No. 18-10545

In the United States Court of Appeals for the Fifth Circuit

State of Texas; State of Kansas; State of Louisiana; State of Indiana; State of Wisconsin; State of Nebraska,
Plaintiffs-Appellees / Cross-Appellants,

v.

Charles P. Rettig, in His Official Capacity as Commissioner of Internal Revenue; United States of America; United States Department of Health and Human Services; United States Internal Revenue Service; Alex M. Azar, II, Secretary, U.S. Department of Health and Human Services,
Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Wichita Falls Division

APPELLEES / CROSS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Certificate of Interested Persons

No. 18-10545

State of Texas; State of Kansas; State of Louisiana; State of Indiana; State of Wisconsin; State of Nebraska,
Plaintiffs-Appellees / Cross-Appellants,

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Charles P. Rettig, in His Official Capacity as Commissioner of Internal Revenue; United States of America; United States Department of Health and Human Services; United States Internal Revenue Service; Alex M. Azar, II, Secretary, U.S. Department of Health and Human Services,
Defendants-Appellants / Cross-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees/cross-appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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Introduction and Rule 35(b) Statement

This case presents two exceptionally important questions: Whether a federal administrative agency may delegate to a private entity the power to tax States, and whether that agency may avoid judicial review of that delegation under the Administrative Procedures Act when the private entity waits more than six years to wield that delegated power. *See* Fed. R. App. P. 35(b)(1)(B). The Panel answered the second question "yes" and concluded plaintiff States' claim time-barred. It did not address the first. The Court should rehear this case en banc and answer both questions "no." Federal agencies may not delegate to private entities the power to tax States, and a challenge to that delegation is not time-barred merely because the private entity delays the exercise of that power until the APA review period expires.

At stake is nearly $500 million in taxes that plaintiff States seek to reclaim from the federal government. The origin of those taxes lies in the interaction between the Affordable Care Act of 2010 and a 1981 law requiring States to pay "actuarially sound" premiums when they buy insurance for Medicaid beneficiaries from private insurers. 42 U.S.C. § 1396b(m)(2)(A)(iii). But Congress did not define "actuarially sound," and neither did the Centers for Medicare and Medicaid Services (CMS), the agency that administers the federal government's role in the Medicaid program. Instead, in 2002, CMS delegated the task of defining "actuarially sound" to a private entity, the Actuarial Standards Board. 42 C.F.R. § 438.6. For 13 years, the Board did not wield that delegated power—until 2015, when the Board finally issued a binding definition of "actuarial soundness." The States did not challenge the 2002 delegation at the time because that delegation, standing alone, did not injure them.

Instead, the States' injury arose in 2015, when the Board finally deployed the power conferred on it in 2002 to define "actuarial soundness" in a way that effectively imposes a tax on the States. Specifically, the Board's definition requires States to reimburse health-insurance companies for a tax known as the "health-insurer premium fee," or "HIPF." The HIPF, created by the ACA, taxed health insurers for the premiums that the insurers charge States via their Medicaid programs. Wielding the 13-year-old delegation of power from CMS, the Board's 2015 pronouncement conclusively shifted that tax away from insurance companies onto States.

Plaintiff States sued, arguing (among other things) that the Constitution does not permit CMS to delegate power to a private entity to tax States. The district court agreed. ROA.4000-10. On appeal, the Panel did not disagree, but it concluded that plaintiff States' claims were time-barred or not properly preserved. According to the Panel, the APA's six-year limitations period for review of agency actions expired in 2008—six years after CMS delegated rulemaking authority to the Board and seven years before the Board wielded that authority to injure the States.

The Panel's holding, if left undisturbed, creates a Catch-22. According to the Panel, plaintiff States forever lost their right to challenge the 2002 delegation in 2008, even though the private entity who had been delegated power did not exercise that power or cause them injury in those years, meaning that any such challenge would have been dismissed for lack of subject-matter jurisdiction. That view would permit the federal government to skirt the nondelegation doctrine's limits merely by instructing any delegee to wait six years before using its new delegated power.

The en banc Court should intervene to prevent such an end run around judicial review of unconstitutional agency action.

Issues Meriting Rehearing

1. Whether CMS's 2002 rule delegating rulemaking authority to a private entity violates the nondelegation doctrine.

2. Whether cross-appellant States' challenge to that 2002 delegation is time-barred even though the private delegee did not wield the delegation until 2015.

Statement

I. Statutory Framework: Medicaid, Actuarial Soundness, and the ACA

This case involves the constitutionality of a tax levied on States by a private entity via a delegation of power from an administrative agency. Understanding how that delegation and tax came to be requires some background regarding the Medicaid regulatory framework.

Many States contract with private managed-care organizations (MCOs) to run state Medicaid programs. ROA.3083-84. The State pays the MCO a monthly premium per Medicaid beneficiary, regardless of whether the beneficiary needs care. ROA.3083-84. Congress has directed that those premiums be "made on an actuarially sound basis." 42 U.S.C. § 1396b(m)(2)(A)(iii); ROA.3197. Neither Congress nor CMS has defined the term "actuarially sound."

In 2002, CMS promulgated the "Certification Rule" to delegate the task of defining "actuarially sound" to a private entity—the Actuarial Standards Board.

42 C.F.R. § 438.6 (2015).[1] Specifically, the Certification Rule provides that Medicaid MCO premiums must be developed "in accordance with generally accepted actuarial principles and practices," *id.* § 438.6(c)(1)(i)(A), and the rates must be certified by an "actuar[y] who meet[s] the qualification standards established by the American Academy of Actuaries and follow[s] the practice standards established" by the Board, *id.* § 438.6(c)(1)(i)(C). The Board did not act on that delegation of power for over a decade.

Fast-forward to 2010. To offset the Affordable Care Act's enormous costs, Congress levied an unprecedented tax on the health-insurance industry. Pub. L. No. 111-152, 124 Stat. 1029, § 1406(a)(3) (amending ACA, Pub. L. 111-148, 124 Stat. 119, § 9010 (Mar. 23, 2010)). Covered entities are required to pay a fee based on multiplying a market-wide assessment by the entity's market share in the health-insurance market. ACA § 9010(b). States and other "governmental entit[ies]" are not covered entities and are exempt from this tax. *Id.* § 9010(c)(2)(B).

Nevertheless, in March 2015, the Board finally published a binding rule defining "actuarially sound." ROA.1649-91. That definition, known as ASOP 49, states that to be actuarially sound, capitation rates must "provide for"—among other things—any non-deductible taxes. ROA.1655. CMS subsequently issued guidance requiring States to comply with ASOP 49 in developing their MCO contracts. ROA.3243. That

[1] Since 2015, HHS has modified the form but not the substance of the Certification Rule. Consistent with the parties' practice throughout, this petition refers to the rule as written when the lawsuit was filed. U.S. Principal Br. 8 n.3.

is, as of 2015, the Board's ASOP 49 effectively requires States to pay taxes that Congress levied against insurance companies.

II. Procedural History

In October 2015, six States sued to challenge (among other things) the constitutionality of the 2002 Certification Rule. Specifically, the operative complaint alleged "the delegation of rulemaking authority to a private entity under the actuarial soundness requirements" violates the structural provisions of the Constitution. ROA.159 (capitalization altered). It further alleged that the imposition of the HIPF on States was substantively and procedural improper under the APA.

In 2018, the district court granted partial summary judgment for each party. It held that CMS violated the nondelegation doctrine by allowing a private entity to (1) formulate and (2) certify compliance with the standards that determine whether a State may receive Medicaid funding. ROA.4000-10. The district court concluded, however, that the Certification Rule as adopted in 2002 was lawful under the APA. ROA.4014-15. Following additional discovery, the district court ordered the federal government disgorge to plaintiff States the funds they had paid under the HIPF. ROA.4676.

On July 31, 2020, a Panel of this Court reversed that judgment. Ex. A. The Panel did not disagree with the district court's holding that a private party may not define "actuarial soundness" for the purposes of federal law. Instead, it said that the district court and plaintiff States were "confused" about whether the operative complaint had challenged this part of the Certification Rule at all. *Id.* at 4 n.4. In its view, the States had challenged only the certification of compliance with those rules under

subsection (C) of 42 C.F.R. 438.6. *Id.* Furthermore, the Panel concluded that subsection (C) was acceptable because HHS retained significant control over the process—a theory the United States did not press on appeal. Ex. A at 16-17. Finally, the Panel held that plaintiffs' APA challenges were untimely because the Certification Rule was promulgated in 2002, and "HHS took no direct, final agency action in 2015 to create a new obligation." *Id.* at 14.

Argument

The Certification Rule violates the nondelegation doctrine. Administrative agencies may not delegate the substantive power to tax States to private entities. The Panel should have affirmed the district court's decision requiring the federal government to remit to plaintiff States nearly $500 million. Instead, the Panel incorrectly held that federal administrative agencies can skirt the nondelegation doctrine whenever the delegee waits out the APA's six-year limitations period before wielding unconstitutionally delegated power. These weighty matters merit en banc review.

I. The Legality of the Certification Rule Presents an Important Federal Question.

A. The nondelegation doctrine does not allow private parties to set federal law.

Since the Founding, the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated" has belonged to Congress. *The Federalist* No. 78, at 464 (Hamilton) (C. Rossiter, ed. 1961); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). Congress may allow the Executive to fill in the details of how a statute functions on a-day-to-day basis, *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019),

or to find that the law has been triggered by "certain fact[s] being established," *Miller v. Mayor of N.Y.*, 109 U.S. 385, 393 (1883). But Congress may *not* allow the Executive to "pass a prohibitory law." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414-15 (1935).

Arguably, Congress could not allow CMS to define "actuarially sound" in the first instance. Unlike other vague standards that have been upheld, the "boundaries of [the executive's] authority" are not defined elsewhere in the statute, *Gundy*, 139 S. Ct. at 2129, customary practice, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001), or common law, *cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-32 (1935). Indeed, the Board officially stated in 2013 that actuarial soundness "has different meanings in different contexts," ROA.3667, because "'actuarial soundness' is not an actuarial concept," ROA.3676. A term that is not used in the relevant field hardly provides a discernible standard to the President. And if Congress could do no better than to "l[eave] the matter to the President . . . to be dealt with as he pleased," then Congress could not condition States' receipt of Medicaid funds on MCOs having actuarially sound capitation rates. *Panama Ref. Co.*, 293 U.S. at 418.

But this case is even easier because assuming Congress *could* allow the Executive to define "actuarial soundness," the Executive *could not* re-delegate that authority to the private Board. As Justice Alito has explained, the "formal reason" why courts have not "enforce[d] the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43,

61 (2015) (Alito, J., concurring). "When it comes to private entities, however, there is not even a fig leaf of constitutional justification." *Id.* at 62; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (describing private delegation as "legislative delegation in its most obnoxious form"). Government agencies may "employ private entities for *ministerial* or *advisory* roles," but they may *not* give binding "governmental power over others" to such a party. *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (citing *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989)).

The district court properly recognized that the Board may not formulate—and private actuaries may not make binding decisions about the applicability of—rules governing States' access to Medicaid funds. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)); *Cospito v. Heckler*, 742 F.2d 72, 89 (3d Cir. 1984). Under the Panel's holding, private entities will continue to perform these functions. Such an outcome is fundamentally inconsistent with the structure of our government and presents an important question of federal law that merits this Court's review.

B. The Panel's decision is inconsistent with the record and creates a circuit split regarding what supervision satisfies the nondelegation doctrine.

The Panel recognized it is well-established law that "[a] federal agency may not 'abdicate its statutory duties' by delegating them to a private entity." Ex. A at 15 (quoting *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974)). Nevertheless, the Panel reversed the district court's careful application of these principles on the ground "the Certification Rule at issue here is solely 42 C.F.R. § 438.6(c)(1)(i)(C),

the certification component of the actuarial soundness definition. The States' operative complaint and motion for summary judgment objected to only that subsection." Ex. A at 4 n.4. It dismissed plaintiff States' complaint regarding subsection (C) on the ground—not urged by the defendants on appeal—that CMS adequately supervises the private actuaries certifying state Medicaid contracts.

1. To begin, the Panel's treatment of the Board's rulemaking authority misreads both the record and the regulation itself. The operative complaint cites subsection (C) only once, when describing the content of that subsection. ROA.161 ¶ 35. The rest of the complaint makes clear that plaintiffs challenge all of section 438.6. *E.g.*, ROA.159-60. Plaintiffs' motion for summary judgment similarly argues that "defendants' delegation of rulemaking authority to a private entity under the actuarial soundness requirement" is unconstitutional. ROA.1563 (capitalization altered). Rehearing is thus warranted because the Panel's conclusion is based on a misapprehension of fact. Fed. R. App. P. 40(a)(2).[2]

Moreover, subsection (C) also implicates the Board's rulemaking authority because it requires certification of a proposed capitation rate by an "actuar[y] who . . . *follow[s] the practice standards established*" by the Board. 42 C.F.R. § 438.6(c)(1)(i)(C) (emphasis added). The improper delegation of authority to the Board to set standards is thus baked into subsection (C) as well as subsection (A).

[2] Moreover, the defendants never argued that plaintiff States' assertions at summary judgment or on appeal exceeded the scope of their complaint. Therefore, any such deficiencies were waived. *See Jones v. Miles*, 656 F.2d 103, 107 n.7 (5th Cir. 1981); *Trenerry v. Fravel*, 10 F.2 1011, 1011 (D.C. Cir. 1926); Fed. R. Civ. P. 15(b)(2).

Because the Certification Rule remains the gate through which States must pass to receive Medicaid funds, its function presents an important issue of federal law that merits this Court's attention. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581-82 (2012) (describing significance of Medicaid funding to States).

2. The Panel's conclusion that CMS retains adequate supervisory authority over the actual certification decision, *see* Ex. A at 16-17, similarly merits further review. It is well-established the government may use private parties as advisors or to perform ministerial functions. *See* Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 Hastings Const. L. Q. 165, 169-74 (1989) (categorizing traditional use of private actors in government). But the United States did not rely on the theory that the private actuaries at issue in this case served merely as advisors at summary judgment, ROA.2854-58, or on appeal, U.S. Principle Br. 22-39, for good reason. Even if CMS has authority to reject a contract that a private actuary has approved, Ex. A at 16, on its face, the Certification Rule does not allow CMS to approve a contract that the actuary has rejected. 42 C.F.R. § 438.6(c)(1)(i)(C). And defendants offered no evidence to the contrary. *See* ROA.3026-27.

By nonetheless upholding the Certification Rule, the Panel has created a circuit split on a fundamental question of constitutional law: In any other court, a private party must serve as a true advisor to the government. *E.g.*, *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977) ("Each applicant can obtain certification through a process superintended by the Board in every respect."); *Cospito*, 742 F.2d at 89 (upholding delegation where agency could approve

or disapprove private action). Here, by contrast, a private actuary can veto government action. That split merits rehearing. Fed. R. App. P. 35(a)(2); *e.g.*, *Def. Distrib. v. U.S. Dep't of State*, 865 F.3d 211, 213 (5th Cir. 2017) (Elrod, J. dissenting); *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (per curiam) (Owen, J., concurring).

II. The Panel's Dismissal of Cross-Appellant States' APA Challenges Presents an Important Federal Question.[3]

Rehearing is also warranted to consider whether challenges to the Certification Rule are time-barred simply because the Board waited more than six years to act. The Panel's decision declaring this challenge time-barred creates a Catch-22 that cannot be reconciled with this Court's and other circuits' cases.

A. The Panel's ruling is inconsistent with how this and other courts have analyzed the finality of agency actions.

Plaintiffs brought both substantive and procedural APA challenges to application of the HIPF to States through the Certification Rule. States Principal Br. 37-44. The Panel concluded these challenges were time-barred because the only relevant agency action was the promulgation of the Certification Rule itself in 2002. Ex. A at 12. This conclusion is inconsistent with other aspects of the opinion, and it creates uncertainty and disagreement over what constitutes final agency action.

No one disputes that APA claims are subject to a six-year statute of limitations. 28 U.S.C. § 2401(a). Any challenge to the procedures by which the rule was adopted

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[3] Plaintiff-Appellee Wisconsin has not independently cross-appealed the district court's rejection of its APA claims.

thus became untimely in 2008. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). Plaintiffs may still challenge the legality of the Certification Rule, however, if it has been applied to them within the last six years. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).

The Panel acknowledges that this law applies and that CMS reviewed plaintiffs' Medicaid contracts using the Certification Rule within the last six years. *See* Ex. A at 12-13. The Panel nonetheless concluded there was no final agency action within that period because CMS's actions neither created new legal obligations nor bound plaintiff States. *Id.* This conclusion is inconsistent with how courts define final agency action.

Of particular note is how the Panel treated a 2015 guidance document in which CMS instructed States to comply with ASOP 49 going forward. ROA.3243. The district court concluded this was final agency action restarting the statute of limitations because it removed any discretion that actuaries and States previously had to exclude the HIPF from state capitation rates. ROA.3996-97. The Panel disagreed because, in its view, "[a]ctuarially sound capitation rates have consistently required" the States to account for the HIPF since 2002. Ex. A at 14.

The record belies the Panel's conclusion. The Certification Rule was adopted in 2002 specifically because HHS was *not* able to promulgate "prescriptive standards" of "actuarial soundness" in this context. ROA.1411. Its reliance on the Board drew immediate criticism from members of Congress for the agency's "fail[ure] to define ambiguous terms, fail[ure] to require provision of necessary information, and

generally fail[ure] to regulate." ROA.1064. The Government Accountability Office (GAO) similarly criticized CMS in 2010 for lack of a "working definition" of actuarial soundness "that applie[d] to actuarial work performed to comply" with the Certification Rule. ROA.3087. It was only in response to the GAO's criticism that CMS demanded that the Board adopt what became ASOP 49. ROA.3162.

The Panel's conclusion is inconsistent with other portions of its own opinion. In addressing plaintiffs' standing, the Panel recognized that ASOP 49 removes any discretion about *how* the rates account for the HIPF. Ex. A at 10-11. That is, before ASOP 49 actuaries had some discretion regarding if and how much of the HIPF would be transferred to States. ROA.2592 (stating only that "the fee may be considered"). Defendants' own expert admitted that following ASOP 49, actuaries have no discretion. ROA.1683, 1694. States must pay 100% of the HIPF, *e.g.*, ROA.1732, 1797, 2072, or forfeit Medicaid funding, 42 C.F.R. § 438.6.

The Panel's decision further creates intra-Circuit disagreement. Indeed, just last year in *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019) (Smith, J.), the Court held that an agency guidance document that "'withdraws an entity's previously-held discretion . . . alters the legal regime, binds the entity, and thus qualifies as final agency action.'" *Id.* at 442 (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016)). Such an action restarts the limitations period. *Dunn-McCampbell*, 112 F.3d at 1287.

In holding otherwise, the Panel created conflict with decisions from this Court, *id.*; *e.g.*, *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016); the Supreme Court, *U.S. Army Corps of Engr's v. Hawkes Co.*, 136 S. Ct. 1807, 1813

(2016); and other circuit courts, *e.g.*, *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049-50 (9th Cir. 2016); *Nat'l Envt'l Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1003 (D.C. Cir. 2014). Such conflicts merit review by the full Court to ensure the APA's finality requirements remain "'flexible' and 'pragmatic.'" *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)).

B. The Panel's ruling creates a trap that allows agencies to evade judicial review of unlawful actions.

En banc review is warranted for an additional reason: the Panel's opinion creates a trap for States and provides unduly shields federal administrative agencies from judicial review. There are two basic problems with the Certification Rule: It allows a private party to issue binding federal law, and it exceeds the agency's power by imposing a tax on States from which they were exempted. ACA § 9010(c)(2)(B). The Certification Rule created the *possibility* of such injuries when promulgated in 2002. But there was no binding definition of "actuarial soundness"—and thus no improper delegation—until 2015. ROA.3087. And there was no HIPF—and therefore no improper taxation—until at least 2010.[4] Any lawsuit before such time would have been dismissed for lack of Article III jurisdiction. *See Lopez v. City of Houston*, 617 F.3d 336, 341-42 (5th Cir. 2010). And now, under the Panel's rule, lawsuits *after* these events are time-barred.

[4] The HIPF went into effect in fee year 2014, 26 C.F.R. § 57.4(a)(3), but is assessed based on an insurer's market share the previous year. ACA § 9010(b). Regardless, plaintiffs brought suit five years after the HIPF was enacted.

Such a rule encourages unlawful behavior. As a matter of administrative law, it is improper for an executive agency to adopt a placeholder rule that requires additional substantive rules to give it practical meaning. *E.g.*, *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989). Yet, according to the Panel, there is nothing that a regulated party may do about it so long as the agency takes more than six years to give that rule content. That is not the law in other circuits, which recognize that "[a] plaintiff cannot be expected to anticipate all possible future challenges to a rule and bring them within six years of the rule's promulgation, before a later agency action applying the earlier rule leads to an injury." *Cal. Sea Urchin Comm'n*, 828 F.3d at 1049-50. And it should not be the law here.

Conclusion

The Court should grant the petition for rehearing en banc.

Respectfully submitted.

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Certificate of Service

On September 14, 2020, this petition for rehearing en banc 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.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,894 words, excluding the parts of the brief exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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