No. 21-51038

In the United States Court of Appeals for the Fifth Circuit

CONSUMER DATA INDUSTRY ASSOCIATION,
Plaintiff-Appellee,

V.

STATE OF TEXAS, THROUGH ATTORNEY GENERAL KEN PAXTON,
ACTING IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Appellee Consumer Data Industry Association ("CDIA") is requesting this Court stretch the imminence requirement "beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (internal citation omitted). After over two years of litigation, CDIA cannot point to the commencement or threat of any enforcement of the prohibition against its member credit reporting agencies—Section 20.05(a)(5) of the Texas Business and Commerce Code, "Regulation of Consumer Credit Reporting Agencies" ("section 20.05(a)(5)").

Instead, CDIA relies on prior voluntary multi-state settlement agreements initiated by parties other than the Attorney General of Texas. The settlements do not prohibit the conduct addressed by section 20.05(a)(5), surprise-balance-billing by out of network providers. Nor does section 20.05(a)(5) present the unique chilling injuries and criminal penalties outlined in *Virginia v. American Booksellers Association, Inc.*, and *Susan B. Anthony List v. Driehaus*, 484 U.S. 383, 394 (1988); 573 U.S. 149, 161 (2014). Unlike the petitioners in *Whole Woman's Health v. Jackson*, CDIA has not endured any present injury due to the mere existence of section 20.05(a)(5) on the books.

142 S. Ct. 522, 536 (2021). On these facts, CDIA cannot show that enforcement is imminent and that its members' alleged future injury—"material changes to their day-to-day business operations"—is based on more than just a hypothetical fear of enforcement. ROA.442-3, ¶10.

Because CDIA cannot show that enforcement is imminent and that its members suffered an injury-in-fact, CDIA cannot trace its members' alleged potential injury to the Attorney General of Texas. Redressability also cannot be met because the "system changes" CDIA alleges its members will have to make to come into compliance with section 20.05(a)(5) will remain even if the Attorney General of Texas is enjoined from enforcement of section 20.05(a)(5).

CDIA cannot establish waiver of immunity under *Ex parte Young* because CDIA has not shown that the Attorney General "has the authority to enforce" the challenged statute and that he is "likely to do [so] here." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Because enforcement is speculative, CDIA cannot establish a ripe claim. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2000).

CDIA's hypothetical fear of enforcement of section 20.05(a)(5) is not sufficient to support Article III standing, waiver of immunity, or a claim ripe for review.

ARGUMENT

I. CDIA Fails to Allege a Cognizable Pre-Enforcement Injury.

Future injury alone is insufficient to confer standing. CDIA must demonstrate that its members' alleged injury is "certainly impending." *Clapper*, 568 U.S. at 409. To do so, CDIA bears the burden to allege its members face a "credible threat of enforcement." *SBA List*, 573 U.S. at 161.[1] This burden begins at the initiation of the lawsuit and must be maintained throughout the litigation. *Carney v. Adams*, 141 S. Ct. 493, 499 (2020).

CDIA cites no prior enforcement or threat of future enforcement of section 20.05(a)(5). Instead, CDIA points to voluntary settlement agreements its members entered into due to investigations initiated by consumers and the credit reporting agencies ("CRAs") themselves. Resp. Br.15-16. Because CDIA can point to no *actual* or *threatened* enforcement of section 20.05(a)(5), CDIA cannot meet the traceability or redressability requirement of Article III.

[1] CDIA, as an association, "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).

A. CDIA's pre-enforcement injury is not imminent.

CDIA fails to plead sufficient facts to show that its members face a credible and specific threat of enforcement under section 20.05(a)(5). *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). If a party claims prospective injury, the injury must be "real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Standing is denied "when claimed anticipated injury has not been shown to be more than uncertain potentiality." *Prestage Farms, Inc. v. Bd. of Sup'rs of Noxubee County, Miss.*, 205 F.3d 265, 268 (5th Cir. 2000). CDIA can cite no specific threat that merits pre-enforcement review of section 20.05(a)(5).

i. No judicial assumptions apply here.

CDIA attempts to circumvent the imminence requirement by citing cases that involve challenges to statutes with criminal penalties that arise in the First Amendment context. Resp. Br.12-13. None of these unique applications are at play here.

CDIA first cites *American Booksellers*, for the proposition that standing exists where a plaintiff must choose between costly compliance or criminal prosecution. 484 U.S. at 383; Resp. Br.12.

Plaintiffs in *American Booksellers* challenged a Virginia statute criminalizing the commercial display of sexual material targeting juveniles.

484 U.S. at 392. The Supreme Court noted that in the First Amendment context, there exists a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 392–93. The "danger" of the statute challenged in *American Booksellers* was "in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* (internal citations omitted). No such judicial assumption is present here. Nor does section 20.05(a)(5) provide for criminal prosecution. The mere existence of section 20.05(a)(5) cannot justify judicial intervention.

CDIA's reliance (at 13) on *SBA List,* a challenge to an Ohio statute criminalizing "false statements," is also misplaced. 573 U.S. at 158-59. CDIA relies on *SBA List* for the proposition that standing is satisfied without affirmative action by the State. Resp. Br.13. CDIA ignores the crucial element in every pre-enforcement challenge reinforced by the Court in *SBA List*: a credible threat of enforcement. *Id.* at 159.

The Supreme Court in *SBA List* explained that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenge the law." *Id.* But the inquiry does not end with the plaintiff's alleged injury. The

Supreme Court further clarified the specific circumstances that may merit pre-enforcement review:

> Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement *sufficiently imminent*. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat of prosecution* thereunder."

Id. (citing *Babbitt*, 442 U.S. at 298) (emphasis added).

The Court did not decide that the threat of regulatory enforcement "standing alone gives rise to an Article III injury." *Id.* at 166. Noting that "[t]he burdensome Commission proceedings here are backed by the additional threat of criminal prosecution," the Court "conclude[d] that the combination of those two threats suffices to create an Article III injury under the circumstances of this case." *Id.* The Court ultimately held "the threat of future enforcement of the false statement statute [wa]s substantial" given that there was "a history of past enforcement" of the law at issue—by state regulators, against plaintiff SBA List, in connection with the same statements plaintiffs specifically alleged they wished to make in the future—*and* because the law imposed criminal penalties. *Id.* at 164. Unlike SBA List, CDIA can cite to no

history of enforcement of section 20.05(a)(5) or potential criminal penalties under the Act.

The recent Supreme Court decision, *Whole Woman's Health*, is also not instructive as to pre-enforcement injury in this context. 142 S. Ct. at 536. The majority opinion never addressed whether the abortion provider petitioners' injury-in-fact was due to a "credible threat" of enforcement of S.B. 8. *Id.* Without delving into enforcement, the Court found the abortion provider petitioners had alleged S.B.8. "already had a direct effect on their day-to-day operations." *Id.* Distinct from the abortion provider petitioners, CDIA has not yet suffered any injury due to the enactment of section 20.05(a)(5).

ii. Past voluntary settlement agreements do not support an injury-in-fact.

CDIA insists (at 15-17) that past voluntary multi-state settlements entered into under the authority of statutes *other than* section 20.05(a)(5) are sufficient to create an Article III injury. ROA.446-448. The settlements do not establish past enforcement of the same conduct regulated by section 20.05(a)(5). *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

The first settlement CDIA relies upon (at 15-16) to establish prior enforcement of section 20.05(a)(5) is a multi-state settlement agreement from 2015—*before* Texas Business and Commerce Code section 20.05(a)(5) was

enacted. ROA.451-536. The 2015 settlement agreement (referred to as the "NCAP Settlement") was initially spearheaded by Ohio Attorney General Mike DeWine in 2012.[2] The multi-state investigation was driven by consumers. ROA.455. An Executive Committee was formed "to examine consumer complaints and disputes presented by consumers to the States for various credit reporting issues." ROA.455. Equifax Information Services LLC, Experian Information Solutions Inc., and TransUnion LLC, fully cooperated in the investigation and ultimately entered into a voluntary settlement agreement with the attorneys general and offices of consumer protection divisions of thirty-one states. ROA.453, 455.

CDIA also contends the Texas Attorney General's statutory authority to enter into the NCAP settlement under the Texas Deceptive Trade Practices Act ("DTPA") is dispositive of past enforcement. Resp. Br.15. While violation of Chapter 20 is also considered a deceptive trade practice, the NCAP settlement contained no prohibition against reporting surprise-balance-billing within 180 days of the delinquency—the reporting prohibited by section

[2] Resp. Br.15-16 (citing Attorney General Paxton Announces $6 Million Settlement with Credit Reporting Agencies, NEWS RELEASES, May 28, 2015, https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-6-million-settlement-credit-reporting-agencies); ROA.451-536.

20.05(a)(5). Resp. Br.15; ROA.451-536. And CDIA points to no such prohibition.

CDIA's passing reference (at 16 n.7) to a 2017 settlement between Equifax and 48 states, the FTC, the CFPB, District of Columbia, and Puerto Rico is also unpersuasive. ROA.449, ¶35. The 2017 settlement was initiated in response to a data breach self-reported by Equifax. *See* Resp. Br.16 n.7.[3] The breach exposed the personal information of almost half of the United States population. *Id.* The Attorney General of Texas, along with 48 states, investigated the self-reported data breach and ultimately entered into a settlement with Equifax. ROA.449, ¶35. Investigation and remediation of a data breach of personal information is far afield of enforcement of the conduct regulated by section 20.05(a)(5)—the reporting of surprise-balance billing.

CDIA bears the burden to plead sufficient facts to evidence "at least a substantial risk that the injury will occur." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (internal citation omitted). Without any prior enforcement of section 20.05(a)(5), CDIA cannot meet its burden to demonstrate a

[3] AG Paxton Announces Historic $600 Million Data Breach Settlement with Equifax, NEWS RELEASES, July 22, 2019, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-historic-600-million-data-breach-settlement-equifax.

"'certainly impending harm' or a 'substantial risk of harm.'" *Shrimpers & Fishermen of RGV v. Tex. Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (collecting cases).

B. CDIA's members' injury is not particularized and concrete.

CDIA's members' injury is not particularized or concrete—a necessary requirement of an injury-in-fact CDIA cannot avoid. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), *as revised* (May 24, 2016). For an injury to be concrete, the injury "must be '*de facto*'; that is, it must actually exist." *Id.* at 340. A risk of harm is considered concrete when the "degree of risk [is] sufficient to meet the concreteness requirement." *Id*. at 343.

Here, CDIA has not met its burden to show the risk of enforcement under the Act—by both consumers and the Attorney General of Texas—evidences a concrete injury. CDIA dismisses (at 17) the Act's consumer enforcement provision and provides no rebuttal as to whether any enforcement by a consumer would even occur or be resolved by arbitration or settlement. Tex. Bus. & Com. Code §§ 20.06-.08 (outlining the dispute procedure available for consumers if the information contained in a consumer credit report is in dispute). CDIA has not alleged that any consumer has even notified a CRA of a potential dispute of information prohibited under section 20.05(a)(5), a

necessary requirement before filing a private enforcement action. Tex. Bus. & Com. Code § 20.08.

Because the threat of enforcement is entirely speculative, CDIA cannot plead any concrete injury incurred by its members. ROA.448.

C. An injury based on an unfounded fear cannot be traceable to the Attorney General of Texas.

CDIA's members' alleged injury is not fairly traceable to the Attorney General of Texas because CDIA's fear of enforcement is too speculative. CDIA must demonstrate that the "significant threat of enforcement" that its members face is traceable to the Attorney General's "intention to enforce the statute." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008). More, CDIA's injury must be causally connected to actions by the Attorney General. *Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 502 (5th Cir. 2020). The injury arising from enforcement of section 20.05(a)(5) by the Attorney General must be "actual or imminent." *E.T. v. Paxton*, 19 F.4th 760, 766 (5th Cir. 2021). Changes in plans "must still be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018).

CDIA's members' self-inflicted injury is not traceable to the Attorney General's threatened enforcement of section 20.05(a)(5). CDIA's theory (at 13-

14) that its members face a Hobson's choice fails for the same reason. Without a credible threat of enforcement, no coercion exists to support the binary choice CDIA proposes. Traceability fails because CDIA's members' decision to enact "system changes" cannot be traced to a credible threat of enforcement by the Attorney General of Texas.

D. A speculative injury is not redressable.

Injunctive relief preventing the Attorney General from enforcing section 20.05(a)(5) will not redress CDIA's members' alleged injuries. ROA.452, ¶1; *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001). CDIA has asserted generally that its members will have to make "significant changes" to comply with section 20.05(a)(5). ROA.445, ¶20. According to CDIA's theory, these "significant changes" will occur no matter who enforces the statute. Simply enjoining the Attorney General from enforcing the statute will not prevent private citizens from enforcing section 20.05(a)(5) via a private cause of action. Tex. Bus. & Com. Code § 20.08(a). Even if the Attorney General is enjoined, CDIA may face enforcement by private citizens. The Attorney General cannot prevent private citizens from seeking relief under section 20.08, as the Supreme Court has pointed out in *Whole Woman's Health*. 142 S. Ct. at 535 (acknowledging the Attorney General of Texas cannot enjoin private citizens).

CDIA provides no response as to these private enforcement actions. Resp. Br.16.

CDIA's members, whom CDIA admits operate nationwide (ROA.573), may also make these same alleged "system changes" due to regulation in other States—thus eliminating its members' potential injury and the available remedy.[4]

[4] While CDIA devotes some argument to the preemption of section 20.05(a)(5) (at 5-7), the ultimate merits question is not before this Court. *Whole Woman's Health*, 142 S. Ct. at 531. However, parallel litigation pending in the First Circuit is instructive as to the redressability of CDIA's members' injury. *See Consumer Data Indus. Ass'n v. Frey*, No. 20-2064, 2022 WL 405956 (1st Cir. Feb. 10, 2022). CDIA challenged a similar statute in Maine concerning the reporting of medical debt. *Id.*; 10 M.R.S.A. § 1310-H(4) (limiting the reporting of medical expenses when the consumer is making regular, scheduled payments toward the debt). The parties stipulated that CDIA's members "will have to take affirmative steps and revise procedures to comply with the Maine Amendments." 495 F. Supp. 3d 10, 17 (D. Me. 2020), *rev'd and vacated*, No. 20-2064, 2022 WL 405956 (1st Cir. Feb. 10, 2022). The district court held Maine's Medical Debt statute was preempted by the Fair Credit Report Act. *Id.* at 21. Recently the First Circuit reversed and vacated the district court's holding, finding the Maine Amendments are not preempted in their entirety by the FCRA and remanded the case back to the district court to determine the extent the FCRA may partially preempt the Medical Debt Reporting Act. *Consumer Data Indus. Ass'n v. Frey*, No. 20-2064, 2022 WL 405956, at *10 (1st Cir. Feb. 10, 2022). The First Circuit expressed no opinion as to "whether or to what extent" the FCRA preempts the Medical Debt Reporting Act. *Id.* Depending on the extent of the district court's ruling as to the preemptive effect of the FCRA, CDIA may implement the same procedures CDIA claims its members will be injured by implementing here.

Because the Attorney General of Texas cannot remedy CDIA's members' alleged harm, redressability is wanting. *Tenth St. Residential*, 968 F.3d at 503 (finding lack of traceability when plaintiff's requested relief "would not be the antidote for its malady").

II. CDIA Cannot Establish a Waiver of Immunity Without a Threat of Enforcement of Section 20.05(a)(5) by the Attorney General of Texas.

CDIA has not established that the Attorney General of Texas has the requisite connection to the enforcement of section 20.05(a)(5) to establish waiver of immunity under *Ex parte Young*, 209 U.S. 123, 128 (1908). The question presented is not, as CDIA insists (at 22), solely whether the Attorney General of Texas is named as the state official charged with enforcement of the statute. This Circuit requires more than just the identification of an official. The state official must have "the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi*, 244 F.3d at 416 (plurality opinion))(emphasis added). Noticeably absent from CDIA's response is whether the Attorney General has "demonstrated willingness to exercise that duty." *Id.* Especially in pre-enforcement challenges when the party attempts a "first strike" lawsuit before action by the State, "the prospect

of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992). Mere connection to enforcement of the statute is not sufficient—the Attorney General must also take some step towards enforcement of the law. *Ex parte Young*, 209 U.S. at 155–56 (waiver is established for individuals "who threaten and are about to commence proceedings").

CDIA cites *Whole Woman's Health* to support its contention that this Court should end the *Ex parte Young* analysis after identifying the enforcement authority. Resp. Br.22-24 (citing 142 S. Ct. 522 (2021)).

The *Whole Woman's Health* decision is distinguishable for two reasons. First, the Supreme Court found the abortion-provider petitioners had already suffered an injury due to S.B.8's enactment. 142 S. Ct. at 536–37. CDIA has not alleged a present injury. ROA.448, ¶34. Second, the enforcement authority cited "impose[d] a duty on the licensing-official defendants to bring disciplinary actions against [petitioners] if they violate S. B. 8." *Id.* The specific language of the statute identified, Texas Occupational Code section 164.05, provides that the board "shall take an appropriate disciplinary action" and shall refuse to admit or renew a license of violators. Tex. Occ. Code § 164.055.

Unlike the Texas Health and Safety Code, the Texas Business Code provision granting the Attorney General of Texas the authority to file suit for relief under Chapter 20 is permissive. *See* Tex. Bus. & Com. Code § 20.11(a) (providing the attorney general "may" file a suit against for relief to prevent a violation of Chapter 20). And as discussed *supra*, the Attorney General's participation in settlements arising under *other* statutes does not establish that the Attorney General has "demonstrated willingness" to enforce *this* statute. ROA.446-9.

Without a specific threat of enforcement demonstrated by more than just the Attorney General's discretionary enforcement authority, CDIA cannot establish a waiver of immunity under *Ex parte Young*.

III. CDIA Cannot Establish a Ripe Claim Without a Sufficiently Imminent Threat of Litigation.

Here, CDIA cannot meet the hardship prong necessary to establish its members' claim is ripe. Whether CDIA's members will be subject to enforcement is too speculative to merit judicial review pre-enforcement. The ripeness inquiry for an injury that is predicated on threat of litigation "focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Orix Credit All., Inc.*, 212 F.3d at 897 (citing

Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153 (5th Cir. 1993)). Pre-enforcement standing "tracks closely with ripeness" and the inquiry "often ask[s] whether the threat of enforcement is sufficiently 'credible' or 'clear.'"[5] Even if a question presented is purely legal, "the plaintiff must show some hardship in order to establish ripeness." *Cent. & S. W. Services, Inc. v. U.S. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000).

CDIA's reliance on the pre-enforcement review of a Food and Drug Administration drug-labeling regulation in *Abbott Labs. v. Gardner* is not instructive as to hardship. 387 U.S. 136, 153 (1967) (abrogated on other grounds). The Supreme Court emphasized that the drug manufacturer petitioners "deal in a sensitive industry, in which public confidence in their drug products is especially important." *Id.* Notwithstanding the unique facts, the Court examined whether the regulation "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* As discussed supra (at 4-7), CDIA's

[5] *Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 313 (5th Cir. 2021) (cleaned up) (citing *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 394 (1988); *Susan B. Anthony List v. Driehaus*. 573 U.S. 149, 161 (2014); *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 4 (1st Cir. 2000)).

construction of injury is based on a speculative fear of enforcement. CDIA faces no immediate injury. And CDIA does not deal in the "sensitive industry" of the drug market. *Id.* CDIA will not be harmed if review is delayed because the threat of enforcement and resulting harm is not sufficiently imminent.

This lawsuit should be dismissed for lack of subject-matter jurisdiction because CDIA's members fail to cite any articulable injury that is addressable under Article III, ripe for review, or establishes waiver of immunity under the *Ex parte Young* doctrine.

CONCLUSION AND PRAYER

For the foregoing reasons, the district court's denial of sovereign immunity should be reversed and the lawsuit dismissed because CDIA has not established a waiver of immunity, and in the alternative CDIA has failed to invoke the district court's subject-matter jurisdiction due to lack of standing and ripeness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13: (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Caroline Merideth
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CERTIFICATE OF COMPLIANCE

I hereby certify that (1) required privacy redaction have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of Symantec Endpoint Protection and was reported free of viruses.

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because exclusive of the portions exempted by 5th Cir. R. 32.2 Microsoft Word reports that this brief contains 3,743 words, and complies with the 14 pt. typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it was prepared in Microsoft Word using a 14-point proportionally spaced typeface.

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