divorce proceedings were commenced, Korpak filed a request for a TPO pursuant to NRS 33.020. RespAppx 70-71. Under Nevada law a TPO may be issued if a hearing master (“Master”) finds an act of domestic violence has occurred or there exists a threat of domestic violence. The qualifying acts of domestic violence are enumerated in NRS 33.018.

The Master was satisfied an act of domestic violence occurred and issued the TPO. RespAppx 71, 1-5. On October 8, 2018, Korpak filed a request to extend the TPO. RespAppx 71. After providing notice, on November 2, 2018, the Master held an evidentiary hearing. RespAppx 6-8. The Master found Phillips engaged in conduct of control and dominance sufficient to constitute acts of domestic violence. RespAppx 72-74, 9-17. Based on the findings, the Master issued an EPO effective until September 17, 2019. *Id.*

Phillips objected to the EPO and requested a new trial, but the EPO was adopted by the PO Court the following year. RespAppx 21-33, 74-75. The PO Court also denied Phillips’ request for a new trial. *Id.* Phillips’ subsequent appeals to the Nevada Supreme Court were dismissed. RespAppx 34-35, 36, 40-41, 75. The record does not indicate Phillips violated either the TPO or EPO, so Phillips was never charged with a crime associated with the findings of the Master or the PO Court.

On October 5, 2018, Korpak filed for divorce from Phillips in the Family Division of the District Court

(“Trial Court”). Plaintiff’s Appendix E. The Trial Court issued interim orders regarding child custody, visitation, insurance, and child support. See RespAppx 43-45, 68-70. The Trial Court also ordered reunification therapy for Phillips and Son which included visits at Donna’s House.<sup>1</sup> *Id.* Phillips refused the visits at Donna’s House and the reunification therapy. *Id.*, see also RespAppx 46-50. The parties were divorced on September 27, 2019. RespAppx 51-64, 68-69. Subsequent proceedings with the Trial Court focused on child custody and visitation. RespAppx 69.

The trial was held over two days, December 20, 2019, and October 19, 2020.<sup>2</sup> RespAppx 67. The Trial Court’s subsequent Decision and Order was filed on December 19, 2020. RespAppx 67-135. When issuing orders regarding child custody and visitation, the Trial Court was required to consider the best interests of the child. NRS 125C.0035. As part of this analysis, the Trial Court was required, pursuant to NRS 125C.0035(6) and NRS 125C.230(1), to determine whether a parent engaged in one or more acts of domestic violence against the child

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<sup>1</sup> Donna’s House Central (“Donna’s House”) is a Family and Child Treatment Program sponsored by the 8th Judicial District Court-Family Division. Donna’s House provides supervised visitation and exchange services for custodial and non-custodial parents. Donna’s House provides a safe, neutral, and child friendly environment for non-custodial parents to initiate, reunite, or to continue in a relationship with their children.

<sup>2</sup> The long gap was owing to COVID-19 and several interim motions filed by Phillips.

or a parent of the child. NRS 125C.0035(10)(b) defines domestic violence as “the commission of any act described in NRS 33.018.” If the Trial Court finds clear and convincing evidence a parent engaged in such domestic violence, there is a rebuttable presumption that joint custody is not in the best interest of the child. NRS 125C.230.

In the Order, the Trial Court found Phillips engaged in multiple acts of domestic violence against Korpak relying, in limited part, on the EPO.<sup>3</sup> RespApp 110, *see also* 106-110 (listing the numerous acts). The Trial Court also relied upon testimony and additional evidence presented during the two-day evidentiary hearing. RespAppx 68-97, 102-111. The Trial Court found clear and convincing evidence Phillips engaged in acts of domestic violence not only against Korpak but also against the Son.<sup>4</sup> RespAppx 110-111, 114, 115, 116. As such, Korpak was awarded sole legal and primary physical custody of Son. RespAppx 132. Phillips was ordered to enroll with a reunification therapist. RespAppx 132-133. Phillips could call Son twice a week and Son could freely call Phillips. RespAppx. 132.

The Order was ultimately appealed to the Nevada Supreme Court which found the Trial Court properly applied Nevada law and the factual determinations were supported by the record. Plaintiff’s Appendix B, Plaintiff’s Appendix A. As such, Phillips’ appeal was

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<sup>3</sup> The Trial Court specifically indicated: “The Court does not solely rely on the protective order proceedings.” RespAppx 106.

<sup>4</sup> Neither the TPO nor the EPO found Phillips engaged in domestic violence against the Son.

dismissed. *Id.* Phillips then petitioned this Court for a writ of certiorari.

Despite Phillips being found to have engaged in domestic violence, Phillips admits he was never arrested, charged with a crime, or indicted, yet he claims he was convicted of a crime. Nothing in the record indicates the Order, the EPO, or the TPO have been used against Phillips in any kind of criminal proceeding. Likewise, the record is devoid of any indication Phillips was indicted, arrested, confined, or had to pay a criminal fine owing to Order, the EPO, or the TPO. Pursuant to Nevada law, the TPO and EPO must be sent to Central Repository for Nevada Records of Criminal History, but the record does not indicate Phillips has a record of a criminal conviction. Regardless, neither the EPO nor the TPO was the subject of the Nevada Supreme Court decision upon its review of the Trial Court's Order.

## **SUMMARY OF THE ARGUMENT**

After a full evidentiary hearing on Korpak's request for an extended order of protection the Master issued a decision under Nevada law and found that Phillips engaged in acts of domestic violence against his then wife, Korpak. This decision was upheld by the PO Court and the Nevada Supreme Court.

Later, as part of a separate divorce proceeding, the Trial Court conducted a two-day trial to establish custody and visitation of Son. Under Nevada law, the Trial Court was required to evaluate whether a parent had engaged in an act of domestic violence against the child or a parent of the child. Such a finding, based on clear and convincing

evidence, would raise a presumption the offending parent should not have sole or joint custody.

In the Order issued after the trial, the Trial Court found the testimony and evidence (including the TPO and EPO) clearly and convincingly established Phillips had engaged in multiple acts of domestic violence against Son and Korpak.

As both Phillips and Korpak have equal constitutional rights regarding their son, the best interest of the child standard is properly applied to set custody and visitation. The state has urgent interest in the welfare of the child, so may promulgate appropriate regulation. In Nevada, the legislature requires the courts to take prior acts of domestic violence into consideration when evaluating the best interests of the child.

Phillips' liberty was not at stake in the civil proceedings, but a substantial and important individual interest was at stake. In such circumstances, this Court permits a clear and convincing burden of proof to be used. This is the exact standard Nevada uses when determining whether a parent has engaged in domestic violence.

While Phillips' actions were deplorable, he was never charged, arrested, indicted, tried, or convicted based on any crime associated with the domestic violence found by either court. As such, Phillips' characterization of the questions presented is based on an inaccurate premise. Thus, the questions posed by Phillips are not at issue.

## **ARGUMENT**

The issues raised by Phillips are not novel and this Court's intervention is not needed as the Nevada statutes

fully comply with the federal Constitution and the decisions of the Court.

Both parents generally have co-equal fundamental constitutional rights to co-parent their children to the extent reasonably possible under the circumstances. *Troxel v. Granville*, 530 U.S. 57, 65-67, 120 S. Ct. 2054, 2059-61, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S. Ct. 1208, 1212-13, 31 L.Ed.2d 551 (1972).

As neither Phillips nor Korpak were determined to be an unfit parent prior to the Trial Court's decision, the fundamental constitutional right to the care and custody of the children is equal. *Rico v. Rodriguez*, 121 Nev. 695, 705, 120 P.3d 812, 818 (2005) citing *McDermott v. Dougherty*, 385 Md. 320, 353, 869 A.2d 751, 770 (2005). Since the fundamental interests of both parties are identical, the dispute in such cases can be resolved best, if not solely, by applying the best interest of the child standard. *Id.*

The State has an urgent interest in the welfare of the child. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981); *Stanley, supra*, 405 U.S. at 652, 92 S. Ct. at 1213. As such, the well-being of its children is within the State's constitutional power to regulate. *Ginsberg v. State of N. Y.*, 390 U.S. 629, 639, 88 S. Ct. 1274, 1280, 20 L. Ed. 2d 195 (1968). This Court recognizes parental visitation and custody rights may be modified based on the "best interests of the child." See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 555, 54 L. Ed. 2d 511 (1978) (holding natural father's substantive rights under due process clause were not violated by application of the

“best interests of the child” standard when allowing adoption by stepfather); *see also Troxel, supra*, 530 U.S. at 57, 120 S. Ct. at 2054, 147 L. Ed. 2d at 49 (holding court may order visitation rights for any person when visitation serve the best interest of child).

While this Court has repeatedly ruled a parent has an interest of in the companionship, care, custody, and management of his or her children, *see, e.g., Stanley, supra*, 405 U.S. at 651, 92 S. Ct. at 1212, it has also ruled the State has a legitimate interest as well. *Id.* Further, the federal government considers child custody proceedings to be civil in nature. *See e.g.* Servicemembers Civil Relief Act, 50 U.S.C.A. § 3932. *See also Lassiter, supra*, 452 U.S. at 25–26, 101 S.Ct. at 2159 (“[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.”).

When the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money, this Court permits the use of the intermediate standard of proof -- clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 756–57, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982). This level of certainty is necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with “a significant deprivation of liberty” or “stigma.” 441 U.S., at 425, 426, 99 S.Ct., at 1808, 1809. *See, e. g., Addington v. Texas*, *supra* (civil commitment); *Woodby v. INS*, 385 U.S., at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States*,

320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

Nevada enacted NRS 125C.0035 to guide courts in determining the best interests of the child regarding custody. NRS 125C.0035(4)(k) requires the court to consider: “Whether either parent [] seeking physical custody has engaged in an act of domestic violence against the child [or] a parent of the child [].” The definition of domestic violence is contained in NRS 33.018. This statute uses terms such as battery and assault to describe domestic violence and, regarding coercion, references a criminal statute. Borrowing the definition used in a criminal statute does not convert the proceeding to a criminal action, however, as Phillips’ liberty was never at issue.

Before a parent is found to have engaged in an act of domestic violence, NRS 125C.0035(5) requires the court hold an evidentiary hearing and find by clear and convincing evidence the acts of domestic violence occurred. If the court makes such a finding, it is only a rebuttable presumption that sole or joint physical custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. If there is a finding of domestic violence NRS 125C.0035(5) mandates the court make findings “that the custody or visitation arrangement ordered by the court adequately protects the child.”

The Trial Court held a two-day evidentiary hearing over 11 months. Phillips actively and substantively participated in both hearings. The Trial Court then issued the 68-page Order detailing the basis for its findings and rulings. The Trial Court expressly found clear and convincing evidence that Phillips committed



multiple acts of domestic violence against Korpak and Son and expressly stated which acts the Trial Court found consisted domestic violence.

Based on these findings, the Trial Court granted Korpak sole legal and primary physical custody. The Trial Court did not eliminate Phillips' right to visitation, but, consistent with the mandate of NRS 125C.0035(5)(b), established reasonable visitation limitations. The Trial Court attempted to facilitate reunification between Phillips and Son by ordering reunification therapy. Phillips, however, has refused to participate.

There is nothing in the record to indicate the Order, the EPO, or the TPO has been used against Phillips in any kind of criminal proceeding, and, likewise, the record is devoid of any indication Phillips was indicted, arrested, confined, or paid a criminal fine owing to the Order, the EPO, or the TPO. As such, Phillips' discussion of U.S. Const. amend. V, U.S. Const. amend. VI, and Nev. Const. art. I, § 8 are simply inapplicable. Indeed, since there is nothing in the record to indicate Phillips is the subject of a criminal action or at risk of incarceration on the basis of the civil proceedings before the PO Court and the Trial Court, Phillips seeks nothing more than an advisory opinion from this Court.

As noted above, the use of the "clear and convincing" standard at a two-day evidentiary hearing to determine custody and visitation plainly meets the due process requirements set forth by this Court. As noted by the Nevada Supreme Court in the decision in this case, there is no right to a jury trial in child custody cases. *In re Parental Rts. as to M.F.*, 132 Nev. 209, 213, 371 P.3d 995, 998 (2016). Finally, there is no indication in the record

Phillips was treated any differently than any other civil party or criminal defendant.

**CONCLUSION**

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Dated this 18<sup>th</sup> day of October, 2022.

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**CERTIFICATE OF WORD COUNT**

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Brief in Opposition to Petition for a Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 4,451 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

Dated this 18<sup>th</sup> day of October, 2022.

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