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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

23-1690

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**UNITED STATES OF AMERICA,**

Appellee,

v.

**MICHAEL RYAN COULSON,**

Appellant.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
HONORABLE LEONARD T. STRAND, CHIEF U.S. DISTRICT COURT JUDGE*

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**APPELLANT'S BRIEF**

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## **SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT**

Appellant Michael Ryan Coulson is required to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”). He pled guilty to failing to comply with that obligation.

At sentencing, the district court concluded that Mr. Coulson is a Tier III offender—the tier reserved for offenders with the most serious prior convictions. That decision increased Mr. Coulson’s base offense level, his guideline range, and, ultimately, his prison sentence. Mr. Coulson appeals this erroneous sentencing decision.

Mr. Coulson requests oral argument. Unlike other circuits, this Court has not had the opportunity to issue a published decision on whether the categorical approach applies in interpreting SORNA’s tier classifications, so the decision in this case could have a broad impact. An offender’s tier classification not only affects his guideline sentencing range upon conviction for violating SORNA; it also affects for how long he must register as a sex offender in the first place. Mr. Coulson suggests 10 minutes of oral argument per side.

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## **JURISDICTIONAL STATEMENT**

The decision appealed: Mr. Coulson appeals from the judgment entered against him in the U.S. District Court for the Northern District of Iowa.

Jurisdiction of the court below: The district court had jurisdiction over all aspects of Mr. Coulson's prosecution under 18 U.S.C. § 3231, because he was charged with an offense against the laws of the United States.

Jurisdiction of this Court: This Court has jurisdiction over Mr. Coulson's appeal under 28 U.S.C. § 1291, which provides for jurisdiction over a final decision from a U.S. District Court.

The district court entered the judgment on April 10, 2023. (R. Doc. 32; Add., pp. 1-7.) Mr. Coulson's timely notice of appeal was filed on April 11, 2023. (R. Doc. 34.)

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND  
MOST APPOSITE AUTHORITIES**

(1) Whether the categorical approach applies to determine a sex offender's tier classification under SORNA; and

Most Apposite Authorities: *United States v. Walker*, 931 F.3d 576 (7th Cir. 2019); *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118 (10th Cir. 2015).

(2) Whether the district court erred by concluding that Mr. Coulson is a Tier III sex offender.

Most Apposite Authorities: No particularly apposite cases.

## STATEMENT OF THE CASE

In 2013, Michael Coulson was convicted at court martial of forcible pandering, in violation of Article 120c(b) of the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. § 920c(b). (PSR ¶¶ 5, 24; Sentencing Ex. A (R. Doc. 29-2); Sentencing Ex. 1 (R. Doc. 30-1); Sentencing Ex. 2, p. 1 (R. Doc. 30-2).) The victim of his offense was an “adult female.” (PSR ¶ 24.)

Thereafter, Mr. Coulson traveled across state lines to Iowa, where he failed to register as a sex offender, as required by SORNA. Consequently, a grand jury in the Northern District of Iowa returned an indictment charging him with failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). (R. Doc. 3.) Mr. Coulson pled guilty to the offense without a plea agreement. (R. Doc. 19; R. Doc. 20; R. Doc. 22.)

SORNA classifies sex offenders by tiers, which are based on the nature of the predicate sex offense. The offender’s tier governs for how long he must register: a Tier I offender is required to register for 15 years; a Tier II offender is required to register for 25 years; and a Tier



III offender is required to register for life, with the possibility of a reduction for a “clean record.” 34 U.S.C. §§ 20915(a)-(c).

Of particular significance to this appeal, the offender’s tier also dictates his base offense level under the U.S. Sentencing Guidelines upon conviction for violating SORNA, *see* USSG § 2A3.5 comment. n.1, and thus it has a significant impact on his guideline sentencing range. A Tier I has a base offense level of 12; a Tier II offender has a base offense level of 14; and a Tier III offender has a base offense level of 16. USSG § 2A3.5(a).

At sentencing in Mr. Coulson’s case, the parties disagreed as to the tier in which he fell. The government argued that Mr. Coulson was a Tier III offender on the theory that “his underlying offense is comparable to the offense of sexual abuse in violation of 18 U.S.C. § 2242(1)” (R. Doc. 30, pp. 5-6), which is enumerated in SORNA as an offense leading to Tier III designation. 34 U.S.C. § 20911(4)(A)(i). For his part, Mr. Coulson argued that he was a Tier I offender because, among other reasons, the forcible pandering offense “includes conduct that is not a sex act, as required under 18 U.S.C. §§ 2241 and 2242.” (R. Doc. 29-1, p. 6.) The district court received into evidence a Report of

Result of Trial from Mr. Coulson's court martial (Exhibits A and 1, R. Doc. 29-2, R. Doc. 30-1), as well as a decision from the Air Force Court of Appeals affirming Mr. Coulson's conviction and approving of the instructions provided to the triers of fact in the court martial. (Exhibit 2, R. Doc. 30-2).

The district court ruled that Mr. Coulson was a Tier III offender.<sup>1</sup> The court concluded that it must apply the categorical approach to determine Mr. Coulson's tier. Applying the categorical approach, the court concluded that forcible pandering under the UCMJ is comparable to sexual abuse under 18 U.S.C. § 2242(1). In so ruling, the district court acknowledged that although Article 120c(b) of the UCMJ covers more conduct than § 2242(1), the difference was not sufficiently meaningful to make a difference. On the other hand, the district judge said that Mr. Coulson made a "great argument" and conceded that he could have simply "flipped a coin" because it was such a difficult decision.

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<sup>1</sup> A transcript of the district court's oral ruling appears in the addendum. (Add., pp. 8-15).

After deciding the base offense level, the district court found that Mr. Coulson's guideline range was 24-30 months' imprisonment. (Sentencing Tr., p. 19.) The court imposed a sentence of 24 months' imprisonment, to be followed by a five-year term of supervised release. (*Id.*, pp. 23-24; *see also* Add., pp. 2-3; R. Doc. 32, pp. 2-3.)

The district court entered judgment against Mr. Coulson on April 10, 2023. The next day, he filed a timely notice of appeal.

## SUMMARY OF ARGUMENT

The district court erred by sentencing Mr. Coulson as a Tier III offender. The court concluded that Mr. Coulson's conviction for forcible pandering under the UCMJ is comparable to sexual abuse under 18 U.S.C. § 2242(1). But the offenses are not comparable because the forcible pandering offense encompasses sexual contact, which includes touching over the clothing. By contrast, § 2242(1) does not encompass sexual contact that does not amount to a sexual act. In fact, Mr. Coulson is a Tier I offender who is entitled to resentencing with a lower guideline range.

## ARGUMENT

Mr. Coulson argues that the district court committed procedural error in setting his base offense level and, ultimately, his guideline range. This Court reviews the legal issues presented *de novo*. See *United States v. Lowry*, 595 F.3d 863, 865 (8th Cir. 2010).

A “sex offender” under SORNA is “an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). A “sex offense,” in turn, means the following:

(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18; (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

*Id.* § 20911(5)(A). As noted, SORNA classifies sex offenders by tiers depending on the severity of their offense. Tier III is the designation reserved for sex offenders convicted of the most serious sex offenses. SORNA defines a Tier III sex offender as follows:

a sex offender whose offense is punishable by imprisonment for more than 1 year and –

- (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
  - (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
  - (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
- (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
- (C) occurs after the offender becomes a tier II sex offender.

*Id.* § 20911(4). At the next rung down, SORNA defines a Tier II sex offender as follows:

a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

- (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
  - (i) sex trafficking (as described in section 1591 of title 18);
  - (ii) coercion and enticement (as described in section 2422(b) of title 18);
  - (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a) of title 18);
  - (iv) abusive sexual contact (as described in section 2244 of title 18);
- (B) involves –
  - (i) use of a minor in a sexual performance;
  - (ii) solicitation of a minor to practice prostitution; or
  - (iii) production or distribution of child pornography; or
- (C) occurs after the offender becomes a tier I sex offender.

*Id.* § 20911(3). A Tier I offender is a “sex offender other than a tier II or tier III offender.” *Id.* § 20911(2).

Resolving Mr. Coulson’s appeal requires answering two questions: *First*, what is the correct approach for deciding whether forcible pandering under the UCMJ “is comparable to or more severe than” sexual abuse under 18 U.S.C. § 2242(1)? *Second*, using that approach, to which tier does Mr. Coulson belong?

As explained below, the district court correctly answered the first question, but was incorrect on the second.

**I. CONSISTENT WITH THE RULINGS OF OTHER COURTS, THE DISTRICT COURT CORRECTLY RULED THAT THE CATEGORICAL APPROACH APPLIES TO COMPARE A PRIOR OFFENSE TO THE OFFENSES LISTED IN SORNA.**

As a district court in this Circuit has explained:

Federal courts generally use one of two analytical approaches when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, like SORNA. One is the “categorical approach,” which compares the “elements” of a prior offense with the elements of the listed offense. This approach disregards the facts, or “means,” of a prior conviction and focuses on the elements of the crimes at issue. Only if the elements of the prior offense are the same as, or narrower than, the elements of the listed offense, does the prior offense qualify as the listed offense. The other approach, called “circumstance-specific,” requires a court to consider

the facts behind the offense of conviction and ask if the offense, as committed, satisfies the elements of the listed offense.

*United States v. Church*, 461 F. Supp. 3d 875, 882 (S.D. Iowa 2020) (citations omitted). This Court has not decided<sup>2</sup> whether the categorical approach applies in this particular context.<sup>3</sup>

District courts in this Circuit have, however, applied the categorical approach when determining whether a defendant's prior conviction "is comparable to or more severe than" one of the offenses listed in § 20911(3)(A) or § 20911(4)(A). See *United States v. Burchell*, No. 4:21-cr-40025, 2021 WL 3726899, at \*4-5 (D.S.D. Aug. 23, 2021) (unpublished); *United States v. Laney*, No. CR20-3053-LTS, 2021 WL

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<sup>2</sup> In *United States v. Hall*, 772 F. App'x 375, 375 (8th Cir. 2019) (unpublished), this Court suggested (without deciding) that the categorical approach applies.

<sup>3</sup> *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016), held that the circumstance-specific approach applies in resolving whether a prior offense involves "conduct that by its nature is a sex offense against a minor" under a different provision of SORNA. In *Hill*, however, this Court "had no occasion to address whether a circumstance-specific or categorical approach applies to the three tier classifications set forth in § 16911(2), (3), and (4)." *United States v. Mulverhill*, 833 F.3d 925, 929 (8th Cir. 2016) (ultimately declining to "wade into the quagmire of which approach applies to the three tier classifications").



1821188, at \*6 (N.D. Iowa May 6, 2021) (unpublished); *Church*, 461 F. Supp. 3d at 883.

And several circuits have also applied the categorical approach in this context as well. *See United States v. Walker*, 931 F.3d 576, 579 (7th Cir. 2019) (Barrett, J.); *United States v. Barcus*, 892 F.3d 228, 231-32 (6th Cir. 2018); *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017); *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1, 5-6 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118, 1134-36 (10th Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014).<sup>4</sup> This Court should join these courts for at least the following reasons.

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<sup>4</sup> Some provisions in SORNA describe a generic offense and an additional age requirement. For instance, 34 U.S.C. § 20911(4)(A)(ii) states that an offense comparable to abusive sexual contact under 18 U.S.C. § 2244 is a Tier III offense, but only when the victim had not yet attained 13 years of age. For such provisions, some courts have held that a “hybrid” approach applies, requiring a court to use the categorical approach to compare the elements of the predicate offense with the offense listed in SORNA, and then a circumstance-specific approach to determine whether the offense involved a victim of a certain age. *See Walker*, 931 F.3d at 580 (collecting cases). Whether this hybrid approach is appropriate is not at issue here, because this case involves merely comparing the elements of forcible pandering under the UCMJ with the elements of sexual abuse under 18 U.S.C.

*First*, SORNA requires a court to compare the predicate “offense” with specific “offenses” described in the U.S. Code. “The Supreme Court has indicated that a reference to a corresponding section of the criminal code strongly suggests a generic intent.” *White*, 782 F.3d at 1132 (citing *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009)); *see also Walker*, 931 F.3d at 579. For instance, in *Nijhawan*, the Supreme Court considered the definition of the term “aggravated felony” in federal immigration law, 8 U.S.C. § 1101(a)(43). Where § 1101(a)(43) “refer[s] specifically to an ‘offense described in’ a particular section of the Federal Criminal Code,” the Court stated that it “must refer to generic crimes.” 557 U.S. at 37.<sup>5</sup> Likewise, SORNA’s references to “offense” must mean a generic offense.

*Second*, practical considerations support application of the categorical approach in this context. “By using a categorical approach

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§ 2242(1). In any event, Mr. Coulson’s prior conviction did not involve a minor.

<sup>5</sup> Similar to *Walker* and the cases cited therein, however, the Supreme Court held that the circumstance-specific approach applies where a provision adds an additional qualifier. Specifically, the Court held that a court should look to the underlying facts to determine whether a prior conviction was for “an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000*,” 8 U.S.C. § 1101(a)(43)(M)(i) (emphasis added). 557 U.S. at 40.

for the comparison between the defendant's offense and the listed federal statute, the court will avoid many of the problems with a circumstance-specific approach identified by the Supreme Court." *White*, 782 F.3d at 1135 (citing *Taylor v. United States*, 495 U.S. 575, 600-02 (1990)). By focusing exclusively on elements, the categorical approach eliminates the possibility of resource-draining mini-trials on the defendant's past conduct. It also "gives the defendant most of the benefits of a plea bargain, strictly confines the need to consult documents from a prior proceeding, and avoids the inequity of relying on allegations of the indictment where the defendant may have had no reason to challenge those assertions." *Id.*

Accordingly, consistent with the rulings from other courts, this Court should apply the categorical approach to compare Mr. Coulson's UCMJ conviction with the elements of 18 U.S.C. § 2242(1). *See Walker*, 931 F.3d at 582 (vacating defendant's conviction because the district court erroneously concluded that he was a Tier III offender, when applying the categorical approach resulted in the conclusion that the defendant was a Tier I offender whose obligation to register had expired).

**II. FORCIBLE PANDERING UNDER THE UCMJ ENCOMPASSES SEXUAL CONTACT, AND SEXUAL ABUSE UNDER 18 U.S.C. § 2242(1) DOES NOT; THUS, THE OFFENSES ARE NOT COMPARABLE.**

Now for comparing the elements of forcible pandering under the UCMJ with the elements of sexual abuse under 18 U.S.C. § 2242(1), which appears in Chapter 109A of the U.S. Code. This is where the district court erred.

As noted, Mr. Coulson incurred his forcible pandering conviction under Article 120c(b) of the UCMJ, which provides as follows: “Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.” 10 U.S.C. § 920c(b).<sup>6</sup> An “act of prostitution” means “a sexual act or sexual contact (as defined in section 920(g) of this title (article 120(g))) on account of which anything of value is given to, or received by, any person.” 10 U.S.C. § 920c(d)(1). Note the inclusion of *both* “sexual act” *and* “sexual contact.”

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<sup>6</sup> All citations to the UCMJ are to the 2012 version in effect when Mr. Coulson committed his prior offense.

At the time of Mr. Coulson's prior offense, the UCMJ defined "sexual act" as follows:

- (A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
- (B) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920(g)(1). The term "sexual contact" was defined as follows:

- (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or
- (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

10 U.S.C. § 920(g)(2). The triers of fact in Mr. Coulson's court martial were instructed that either a sexual act or sexual contact sufficed for conviction. They were also provided definitions for sexual

act and sexual contact that were consistent with the foregoing statutory definitions. (*See* R. Doc. 30-2, pp. 3-4 n.3.)

In this case, the district court accepted the government’s argument that the elements of the forcible pandering offense were comparable to sexual abuse under 18 U.S.C. § 2242(1), which provides as follows:

Whoever . . . knowingly—

- (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping);

. . . .

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

18 U.S.C. § 2242(1). Like the UCMJ, Chapter 109A distinguishes between a “sexual act” and “sexual contact.” The term “sexual act” for purposes of Chapter 109A means the following:

- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

18 U.S.C. § 2246(2). The term “sexual contact” under Chapter 109A “means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

There is an unambiguous mismatch between forcible pandering under the UCMJ and sexual abuse under § 2242(1): forcible pandering encompasses compulsion to engage in *either* a sexual act *or* sexual contact; sexual abuse under § 2242(1) encompasses *only* a sexual act and *not* sexual contact. In other words, a person commits the crime of forcible pandering by compelling another person to submit to touching through the clothing for sexual gratification or to abuse, humiliate, or

degrade the person. On the other hand, touching through clothing is not a sexual act, as defined in Chapter 109A of the U.S. Code, and thus it is not sexual abuse under § 2242(1). Thus, contrary to the district court's ruling, forcible pandering under the UCMJ is not, in fact, comparable to sexual abuse under § 2242(1).<sup>7</sup>

This is a distinction with a difference. Although “it is obvious that any sexual act will necessarily involve sexual contact,” *United States v. Two Bulls*, 940 F.2d 380, 381 (8th Cir. 1991), it is just as obvious that not all sexual contact is a sexual act. Indeed, abusive sexual contact that falls short of a sexual act is a separate crime under 18 U.S.C. § 2244. That separate crime carries lesser penalties than § 2242—a recognition that abusive sexual contact is generally not as grave as sexual abuse involving an illegal sexual act.

To the extent Mr. Coulson's sex offense is comparable to § 2244, he is still a Tier I offender. An offense comparable to abusive sexual contact is a Tier III offense only when committed “against a minor who

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<sup>7</sup> The PSR suggested that Mr. Coulson's offense was also comparable to aggravated sexual abuse under 18 U.S.C. § 2241 (PSR ¶ 24), but that offense also does not encompass sexual contact. The district court did not rely on a comparison with § 2241 in its ruling.



has not attained the age of 13 years.” 34 U.S.C. § 20911(4)(a)(ii). An offense comparable to abusive sexual contact is a Tier II offense only when committed against a minor—in other words, a child 13 years or older. *See* 34 U.S.C. § 20911(3)(a)(iv). The age of the victim is not an element of the forcible pandering offense (and, in any event, the victim of Mr. Coulson’s offense was an adult), so even if it is comparable to § 2244, it does not fall under Tier II or III.

\* \* \*

In sum, this Court should apply the categorical approach to compare the crime of forcible pandering under the UCMJ with the offense of sexual abuse under 18 U.S.C. § 2242(1). This requires a focus on elements, and not on the facts of the predicate conviction.

Looking at the elements, the crime of forcible pandering encompasses compulsion to engage in a sexual act *or sexual contact*. The crime of sexual abuse under 18 U.S.C. § 2242(1) encompasses only causing a sexual act. This material distinction is clear and unambiguous from the statutory provisions at issue.

Accordingly, the district court erred by sentencing Mr. Coulson as a Tier III offender.

## CONCLUSION

For the foregoing reasons, this Court should vacate the judgment against Mr. Coulson and remand for resentencing with instructions to apply the guidelines to reflect his status as a Tier I offender.

Respectfully submitted,

*/s/ Brad Hansen*

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## CERTIFICATE OF FILING AND SERVICE

I certify that on June 29, 2023, I electronically filed this brief and an addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I scanned the brief and the addendum for viruses using Trend Micro Apex 14.0.11564.

I further certify that, on \_\_\_\_\_, 2023, after the Court approved the brief and addendum, I sent via FedEx ten paper copies of the brief and addendum to the Clerk of Court; one paper copy of the brief and addendum via regular U.S. mail to Assistant U.S. Attorney Ron Timmons; and one copy of the brief and addendum via regular U.S. mail to the appellant.

Respectfully submitted,

*/s/ Brad Hansen*

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**FED. R. APP. P. 32(a)(7) AND 8TH CIR. RULE 28A(c)  
CERTIFICATION**

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The brief uses a proportional-space, 14-point Century Schoolbook font. Based on a word count under Microsoft Word Version 14, the brief contains 416 lines and 3909 words, excluding the items listed in Fed. R. App. P. 32(f).

Respectfully submitted,

*/s/ Brad Hansen*

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