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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

TAMMY WILHITE,)	
)	
Plaintiff,)	Case No. 18-CV-80-BIL-SPW
)	
v.)	DEFENDANTS' BRIEF IN
)	SUPPORT RE: MOTION TO
AWE KUALAWAACHE CARE)	DISMISS REGARDING
CENTER, PAUL LITTLELIGHT,)	SOVEREIGN IMMUNITY
LANA THREE IRONS, HENRY)	
PRETTY ON TOP, SHANNON)	
BRADLEY, and CARLA)	
CATOLSTER,)	
)	
Defendants.)	

Defendants herein, through their counsel of record, Michael Rausch and Evan Thompson of the firm of Browning, Kaleczyc, Berry & Hoven, P.C., file this brief in support of their Motion to Dismiss based on Tribal sovereign immunity.

BACKGROUND

On May 9, 2018, the Plaintiff Tammy Wilhite filed a Complaint in this Court based on the following alleged facts. The Plaintiff worked for the Crow Tribe's Care Center (a/k/a the Awe Kaulawaache Care Center), an entity created by the Crow Tribe. Doc. #1, ¶ 4.¹ The named Defendants (with the exception of Carla Catolster) are members of the Board of Directors of the Care Center. Id., at ¶¶ 5-8. Defendants are enrolled members of the Crow Tribe. See **Exhibit A**, attached hereto, the Affidavit of Paul Littlelight in support of Defendants' Motions to Dismiss. Ms. Catolster was the "administrator and managing employee of the Care Center" at the time of these allegations. Doc. #1, ¶ 10.² Notably, all of the conduct of which the Plaintiff complains, occurred within the exterior boundaries of the Crow Indian Reservation.³

Thereafter, after serving some of the defendants in this case, the Plaintiff filed an Amended Complaint, Docket #11. This amendment modifies only some of the factual assertions but not the substance of allegations identified above.

Additionally, as set forth in the attached **Exhibit A**, the affidavit of Paul Littlelight, the Care Center is a tribally owned and operated nursing home facility

¹ The Care Center is located on trust property within the exterior boundaries of the Crow reservation. All alleged actions by the Defendants occurred within the reservation boundaries.

² ¶ 10 was misnumbered and should be ¶ 9.

³ Defendants contest the factual allegations of the Complaint and Amended Complaint and reserve their right to defend against these claims on the merits. Nothing in this brief should be construed as an admission to any such allegations.

located on trust property within the exterior boundaries of the Crow Reservation. Exhibit A, ¶ 2. All of the Care Center residents are Indians. Id., ¶ 5. Pursuant to Tribal law, its workforce has an Indian hiring preference. Id., ¶ 6. The Board members include all the other named Defendants except for Carla Catolster who was the Care Center's administrator and managing employee. Id., ¶ 7-8. All actions allegedly taken by the Board of Directors as set forth in the Plaintiff's Amended Complaint were taken in their official capacities as board members. Id. This is evidenced by Plaintiff's allegations that their actions occurred during a board meeting. Complaint, ¶¶ 21-22. All of the individually named Defendants are Crow tribal members. Id., ¶ 9.

Additionally, the Crow Tribe established the Crow Tribal Care Center, d/b/a the Awe Kualawaache Care Center, on April 11, 1998, by resolution 98-29, attached hereto as **Exhibit B-1**.⁴ According to that resolution, the Care Center is a "tribal instrumentality" which provides an on-reservation nursing facility. The resolution adopted by reference a tribal ordinance which set forth the by-laws of the Care Center. **Exhibit B-2** hereto. On October 14, 2000, Resolution 2001-18 modified said ordinance to allow the Tribal Chairman to select three Board Directors for the Care Center. **Exhibit B-3** hereto. Based on these documents the following provisions of Exhibit B-2 are applicable to this motion:

⁴ **Exhibit B** is a supplemental affidavit by Mr. Littlelight which provides the evidentiary foundation for Exhibits B-1 through B-4.

Section 5. Sovereign Immunity. As an instrumentality of the Tribe, the Care Center, its officers, employees, agents and attorneys shall be clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by this Ordinance, including sovereign immunity from suit in any state, federal or tribal court. Nothing contained in this Ordinance shall be deemed or construed to be a waiver of the sovereign immunity of the Care Centers, its officers, employees, agents or attorneys from suit, which may be waived only in accordance with this Ordinance.

5.01 Procedures to Waive Sovereign Immunity. Sovereign immunity of the Care Center, its officers, employees, agents or attorneys may be waived only by written resolution of the Board of Directors. Any waiver of sovereign immunity shall be specific and limited as to (i) duration, (ii) the grantee, (iii) the particular transaction, (iv) definite property or funds, if any of the Care Center, (v) a particular court having jurisdiction pursuant thereto, and (vi) the law that shall be applicable thereto.

5.02 Care Center Without Power to Waive Sovereign Immunity of the Tribe. Any express waiver of sovereign immunity by resolution of the Board of Directors shall not be deemed a waiver of the sovereign immunity of the Tribe, its officers, employees, agents or attorneys, a consent to the jurisdiction of any court over the Tribe, or a consent to the levy of any judgment, lien, or attachment upon any property or income of the Care Center, the Tribe or any other organization nor instrumentality of the Tribe other than that specifically pledged or assigned.

The Care Center's Board of Directors has previously used this waiver procedure to provide for limited waivers of the Care Center's sovereign immunity. See Exhibit B-4, attached hereto. In this case, the Care Center has not waived its sovereign immunity. See Exhibit B, ¶ 2, attached hereto, the supplemental affidavit of Paul Littlelight. The Plaintiff cannot prove any such written express waiver of sovereign immunity exists.

The Crow Law and Order Code (CLOC) also sets forth the sovereign immunity of the Crow Tribe and of its Tribal Entities and employees. The Constitution and Bylaws of the Crow Tribe of Indians, Article IV, Section 3(k) authorizes the Executive Branch of the Crow Tribe to negotiate and approve limited waivers of sovereign immunity when such a waiver is necessary for business purposes. See Exhibit C. Article V, Section 2(f) authorizes the Legislative Branch of the Crow Tribe to grant final approval or disapproval of limited waivers of sovereign immunity. Id. CLOC § 1-2-101 confirms this constitutional framework through legislation related to joint resolutions. Id. CLOC § 3-2-206 further states:

Nothing contained in the preceding provisions on jurisdiction, or any other provision of the Crow Tribal Code shall be construed as a waiver of the sovereign immunity of the Crow Tribe, its officers, or businesses, unless specifically waived by such entity.

Copies of these provisions are attached hereto as **Exhibit C**.

Defendants move the Court to dismiss this case because the Care Center and its officers, directors, and employees enjoy the Tribe's sovereign immunity and are immune from suit in any jurisdiction.

STANDARD OF REVIEW

Courts have no discretion about whether to apply the doctrine of sovereign immunity, for it "involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy ... the application of which is within

the discretion of the court." People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979).

Absent the sovereign's consent, the attempted exercise of judicial power is void. United States Fidelity & Guaranty Co., 309 U.S. 506, 514, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940). Because sovereign immunity is a preliminary jurisdictional issue, the Court is required to resolve any factual disputes on the merits when it decides this Motion and is not bound by allegations of the Complaint. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977); See Osborn v. United States, 918 F.2d 724, 728-29 (8th Cir.1990). When a district court is presented with a challenge to its subject matter jurisdiction, "[n]o presumptive truthfulness attaches to [a] plaintiff's allegations." Robinson v. United States, 586 F.3d 683, 685 (9th Cir. 2009) (citing Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)). In resolving a motion to dismiss for sovereign immunity, "[a] district court may 'hear evidence regarding jurisdiction' and 'resolv[e] factual disputes where necessary.'" Robinson, 586 F.3d at 685 (citing Augustine, 704 F.2d at 1077). This Court is required to follow this law. Failure to do so deprives the Tribe of a fundamental aspect of its sovereignty and its most basic due process rights.

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MEMORANDUM

Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675 (1978). Tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums. Id. (internal citations omitted). Immunity from suit is a fundamental element of sovereignty, whether exercised by the federal government, states or tribes. Santa Clara Pueblo, 436 U.S. at 58. Tribal sovereign immunity applies in federal, state and tribal courts. Ingrassia v. Chicken Ranch Bingo and Casino, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009) (citing Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir.1983)).

A tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies which act as an arm of the tribe. Ingrassia, 676 F. Supp. 2d at 956 (citing Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) (emphasis added). An agency or arm of tribal government enjoys sovereign immunity, and its immunity must be unequivocally waived before an action can be maintained. Linneen v. Gila River Indian Comm., 276 F.3d 489, 492 (9th Cir. 2002); Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993); Cook v. Avi Casino Enterprises, 548 F.3d 718, 725 (9th Cir. 2008)).

Not only are Tribal entities covered and protected by Tribal sovereign immunity, but Tribal sovereign immunity also “extends to tribal officials when acting in their official capacity and within the scope of their authority.” Cook, supra at p. 727 (citing Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.2002)). This is because the sovereign entity is the “real, substantial party in interest”. Id. Further, a plaintiff cannot circumvent tribal immunity “by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.” Snow v. Quinault Indian Nation, 709 F.2d 1319, 1322 (9th Cir.1983). In Cook, the Ninth Circuit followed the Second Circuit’s reasoning stated in Chayoon v. Chao, 355 F.3d 141, 143 (2nd Cir. 2004) and further held that employees acting within the scope of their authority are likewise immune from suit. Cook, at p. 727. Thus, the fact that the Plaintiff has named individuals as Defendants in this case makes no difference on the issue of sovereign immunity, particularly where the Amended Complaint asserts that their actions were done within their official capacities as Board Directors for the Care Center or “at all relevant times” as the Care Center’s Administrator. See Amended Complaint, ¶¶ 5-9, 21-22.

“[S]overeign immunity is a ‘threshold jurisdictional matter’ and a ‘jurisdictional prerequisite.’” Amerind Risk Mgt. Corp. v. Malaterre, 633 F.3d 680, 686 (8th Cir. 2011) cert. denied, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (U.S.

2012) (emphasis added). The issue of sovereign immunity bears directly on whether a court has subject matter jurisdiction. See, e.g., Smith v. Babbitt, 875 F.Supp. 1353, 1366 (D.Minn. 1995). Consequently, the Court “must address [sovereign immunity] first and resolve it irrespective of the merits of the claim.” Chemehuevi Indian Tribe v. Cal. St. Bd. of Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev’d. on other grounds*, 474 U.S. 9 (1985) (emphasis added). The issue of subject matter jurisdiction may be raised by a party, or *sua sponte* by a court, at any stage of a judicial proceeding, even after entry of judgment. In re Est. of Big Spring, 2011 MT 109, ¶ 23, 360 Mont. 370, 255 P.3d 121 (citing Mont.R.Civ.P. 12(h)(3)); Wippert v. Blackfoot Tribe, 260 Mont. 93, 102, 859 P.2d 420, 425 (1993); Oregon v. Leg. Services Corp., 552 F.3d 965, 969 (9th Cir. 2009). Once a court determines it lacks subject matter jurisdiction, it must dismiss the action. Id.

The Tribe’s sovereign immunity is not a mere affirmative defense. It is an absolute jurisdictional bar. Unless Plaintiff establishes an express waiver of the immunity, which she cannot, this Court is required to dismiss this case. Sovereign immunity from suit not only prevents a defendant from being subject to liability, but also prevents the defendant from having to suffer the unwarranted demands associated with defending a lawsuit. Siegert v. Gilley, 500 U.S. 226, 232 (1991). “The entitlement is an *immunity from suit* rather than a mere defense to liability.”

Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) (emphasis added). In other words, it precludes all discovery on the substance of the claim in addition to any further proceedings unrelated to resolving the threshold issue of Defendants' sovereign immunity.

I. DEFENDANT CARE CENTER ENJOYS SOVEREIGN IMMUNITY AS AN ARM OF THE CROW TRIBE.

The Plaintiff admits the Care Center is an entity created by the Crow Tribe. Amended Complaint, ¶ 4. Defendant Paul Littlelight's affidavits affirm this fact. The Care Center is a tribal agency acting as an arm of the Tribe. Exhibits A and B. As such, there is no doubt the Care Center enjoys tribal sovereign immunity to the same extent as the Crow Tribe itself. Ingrassia, 676 F. Supp. 2d at 956.

The Care Center, as a nursing facility as an arm of the Tribe, is really no different for purposes of sovereign immunity than other tribal entities which also enjoy sovereign immunity such as housing facilities and tribal casinos. It is well established Indian housing authorities are tribal governmental entities and agencies which are immune from suit. See, e.g., E.E.O.C. v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1080 (9th Cir. 2001) ("[Tribal housing authorities are] not simply business entit[ies] that happen to be run by a tribe or its members, but, rather, occup[y] a role quintessentially related to self-governance."); Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581, 583 (8th Cir. 1998) (determining tribal housing authority was a tribal, governmental agency, rather than a separate

corporate entity). Tribal casinos are likewise immune from suit. The question is not whether the activity may be characterized as a business, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe. Allen, 464 F.3d at 1046. The economic and other advantages tribal casinos create inure to the benefit of the tribe. Allen, 464 F.3d at 1047. Immunity for such casinos “directly protects the sovereign tribe’s treasury, which is one of the historic purposes of sovereign immunity in general.” Id. Considering factors nearly identical to those present here, the Allen Court determined the tribal casino at issue was protected by the tribe’s sovereign immunity. See Allen, 464 F.3d 404.

Similarly, the Care Center protects the Tribe’s members by providing its members with nursing services. Exhibit B-1 (“the Crow Tribal Administration had determined that no on-reservation nursing facility exists and that a significant number of Crow Tribal members are in need of such a facility and have had to seek such a facility off the Crow Reservation”; and “The Crow Tribal Council has determined it to be in the best interests of the Tribe that a tribal instrumentality ... doing business as the Crow Tribal Care Center, be established under tribal law for the purpose of governing the on-reservation nursing facility”). Exhibit B-1. The Care Center has only Indian clientele. Exhibit A, ¶ 5. All the individually named Defendants in this case (Care Center Board members and employee) are members of the Crow Tribe of Indians. Id., ¶ 9. The Care Center’s establishment documents

clearly state it is an “instrumentality of the Tribe with those powers expressly delegated by the Tribal Council.” Exhibit B-2, Section 1. The address and location of the Care Center is within the exterior boundaries of the Crow Reservation. Exhibit A, ¶¶ 2 and 10. Therefore, there can be no question the Care Center enjoys tribal sovereign immunity. Therefore, the Court should find the Care Center enjoys sovereign immunity and should dismiss this suit against it.

II. THE BOARD OF DIRECTORS FOR THE CARE CENTER ENJOY SOVEREIGN IMMUNITY AS OFFICIALS OF THE CARE CENTER.

Defendants Paul Littlelight, Lana Three Irons, Henry Pretty on Top, and Shannon Bradley are all Care Center Board Members. Exhibit A, ¶ 7. The Plaintiff has admitted this fact. Complaint ¶¶ 5-8. As noted above, Tribal sovereign immunity “extends to tribal officials when acting in their official capacity and within the scope of their authority.” Cook, supra at p. 727 (citing Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.2002)).

The Plaintiff has asserted that the Care Center’s Board of Directors summoned her to a Board meeting on March 29, 2018. Complaint, ¶ 21. The above-named Board-member Defendants were present. Id. The Plaintiff then asserts, “At the meeting, Plaintiff’s employment was terminated.” Id., ¶ 22. Clearly, the Board members’ termination action was taken at a Board Meeting in their official capacities as Care Center Board members. There is no allegation any of them acted outside the scope of their official capacities as Board members. In fact, according to Mr. Littlelight, “all actions allegedly taken by these Defendants ... were done within the scope and course of our official capacities as board members of the Care Center.” Exhibit A, ¶ 7.

Additionally, as set forth above CLOC § 3-2-206 states:

Nothing contained in the preceding provisions on jurisdiction, or any other provision of the Crow Tribal Code shall be construed as a waiver of the sovereign immunity of the Crow Tribe, its officers, or businesses, unless specifically waived by such entity.

Ms. Catolster is an officer of the Care Center. She is its administrator. Plaintiff's Complaint, Doc. #1, ¶ 10. Based on the above facts, there is no question that all of the individually named Defendants in this case are all immune from suit. The Court should dismiss Plaintiff's claims against them.

III. THERE HAS BEEN NO WAIVER OF SOVEREIGN IMMUNITY IN THIS CASE.

“There is a strong presumption against waiver of tribal sovereign immunity.” Ingrassia, 676 F.Supp.2d at 956 (citing Demontaine v. United States, 255 F.3d 801, 811 (9th Cir. 2001) (emphasis added). If it is alleged there has been a waiver of sovereign immunity, the plaintiff bears the burden of showing a waiver of tribal sovereign immunity. Ingrassia, 676 F. Supp. 2d at 956-957 (citing Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 2007 WL 2701995, *2, 2007 U.S. Dist. LEXIS 67422, *7 (D.Colo.2007); Dontigney v. Conn. BIAC, 2006 WL 2331079, *3, 2006 U.S. Dist. LEXIS 55625, *10 (D.Conn.2006); Morgan v. Coughatta Tribe of Indians of La., 214 F.R.D. 202, 205 (E.D.Tex.2001). If there is any ambiguity in a tribe's waiver of sovereign immunity, courts are required to apply the interpretation which results in the narrowest waiver of the immunity which must be “construed strictly in favor of the sovereign.” U.S. v. Nordic

Village Inc., 503 U.S. 30, 34, 112 S. Ct. 1011, 1014 (1992) (internal citations omitted) (emphasis added).

Here, Plaintiffs bear the heavy burden of proving – by a preponderance of the evidence – that sovereign immunity has been waived and jurisdiction in this Court does in fact exist. See, e.g., Makarova v. United States, 201 F.3d 110, 113 (2nd Cir. 2000). The Plaintiff cannot establish such a waiver, and thus, the Court is required to dismiss her case.

There are only two ways the Defendants in this case can be divested of sovereign immunity: (1) Congress may abrogate tribal immunity; or (2) the Tribe may clearly and unequivocally waive its immunity. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). As to the first, we are unaware of any congressional waiver that would apply to the Plaintiff's claims in this matter. Plaintiff's reliance on 25 U.S.C. § 5321 as a basis for asserting Congressional waiver of sovereign immunity in this case is not only misplaced, it is incorrect as a matter of law. See Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989) (§ 5321 does not constitute a waiver of the Tribe's sovereign immunity). Therefore, there is no Congressional sovereign immunity waiver applicable to this case.

As to the second, neither the Tribe nor the Care Center nor its Board of Directors nor its Administrator have waived Tribal sovereign immunity in this case

under the Crow Tribe's established and express methods to do so. CLOC § 3-2-206 requires a "specific waiver by such entity". Exhibit B-2, § 5 requires an express waiver via resolution of the Care Center's Board of Directors. No such express waiver exists because the Care Center has never waived its sovereign immunity applicable to Plaintiff's claim. The Tribe's statutory requirement for waiver of sovereign immunity to be specifically made in writing by a resolution or ordinance of the Chippewa Cree Business Committee is consistent with United States Supreme Court interpretation of the sovereign immunity doctrine. See C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998); Santa Clara Pueblo, 436 U.S. at 58. Again, it is well settled that "[a] waiver of sovereign immunity may not be implied, but must be unequivocally expressed by either the Tribe or Congress." Amerind Risk, 633 F.3d at 685 (citation omitted) (emphasis added); see also Santa Clara Pueblo, 436 U.S. at 58; Ingrassia, 676 F. Supp. 2d at 956.

Further, the mere purchase of liability insurance does not constitute a waiver, express or implied, of a tribe's sovereign immunity protection. See Seminole Tribe of Fla. v. McCor, 903 So.2d 353, 359 (Fla.2d DCA 2005) ("[T]he purchase of insurance may simply be a measure to provide protection for the Tribe's assets *against the possibility that the Tribe's immunity will be abrogated*

or ignored.”) (emphasis added); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977)

(The purpose of tribal sovereign immunity would be defeated if it could be implicitly waived to the extent of insurance coverage); Miccosukee Tribe of Indians v. Napoleoni, 890 So.2d 1152 (Fla. 1st DCA 2004) (Rejecting argument that tribe's purchase of workers' compensation insurance is a waiver of tribal immunity); see also White Mountain Apache Tribe v. Industrial Comm'n of Ariz., 696 P.2d 223, 228-29, (Ariz. Ct. App. (1985) (Authority for Indian tribe to purchase workers' compensation insurance, under statute providing for expenditure from tribal funds without specific appropriations by Congress in certain circumstances, does not rise to level of waiver of sovereign immunity).

Applying this law to this case, it is clear the Care Center has not waived its sovereign immunity. It has not used the required procedure to do so which is established by its bylaws and which it has used previously in its business dealings. The Plaintiff cannot prove any such waiver or provide such a waiver to the Court which is her burden to do. Further, Congress has not abrogated the Tribe's immunity either with respect to this civil RICO claim or with respect to 638 contracts under the ISDEAA. The Court should GRANT Defendants' Motion to Dismiss based on sovereign immunity.

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CONCLUSION

Sovereign immunity is a basic fundamental precept of American Indian law. The sovereignty of Indian nations in the United States predates the sovereignty of the United States itself. N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002). Such sovereign immunity is a complete bar to any suit and to the jurisdiction of this Court. Absent Congressional abrogation or an express waiver of such immunity, the immunity applies and must be upheld as a matter of law regardless of the allegations made by the Plaintiff or the merits of her case.

Here, the Care Center is an arm of the Tribe providing Tribal members with nursing care on the reservation. Its Board of Directors and its Administrator are likewise immune from suit. Therefore, the Court should dismiss this case with prejudice.

DATED THIS 24th day of August, 2018.

/s/Michael L. Rausch
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the above Brief in Opposition is double spaced, is a proportionately spaced 14 point typeface, and contains 3893 words.

By /s/ Michael L. Rausch
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2018, a true copy of the foregoing was served via CM/ECF and e-mail:

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