No. 24-CV-1011

DISTRICT OF COLUMBIA
COURT OF APPEALS

CROWELL & MORING LLP,
Appellant,

v.

TREA 1001 PENNSYLVANIA TRUST,
Appellee.

On Appeal From The Superior Court for the District of Columbia,
Civil Division, Case No. 2023-CAB-001531
The Hon. Donald Dunnage

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THE PARTIES AND THEIR COUNSEL

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TREA 1001 Pennsylvania Avenue Trust was the defendant in the trial court and is the appellee in this Court. TREA is represented by Rebecca Woods and Seth Fortin of Seyfarth Shaw LLP.

RULE 26.1 DISCLOSURE STATEMENT

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STATEMENT OF JURISDICTION

This Court has jurisdiction over appeals from all final orders and judgments of the Superior Court of the District of Columbia, D.C. Code § 11-721(a)(1), and the court's order granting summary judgment is a final order, *see RFB Properties II, LLC v. Deutsche Bank Trust Company Americas*, 247 A.3d 689, 694 (D.C. 2021) ("Here, there is no question that when the trial court granted summary judgment . . . it issued a final order in that case.").

ISSUES PRESENTED FOR REVIEW

I. Whether the Mayor's COVID-19 Order requiring the Closure of Non-Essential Businesses interrupted prompt and secure access into the Premises for Crowell, its employees, and its invitees?

II. Whether the Mayor's COVID-19 Orders, which imposed access restrictions against Crowell, its employees, and its invitees entering into the Premises, rendered the Premises unusable for the purpose of conducting Crowell's business?

III. Whether, under the Seventeenth Lease Amendment's definition of Force Majeure, an "order of government" is limited to a taking by an order of government, when the lease includes—and the Amendment specifically references—a separate provision governing takings?

INTRODUCTION

In 2010, Crowell & Moring LLP ("Crowell" or "Tenant") and TREA 1001 Pennsylvania Avenue Trust ("TREA" or "Landlord") negotiated a unique lease provision that provides for rent abatement when three conditions are met: (1) an interruption of an Essential Building Service; (2) that renders the leased Premises unusable for the purpose of conducting Crowell's business; (3) because of a Force Majeure if not resolved after seven days' notice to Landlord. When those conditions are met, the rent must be abated by the extent to which Crowell's use and enjoyment of the Premises is restricted. Crowell was able to negotiate for this special protection, which provides a benefit even if the Interference with the Premises was beyond the control of the Landlord, because Crowell occupied more than half of the building—affording it significant bargaining power. A decade later, Crowell invoked this provision and sought rent abatement when (1) the majority of its employees were prohibited from accessing the Premises (2) making it unusable for their practice of law (3) because of the COVID-19 pandemic and restrictive orders from the DC Mayor. TREA refused to hold up its end of the bargain.

When Crowell filed suit, the court properly denied TREA's motion to dismiss the complaint—reasoning that the case turned on factual issues. Yet at summary judgment, the court did an about-face. It denied Crowell's motion and granted TREA's motion, concluding that, based on the language of the lease alone, there was

no set of facts under which Crowell was entitled to relief. It ruled that Crowell's access was not interrupted (even though the Mayor's Orders imposed severe restrictions on how many people could access the building), that the Premises were not unusable for the purpose of conducting Crowell's business (even during the period when the only business allowed was Minimum Basic Operations), and that the Mayor's Orders could not be a Force Majeure (because they did not order a governmental taking of the property). The last conclusion was particularly perplexing, because at the motion to dismiss phase of this case, both parties *agreed* that Mayor's Orders could be a Force Majeure under the agreement even though it did not effectuate a governmental taking. That the parties would agree on that reading is unsurprising; an entirely separate provision of the lease already addresses the consequences for the parties of a governmental taking. The parties' disagreement instead focused on the other two abatement conditions: whether the Mayor's Orders interrupted access and made the Premises unusable.

Crowell's interpretation of the contract is correct as a matter of law because, given the undisputed facts, all three abatement conditions are satisfied. First, the Mayor's Orders interrupted Crowell's access into the Premises—an Essential Building Service—by prohibiting the vast majority of Crowell's employees from entering the building during the height of the pandemic. Second, those access restrictions rendered the Premises unusable for the purposes of conducting Crowell's

business (practicing law) in the Premises. Third, orders of government that interrupt Essential Building Services qualify as a Force Majeure under the parties' lease agreement even if those orders are not of a governmental taking. At a minimum, Crowell's reading of the lease is a reasonable interpretation of the lease. Assuming for sake of argument that the court's reading was also reasonable, the court erred in refusing to consider extrinsic evidence to determine the provision's meaning.

STATEMENT OF THE CASE

For decades, Crowell has leased space at 1001 Pennsylvania Avenue NW to operate its law firm. TREA currently owns that building. In April 2020, as the profoundly disruptive and enduring consequences of the COVID-19 pandemic became evident, the parties found themselves in disagreement over whether DC Mayor's Orders—which imposed severe restrictions on non-essential businesses that operated in facilities in DC, requiring them to limit the number of people who could access the Premises—entitled Crowell to an abatement of its rent under the terms of its lease. When the parties reached an impasse, Crowell filed a complaint in DC Superior Court seeking to enforce Section 13(f) of the Seventeenth Lease Amendment, which provides for proportional rent abatement if certain conditions are met, including a Force Majeure event. App12.

TREA moved to dismiss the complaint, which the court denied on the ground that factual questions precluded dismissing Crowell's claims as a matter of law based

on the contractual language of the lease alone. App506-08. After discovery, both parties filed motions for summary judgment. App5. At the end of a three-day hearing, the court denied Crowell's motion for summary judgment and granted summary judgment in favor of TREA. App413-23. Crowell filed a timely notice of appeal. App3.

STATEMENT OF FACTS

A. Original Lease

In 1985, Crowell entered into an "Office Lease Agreement" with the then-Landlord for space in 1001 Pennsylvania Avenue NW. App513. At the time, the "Premises" Crowell leased were defined as "[t]he premises located on the 10th and 11th floors of the Building, including contiguous exterior balconies and exterior terraces . . . plus the Storage Space." App 514. Notably, the "use" provision set forth at Article 9 of the lease lays out the expectation that "[t]he Premises shall be used only for general office purposes and for no other purpose." App541. As the attorney who later represented Landlord in lease negotiations explained, there is "an industry understanding about what general office purposes means": things like "[t]yping on a computer, sitting in a conference room, keeping noise levels down" and that "in a typical law firm, an office use would involve a receptionist, secretaries, lawyers, paralegals, people maintaining files et cetera." App858-59.

The lease identifies the benefits and obligations assigned to each party, including Services and Utilities Landlord must provide. App535-36. Most relevant here, as described in Article 4, Section 4.02 of the lease, the Landlord is obligated "at its cost and expense" to provide Crowell, as well as Crowell's "employees and invitees prompt access" "into the Building" "and the Premises twenty-four (24) hours each day, seven (7) days per week." App525. At least two aspects of that language are distinctive. First, as TREA's expert acknowledged, "most every lease provides for access *to the building*," App821 (emphasis added), whereas the lease the parties negotiated provides access "into the Building . . . *and the Premises*," App525. Second, access includes not just minimal access to Crowell as a corporate entity, but to Crowell's *employees and invitees*; a benefit that TREA's expert could not "recall in any lease other than the one at issue" in this case. App822. The lease separately addresses the means by which Crowell's employees and invitees would enter into the premises: with "a Building security system of quality equal to other first-class modern office buildings in the District of Columbia." App525.

The original lease also prescribed what would happen in the event that the Landlord did not, or could not, provide the Services and Utilities agreed upon between the parties. As a general matter under Article 8, "any stoppage of" the services the Landlord promised to provide would "not make Landlord liable in any respect for damages," nor would it "entitle Tenant to any abatement of rent."

App541. However, "[i]f the Building or the Premises shall be damaged by any casualty," Crowell would have the right to reduced rent "in proportion to the extent that the Premises are rendered unusable for the normal conduct of business." App548. Additionally, if all, or a portion, of the Premises were "taken or condemned for any public purpose," the lease would terminate (for all, or the applicable Portion of Premises) and rent would be adjusted for the portion of the Premises that remained. App550-51. Notably, neither provision conditions abatement on circumstances within the control of the landlord. *See* App548-53.

Initially, Crowell paid over $2.28 million per year in exchange for its use and enjoyment of the Premises, with an upfront expectation that rent would increase over time. App515. Crowell gradually expanded so that by 2009 it occupied a majority of the building. App907-09. That expansion continued apace, eventually including space for offices, conference rooms, and a cafeteria, so that Crowell's DC office could operate as "a hub for the firm as a whole," hosting employees, partners, and guests. App888.

B. Seventeenth Lease Amendment

The lease agreement changed over time through numerous amendments—highly negotiated by counsel. As Crowell expanded in size and its importance as the key tenant of the building increased, Crowell's bargaining power naturally increased as well—and the evolution of the lease terms over time reflected Crowell's

increasing leverage. As particularly relevant to this case, the parties signed a Seventeenth Amendment to the lease ("Seventeenth Lease Amendment" or "Amendment") in July 2010. App664. Section 13(f) of the Amendment included a provision reminiscent of language in the original lease: as a general matter "Landlord shall not be liable for, and Tenant shall not be entitled to, any damages, abatement or reduction of Rent . . . by reason of any failure to furnish any services or utilities." App681. Critically, however the Amendment made an important change that gave Crowell a significant new benefit: it provides for abatement under certain conditions, both within *and beyond* Landlord's control, should Crowell experience a long-term interruption in the Essential Building Services Landlord was obligated to provide. App681-82. Specifically, "[n]otwithstanding any provision of the lease to the contrary," Crowell receives a rent abatement if three conditions are met:

Condition 1: "Tenant actually suffers a material interference, interruption, curtailment, stoppage or suspension *of its use and enjoyment* of any portion of the Premises by reason of any interruption of any Essential Building Service (defined below) (collectively, 'Interference')." App682 (emphasis added). "**Essential Building Services**" in turn "shall include HVAC, electrical, elevator and fire and life safety services as well as secure access to the Building (including the requirements set forth in Section 4.02 of the Lease), hot and cold water, plumbing and sewage services." *Id*.

Condition 2: "[S]uch Interference shall render all or any material part of the Premises unusable *for the purpose of conducting Tenant's business* in such applicable part of the Premises as permitted under this Lease." *Id*. (emphasis added).

Condition 3: "[E]ither such Interference arises from (I) reasons within control of Landlord . . . or (II) a Force Majeure (as defined below) event and such Interference shall continue for more than seven (7) consecutive business days after Landlord has been given written notice by Tenant of the Interference." *Id*. "'**Force Majeure**' shall mean any prevention, delay or stoppage due to any Act of God . . . a taking by eminent domain, requisition, laws, orders of government or of civil, military or naval authorities, or any other cause similar to the foregoing not within the reasonable control of [the] Landlord." *Id*.

The Seventeenth Lease Amendment gave Crowell protection far beyond what a typical commercial tenant would receive: it provided for abatement in the event of a force majeure, even though a force majeure is by definition something beyond the Landlord's control. Equally to the point, the agreed upon language repeatedly emphasized that Crowell would be entitled to abatement if its use and enjoyment of the premises were interrupted for any reason covered by the force majeure provision, whether or not and the event triggering the provision resulted in physical damage to the premises. That much is clear from the abatement calculation itself: If all three conditions are met, the Seventeenth Lease Amendment provides that "Rental shall

abate in a reasonable and proportional amount . . . based upon the degree of material interference *of Tenant's use and enjoyment* of the Premises ('**Premises Interference**')." *Id*. (emphasis added). And the measure takes into account "all reasonably relevant factors, including that portion of the Premises which Tenant actually continues to reasonably operate under normal business conditions." *Id*.

C. Impact of COVID-19 and the Mayor's Orders

Prior to March 2020, Crowell's partners, employees, clients, guests, and vendors actively accessed and used the Premises for various business functions, including meetings, networking events, recruiting, training, and other in-person, interactive use of the space to carry out Crowell's business. App888-89. Crowell had over 600 employees who expected, and were expected to, work in the Premises on a daily basis. App889-90. But in March 2020, that use and enjoyment of the Premises was drastically curtailed when the DC Mayor issued the first of a series of orders declaring a public health emergency in response to the novel coronavirus, mirroring the President's declaration of a national emergency and the World Health Organization's announcement of a global pandemic. App737. The initial March 24, 2020 Order closed "the on-site operation of all non-essential businesses" to minimize the risk of "serious health complications, including death, from COVID-19." App737-40. Any business "with a facility in Washington, DC" was required

to "cease all activities at those facilities." App740. And while there were exceptions to this closure order, the exceptions were strictly limited.

First, "Essential Businesses" could continue to operate. App739-40. But Essential Businesses were expressly defined to include only services that could not be performed remotely, such as "Healthcare and Public Health Operations" like hospitals and emergency rooms, and "Food and Household Products and Services" like grocery stores and pharmacies. App740-45. Although Essential Businesses could include "Professional Services" such as legal work, the work only qualified as essential "when necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental Functions." App746.

Second, "non-essential businesses" were authorized to continue "Minimum Basic Operations." But those operations were defined as the "minimum necessary activities" to keep the business functioning during the pandemic, including, to "facilitate teleworking or the remote delivery of services formerly provided in-person." App747. Violating those orders, which were "need[ed] to protect all members of Washington, DC, and the region, especially residents most vulnerable to the virus," carried potential civil, criminal, and administrative penalties. App739-40.

Needless to say, the COVID-19 restrictions lasted for quite some time. On March 30, 2020, the Mayor issued a Stay-at-Home Order that restricted not just

businesses, but "all individuals anywhere in Washington, DC." App755-58. The order prohibited people from leaving their homes for anything that was not "essential"—again, specifically defined, and with narrow exceptions. App755-58. Relying on the information available at the time, basic activities like taking a walk outside with someone in a different household or visiting an elderly neighbor for the sake of companionship were made unlawful. App762.

Crowell's business was, with few exceptions, non-essential under the terms of the Mayor's orders. App876 ("[T]he law firm . . . was . . . a nonessential business, and remained so, as long as our lawyers and staff could work remotely."); *see also* App880-81 ("[A law firm is] not an essential business overall, but there are certain things that . . . are considered essential activities."). TREA conceded as much prior to this litigation: "[W]e do not debate that D.C. COVID restrictions forced the closure of non-essential businesses, such as [Crowell's], beginning on March 25, 2020." App987. And, consistent with Landlord's understanding at the time, "to comply with the Mayor's Executive Order" only Crowell's "essential employees" were given access to the building, assuming they had "a valid building I.D./access card." App991. Crowell's compliance with these restrictions "was not only required by the D.C. orders but very important for health," because if non-essential businesses had remained open, "the early parts of the pandemic would have been much more dangerous for D.C." App884.

The Mayor modified and extended restrictions multiple times as the pandemic continued. The March restrictions lasted until May 29, 2020, when DC announced "Phase One" of its reopening plan. *See* App767. In Phase One, the "nonessential businesses that remained closed except for minimum business operations" included "professional services other than those provided to essential businesses." App776-68. Accordingly, "[o]ther than a few employees responsible for Minimum Business Operations," Crowell's employees and invitees were generally not allowed to access the Premises. App897. Starting on June 22, 2020, the Mayor lifted some restrictions but still ordered that non-essential, non-retail businesses "shall continue to have employees telework to the greatest extent consistent with their business operations." App898. During this period, while Crowell "focused on establishing appropriate health and safety measures for the office, as required by the D.C. Orders," Crowell employees were not allowed to access the Premises without express permission, and only "a small portion" of Crowell's DC workforce came into the office, and only as needed. App898-99.

Beginning October 8, 2020, the District entered "Phase Two" of reopening, which still mandated that businesses "shall have employees and contractors telework to the extent that it is consistent with their current business operations," but also encouraged businesses "to develop plans to safely return employees." App900. In response, Crowell "implemented a 'soft' re-opening" that allowed employees to

collect belongings from the office or, on a limited basis, to work in the office. App900-01. But in compliance with DC's reopening guidance, Crowell understood it could not allow more than 25% of its employees in the office at a time. App901; *see also* App1053-54.

Before reaching Phase 3 of reopening, the DC Mayor issued an order reverting back to more severe restrictions in response to a spike in COVID-19 cases. App795-98. As a result, between December 24, 2020 and January 21, 2021, "[n]on-essential businesses" were again "required to telework, except in person staff needed to support minimum business operations." App795-98. After the holiday restrictions were lessened, TREA conceded, DC did not lift "all remaining restrictions for non-essential, non-retail businesses" until May 21, 2021. App987. By that point, "more than 32.98 million Americans [had] been diagnosed with COVID-19 and more than 584,000 [had] died from the disease." App801.

Because of these restrictions, Crowell notified TREA in a letter dated April 7, 2020 that it had "suffered an Interference" as defined in Section 13(f) of the Seventeen Lease Amendment—which started the seven-day clock before Crowell would be entitled to abate rent under the Amendment's terms. App1072. TREA disagreed that all abatement conditions under Section 13(f) had been met, disputing in particular that there had been "any interruption of any Essential Building Service." App988. Notably, TREA never suggested that "orders of government" in the

definition of Force Majeure was limited to takings. *See, e.g.*, *id*. After attempting unsuccessfully to resolve this dispute, Crowell initiated this action in DC Superior Court. App9.

D. Motion to Dismiss

TREA moved to dismiss the Complaint. App8. At a hearing on the motion, the court began by raising two questions about the court's reading of the contract—perceived issues that ultimately drove its decision on summary judgment. First, the court asked whether, to be a Force Majeure, the order of government "[had] to be a taking." App428. Second, the court asked whether the Mayor's Orders were "a restriction on the movement of people or a limitation on the building." App428. The parties' briefing had not raised either of those questions. To the contrary, with respect to which "orders of government" constitute a Force Majeure, TREA's counsel acknowledged that they "have not read it" to "be qualified by a taking." App433-34. TREA's counsel suggested "there is potential ambiguity" in the language, App433-34, but conceded that "a government order might qualify as a force majeure," App444. The court noted that "both litigants relied on the exact same reading." App506-07.

Given TREA's concession that the Amendment's force majeure provision could include government actions that were not takings, the parties naturally focused their dispute on Conditions 1 and 2. TREA's main argument was that "secure access

needs to be read" as something that Landlord "can provide to the tenant, which would be physical access to the building." App436. Crowell countered that it was entitled to abatement because "there was a restriction on all of the leased space in that we could not operate our business in the space," so Crowell did "not have access, as access is understood." App484. Ultimately, the Court ruled that "the dispute appears to be one of fact," App506, for example, about "whether [Crowell is] an essential business," "what were the nature of [Crowell's] services," and whether "access was limited." App505-06. The Court denied the motion to dismiss and the parties proceeded with discovery. App9.

E. Cross Motions for Summary Judgment and the Court's Ruling

After discovery, the parties filed cross motions for summary judgment. App5. The Court heard argument on September 11, October 2, and October 3, 2024 before providing an oral ruling. App8-9. The parties again focused on what qualified as "access" and "usable" under the terms of the Lease. Throughout the hearing, Crowell and the court talked past each other—with the court narrowly focused on "*where* access was curtailed or limited or restricted." App76 (emphasis added). According to the court, the Mayor's Orders restricted "the business, not the premise[s]," App283, and "the mayor's order to stay at home is what kept everyone at home," App394.

In the end, the court concluded "as a matter of law that the contract is not ambiguous." App414. The court found that because the Seventeenth Lease Amendment referred to "the portion of the premises" and "a part of the premises," Crowell had to identify a "physical space" out of the "eight floors" Crowell occupied under the lease that were restricted from even the employees conducting Minimum Basic Operations. App416-17. And, the court found, "a plain reading of the lease" made "orders of government . . . dependent upon a taking." App417. Applying those findings, the court determined that Crowell could not satisfy the conditions for abatement, because "there are no set of facts" where "any portion of the premises was physically unavailable." App419.

SUMMARY OF ARGUMENT

Crowell is entitled to judgment as a matter of law that its contract with TREA entitles it to rent abatement for the period during which governmental orders restricted the use and enjoyment of Crowell's office space to conduct its law firm business. In reaching a contrary conclusion, the court misconstrued the three contractual conditions for rent abatement.

First, the Mayor's Order requiring Closure of Non-Essential Businesses interrupted Crowell's secure access into the Premises—an Essential Building Service—and interfered with Crowell's use and enjoyment of the Premises. Under the court's reading, Crowell could only satisfy Condition 1 by identifying a *specific*

portion of the Premises that was physically inaccessible to anyone as a result of the Mayor's Order. That was incorrect. TREA conceded that Crowell's use and enjoyment of the Premises was diminished. And the court's narrow focus on "secure access" and "prompt access" for the small number allowed to access the Premises at all (less than 10% of Crowell's workforce) missed the more important—and contractually dispositive—point that the Mayor's restrictions denied access to the entire premises to the vast majority of Crowell's workforce and all of its invitees, which could hardly be described as anything other than interruption of secure and prompt access.

Second, the Mayor's Orders restricted access *into the Premises*, rendering the Premises unusable for the purpose of conducting Tenant's business, i.e., operating a full-service, primarily civil law firm. Again, the court focused on a physical "*part* of the Premises," and ignored that the Mayor's Order denied to the vast majority of Crowell's workforce all access to the *entire* premises. Despite clear language in the Mayor's Orders restricting *facilities* located in the District, the court read the order as a limitation on Crowell's practice of law, as distinct from a limitation on the facility in which it practiced law. But if all Crowell could do was have essential employees coordinate remote work, or have a fraction of its employees work at a distance in their separate offices, Crowell was obviously denied the use and enjoyment of the Premises to conduct its normal business operations.

Third, an "order of government" under the plain language of the lease can constitute a Force Majeure, even if the order is not a taking. That is the most natural reading of lease terms, as is clear from the provision's plain text and its most natural grammatical construction, the fact that government actions are commonly included in force majeure clauses, and the existence of a separate lease provision that already addressed the consequences of a government taking. It is also exactly how both parties understood the clause before the court made up its own alternative interpretation that worked to TREA's benefit. Because all three contractual abatement conditions have been satisfied, Crowell's entitlement to rent abatement is clear.

At a minimum, the alignment between the parties at the motion to dismiss phase shows that Crowell's interpretation is a reasonable one, which requires consideration of extrinsic evidence and forecloses summary judgment.

ARGUMENT

The court's blinkered reading of the Amendment's terms misconstrued the deal the parties agreed to. Because the Amendment uses the words "the portion of" and "a part of," the court required Crowell to identify a subset of the building's square footage that was physically unavailable to any of its employees or invitees. But that misses the point: the entire building was unavailable to 90% of Crowell's employees, as well as any and all clients or guests they would have invited to visit

under normal conditions. For much of the period at issue, the only individuals using the Premises were those conducting Minimum Basic Operations to allow everyone else to telework. And even in the periods with slightly more relaxed restrictions, Crowell's use and enjoyment of the Premises was—as required by the Mayor's Orders—a fraction of what Crowell expected when it signed the lease. That the exclusion resulted from an order from the DC Mayor in response to a global health crisis does not make it any less extraordinary, and both parties originally agreed it was a Force Majeure under the terms of the contract. The court's ruling that "secure access" was never interrupted because it was technically possible to open the doors was error as a matter of law.

Undisputed evidence demonstrates that Crowell satisfied all of the conditions for abatement because (1) the Mayor's Orders closed non-essential businesses like Crowell's, interrupting access into the Premises; (2) Crowell's employees and invitees could not use the Premises to practice law while the Mayor's restrictions were in place; and (3) the Mayor's Orders are a Force Majeure under the plain language of the lease. Crowell is entitled to judgment as a matter of law.

I. Standard of Review

The Court reviews a trial court's grant of summary judgment *de novo*, viewing the evidence "in the light most favorable to the non-prevailing party" to assess whether there is any "genuine issue of material fact." *Rose's 1, LLC v. Erie*

Insurance Exchange, 290 A.3d 52, 60 (D.C. 2023) (citing *Liu v. U.S. Bank N.A.*, 179 A.3d 871, 876 (D.C. 2018)). Contract interpretation is, itself, "a legal question, which this Court reviews *de nov*o." *District of Columbia v. D.C. Contract Appeals Bd.*, 145 A.3d 523, 530 (D.C. 2016).

The District adheres to the "objective law of contracts," which requires the Court to "rely solely upon . . . the best objective manifestation of the parties' intent" when deciphering the plain meaning. *District of Columbia v. District of Columbia Public Service Commission*, 963 A.2d 1144, 1155-56 (D.C. 2009) (citations omitted). Moreover, the Court must interpret a contract "as a whole, giving a reasonable, lawful, and effective meaning to all its terms . . . in light of the circumstances known to the parties at the time of contract formation." *Id*. If the plain language of a contract is unambiguous, the Court decides the terms "as a matter of law." *Id*. But if the language is "reasonably susceptible of different constructions or interpretations," the Court must look at extrinsic evidence to determine the parties' intent, and "summary judgment is necessarily improper." *Id*. (citation omitted).

II. Closure Of Non-Essential Businesses Interrupted An Essential Building Service and Materially Interfered With Crowell's Use and Enjoyment

The first condition under Section 13(f) looks at whether there has been any interference with Crowell's "use and enjoyment of any portion of the Premises" and,

if so, whether that interference was caused by an interruption of any Essential Building Service. App682.

TREA concedes that Crowell suffered "a very material change" in its "use and enjoyment" of the Premises. App219; *see also* App310 ("I don't think we dispute that there was some degree of impact on their use and enjoyment."). As TREA's expert put it, "nobody used their premises in March of 2020 in ways they anticipated when they signed leases before that." App839. Given that concession, the court's determination that Crowell had not identified a curtailment in its use and enjoyment of "any portion of the premises" is inexplicable, and contrary to *both* parties' reading of the Amendment's plain language. To give effect to the parties' understanding of the contract, therefore, this Court should find as a matter of law that Crowell suffered a material interference, interruption, or curtailment of its use and enjoyment of the Premises. *See Kalorama Citizens Ass'n v. Suntrust Bank Co.*, 286 A.3d 525, 531 (D.C. 2022).

With respect to the first abatement condition, the parties dispute whether an Essential Building Service—specifically Crowell's right to "secure access to the Building"—had been interrupted. The plain language of the lease makes clear that it was. Secure access is defined to "includ[e]" that Landlord shall provide "Tenant, its employees and invitees" with prompt access into the Building and the Premises. App525. In the period between March 2020 and May 2021, the overwhelming

majority of Crowell's employees and invitees did not have access to the Building at all—let alone secure or prompt access.

A. The Mayor's Orders Imposed Restrictions That Dramatically Curtailed Crowell's Secure Access Into The Premises

As a preliminary matter, TREA questioned whether Crowell was truly required to implement restrictions, as opposed to having the discretion to continue operating normally. That assertion conflicts with the language of the Mayor's Orders and with the undisputed factual record. Under the Mayor's Orders, "[a]ll businesses with a facility in Washington, DC" were required to "cease all activities at those facilities, except Minimum Basic Operations." App739. And although there was an exception defining professional, legal services as essential—the exemption was limited to services "necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental functions." App743. Under that narrow definition, Crowell was not an Essential Business. The Question and Answer website released with the Mayor's Orders confirmed that reading: although a law firm's attorneys could "go to the office if necessary to meet court deadlines," such a "business [was] otherwise a non-essential professional services firm." App750. And prior to litigation, TREA agreed Crowell was non-essential. *See* App987 ("We do not debate that D.C. COVID restrictions forced the closure of non-essential businesses, such as Tenant's, beginning on March 25, 2020.").

As a non-essential business, for much of the period at issue, Crowell could lawfully conduct only "Minimum Basic Operations" in the Premises. Those operations were defined as "[t]he minimum necessary activities" to maintain the value of the business's inventory, to facilitate teleworking, and to provide legal services remotely. App744-45. Again, TREA admitted as much at the time—acknowledging that "essential employees" could enter the building, but otherwise emphasizing that tenants should "comply with the Mayor's Executive Order." App991. "[T]he only" people "who were allowed to enter during the pendency of the mayor's orders" were "those that were necessary to maintain minimum business operations." App87. Even during periods with slightly eased restrictions, the Mayor's Orders "strongly encouraged" or mandated telework. *See, e.g.*, App773 (ordering non-essential business to continue telework "to the greatest extent consistent with their business operations"). Taking seriously both the orders and the public health emergency, fewer than 10% of Crowell's employee population entered the building while the Mayor's Orders were in effect. App87; *see also* Crowell MSJ Ex. 13 (acknowledging "the data shows that Crowell's occupancy was something between a couple percent and something slightly less than 10 percent" between "March of 2020 through May of 2021"). True, the individuals allowed into the Premises "were selected by Crowell," App87, but Crowell limited the numbers to

comply with the "capacity limits and operational restrictions" imposed by the government, App802.

Applying the ordinary meaning of the word "access," a restriction that prevented the overwhelming majority of the workforce from entering into the Premises was indisputably an interruption of "secure access" into the Premises. Merriam-Webster defines "access" as "permission, liberty, or ability to enter, approach, or pass to and from a place" and as the "freedom or ability to obtain or make use of something." Access, Merriam-Webster, https://www.merriam-webster.com/dictionary/access; *see also, e.g.*, *Burlington N. & Santa Fe Ry. v. S. Plains Switching, Ltd.*, 174 S.W.3d 348, 356 (Tex. App. 2005) ("[A]ccess can mean either the right to make use of or the ability or right to approach[.]"). Aside from violating the law, allowing unrestricted access to the Premises would have jeopardized the health and safety of Crowell's employees, others tenants in the building, and the community at large. As a result, the vast majority of Crowell's employees did not have permission, and were not at liberty, to enter, approach, or make use of the building for the period between March 2020 and May 2021 that the Mayor's Orders imposed restrictions. That was an interruption to an Essential Building Service satisfying the first condition for rent abatement. Indeed, the restrictions obviously interrupted Crowell's ability to put the premises to their intended use.

B. "Secure Access" Under the Lease Required Actual Access, Not Merely Locked Doors That Open

The court rejected that plain meaning of access, and instead held that "secure access" under the lease had been provided to Crowell if any Crowell personnel could physically enter the Premises—in the sense that the doors would open and an individual could walk around inside, assuming they were allowed to come to the building in the first place. According to the court, Crowell "had th[e] ability to enter," and it was immaterial that "only five percent of [Crowell's] workforce was allowed to enter." App239. Moreover, the court focused on whether the *Landlord* denied access to the building, App76, despite Crowell's clarification that "[i]t is not the landlord. It is the order that limited access." App122. Ultimately, the court reasoned that "premises is understood to mean the physical space that the tenant leased inside of the building" and that Condition 1 "requires an identification of the portion of the premises" that was physically inaccessible to all Crowell personnel. App416. Because Crowell could not identify "that any portion of the building was physically unavailable to it," Crowell could not meet its burden. App419. That counterintuitive reading contradicts the plain meaning of the Amendment's terms for at least three reasons.

First, the court's focus on the theoretical possibility of physical entry into the building by a small subset of Crowell's personnel ignores the plain text of Section 13(f). It improperly treats "secure access" as a ceiling (focused on "secure") rather

than a floor (focused on "access"). According to the court, Landlord's obligation was to provide some sort of security system that allowed entry into the building, and as long as such system was in place, "secure access" was satisfied even if the overwhelming majority of Crowell's workforce could not lawfully gain access to the building. That reading makes little sense. Although the Seventeenth Lease Amendment "modifies access with secure," App419, "secure access" is intended to address more than a requirement for a security system. It is described as *"including"* the requirements in Section 4.02; not limited to Section 4.02. *See, e.g.*, *In re Maharaj*, 681 F.3d 558, 564 (4th Cir. 2012) ("'Included' is not a word of limitation."). And Section 4.02 already provides for both "a Building security system" and "prompt access . . . into the building." App525.

If the contracting parties had meant "secure access" to be defined as *only* the requirements in Section 4.02, they would have said so—using the word "defined" as they did in other clauses. *See AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 992 (9th Cir. 2011) ("Ordinarily, we presume that the use of 'different words in connection with the same subject' signifies that the drafter intended to convey different meanings by its disparate word choice." (citation omitted)). Moreover, if "secure access" was meant to describe the *method* of securely accessing the building, the drafters could have used specific language to signify that as well. *See, e.g.*, Crowell MSJ, Ex. 48 ("Landlord shall provide access

to the building . . . by means of an electronic card or key system."). Because no restriction appears in the text, "secure access" includes Section 4.02, but also includes access as it is ordinarily understood. Notably, TREA's expert conceded that allowing only "a portion of Crowell's employees into the building and the premises, again, for whatever reason" would be "a breach of 4.02, Romanette V." App835-36. That's because Section 4.02 "is intended to apply to *all of* [Crowell's] employees and *all of* its invitees." App836 (emphasis added).

Second, in determining that Condition 1 required a restriction that prohibited anyone from entering a portion of the physical premises, the court failed to account for related provisions in the original lease. Another section of the lease, Article 16, already provides for reducing rent "in proportion to the extent that the Premises are rendered unusable" when there has been physical damage to the Premises. Section 13(f) explicitly references Article 16, making clear that it remains in effect despite the language of Section 13(f). App682. If, as the trial court believed, Section 13(f) was intended to refer only to the physical inaccessibility of a portion of the Premises, it would be entirely superfluous. Rather than read Section 13(f) as redundant, interpreting an interruption in Essential Building Services to include all interruptions, and not just physical inaccessibility, "giv[es] a reasonable, lawful, and effective meaning to all [the lease's] terms." *Public Service Commission*, 963 A.2d at 1155 (citation omitted).

Third, although the court found this Court's decision in *Rose's 1, LLC v. Erie Insurance Exchange*, 290 A.3d 52 (D.C. 2023), instructive, the court somehow missed this Court's guidance to focus "on the language of the specific contract at issue." *Id*. at 63. *Rose's 1* is similar to the instant case only at a high level of generality: in that case, restaurants sought to recover loss, under their insurance policies, sustained because of the DC Mayor's COVID-19 orders restricting access to their businesses during the pandemic. *Id*. at 54. But the language of the contract at issue in this case differs materially from the language at issue in *Rose's 1*.

In *Rose's 1*, the question was whether COVID-19 (or the Mayor's Orders) had caused "direct physical loss" to the property. *Id*. at 56. The Court found that the words "direct" and "physical" "unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the insured property." *Id*. at 61. In other words, the insurance policy protected the policyholder from flood or fire damage, or other forms of direct physical damage to the insured property. Section 13(f) of the Agreement, in contrast, contains no such limiting language. It is triggered by any "interruption" of secure access that prevents use and enjoyment of the premises, not direct physical alteration of the property itself. Moreover, in describing the impact of the Mayor's Orders prohibiting dining in restaurants, this Court recognized that "government edicts prevented [restaurants] from *accessing and using* their properties to operate their respective businesses." *Id*.

at 62 (emphasis added). That is exactly what the government edicts at issue in this case did: they prevented Crowell from accessing and using the Premises to operate its business.

Because Crowell was subject to severe restrictions that prohibited its employees and their invitees from accessing the Premises, the Mayor's COVID-19 orders interrupted secure access into the Premises. Thus, based on the plain language of the Amendment the undisputed facts establish that the first criterion for triggering rent abatement was satisfied.

III. Access Restrictions Rendered The Premises Unusable For The Purpose of Conducting Crowell's Business

The restrictions imposed by the government also satisfy Condition 2. Condition 2 asks whether the Interference (identified in Condition 1) "shall render all or any material part of the Premises unusable for the purpose of conducting Tenant's business." App682. The plain language of the Amendment thus requires an evaluation of whether Crowell is *able* to *use* the Premises *to conduct its business*. The undisputed record establishes that Crowell was not able to do so.

Crowell's DC Office is its headquarters, and Crowell leased the Premises with the expectation that its employees would "provide the full panoply of litigation, regulatory, and transactional legal services to clients" while working from those offices. App886. The Mayor's Orders prohibited Crowell from doing those things (i.e., conducting its business) in the Premises. As TREA's expert agreed, a law

firm's use of office space "truly was not normal business operations in the way we had become accustomed to working." App839-40. If Crowell's business had been simply a storage facility, or a copy and print center, the restrictions may not have made the Premises unusable for the purpose of storing boxes, or of copying documents for curbside pickup. But operating a law firm required much, much more.[1]

In finding that Crowell nevertheless could not satisfy Condition 2, the court invented a "physically unavailable" requirement out of thin air. The court ruled as a matter of law that this contractual abatement condition could be satisfied only if the Premises were "physically unavailable," even though the word "physical" appears nowhere in Section 13(f). App416, App419. Starting with "part of the Premises," the court noted that Merriam Webster defines "part" as "subdivisions into which something is or is regarded as divided, and which together constitute the whole." App416. Then, because "the Premises" was "defined by the lease as the eight floors of space occupied by the tenant," the court concluded that Condition 2 refers to "the physical space." *Id*. But as with Condition 1, Crowell *had* identified physical space that was unusable—the entire space was unusable for the purpose of

[1] To be clear, Crowell argues that the Premises were unusable for the purpose of conducting its business because the Mayor's Orders imposed restrictions on accessing the facilities during the period for which it seeks abatement. Crowell does not seek abatement simply because attendance was less than full capacity after restrictions were lifted.

conducting Crowell's business, because the entire space was subject to access restrictions.

If "render all or any material part of the Premises unusable" meant "render all or any material part of the Premises physically unusable," the contracting parties could have said so. Instead, they tied usability to Crowell's business. And the parties did this even though, as noted *supra*, Section 13(f) explicitly refers them to the original lease if the Premises are physically damaged. *See* App682; *see also* App538. As Crowell emphasized at the hearing, "[i]f this had been a physical damage claim, it would have been brought under section 16 of the lease, which deals with physical damage to the property." App407. Section 13(f) was mean to address something different.

In addition to ignoring the plain language in Condition 2, the Court failed to give due effect to other provisions in Section 13(f). *See Steele Foundations, Inc. v. Clark Const. Group, Inc.*, 937 A.2d 148, 154 (D.C. 2007) ("Contractual provisions are interpreted taking into account the contract as a whole, so as to give effect, if possible, to all of the provisions in the contract."). The court's finding that the mayor's restrictions *could not* render the Premises unusable for the purpose of conducting Tenant's business ignores that under Condition 1 an Interference is not limited to "stoppage" or "suspension" of the use and enjoyment of the Premises, but also includes an "interference, interruption, [or] curtailment" of use and enjoyment.

In other words, Condition 1 contemplated an Interference that dramatically curtailed Crowell's use and enjoyment even without foreclosing it completely. *See Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, No. 97-2185, 2002 WL 31185884, at *2 (D. Minn. Sept. 27, 2002) ("[T]he term interruption can mean something less than suspension.").

Zooming out to the broader context of Section 13(f), the text reveals a broad definition of what is "unusable," consistently connecting it to Crowell's ability to use and enjoy the Premises. Take, for example, the ultimate measure of rent abatement: that rent "shall abate in a reasonable and proportional amount" based not on the square footage that is physically available to Crowell, but on "the degree of material interference of Tenant's use and enjoyment of the premises." App682 (defining "Premises Interference"). In calculating that reasonable proportional amount, the parties must "take[] into account all reasonably relevant factors" including whether "Tenant actually continues to reasonably operate under normal business conditions." *Id*. Notably, "use and enjoyment" often refers to normal business operations. *See, e.g.*, *River Ave, Inc. v. Foodfest Cash & Carry, Inc.*, 140 N.Y.S.3d 204, 205 (N.Y. App. Div. 2021) ("use the leased premises to conduct their business as intended"); *GFE Jerome Ave LLC v. Steph-Leigh Assocs., LLC*, 155 N.Y.S.3d 82, 83 (N.Y. App. Div. 2021) ("necessary for the operation of plaintiff's business"). The repeated references to how Crowell would use the Premises, *e.g.*,

its "use and enjoyment" and "normal business conditions," is further confirmation that Section 13(f) looked at whether the Premises were "usable" for Crowell's business, not in a vacuum.

Rejecting the concept that the Mayor's orders restricted the Premises at all, the court "characterized the mayor's order as a stay-at-home order." App205. And because, in the court's view, "[c]ompliance with the mayor's order to stay at home is what kept everyone at home," App394, the "order was addressing the nature of the business, not the premise," App283. But the Mayor's Closure Orders specifically targeted "activities *at those facilities*" in DC operating non-essential businesses. App739 (emphasis added); *see also* App802 (lifting "capacity limitations and operational restrictions" on facilities in DC). And even if the Stay-at-Home Orders addressed the nature of the business, Section 13(f) purposefully incorporates the nature of the business into the three conditions, looking at use and enjoyment and normal business operations.

Rose's 1 is instructive, but again, not for the reasons the court articulated. *Rose's 1* involved restaurants that were prohibited from offering "table seating" because of the COVID-19 pandemic and the Mayor's Orders, although they could continue to offer grab-and-go services and delivery. 290 A.3d 52, 55 & n.4 (citing Order 2020-048 [Prohibition on Mass Gatherings]). The *Rose's 1* Court acknowledged that the Mayor's Orders included both "orders closing all non-

essential businesses" and orders "requiring residents to stay at home." *Id*. at 55. And importantly, *Rose's 1* was not an announcement that the pandemic and the Mayor's Orders had no impact on the physical space in which businesses operated. Instead, the *Rose's 1* Court acknowledged that because of "COVID-19 and the closure orders that were issued by state and local authorities" the restaurant's facilities were "rendered temporarily unsuitable for its intended use." *Id*. at 58 (citation omitted). That conclusion mirrors the issue here: that the facility was rendered temporarily unsuitable (or unusable) for its intended use—conducting Crowell's business.

IV. COVID-19 And The Mayor's Orders Were A Force Majeure

Finally, under the plain language of Section 13(f), the Mayor's Orders satisfy Condition 3, even if they do not constitute a taking by an order of government. "Force majeure shall mean any prevention, delay or stoppage due to any Act of God . . . orders of government . . . or any other cause similar to the foregoing not within the reasonable control of the Landlord." App681-82. The COVID-19 pandemic and the Mayor's Orders constitute an Act of God, an order of government, and a cause similar to the foregoing that are outside Landlord's control.

That the parties agreed that a Force Majeure event entitled Crowell to abatement *at all* is an indication of Crowell's bargaining power at the time of the Seventeenth Lease Amendment. Aside from the fact that it was a modification of

the original lease, commercial leases often provide that a landlord may close their building "if required because of a life-threatening or Building-threatening situation," or provide that interruption of services does not entitle a tenant to abatement if "for any reason beyond the reasonable control of [the] Landlord." Crowell MSJ, Ex. 49, at 154-155 (The Commercial Lease Formbook). There is no indication in the language of the lease, or in the context surrounding its formation, that the parties provided Crowell this benefit while simultaneously intending an unusual and non-customary limitation to what qualified as a Force Majeure. *See DCA Capitol Hill LTAC, LLC v. Capitol Hill Group*, 332 A.3d 518, 531 (D.C. 2025) (in "ascertain[ing] what a reasonable person in the position of the parties would have thought the words of a contract meant," "[a] reasonable person is . . . presumed to know all the circumstances surrounding the contract's making") (citations omitted).

Moreover, the parties initially agreed that "orders of government" could be events recognized under the Force Majeure clause. Although TREA previously argued that the COVID-19 pandemic and the Mayor's Orders were not a Force Majeure, the dispute was focused on whether Crowell "could clear the first two hurdles" (Conditions 1 and 2) and whether COVID-19 and the Mayor's orders "*caused* the material interruption of Essential Building Services." Memo ISO Mot. to Dismiss at 15. TREA made no suggestion that the Mayor's COVID-19 Orders *could not* be a Force Majeure because they did not effectuate a taking. Yet the court

found that "a plain reading of the lease" unambiguously made "eminent domain, requisition, laws, orders of government or civil, military, and naval authorities, all dependent upon a taking," such that only a *taking by* orders of government qualified as a Force Majeure. App417. This was wrong for multiple reasons.

The Seventeenth Lease Amendment defines "Force Majeure" broadly, with language that at times overlaps in order to ensure that variations of an event are included. For example, Force Majeure includes "any Act of God" and also "fire, earthquake, flood, explosion, [and] action of the elements." App924. It includes "war" and also "invasion [and] insurrection;" "riot" and also "mob violence." *Id*. The contract describes issues with labor in multiple ways to make sure that none are left out: "inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market" and also "failure of transportation, strike, lockout, [and] action of labor unions." App924. Notably, this list of Force Majeure events confirms that Section 13(f) was meant to include Interruptions to Essential Building Services that are completely beyond the Landlord's control. If a "general shortage of labor" or a "failure of transportation" can be a Force Majeure, Force Majeure can obviously include problems external to the building that nevertheless restrict Tenant's use and enjoyment.

As with other Force Majeure events, the list beginning with "a taking by eminent domain" was intended to broadly identify potential Force Majeure events.

Rather than restrict government orders to takings, it enumerates government actions that go beyond takings. Importantly, Section 13(f) also explicitly references a different provision in the lease that addresses takings—allowing for termination of the lease (if all or substantially all of the Premises are taken) or abatement (if part of the Premises are taken). *See* App550-53. That is consistent with the admissions of TREA's expert: "Typically, in leases, the takings clause—the condemnation is separately dealt with in leases. . . . I don't think it's typical in force majeure to address takings." App843-44. If the Force Majeure clause were triggered only by government orders that constitute takings, there would be no reason for the clause to cross-reference a separate lease provision that specifically addresses takings.

Moreover, a grammatically correct reading of the list beginning with "a taking by eminent domain" demonstrates that "orders of government" are not limited to takings. Specifically, if "orders of government" were part of a sub-list modified by "a taking," the phrase would include a conjunction to signal the end of the sub-list. Thus, the phrase would read: "a taking by eminent domain, requisition, laws, ***or*** orders of government or of civil, military or naval authorities." That's the way the drafters structured an earlier sub-list in the definition: "inability to procure or a general shortage of labor, equipment, facilities, materials ***or*** supplies in the open market." App924 (emphasis added). But the text does not include a conjunction between "laws" and "orders of government" because that phrase is not a sub-list; "a

taking by eminent domain," "requisition," "laws," and "orders of government" are instead each independent items in the broader list of Force Majeure events.

Even if Crowell's reading is not unambiguously correct, at a minimum the language in Condition 3 is "reasonably susceptible [to] different constructions or interpretations," *see Public Service Commission*, 963 A.2d at 1155-56 (citation omitted), obligating the court to consider extrinsic evidence of the parties' intent. Walking into the hearing on TREA's motion to dismiss, both parties read "orders of government" to be a potential Force Majeure event until the court opined otherwise. Neither during litigation, nor beforehand, had any of the parties suggested "orders of government" were limited to takings. And the attorney who negotiated the Seventeenth Lease Amendment conceded as much in her deposition—that "outside the context of a privileged conversation," it was the first time she had ever said "orders of government" were "limited by the phrase a taking by eminent domain." App863-64.

TREA even pushed back on the court's interpretation, because it was inconsistent with TREA's understanding:

> **Court**: Right. And that's – but the orders of government seems to be qualified by a taking.
>
> **Landlord**: Oh, I see. *I – I don't read it that way, Your Honor.*
>
> **Court**: It works for your benefit if you did. But—

> **Landlord**: I know. I'm realizing that. . . . Your Honor, perhaps there is potential ambiguity there. *I honestly have – have not read it that way.* And – and I will note that the lease uses somewhat loose language.

App433-34 (emphasis added). Taking the hint from the court, TREA suggested "potential ambiguity." *Id*. But TREA still acknowledged that "a government order might qualify as a force majeure under the third prong," App444, leading the court to conclude that "both litigants relied on the exact same reading," App506-07. By summary judgment, TREA had fully adopted the court's interpretation of Force Majeure. But that cannot erase the fact that the parties' original reading of the definition was reasonable.

To be sure, "[c]ontracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction," *National Ass'n of Postmasters of the United States v. Hyatt Regency Washington*, 894 A.2d 471, 474 (D.C. 2006) (citation omitted), but this was different. In concluding as a matter of law that "the words of the lease, taken as a whole, are capable of but one reasonable interpretation," App414, the court ignored the fact that *both* parties had interpreted the clause to mean something different than what the court concluded it unambiguously meant. As a matter of law, this Court should find that the definition of Force Majeure in Section 13(f) unambiguously includes "orders of government." But if it also reasonable to read the clause to mean "a taking by orders of

government," the court should have looked at extrinsic evidence.

CONCLUSION

For the foregoing reasons, this Court should reverse the court's order granting summary judgment in favor of TREA and, applying the correct interpretation of the lease, grant summary judgment in favor of Crowell. Alternatively, the case should be remanded for further proceedings to consider extrinsic evidence in interpreting the lease.

DATED: June 30, 2025 MUNGER, TOLLES & OLSON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2025, a copy of the foregoing Brief of Appellant was served electronically on all counsel of record.

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