No. 14-12004-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,
Plaintiff/Appellant

v.

PCI GAMING AUTHORITY, ET AL.,
Defendants/Appellees

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:13-cv-00178-WKW-WC

REPLY BRIEF

Luther Strange
Alabama Attorney General
Andrew L. Brasher
Alabama Solicitor General
Megan A. Kirkpatrick
Alabama Ass't Solicitor General

OFFICE OF THE ATTORNEY
GENERAL OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
(334) 242-4891 (fax)
abrasher@ago.state.al.us
mkirkpatrick@ago.state.al.us

Attorneys for Appellant State of Alabama

CERTIFICATE OF INTERESTED PERSONS

Appellant State of Alabama certifies that the following persons, firms, and entities have an interest in the outcome of this case:

No new entries.

Respectfully submitted,

LUTHER STRANGE
ATTORNEY GENERAL

s/ Andrew L. Brasher
Andrew L. Brasher
Solicitor General

OF COUNSEL:
Andrew L. Brasher
Solicitor General
Megan A. Kirkpatrick
Assistant Solicitor General

Office of the Attorney General
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130-0152
(334) 242-7300
(334) 242-4890 – FAX
abrasher@ago.state.al.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

The State preemptively addressed almost all of the tribal defendants' arguments in its initial brief. We will rely on and reference those portions of our initial brief, where appropriate, to make this reply brief as succinct as possible.

The Court should keep in mind that the express purpose of the Indian Gaming Regulatory Act (IGRA) was to reverse the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987). In *Cabazon*, the Supreme Court held that a state could *not* apply its prohibition on high-stakes bingo to Indian land because of abstract notions of tribal sovereignty. Justice Stevens, in his dissenting opinion, succinctly identified the problem with that approach: "the decision to . . . set aside the substantial public policy concerns of a sovereign State" should not be made "by this Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs" from Las Vegas. *Id.* at 227, 107 S. Ct. at 1097-98. It "should be made by the Congress of the United States." *Id*. In their briefs, the tribal defendants and the Secretary of the Interior ask this Court to return to *Cabazon* and, again, to nullify the "substantial public policy concerns of a sovereign State" based on nebulous tribal interests. The Court should instead enforce to the text of Congress's statute.

I. The State can litigate the status of the lands in response to the tribe's preemption defense.

Several misconceptions pervade the tribal defendants' and United States' discussion of our state-law public nuisance claim.

First, the tribal defendants, not the State, injected the status of the Poarch Band's lands into this case. We filed our state-law nuisance claim in state court, and it was removed by the tribal defendants on the grounds of complete preemption under IGRA. *See* Doc. 1. To establish complete preemption, the tribal defendants argued that the gambling at issue was occurring on "Indian lands" because the deeds to the lands at issue are in the name of the United States. *Id.* at 1-2. We responded to this assertion in our Amended Complaint. We took the position that the mere fact that the United States' name is on a deed is insufficient to establish that those lands are "Indian lands" under IGRA, such that IGRA preempts state law. Instead, to establish complete preemption under IGRA, the tribal defendants must establish that the Secretary of the Interior actually had the power to authorize gambling on those lands, which entails an evaluation of whether the Secretary had the power to take those lands "in trust."

This action, therefore, is not a "collateral attack" on the United States "title to land," and is not subject to the concerns that the Secretary of the Interior and the tribal defendants have raised. As the United States concedes, a court's ruling on our state-law public nuisance claim—even a ruling that ultimately stopped the

tribe's gambling activity—would not be binding on the United States in any way. U.S. Br. 14 ("the district court's decision does not bind the Untied States"). Our state-law public nuisance claim does not seek—in name or effect—to disturb the United States' title to the lands at question. Our position is only that, before the tribal defendants can use federal law as a sword against the State, they must prove that federal law actually gives them the authority that they claim.

Second, the United States and tribal defendants suggest that these matters should have been litigated long ago. But the State had no interest, and likely no standing, to litigate these issues when these lands were first purportedly taken into trust. The Secretary of the Interior took title to some of these lands in the 1980s, before IGRA was even enacted. And the first harms the State suffered occurred only recently when the tribal defendants built multi-million dollar casinos and filled them with Las Vegas style slot machines. The United States suggests that the State could have sued earlier over lost property-tax revenue. *See* U.S. Br. 17. But the decrease in property tax would have arisen regardless of how the United States took title to the property; the State cannot tax the federal government's property even if the United States buys the property outright. *See, e.g.*, *Clallam County v. United States*, 263 U.S. 341, 44 S. Ct. 121 (1923). The first time the State was harmed by the purported "trust status" of these lands—as opposed to the

mere fact that the United States' name is on the title—is when the tribal defendants built multi-million dollar casinos and filled them with slot machines.

It is also noteworthy that the United States and Indian tribes made exactly these same policy arguments in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, --- U.S. ----, 132 S. Ct. 2199 (2012), and they did not succeed. In *Patchak*, for example, an adjoining landowner filed an APA suit against the Secretary over the Secretary's decision to take land into trust. The United States argued that an APA challenge had to be brought within 30 days because "permitting suits such as this one to proceed . . . would severely disrupt the Secretary's acquisition and retention of trust lands for Indians." Brief of United States, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2012 WL 416751 at *23. This uncertainty, the United States argued, "would pose significant barriers to tribes seeking assurances concerning the status of trust lands and their ability to promote investment and economic development on the lands." *Id.* at 24. The Supreme Court rejected those arguments, and ruled against the United States. These policy arguments are "not without force," the Supreme Court explained, "but [they] must be addressed to Congress." *Patchack*, 132 S. Ct. at 2209.

Third, the Secretary of Interior is obviously not a necessary party to this dispute. As the United States concedes, the "United States is not a required party in

every case raising the issue of whether, for jurisdictional purposes, a particular parcel of land constitutes 'Indian country.'" U.S. Br. 14 n5. And we are not seeking any relief against the Secretary of the Interior, nor are we seeking to invalidate the United States' title to the property. If our view of the law prevails, the United States will still hold title to the property; the tribal defendants will merely not be able to use it for gambling in contravention of state law.

But, if the Secretary is a necessary party, we should be allowed to sue her. The United States and tribal defendants argue that an APA claim would be barred by the six year statute of limitations. *See* U.S. Br. 15-16; PCI Br. 17-22. But that is not a foregone conclusion for at least two reasons. First, as we explain in our initial brief, there is an exception to the APA statute of limitation when an old administrative action is applied anew. Here, the tribe has only recently raised the administrative action to defeat the state's public nuisance suit and engage in gambling that violates state law. The question of the APA statute of limitations has recently divided a Ninth Circuit panel and resulted in full *en banc* treatment by the Ninth Circuit. *See Big Lagoon Rancheria v. California*, 741 F.3d 1032, en banc rehearing granted, 758 F.3d 1073, 2014 WL 2609714 (9th Cir. 2014). This question is, at the very least, close enough to warrant full and fair litigation in the district court between the State and the United States.

Second, the United States pointed out in its brief in *Patchak* that—if it lost that case, which it did—every new administrative action that pertains to trust land would create a new opportunity to challenge trust status under the APA. The United States explained:

> [T]he uncertainty surrounding the status of trust land arguably would not even end six years after the land is taken into trust. The implication of the court of appeals' reasoning is that, whenever the Secretary takes final agency action with respect to Indian trust land, such as approving a lease, plaintiffs (again, as long as they do not claim to own the land) can bring an APA suit contending that his action was contrary to law because the land is not properly held in trust for Indians. That might even be so when the United States has held the land in trust for years and the tribe has made substantial investments in it.

Brief of United States, *Patchak*, 132 S. Ct. 2199, 2012 WL 416751 at *24. In other words, if the State can identify a final agency action with respect to the Poarch Band within the last six years, it can file an APA claim against the Secretary and raise the status of the lands in that litigation. It is likely that the Secretary has taken some action within the last six years that could be construed as a final agency action that would give the State an APA claim within the six-year statute of limitations.[1] If the Secretary or the United States is a necessary party, then the case should be remanded so that the State can sue them.

[1] In fact, there is ongoing litigation in the district court between the Poarch Band, another Indian tribe, and the United States over actions that the United States has allegedly taken to allow the most recent casino to be built. First Amended Complaint, *Muscogee Creek Nation, et al. v. Poarch Band of Creek Indians, et al.*,

II. Assuming the lands are Indian lands, the State has a cause of action.

As we explained in our principal brief, even if one assumes that the gambling at issue occurs on Indian lands as that term is defined under IGRA, the State can pursue a cause of action against the tribal defendants under Section 1166. That statute provides that all state gambling laws are enforceable in Indian country "in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). Because Alabama gambling law gives the State a public-nuisance cause of action to enjoin slot-machine gambling, Section 1166 expressly allows the State to file that public-nuisance cause of action with respect to gambling in Indian country too.

In response to our argument, the tribal defendants and United States argue that Section 1166 means the *opposite* of what it says. Section 1166(a) expressly incorporates all state gambling laws (1) "including but not limited to criminal sanctions" (2) and makes them apply to Indian country "in the same manner and to the same extent as such laws apply elsewhere in the State." The tribal defendants and the federal government are asking this Court to read these two phrases out of the statute. Section 1166, they say, is a statute *limited* to "criminal sanctions." *See* PCI Br. 25 ("exclusively criminal statute"). State gambling laws apply in Indian

---

No. 2:12-cv-1079-MHT (M.D. Ala.) One of the casinos has apparently been built on an ancient Indian burial ground.

country, they say, in "a [different] manner and to a [different] extent" than such laws "apply elsewhere in the State." *See* U.S. Br. 24 (arguing that state laws assimilated under 1166 can only be enforced by the United States).

Congress did not write the statute that the tribal defendants and United States believe it wrote. The "preeminent canon of statutory interpretation" requires the courts to "presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593 (2004). The statute that Congress actually wrote provides that "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166. This is a decidedly unambiguous provision. And the import of the statute is simple: if there is a state law that pertains to gambling, it applies to gambling on Indian country in the same way that it applies everywhere else. There has never been any dispute that an essential part of Alabama's gambling-regulatory regime is the right of the State to file a public-nuisance suit to enjoin slot-machine gambling. Under Section 1166, this aspect of Alabama law applies on Indian lands just as much as it applies anywhere else in Alabama.

The tribal defendants are able to interpret Section 1166 to say the opposite of what it plainly says only by inverting the proper order of statutory interpretation. The Court must begin with the text and address other matters, such as legislative history or canons of construction, only if the text is ambiguous. *See Packard v. C.I.R.*, 746 F.3d 1219, 1222 (11th Cir. 2014) ("A court's inquiry, therefore, 'begins with the statutory text, and ends there as well if the text is unambiguous.'"). But the tribal defendants *begin* with legislative history and canons of construction and do not meaningfully address the text at all.

Specifically, the tribal defendants begin with implications from silence. They argue that, because the statute makes no express "reference to civil violations or civil enforcement," it must be a purely criminal-law statute. But that has things precisely backward. The first step of statutory interpretation is to identify the unambiguous import of the words that Congress used; the first step is not to draw implications from words that Congress *did not* use based on "statutory background," "labeling and codification," "the structure and policy of IGRA as a whole," or "Indian canons of statutory construction." *See* PCI Br. 23-32. Here, the words that Congress used broadly incorporate all state laws pertaining to gambling and direct that those state laws apply to Indian country exactly as they apply everywhere else in the state.

We recognize, of course, that Section 1166 also provides that the United States can bring criminal actions against individuals who violate state law on Indian lands. As the tribal defendants explain, Section 1166(b) provides how criminal penalties will work and 1166(d) reserves the power to prosecute persons for state-law crimes to the federal government. *See, e.g.*, PCI Br. 33-34. We do not disagree. But the text of Section 1166 also goes beyond criminal sanctions and criminal prosecution. The "scope of section 1166 is clearly broad, assimilating all state laws governing regulation of gambling, including those which are civil, as well as those which are criminal." *United States v. Seminole Tribe of Fla.*, 45 F. Supp. 2d 1330, 1331 (M.D. Fla. 1999). As the United States once told the U.S. Supreme Court, IGRA "independently prohibits the operation of forms of Class III gaming that are illegal under state law." Brief in Opposition of United States, *Santee Sioux Tribe of Nebraska v. United States*, No. 97-1839, 1998 WL 34103431 at *8. The United States explained that, "[b]ecause Nebraska law absolutely forbids the forms of gaming conducted by petitioner, an injunction prohibiting such gaming was appropriate." *Id.*

The tribal defendants say that our reading of Section 1166(a) would render Section 1166(b) "superfluous." But that is incorrect. Subsection (b) provides:

> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the

> jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 1166(b). Under our view of subsection (a), subsection (b) still does plenty of work. It establishes a federal crime. *Id.* ("shall be guilty of a like offense and subject to a like punishment"). It provides for the proper punishment for the commission of that federal crime. *Id.* ("although not made punishable by any enactment of Congress. . . subject to like punishment"). And it provides that compliance with an Indian tribe's regulations is no defense to that federal crime, even though it might be a defense under the incorporated state law. *Id.* ("whether or not conducted or sanctioned by an Indian tribe"). Instead, it is the tribal defendants' reading of the statute that renders 1166(a) superfluous. If Congress had wanted *only* to establish a new crime, then it needed only to enact 1166(b).

The tribal defendants' interpretation does not give effect to all the words of the statute. The tribal defendants do not explain, under their interpretation, what Congress meant when it used the words "all State laws," "including but not limited to criminal sanctions," and "in the same manner and to the same extent as such laws apply elsewhere in the State." Their proposed reading of the statute simply eliminates those words. This is how subsections (a) and (c) would read if Congress had wanted to do what the tribal defendants argue that it did:

> **(a)** Subject to subsection (c), for purposes of Federal law, ~~all~~ State criminal laws pertaining to ~~the licensing, regulation, or prohibition of~~ gambling, ~~including but not~~ limited to criminal sanctions applicable thereto, shall apply in Indian country ~~in the same manner and to the same extent as such laws apply elsewhere in the State~~." .
>
> **(b)** [discussing how criminal penalties will work]
>
> **(c)** [excepting class I and class II gambling]
>
> **(d)** The United States shall have exclusive jurisdiction over all actions ~~criminal prosecutions of violations of State gambling laws that are made applicable~~ under this section ~~to Indian country~~, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

In fact, as explained above, if the tribal defendants were right that Congress only wanted to provide for criminal punishment, Congress could have passed the statute with *just* subsection (b); there would be no need for subsections (a) or (d). The Court cannot redline the statute based on amorphous concepts of tribal sovereignty. That is precisely the kind of reasoning that led to *Cabazon* and compelled Congress to enact IGRA in the first place.

The Court should also note an important difference between the arguments of the United States and the tribal defendants. The tribal defendants argue that no one—not the State and not the federal government—can enforce any state laws incorporated under Section 1166 in a civil proceeding. PCI Br. 25-30. The United States disagrees; it argues that the federal government can enforce civil gambling

laws, but that the states cannot. The United States' interpretation erroneously gives overriding importance to the statute's grant of exclusive authority over criminal prosecutions, and it completely ignores the statute's directive that state laws apply to Indian country "in the same manner and to the same extent as such laws apply elsewhere in the State." Nonetheless, as we explain in our principal brief, if the tribal defendants are right to invoke the Indian-benefit canon here, that canon runs against the federal government just as much as it runs against the State. State Br. 47-48. The United States' interpretation of the statute is thus incompatible with the tribal defendants' interpretation.

Finally, our reading of Section 1166 is amply supported by the policy of IGRA. The point of IGRA was to *balance* state, tribal, and federal interests. It specifies, among other things, that a tribe can engage in gambling activity only if it "is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). Our proposal effectuates that balance by allowing a state to sue tribal officers when their gambling activity violates a state's "criminal law and public policy." But our approach also recognizes that certain types of gambling, such as class I and class II gambling, are off-limits for state regulation and interference. States only have a role with respect to Class III gambling, and that is the only kind of gambling our interpretation of Section 1166 allows the State to sue over.

The United States and tribal defendants propose interpretations of IGRA that make no attempt at *balancing* state, tribal, and federal interests. Under their view, IGRA is a statute that gives no power to the states. Under their view, the only protection a state has against illegal gambling in violation of its public policy and criminal law is the good grace of other sovereigns. But that was the only protection the states had under *Cabazon*.

Specifically, the tribal defendants argue that the State can confidently rely on the National Indian Gaming Commission (NIGC) to "shutter" Indian casinos that violate the law. *See* PCI Br. at 31. That suggestion is legally and practically implausible. First, tribes have invoked the possibility of NIGC enforcement to argue against the United States' own ability to bring civil actions under Section 1166, and those arguments have rightly failed. *See Seminole Tribe*, 45 F. Supp. 2d at 1331 (rejecting argument that "the only authorized federal remedies [were] a civil enforcement by the National Indian Gaming Commission (NIGC) under 25 U.S.C. § 2713" and criminal penalties). Second, the tribal defendants' gambling devices at issue in this case are illegal under the NIGC's own longstanding interpretation of IGRA, but the NIGC is actively refusing to enforce that interpretation. *See* State Br. 13. This is unsurprising. The NIGC is funded by the tribes that it purportedly regulates. *See* 25 U.S.C. § 2717(a). Even when the U.S. Secretary of the Interior herself determined that the Bay Mills tribe in Michigan

was engaged in illegal gambling activity, the federal government did not act to bring the casino into compliance. *See, e.g.*, *Michigan v. Bay Mills*, 134 S. Ct. 2024, 2029 (2014) (noting that "the federal Department of the Interior issued an opinion concluding (as the State's complaint said) that the Tribe's use of Land Trust earnings to purchase the Vanderbilt property did not convert it into Indian territory"). Our interpretation of Section 1166 is most consistent with the goals of IGRA and is the only proposed interpretation that effectuates true balance between tribal, federal, and state interests.

III. The tribal defendants do not have immunity.

We have already explained that the district court was plainly incorrect in its finding that, *if the state-law claim is not preempted*, the tribal defendants have immunity from that claim. The United States agrees with us. As the United States notes, "[i]f the casinos were not on Indian lands, then Alabama could sue tribal officials under state law to enjoin the casinos' operations." U.S. Br. 12 n.4. This is the straightforward holding of *Michigan v. Bay Mills Indian Community*, --- U.S. ---, 134 S. Ct. 2024, 2034-35 (2014), a precedent that was issued after the district court's decision in this case.

We have also explained that the district court was plainly *correct* in its finding that the tribal defendants do not have immunity from the State's federal-law claim because of *Ex parte Young*. State Br. 50-52. The tribal defendants

respond that, as to the federal-law claim, they have immunity because *Ex parte Young* does not apply to a cause of action that relates to IGRA. They are essentially arguing that IGRA is so preemptive that it preempts itself. There are several problems with this argument.

The first problem is that the tribal defendants have never made this argument before. *See* Doc. 14 at 4-6. Instead, they argued below only that the State did not plead enough facts to invoke *Ex parte Young*—an argument they now expressly withdraw. PCI Br. 51 ("The Tribal Defendants concede that the district court properly interpreted this Court's precedents in holding that the allegations of the Amended Complaint suffice, at least at this stage of the litigation, to bring the State's federal claim within the scope of the Ex parte Young").

The second problem is that this Court has already held that *Ex parte Young* applies to suits arising under IGRA. *See Tamiami Partners, Ltd. By and Through Tamiami Development Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050-51 (11th Cir. 1995). In *Tamiami I*, this Court expressly held that tribal officials did not have tribal immunity for claims arising under IGRA based on the doctrine of *Ex parte Young*. *Id.* As this Court explained in a follow-on case, the Court in *Tamiami I* "relied on *Ex parte Young* in affirming the district court's ruling that the Tribe's sovereign immunity did not shield the individual defendants from [the] suit," with respect to "to the third count of [the] amended complaint,

which was brought under IGRA and its regulations." *Tamiami Partners, Ltd., et al. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225 (11th Cir. 1999).

Third and finally, the tribal defendants' argument finds no support in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74, 116 S. Ct. 1114, 1132 (1996). In *Seminole Tribe*, the question was whether a tribe could enforce a statutory cause of action to compel compact negotiation against a state officer under an *Ex parte Young* theory. The express statutory cause of action at issue ran *against the state itself* and included a variety of protections that would not have been available in an *Ex parte Young* action. The Supreme Court reasoned that the tribe could not end-run those statutory protections by casting its claim as one arising under *Ex parte Young*; "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*." *Id.* at 75-76, 116 S. Ct. at 1133. That reasoning does not apply here. The tribal defendants have not identified an express cause of action that imposes *less* liability on the tribe than would be imposed on the tribal officers if the State won this lawsuit. Instead, the federal cause of action that the State has brought in Count Two of the Amended Complaint—an action under Section 1166—runs against individuals and not the tribe itself. There is no IGRA-specific exception to *Ex parte Young*.

* * *

The tribal defendants contend that it would be contrary to public policy if the State were allowed to sue over "what the Tribe and the United States have concluded is lawful gaming activity." PCI Br. 53. But it would actually be contrary to public policy if the district court were affirmed. IGRA unequivocally provides that a tribe must negotiate a compact with a State to offer "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). But that is precisely what the tribal defendants are currently doing, without a compact, such that the State gets none of the benefits of IGRA's regulatory regime and all of the negative spill-over effects of casino gambling within its borders. If the State cannot stop tribal officials from engaging in class III gambling without a compact, then IGRA is a dead letter and we have returned to the world of *Cabazon*. The tribal defendants would like that world, but it would not serve the public interest.

CONCLUSION

The District court should be reversed.

Respectfully submitted,

LUTHER STRANGE
ATTORNEY GENERAL

s/ Andrew L. Brasher
Andrew L. Brasher
Solicitor General

OF COUNSEL:
Andrew L. Brasher
Solicitor General
Megan A. Kirkpatrick
Assistant Solicitor General
Office of the Attorney General
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130-0152
(334) 242-7300
(334) 242-4890 – FAX
abrasher@ago.state.al.us

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,597 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I have relied upon Microsoft Word 2007 to determine the word count.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

s/ Andrew L. Brasher

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected via electronic mail upon counsel of record on this day the 24th of September, 2014.

s/ Andrew L. Brasher