No. 17-20607

In the United States Court of Appeals for the Fifth Circuit

SURESHOT GOLF VENTURES, INC.,

Plaintiff-Appellant,

v.

TOPGOLF INTERNATIONAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, Case No. 4:17-CV-127

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. Because this Court is reviewing the district court's grant of a motion to dismiss, the relevant record on appeal is limited. Moreover, the district court's opinion correctly applies well-established principles of law relating to justiciability and antitrust injury.

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INTRODUCTION

The district court correctly dismissed SureShot's antitrust claims because those claims rest on speculation about what Topgolf may do in the future. SureShot has a license to use the Protracer Range System until 2020, and when that license expires, either party may decide not to renew it—or both may agree to renew. SureShot filed suit three years before the expiration of the license, asserting that Topgolf violated the antitrust laws by acquiring Protracer, because SureShot anticipates that Topgolf may decide not to extend its license to Protracer Range System in 2020. Because SureShot's fear that an alleged competitive harm may occur in the future does not create a ripe controversy, the district court properly held that SureShot lacks standing.

Even if SureShot had constitutional standing, the district court properly concluded that, because SureShot did not allege a cognizable "antitrust injury," it would also lack what courts have termed "antitrust standing." Antitrust standing exists only where the plaintiff's injury flows from the allegedly anticompetitive aspect of the challenged conduct. Yet that standard is not met here because SureShot's anticipated injury, if it ever occurs, will not be the result of any anticompetitive act or any arguably anticompetitive aspect of the Topgolf-Protracer acquisition. Even assuming that Topgolf did, hypothetically, decide in the future not to renew SureShot's current license, this would amount to nothing more than a

unilateral choice by the owner of intellectual property not to enter into a new license agreement. That is a decision that Protracer itself might have made if there had been no acquisition. Indeed, it is a decision that *any other company* that owned Protracer might make. And if the future nonrenewal of the Protracer license that SureShot speculates may occur did in fact come to pass, this would be presumptively lawful under well-accepted antitrust principles. Hence, it would not give rise to an injury to SureShot that would be cognizable under the antitrust laws.

For these reasons, the district court's order dismissing SureShot's complaint was correct. This Court should affirm.

ISSUES PRESENTED

1. Did the district court correctly hold that it lacked jurisdiction over claims that Topgolf might someday decline to renew its contract with SureShot?

2. Did the district court correctly hold that SureShot failed to allege a cognizable antitrust injury?

STATEMENT OF THE CASE

I. Factual Background

Topgolf operates "golf entertainment centers," facilities that include not only competitive, point-scoring golf games on a course similar to a driving range, but also high-quality food and beverage service and other amenities. ROA.5, 7. When competing in golf games, customers hit golf balls toward a series of holes and are

scored based on distance and accuracy. ROA.7. Measuring a customer's distance and accuracy requires technology that tracks where each ball is hit. ROA.7.

Topgolf originally developed its own proprietary technology to track customers' shots, and its facilities currently use that technology. ROA.7. In 2016, Topgolf acquired Protracer and its Protracer Range System, a new method for tracking golf balls. ROA.9, 13. Protracer originally developed its technology to help television viewers of professional golf tournaments track each shot. In time, Protracer adapted that technology to create the Protracer Range System for use at driving ranges. ROA.9.

In 2013 or 2014, SureShot was founded to compete with Topgolf by providing a "superior" gaming experience at "[s]imilar" golf entertainment centers. ROA.5, 8. SureShot decided to procure a license to the Protracer Range System for use in its business. ROA.11. SureShot negotiated a five-year license that allows it to use Protracer's technology from 2015 to 2020. ROA.11.

After Topgolf acquired Protracer in 2016, Protracer continued to honor its agreement with SureShot. However, SureShot demanded "assurances that Protracer would continue to be made available to SureShot even after the initial 5-year term." ROA.13. These conversations occurred very shortly after the Protracer acquisition was completed, and Topgolf executives at that time were not able or willing to commit to make future extensions to a contract that was not set to expire for another

four to five years. ROA.13. As a result, SureShot, unhappy with the commercial terms it had negotiated in its contract with Protracer, sued Topgolf, claiming that it had violated the federal antitrust laws by acquiring Protracer and refusing to guarantee that SureShot would have long-term access to Protracer Range System after the current five-year contract expires.

II. Procedural History

On January 17, 2017, SureShot filed its Original Complaint ("Complaint") in the United States District Court for the Southern District of Texas. ROA.4. The Complaint asserts four federal antitrust claims: conspiracy under Section 1 of the Sherman Act, monopolization and attempted monopolization under Section 2 of the Sherman Act, and an unlawful acquisition under Section 7 of the Clayton Act. ROA.16-17 (citing 15 U.S.C. §§ 1, 2, 18). All of these claims center on SureShot's fear that Topgolf will decline to renew or extend SureShot's license to the Protracer Range System in 2020 when the current service contract expires.[1]

On August 24, 2017, the district court granted Topgolf's motion to dismiss. ROA.157. First, the district court determined that it lacked subject matter jurisdiction over SureShot's claims. Describing "SureShot's perceived threats of monopolistic behavior" as "speculative," the court held that SureShot lacked

[1] For purposes of this appeal, Topgolf assumes the truth of all allegations in SureShot's Complaint.

standing and that its claims were not ripe. ROA.163, 166. Second, the district court ruled that SureShot lacked antitrust standing because "the same injury-in-fact would have occurred had a company of another size purchased the competing business." ROA.165 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 497 (1977)). The court held that SureShot had "failed to plead that Topgolf's actions harmed competition overall, and not just SureShot's competitive advantage." ROA.165.

On September 25, 2017, SureShot filed a notice of appeal. ROA.168.

SUMMARY OF THE ARGUMENT

The district court properly concluded that SureShot's claims are not ripe for consideration. SureShot does not allege that Protracer has changed its relationship with SureShot since being acquired by Topgolf, or that SureShot has lost access to the Protracer technology. SureShot merely alleges that it fears Protracer, now under Topgolf's ownership, will refuse to renew SureShot's license to the Protracer Range System when the current contract expires in 2020. To make a federal case out of conjecture about Topgolf's future decisions would violate the constitutional standing and ripeness limits found in Article III.

Even if this dispute someday were to become ripe, SureShot still would not have a valid cause of action under the antitrust laws. As the district court properly recognized, any injury SureShot suffered from a future refusal to renew its license

would not "flow[] from that which makes the defendants' acts unlawful," but rather would simply result from a post-acquisition business decision not to renew an intellectual property license agreement. ROA.165 (quoting *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992)). Even absent any acquisition, Protracer itself might have in the future decided not to renew SureShot's current license. Likewise, had another party besides Topgolf acquired Protracer, that other party might have determined in the future that it preferred not to renew SureShot's license. In other words, there is nothing specific to this merger that creates a speculative potential for SureShot's current license not to be renewed in 2020. To the extent that potential exists, it would exist with or without this merger.

Such future, hypothetical decisions would not be anticompetitive regardless of who owned Protracer when the decision was made. Indeed, accepted antitrust law principles recognize that it is presumptively within the discretion of an intellectual property owner to extend a license to whomever it pleases, and generally there is no duty to extend or renew a license to a competitor. Thus, even in the speculative, hypothetical scenario upon which SureShot's suit is premised, in which SureShot posits that Topgolf might someday decide not to renew the existing Protracer license, this would not be an action cognizable under the antitrust laws and would not give rise to any "antitrust injury" upon which SureShot could predicate any valid antitrust claim.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss for lack of jurisdiction de novo. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001); *see also Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 921 (5th Cir. 2017) ("We review the jurisdictional issue of ripeness de novo."). This Court also reviews the grant of a motion to dismiss for failure to state a claim de novo. *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 318 (5th Cir. 2009).

ARGUMENT

I. The District Court Correctly Held That SureShot Lacked Standing to Pursue Its Unripe Claims

SureShot's claims ultimately rest on speculation that Topgolf and its affiliate Protracer might one day refuse to renew SureShot's license to the Protracer Range System. A hypothetical, future refusal to deal cannot support federal jurisdiction.

A. SureShot's Claims Are Not Ripe

"Article III standing, at its 'irreducible constitutional minimum,' requires" SureShot to plead an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). In other words, "a claim must be ripe for a federal court to have jurisdiction." *Lower Colorado River Auth.*, 858 F.3d at 924. The "ripeness doctrine seeks to separate

matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for federal court action." *TOTAL Gas & Power N. Am., Inc. v. Fed. Energy Regulatory Comm'n*, 859 F.3d 325, 333 (5th Cir. 2017) (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 333, 544 n.12 (5th Cir. 2008)). The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

If a claim "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," the claim is not ripe for adjudication. *Texas v. United States*, 523 U.S. 296, 300 (1998); *see also Monk v. Huston*, 340 F.3d 279, 283 (5th Cir. 2003) (holding that a claim was not ripe because it depended on the outcome of a "permitting process [that] has not yet run its course").

SureShot's antitrust claims are unquestionably conjectural, hypothetical, and speculative. As the district court observed, "none of the antitrust actions which SureShot alleges has actually occurred." ROA.163-64. SureShot's central allegation is that Topgolf's acquisition of Protracer had the effect of "denying SureShot access to long-term, continued licensing of Protracer technology and purchasing of Protracer equipment." ROA.15-16. But SureShot does not allege that it has *ever* had a guarantee of "access to long-term continued licensing of Protracer

technology and purchasing of Protracer equipment." ROA.15-16. Instead, SureShot alleges that, pre-acquisition, it had an "understanding" that Protracer would agree to future terms in 2020, and it is now "obvious" to SureShot that Protracer will not do so. ROA.11, 13. SureShot thus asks the Court to rule now that Topgolf has violated the antitrust laws because SureShot predicts that in two years Topgolf and its affiliate Protracer will refuse to renew an existing license agreement. This claim on its face rests upon pure conjecture and speculation.[2]

This Court—in *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986)—held that a plaintiff may not sue to declare unlawful a future decision that the plaintiff anticipates the defendant may take. In *Middle South*, the City was the holder of an option to purchase New Orleans Public Service, Inc. ("NOPSI"). *Id.* at 489. The City had not exercised the option at the time of the lawsuit. *Id.* Nonetheless, NOPSI sought a declaration that if the City *did* exercise that option, that would be an unlawful act. *Id.* at 489-90. Even though the City had taken steps to preserve its legal rights under the option, this Court held that the suit was not ripe and thus not within the jurisdiction of the court. *Id.* at 490-91. The

[2] To the extent SureShot relies on other potential harms, they too have not (and may never) come to pass. As the district court recognized, SureShot's allegations about how Topgolf might respond to future "support and maintenance requests" or use SureShot's "confidential information" concern conduct that has not "actually occurred." ROA.178, 180. Moreover, those claims amount to allegations of potential future breaches of contract, not antitrust violations.

Court reasoned that, "[w]hen and how the Council exercises its option, if it ever does, are the critical determinants of the propriety of federal court jurisdiction over this matter." *Id.* at 491.

SureShot disagrees that *Middle South* resolves this case, dismissing it as involving a factual, rather than facial, challenge to jurisdiction, given that the district court there considered evidence regarding the City's current intent. *See* SureShot Br. 23. However, nothing in *Middle South* suggests that the Court would have reached a different conclusion had it been presented with evidence that the City intended to exercise the option. Instead, the Court indicated that the case would only be ripe once "the City Council actually votes to exercise the purchase option." *Middle South*, 800 F.2d at 491. Similarly, in this case SureShot's lawsuit would be ripe, if ever, only if Protracer actually were to exercise its option *not* to renew SureShot's license when that license expires in 2020.

SureShot further argues that *Middle South* "is not an antitrust lawsuit." SureShot Br. 23. This is true but irrelevant. Ripeness is not a doctrine that applies only to certain legal issues; it "originates from Article III of the United States Constitution, which provides that federal courts have jurisdiction over 'cases' or 'controversies.'" *TOTAL Gas & Power*, 859 F.3d at 333 (quoting U.S. Const. art. III, § 2). Nor was the district court the first to apply *Middle South* in the antitrust context. In *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433, 461 (S.D. Tex.

1997) (Rosenthal, J.), an antitrust suit, the court (citing and applying *Middle South*) held that "challenges to an option are not ripe for resolution before the option is exercised."

SureShot also seeks to distinguish *Destec* by arguing that it recognized that "premature interventions" are "especially" improper "in the field of public law," *Destec*, 5 F. Supp. 2d at 462, but of course antitrust is also a form of public law, where the public interest and consumer welfare are paramount considerations. *See Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 681 n.4 (5th Cir. 2009) (noting that a section of the Restatement "concentrates on so-called public law—tax, antitrust, securities regulation, labor law, and similar legislation"). In any event, *Destec*'s holding was not so limited. *Destec*, like *Middle South*, broadly recognizes that there is no ripe controversy over the legality of exercising an option when the option has yet to be exercised. That holding follows naturally from the well-established doctrine of ripeness, which requires that the controversy not be speculative, conjectural, or hypothetical.

On appeal, SureShot also attempts to avoid the Court's ripeness doctrine by arguing that it already suffered an injury, inasmuch as it allegedly was forced to shut down its business owing to fears that Protracer would in the future choose not to renew its license. Because this argument was "not raised before the district court," it is "waived and cannot be raised for the first time on appeal." *LeMaire v. La. Dep't*

of Transp. & Dev., 480 F.3d 383, 387 (5th Cir. 2007). Although arguments against subject matter jurisdiction cannot be waived, "arguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) (emphasis added); *accord United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2001) ("Grounds or arguments in support of subject matter jurisdiction may be waived like any other contention.").

Yet even if the Court did reach the merits of this argument, it should be rejected, as it amounts to an effort by SureShot to manufacture a ripe dispute, something that is precluded by Supreme Court precedent. In *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), the plaintiffs challenged the constitutionality of a federal surveillance program but could not show that the government would "imminently" surveil them. *Id.* at 411. Because government surveillance of the plaintiffs was not "certainly impending," they lacked standing. *Id.* at 414. Undeterred, the plaintiffs argued that they had taken reasonable precautions "to avoid [the challenged] surveillance" and had thereby "suffer[ed] present costs and burdens that are based on a fear of surveillance." *Id.* at 415-16. The Supreme Court firmly rejected that argument, ruling that plaintiffs "cannot manufacture standing" by "incur[ing] certain costs," even "as a reasonable reaction to a risk of harm." *Id.* at 416.

The same is true here. SureShot cannot plausibly allege that Protracer has denied SureShot a renewal of its license, nor can SureShot plausibly allege that such a denial is "certainly impending." *Id.* As a result, SureShot cannot "manufacture standing" by deciding to shut down its business based on the possibility of such a future denial, even if this were considered a "reasonable reaction." *Id*.

B. The District Court Properly Accepted the Allegations in the Complaint as True

SureShot also argues that the district court's holding that its suit was not ripe depended on the court "improperly weigh[ing] the allegations in Topgolf's favor at the pleading stage." SureShot Br. 26. This is incorrect.

First, the conclusions SureShot asserts the district court should have reached based on its allegations are not actually included in SureShot's Complaint. SureShot asserts on appeal that "Topgolf was unequivocal in telling SureShot it would not renew the Protracer agreement," but the Complaint contains no such allegation. SureShot Br. 26. Instead, the only relevant allegation in the Complaint is SureShot's claim that, after refusing to guarantee a future renewal of SureShot's Protracer license, a Topgolf employee told a SureShot employee, "If I was in your position, I would look for alternatives." ROA.13. Even accepting that allegation as true, it falls far short of a guarantee that SureShot's license would *not* be renewed.

Indeed, SureShot would be on no firmer ground even if it had specifically alleged that a particular Topgolf representative unequivocally told his SureShot

counterpart that the license would not be renewed. *See Middle South*, 800 F.2d at 491 (holding that challenge would not be ripe until "the City Council actually votes to exercise the . . . option"). One could not reasonably infer from such an allegation alone that the Topgolf employee who allegedly made the statement had authority to speak for the company, that he was accurate in stating the company's then-current position, or, even if he was, that the company would continue to adhere to that position at the point in time when an actual decision about renewal of the license needed to be made (i.e., in 2020, when the current license expires).

The district court thus acted correctly when it held that it was "unpersuaded that the lack of assurances and the statement to look for alternatives that was allegedly made by an unidentified Topgolf executive is equivalent to a denial of access." ROA.163. This conclusion is a correct comparison of the allegations of SureShot's Complaint to the requirements of the law; it is not an improper "credibility determination." SureShot Br. 27. SureShot's allegations, taken as true, do not amount to a current denial of access, and thus do not present a justiciable case or controversy within the jurisdiction of a federal court.

II. The District Court Correctly Held That SureShot Did Not Allege Antitrust Injury

The district court held that SureShot "not only lacks Article III standing, but also antitrust standing." ROA.164. Antitrust standing requires that a plaintiff show "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants'

conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Waggoner v. Denbury Onshore, L.L.C.*, 612 F. App'x 734, 736 (5th Cir. 2015) (quoting *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997)). The district court correctly concluded that SureShot lacks antitrust standing because it has not alleged and cannot allege "antitrust injury." *Jebaco*, 587 F.3d at 318 (quoting *Doctor's Hosp. of Jefferson*, 123 F.3d at 305).

Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 319 (quoting *Brunswick Corp.*, 429 U.S. at 489); *accord Anago, Inc. v. Tecnol Med. Prod., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992).

The district court properly concluded that SureShot did not allege an antitrust injury. SureShot asserts that Topgolf's actions were anticompetitive because Topgolf allegedly has "dominant market power and monopolies in the market for golf entertainment venues in the United States." ROA.15. But, as the district court correctly concluded, SureShot would have faced precisely "the same injury-in-fact"—the risk of a potential future loss of access to Protracer Range System—even if "a company of another size [had] purchased" Protracer. ROA.165 (citing *Brunswick*, 429 U.S. at 487). The district court's reasoning here follows directly from the logic of the Supreme Court's *Brunswick* decision, where the Court held that

the plaintiff had no antitrust injury given that it "would have suffered the identical 'loss' but no compensable injury had the acquired centers . . . been purchased by [a] 'shallow pocket'" company instead of by Brunswick. *Brunswick*, 429 U.S. at 487. *See also Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) (finding no antitrust injury where plaintiff "would have suffered the identical loss" if the entity acquired by its competitor "had [been] sold to a third party"). As a result, even if SureShot had pled an antitrust violation, its asserted injury would not have occurred "'by reason of' that which made the acquisition[] unlawful." *Brunswick*, 429 U.S. at 488.

SureShot also oddly contends that it need not show antitrust injury because some practices, like group boycotts, are per se illegal without any showing of effect on prices or output, given the presumptive harm they cause to "the competitive process." SureShot Br. 29. This assertion is wrong as a matter of law. *See, e.g.*, *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 341 (1990) (rejecting "suggestion that no antitrust injury need be shown where a per se violation is involved"). But it is also entirely irrelevant, considering that SureShot has not pled any claim of per se illegality. On the contrary, the action that SureShot speculates Topgolf and Protracer may take in the future—i.e., a unilateral decision not to renew an existing intellectual property license—is a type of commercial action that is presumptively *lawful* under the antitrust laws. As various courts have held, it is

"well established that a party may choose with whom he will do business and with whom he will not do business, and that this behavior . . . will not give rise to liability absent a showing of actual competitive injury." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991) (citations omitted) (alterations in original); *see also Dillon Materials Handling, Inc. v. Albion Indus., Div. of King-Seeley Thermos Co.*, 567 F.2d 1299, 1306 (5th Cir. 1978) ("It is well settled, however, that in the absence of any forbidden agreement a seller may unilaterally refuse to do business with a buyer without running afoul of the antitrust laws."); *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.").

Hence, what SureShot is ultimately complaining of here is a speculative, hypothetical, future decision not to renew an existing license agreement in circumstances where any such action, even if it did occur, would not be unlawful and would not give rise to any cognizable antitrust injury. Moreover, what SureShot speculates might happen when its existing Protracer license comes up for renewal in 2020—i.e., that a decision will be made not to renew or extend the license—is something that might have occurred in any event had there been no acquisition of Protracer, or had Protracer been acquired by some entity other than Topgolf. In these circumstances, there is not even a hypothetical injury to competition sufficient to

support an antitrust claim, and any conjectured injury that SureShot fears it could experience if the current license agreement is not renewed would not qualify as the type of "antitrust injury" required under this Court's precedents to support antitrust standing.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: February 15, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 15, 2018, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,182 words, excluding the parts exempted from the word count under Fed. R. App. P. 32(f).

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