COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Middlesex Superior Court No. 2081-1992
Appeals Court No. 2025-P-1360

TIFFANY FONTAINE, NYGEL O'BANNON, WENDELL MCCOY, and GREGOIRE POIRIER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICHAEL BLOOMBERG and MIKE BLOOMBERG 2020, INC.,

Defendants-Appellees

Application for Review from the Superior Court
Of Middlesex County

PLAINTIFFS-APPELLANTS' APPLICATION FOR DIRECT APPELLATE REVIEW TO SUPREME JUDICIAL COURT

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Plaintiffs-Appellants Tiffany Fontaine, Nygel O'Bannon, Wendell McCoy, and Gregoire Poirier, individually and on behalf of all others similarly situated ("Plaintiffs"), respectfully request Direct Appellate Review of this appeal from the Supreme Judicial Court. This case presents several significant issues of law that have not yet been resolved by this Court:

First, whether the Massachusetts Wage Act entitles workers to pay they would have received but did not because their employer unlawfully terminated them (thus preventing them from performing the work);

Second, whether Massachusetts' long-arm statute provides for personal jurisdiction over a person whose agent performs alleged unlawful acts in the Commonwealth; and

Third, whether a plaintiff's lost wage damages may be reduced on account of unemployment payments the plaintiff received, or whether instead the collateral source rule precludes such an offset.

This case concerns a putative class action lawsuit brought on behalf of Massachusetts campaign staff against Michael Bloomberg and his 2020 presidential campaign. In brief, Plaintiffs allege

that they were promised employment through November 2020, but after Bloomberg withdrew from the Democratic primary in March 2020, he and his campaign broke that promise and prematurely terminated their employment.

In the proceedings below, the Superior Court dismissed Plaintiffs' claim under the Wage Act, Mass. Gen. L. c. 149 § 148. In doing so, the Superior Court held that, because the Plaintiffs had not performed work past their termination dates, they had not "earned" the wages they sought and so could not recover under the Wage Act, which only applies to an employer's failure to pay wages for work actually performed. However, this Court has previously held that a commission, which was not technically "earned" because it did not come due during the plaintiff's employment, was nevertheless recoverable in a case in which the plaintiff was unlawfully terminated before the commission came due. Parker v EnerNOC, Inc., 484 Mass. 128 (2020). Similarly here, Plaintiffs allege that the only reason they did not perform the work for which they seek compensation is because they were unlawfully terminated (in breach of contract). Moreover, they allege that (like in Parker) they *did* actually perform the relevant work that caused them to

earn those wages, in that they agreed to be employed at a time that the Bloomberg campaign was looking to build a campaign operation quickly in early 2020, so that Mike Bloomberg could be competitive in the Democratic primary. They allege that they thus performed the work upon which the campaign's promise to pay them wages through November 2020 was based – to join the campaign quickly and commit to working for it at a time it desperately needed their labor. In any event, they contend that they should be able to recover wages that they were entitled to receive, but only failed to receive as a result of Defendants' wrongful premature termination of their employment.

The Superior Court also dismissed Plaintiffs' claims against Mr. Bloomberg personally. The Superior Court dismissed him as a defendant finding that it did not have personal jurisdiction over him. The Bloomberg campaign (which remained a defendant through the case) contended that Mr. Bloomberg was not technically an officer of the campaign, so the fact that the campaign operated in Massachusetts did not render Mr. Bloomberg himself subject to personal jurisdiction here. However, Mr. Bloomberg was a presidential candidate who self-funded his campaign and, as a practical

matter, was the decision-maker responsible for the alleged legal violations, for which his campaign operating in Massachusetts was his agent.

Finally, one of the plaintiffs, Nygel O'Bannon, was permitted to go to trial, and he prevailed before a jury, which awarded him the full wages and benefits he contended he should have received through November 2020 ($56,000).[1] However, following the trial, the Superior Court reduced Mr. O'Bannon's jury award to

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[1] Plaintiffs have also appealed the dismissal of the other named plaintiffs on summary judgment, as well as the Court's denial of class certification. The evidence developed at trial confirmed that the facts underlying Mr. O'Bannon's successful claim were the same as the facts underlying the claims of the other plaintiffs, as well as the other putative class members. Plaintiffs contend that the Superior Court erred in determining, on summary judgment and class certification, that only Mr. O'Bannon had facts allowing his case to be tried.

In any event, the trial later confirmed the Court's error in dismissing the claims of the other plaintiffs on summary judgment and denying class certification (in that it showed that all employees had been promised continued employment until November 2020, even after they signed paperwork stating they were "at will" employees, including at their mandatory training). However, on Plaintiffs' post-trial motion for reconsideration, the Superior Court determined that it could not look at the trial record in determining whether summary judgment had been properly granted and class certification was properly denied. App. at 123-24. Whether the Court was correct that - in considering Plaintiffs' post-trial motion for reconsideration - it had to put blinders on to the actual facts presented at trial also merits consideration by this Court.

account for unemployment benefits he received (in the amount of $18,238) after the campaign terminated his employment. App. at 130-38. The Court rejected Plaintiffs' argument that the collateral source rule should have precluded an offset based on these payments. App. at 114-15. Under that rule, courts have recognized that, if there is to be a "windfall", based on a plaintiff's receipt of unemployment benefits as well as a backpay award, the "windfall" should not go to the employer, who engaged in unlawful behavior. And, if any accounting needs to be made for unemployment benefits, it would be for the Commonwealth to seek repayment of those benefits – it should not be the employer who engaged in misconduct who benefits from the plaintiff's having received unemployment benefits.

Each of these issues raises a significant unsettled question of Massachusetts law, which would be extremely helpful to employers and employees throughout the Commonwealth to be decided definitively by this Court. Plaintiffs thus request this Court take up these issues through Direct Appellate Review.

I. STATEMENT OF THE CASE

A. Prior Proceedings

Plaintiffs filed this case in May 2020. App. at 020-29. The complaint alleges that Michael Bloomberg, who ran for the Democratic nomination for President in 2020, and Mike Bloomberg 2020, Inc., his campaign (together, "Defendants"), promised Plaintiffs and their coworkers in Massachusetts that they would employ campaign staff through November 2020, regardless of whether Mr. Bloomberg won the Democratic nomination. Id. at 023-24. Then, after Mr. Bloomberg withdrew from the race in March 2020 (after a poor showing on Super Tuesday), Defendants broke that promise, immediately terminating the campaign staff, including Plaintiffs. Id. at 024-25. Plaintiffs brought claims under the Wage Act, Mass. Gen. L. c. 149 § 148, and under the doctrines of breach of contract and promissory estoppel. Id. at 027-28.

Defendants moved to dismiss all claims, and on July 1, 2021, the Superior Court granted the motion

with respect to the Wage Act claim and the claims against Mr. Bloomberg personally. App. at 049-63.[2]

Following discovery, on November 9, 2023, the Superior Court granted summary judgment as to the breach of contract claims for three of the Plaintiffs (Ms. Fontaine, Mr. McCoy, and Mr. Poirier) and as to the promissory estoppel claims for all four plaintiffs App. at 064-83. The Superior Court also denied Plaintiffs' motion for class certification. Id.[3]

The Court denied summary judgment for Mr. O'Bannon's breach of contract claim and allowed him to proceed to trial. On May 22, 2025, a jury found in favor of Mr. O'Bannon, awarding him $56,000, App. at 084-86, which represented the full amount of wages and benefits he would have received if he had remained employed through November 2020.

Following trial, the Court reduced Mr. O'Bannon's lost pay award based on unemployment payments he received following his termination. App. at 129-33.

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[2] The court denied Defendants' motion to dismiss the breach of contract and promissory estoppel claims.

[3] Plaintiffs have appealed the grant of summary judgment for the other Plaintiffs and denial of class certification, as well as the denial of their motion for reconsideration on these issues, which they filed after Mr. O'Bannon's trial. App. at 125-28, 139-42.

The Court rejected Plaintiffs' argument that the collateral source rule prevents such mitigation and, further, that the campaign had not met its burden of proof on this issue. App. at 114-15. On November 17, 2025, the Court entered final judgment for the reduced amount of the verdict. App. at 134-38.

B. Short Statement of Relevant Facts[4]

Having entered the Democratic primary race for the 2020 presidential election much later than his rivals, Mike Bloomberg worked quickly to establish a nationwide campaign. To persuade potential campaign staff to join his operation quickly, and ensure it would be competitive, he made an unusual promise to staff that they would keep their jobs through November 2020, regardless of whether he won the primary, so that they could support whoever was the Democratic nominee. This promise was broadcast throughout the country, widely reported in national news media, and repeated by campaign officials to prospective hires in their interviews, as well as repeated to staff after

[4] The following is a brief statement of the facts, as set forth in Plaintiffs' complaint. App. at 020-29. Mr. O'Bannon also proved these facts at trial.

they were hired, to keep them engaged and motivated not to leave the campaign.

After their interviews, however, when the campaign offered jobs to prospective staffers, it required them to sign employment paperwork stating that they were employees "at will". Despite this language, the Bloomberg campaign continued to promise, and reassure, all employees (including at their mandatory training sessions) that they were guaranteed employment through November 2020.

On March 3, 2020 (Super Tuesday), Mr. Bloomberg fared poorly (winning only American Samoa), and the following day, he announced he was suspending his campaign. Shortly thereafter, the campaign informed staff that they were all being laid off and would receive their last paychecks on March 31, 2020.

C. Issues of Law Raised By Appeal

Significant issues of law raised by this appeal include:

First, whether the Wage Act entitles workers to pay they would have received but did not because their employer unlawfully terminated them (thus preventing them from performing the work);

Second, whether Massachusetts' long-arm statute provides for personal jurisdiction over a person whose agent performs alleged unlawful acts in the Commonwealth; and

Third, whether a plaintiff's lost wage damages may be reduced on account of unemployment payments the plaintiff received, or whether instead the collateral source rule precludes such an offset.[5]

II. ARGUMENT

A. The Wage Act Should Allow Workers to Recover Wages for Work They Were Not Permitted to Perform Due to Their Unlawful Termination

The Superior Court dismissed Plaintiffs' Wage Act claims on the ground that employees may only recover wages for work actually performed. App. at 061-63. Plaintiffs recognize this general principle but argue here that (1) Defendants wrongfully prevented them from performing the work and so they should still be able to collect their promised wages, and (2) they *did* perform the work that was the consideration for the promise to pay wages through November 2020: joining the campaign in early 2020 when Defendants were

[5] As noted above at n. 1, another potentially significant issue is whether, when considering a post-trial motion for reconsideration, a court may consider the factual record as actually adduced at trial.

desperate to build it up quickly.

First, Plaintiffs are entitled under the Wage Act to the wages promised through November 2020, because Defendants wrongfully terminated them prematurely, before Plaintiffs could earn the promised wages.

In Parker v EnerNOC, Inc., 484 Mass. 128 (2020), the plaintiff was wrongfully terminated almost a year before she was entitled to receive a commission for a contract she had helped secure. This Court held she was entitled to the commission under the Wage Act, because "[b]ut for the defendants' actions" in wrongfully terminating her, she "would have received the commission due." Id. at 135-36. Plaintiff could not be faulted for failing to remain employed long enough to earn the commission when her employer's wrongful actions "made it impossible." Id.

Here, Defendants promised to employ Plaintiffs through November 2020, entitling them to wages (or at least an opportunity to earn wages) through that time. However, like in Parker, Defendants wrongfully terminated them in March 2020, preventing them from working through November. Plaintiffs did everything they could do to earn the wages they were entitled to, but Defendants' wrongful conduct "made it impossible."

Id. Like Ms. Parker, Plaintiffs should be entitled to recover these wages.[6]

In any event, just as Ms. Parker did what entitled her to the commission (secure a contract) prior to termination, Plaintiffs did what entitled them to wages through November 2020. They joined the Bloomberg campaign quickly, early in 2020, just as the campaign was seeking to ramp up quickly and compete with others that had started much earlier. Bloomberg made the unusual promise of a job through November 2020, regardless of whether the campaign lasted that long, so workers would join quickly, and stay on the campaign, despite the risk that it would end early (as campaigns often do when candidates drop out).

Plaintiffs did exactly what Defendants asked of them (and thus provided the consideration for them to receive wages through November 2020) by joining the campaign in early 2020 and staying with it as long as it lasted. Defendants enjoyed the full benefit of the deal, obtaining Plaintiffs' labor and commitment

[6] It should not matter that Parker concerned a claimed commission, whereas Plaintiffs here seek their weekly wages. A commission is not "earned" for Wage Act purposes until it becomes due. Wiedmann v. Bradford Group, Inc., 444 Mass. 698 (2005).

quickly in 2020. Thus, Plaintiffs earned their wages through November 2020, just as Ms. Parker did what she needed to do to earn her commission before her termination – secure the contract (for the benefit of her employer).

In dismissing Plaintiffs' Wage Act claim, the Superior Court relied on Massachusetts State Police Commissioned Officers Ass'n v. Com., 462 Mass. 219 (2012), where police officers sought wages they would have received if not for a mandatory furlough. This Court found that the wages were not "earned" where the officers had not actually performed the work for the disputed wages. Id. at 225.

Here, by contrast, Plaintiffs were prevented from working through November because Defendants unlawfully terminated them prematurely in breach of Defendants' promises (whereas the Court found that the furlough in State Police was lawful). And unlike in State Police, Plaintiffs did in fact perform the work necessary to earn the wages at issue because they provided what Defendants bargained for: their labor and commitment early in 2020.

This case, therefore, raises the very important issue of whether employees may pursue claims under the

Wage Act, like in Parker, when an employer unlawfully terminates them prematurely (but they have already provided the consideration for having been promised those wages), or whether instead, like in State Police, Plaintiffs' mere failure to perform work renders the Wage Act inapplicable.

B. Massachusetts Courts Can Exercise Personal Jurisdiction Over an Individual Whose Agent Performs Acts in Massachusetts on His Behalf

Massachusetts's long-arm statute enables Massachusetts courts to exercise personal jurisdiction over a person "who acts directly *or by an agent*, as to a cause of action in law or equity arising from the person's transacting any business in this commonwealth." M.G.L. c. 223A, § 3(a).

Plaintiffs alleged that Mike Bloomberg personally established a nationwide campaign with at least 60 staff in Massachusetts, where Plaintiffs worked. App. at 021. They alleged that he made the promise, through his campaign, that staff would have a guaranteed job through November 2020. Id. at 023-24. This promise was his decision, made to serve his personal goal of

quickly building up a viable campaign. Id.[7] He also decided to end his campaign and to lay off the campaign staff rather than continuing their employment as had been promised. Id. at 024-26.

The Superior Court clearly had personal jurisdiction over Mr. Bloomberg's campaign (Mike Bloomberg 2020, Inc.). The campaign undisputedly transacted business in Massachusetts by hiring and overseeing Plaintiffs there, and the claims in this action clearly arise from that business.

The question on appeal is whether the Superior Court had personal jurisdiction over Bloomberg himself based on the campaign's actions in Massachusetts on his behalf. The court simply applied the standard for exercising personal jurisdiction over corporate officers, which requires the officer's "active entrepreneurial or managerial conduct in the State." App. at 053 (quoting Kleinerman v. Morse, 26 Mass. App. Ct. 819, 824 (1989)).

However, this analysis misunderstands the

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[7] Evidence at trial showed Mr. Bloomberg *personally* made this promise on a call with campaign staff in Massachusetts, App. at 094, but on Plaintiffs' motion for reconsideration, the Superior Court refused to consider this evidence. Id. at 123-24.

argument that the entire campaign was acting *as an agent of Mike Bloomberg* when it carried out the activities that gave rise to this lawsuit. See App. at 043-44. While a corporate officer acting as an agent of the corporation enjoys some protection from having the corporation's actions attributed to him, that does not protect an individual *principal* from liability in Massachusetts for the actions of a corporation acting here as *his* agent.

A party is an agent if it has actual or implied authority to act on the principal's behalf, if the principal ratifies the actions, or if a third party reasonably believes that an agent has authority to act on the principal's behalf. See, e.g., von Schonau-Riedweg v. Rothschild Bank AG, 95 Mass. App. Ct. 471, 484 (2019) (applying analysis in context of personal jurisdiction). Here, where Bloomberg decided to make and break the promise at issue, and where his campaign was simply the entity through which staff were informed of these decisions, Plaintiffs have alleged that the campaign was acting as Bloomberg's agent

under at least one (if not all) of these theories.[8]

Indeed, "[t]he essence of the principal-agent relationship is the right of power or control by the alleged principal over the conduct of the alleged agent," and it is difficult to imagine that Bloomberg did not exercise power and control over his own presidential campaign. Theos & Sons, Inc. v. Mack Trucks, Inc., 1999 Mass. App. Div. 14 (Dist. Ct. 1999) (quoting Commonwealth Alum. Corp. v. Baldwin Corp., 980 F. Supp. 598, 611 (D. Mass. 1997)).

While the court should have recognized it had personal jurisdiction over Bloomberg for the breach of contract claim, there should also be no question that the court had jurisdiction over him for the Wage Act claim (which should not have been dismissed, as discussed above). This Court has emphasized the importance of ensuring the Wage Act serves its "clear" purpose of "hold[ing] individual managers liable for violation," even if doing so requires a departure from a literal reading of the statute. Cook v. Patient Edu,

[8] It was widely known that Bloomberg funded the campaign himself, see, e.g., App. at 102, such that it was particularly reasonable for Plaintiffs to understand the promise of wages through November 2020 to be coming from Bloomberg personally.

LLC, 465 Mass. 548, 556 (2013). In Cook, the Court rejected the argument that LLC members could not personally be liable for Wage Act violations because they were not "corporate officers." Id. at 551-56. Here, the person who decided to promise wages, intended to fund those wages, and decided to break his promise, should not escape accountability for the harm he thereby caused to Massachusetts residents (through the Court's declining to exercise personal jurisdiction over him) simply because his actions in this jurisdiction were through an entity *that he created*, and for which he was the decisionmaker, even if he was not technically a "corporate officer".

C. Receipt of Unemployment Benefits Should Not Reduce an Employee's Award of Back Pay

Finally, the Superior Court improperly allowed a plaintiff's receipt of unemployment benefits to offset his back pay awarded by the jury. This Court should accept direct appellate review of this case to determine whether such an offset is allowed under Massachusetts law, or if instead Massachusetts recognizes the collateral source rule, which would prevent such an offset. This is an extremely important issue of first impression.

This Court has already held the collateral source rule prevents insurance payments or other third-party compensation from reducing an award. Law v. Griffith, 457 Mass. 349, 355 (2010). This principle prevents parties that cause harm from benefitting "from either contractual arrangements of the injured party with insurers or from any gifts from others intended for the injured party." Id. This principle prevents a wrongdoer from obtaining a "windfall", "even if a plaintiff thereby receives an excessive recovery in some circumstances." Id.

Other states recognize that, under the collateral source rule, unemployment benefits cannot mitigate damages from breach of employment contracts.[9] This Court should follow suit. There is no meaningful

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[9] See, e.g., Computer Services, Inc. v. Buckley, 844 P.2d 1249, 1254 (Colo. 1992) ("in an action for damages for breach of an employment contract, unemployment compensation benefits are not deductible" and collecting cases); Hayes v. Trulock, 51 Wash. App. 795, 804 (Wash. 1988); Rutzen v. Monroe County Long Term Care Program, Inc., 429 N.Y.S. 863, 867 (N.Y. 1980); In re DCP Operating Co., 2019 WL 1908147, at *5 (Tex. App. Apr. 29, 2019). Courts in other states have held that the collateral source rule applies to breaches of contract where there is tortious or willful conduct. See Hurd v. Nelson, 714 P.2d 767, 770 (Wyo. 1986); Am. Fid. Fire Ins. Co. v. Gen. Ry. Signal Co., 184 Ill. App. 3d 601, 617, 540 N.E.2d 557, 568 (1989).

difference, for instance, in holding that workers' compensation does not offset a tort verdict, e.g., David v. Kelly, 100 Mass. App. Ct. 443, 451 (2021), and holding that unemployment does not offset backpay awarded for breach of contract (or other contexts).

Adopting the collateral source rule here would serve the important goals of protecting workers and ensuring that employers who wrongfully cause workers to be unemployed do not receive windfalls due to the Commonwealth's efforts, at the expense of taxpayers, to provide a social safety net for such employees.[10]

III. THIS COURT SHOULD GRANT DIRECT APPELLATE REVIEW BECAUSE THIS CASES RAISES SEVERAL IMPORTANT UNSETTLED ISSUES OF MASSACHUSETTS LAW

To warrant direct appellate review by this Court, the questions presented by the appeal must be:

> (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States

[10] While the possible "recoupment by the State of unemployment benefits is a matter between the State and the employee," Meyers v. Director of Division of Employment Sec., 341 Mass. 79, 82 (1960), there is no reason that an employer who engaged in unlawful conduct should receive a windfall by not having to pay the full back pay it owes, on account of the employee's having received this benefit from the Commonwealth and its taxpayers.

> which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

Mass. R. App. P. 11.

Plaintiffs respectfully submit that the issues in this case fit squarely within the first and third of these categories.

The question of whether the Wage Act permits an employee to recover wages they would have received if not for their wrongful termination is an important issue of first impression before this Court. While in Parker v EnerNOC, Inc., 484 Mass. 128, the Court explained that an employer could not escape Wage Act liability through an unlawful termination prior to a commission becoming due, the question of whether the same reasoning applies to other types of wages (i.e. weekly or hourly wages) that may not have been "earned" solely due to an employer's wrongful termination of the employee has not been directly addressed.

This is also an issue of great public interest, given this Court's repeated pronouncements about the

importance of protecting workers' wages.[11] Indeed, in enacting the Wage Act the Legislature indicated that common law protections are insufficient to prevent worker exploitation. Addressing whether an employer may circumvent its obligation to pay an employee and evade liability under the Wage Act by wrongfully terminating an employee is of significant importance to ensuring that the Wage Act protects employees as intended.

Similarly, as discussed above, the Court has not squarely addressed whether a corporation can act as an agent of an individual for the purpose of establishing personal jurisdiction over that individual. This is a novel issue which, like in Cook v. Patient Edu., 465 Mass. 548 (2013), raises the question of whether corporate formalities may be used to allow an individual who effectively controls an entity, and makes the decisions challenged in a case, to evade liability in Massachusetts for the entity's violation of the law here.

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[11] See, e.g., DiFiore v. Am. Airlines, Inc., 454 Mass. 486 (2009) (prohibiting "end runs" around the Wage Act); Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013); Somers v. Converged Access, Inc., 454 Mass. 582 (2009).

Finally, the issue of whether the collateral source rule precludes offsetting back pay based on unemployment income arises often in employment law, and guidance on this issue from this Court is sorely needed.

Given that all of these issues are questions of great public interest, and are unsettled by this Court, Plaintiffs urge that this Court grant their request for direct appellate review.

Respectfully submitted,

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December 1, 2025

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. Pro. 13(d), Plaintiffs-Appellants Tiffany Fontaine, Nygel O'Bannon, Wendell McCoy, and Gregoire Poirier, through their counsel, hereby certify that on December 1, 2025, a copy of Plaintiffs-Appellants' Application for Direct Appellate Review to Supreme Judicial Court in the matter of Fontaine et al v. Michael Bloomberg and Mike Bloomberg 2020, Inc. (Middlesex Superior Court No. 2081-1992, Appeals Court No. 2025-P-1360), filed in the Supreme Court Judicial Court, was served by first class mail on counsel of record for Defendants-Appellees:

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CERTIFICATE OF RULE 16(k) COMPLIANCE

Pursuant to M.R.A.P. 11(b), Plaintiffs-Appellants, through their counsel, hereby certify that they have complied with the Massachusetts Rules of Appellate Procedure pertaining to the filing of applications for direct appellate review, including but not limited to M.R.A.P. 11(b), 16(k), and 20(a). This brief was prepared using Courier New, a monospaced font, in size 12, which produces ten characters per inch. Pursuant to M.R.A.P. 11(b), 16(k), and 20(a), the argument in support of direct appellate review, which runs from pages 11 through 21, is not more than ten pages.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.