No. 21-40157

In The United States Court of Appeals
For the Fifth Circuit

WALMART INC.,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; ACTING ADMINISTRATOR D. CHRISTOPHER EVANS; MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Texas (Jordan, J.)

BRIEF OF DEMOCRACY FORWARD FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND AFFIRMANCE

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The undersigned counsel of record certifies that, in addition to the persons and entities identified in the petitioner's certificate, the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

Amicus Curiae **Democracy Forward Foundation** is not a publicly held corporation, does not issue stock, and has no parent corporation.

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INTERESTS OF AMICUS CURIAE

Democracy Forward Foundation is a non-profit legal organization with specialized expertise in administrative law. Democracy Forward Foundation is dedicated to ensuring that government agencies follow the law, operate within the confines set out in the Constitution and applicable statutes, and exercise their obligation to apply and enforce the law without undue constraint. Democracy Forward Foundation represents public interest organizations, local governments, small businesses, and individuals, among others, in challenges to unlawful government action, petitions for relief from agencies, comments seeking to inform government rulemaking, and similar efforts to ensure constructive and lawful governance.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this brief.

All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

As Defendants explain, Walmart has shown neither a waiver of the United States' sovereign immunity nor a ripe case or controversy, and the dismissal below must therefore be affirmed. To overcome these deficiencies, Walmart and its *amici* offer policy arguments, suggesting that federal agencies act improperly when they say how they interpret the laws they enforce. Policy arguments, of course, cannot overcome the constitutional requirements for suit, and are therefore irrelevant to the Court's decision.

In any case, these policy arguments are wrong. Agencies provide a vital public service when they explain how they interpret the law. The federal courts have always been careful not to discourage such guidance, and doing so here would make regulation less consistent, transparent, and efficient for government and industry alike.

Additionally, the decision below can be affirmed for a simple alternate reason: Walmart has not stated a claim for relief. The Declaratory Judgment Act does not provide a cause of action, and yet that is the only cause of action Walmart has pled. Accordingly, even if

Walmart could somehow overcome its jurisdictional deficits, affirmance would still be appropriate.

ARGUMENT

I. Informal Guidance Is Vital to the Efficiency, Consistency, and Transparency of Both Government and Industry

As the District Court found and Defendants explain, Walmart's suit fails at the outset on jurisdictional grounds. Thus, the policy screeds offered by Walmart's *amici* are wholly irrelevant. *See Robinson v. TCI/US West Comms. Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) ("[P]olicy arguments for expanding federal jurisdiction 'may provide very good reasons why Congress should amend the statute but are less adequate as reasons why courts should do so.'") (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987)).

Even if such arguments were potentially relevant here, they are entirely misguided. Far from coercing or burdening regulated entities, informal guidance provides an invaluable service to businesses and other members of the public who seek to understand how the government intends to enforce the law. Allowing suits such as Walmart's would discourage agencies from advising members of the public of their

interpretation of the law, which would reduce the consistency, transparency, and efficiency of regulation and the American economy.

A. Informal Guidance Provides Significant Benefits to Regulated Entities and Other Members of the Public

The events underlying Walmart's allegations are unexceptional: an executive agency charged by Congress with enforcing a statute believed that a private entity may have been violating that statute, so it explained that belief to the entity in hopes of resolving the issue without litigation. The private entity disagreed, and the agency filed suit. This is the ordinary course not only of regulatory enforcement but of innumerable prosecutions of individuals for alleged criminal offenses each year.

Walmart and its *amici* paint this unremarkable exercise of enforcement discretion as a dire threat to American liberty. It is not. To the contrary, government agencies' ability to advise members of the public as to how they interpret the law, including alleged violators, is a vital and valuable public service. As then-Judge Roberts observed, "informal communications between agencies and their regulated communities . . . are vital to the smooth operation of both government and business." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004).

Courts have long recognized that "announcement[s] to the public of the policy which the agency hopes to implement in future rulemakings or adjudications . . . serve[] several beneficial functions." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). Such statements "encourage[] public dissemination of the agency's policies prior to their actual application in particular situations. Thus the agency's initial views do not remain secret but are disclosed well in advance of their actual application." *Id.* "Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996).

For these reasons, courts have never interpreted the APA as "discourag[ing] agencies from synthesizing and documenting helpful and reliable advice," and treat "even a consequential, 'conduct-altering' rule [as] interpretive so long as it can 'fairly be viewed as interpreting—even incorrectly—a statute or regulation.'" *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 408 (D.C. Cir. 2020) (quoting *Cent. Tex. Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 212, 214 (D.C. Cir. 2005)); *see also Hoctor*, 82 F.3d at

167 ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.").

Walmart explicitly seeks to burden and discourage this helpful process, whether provided to the public at large (like the Pharmacist's Manual) or to individual entities (like the various settlement statements and litigating positions to which Walmart objects). As Defendants explain, none of these statements constitute agency action.[1] *See* Appellees' Br. at 38-45; *see also, e.g.*, *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (finding that "an investigation of appellant's [product], a statement of the agency's intention to make a preliminary determination that the [product was unlawful], and a request for voluntary corrective action" did not amount to agency action). They are also the exact kinds of interpretive

[1] The only thing Walmart identifies that could even plausibly be called agency action is the Pharmacist's Manual—but as Defendants explain, the Complaint's sole criticism of the Pharmacist's Manual is based on a demonstrable misrepresentation of the quoted material. *See* Appellees' Br. at 42. The Court may consider the actual contents of the Pharmacist's Manual because it is incorporated in the complaint by reference and is a matter suitable for judicial notice. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011).

guidance courts have refused to burden or discourage. *See, e.g.*, *POET Biorefining*, 970 F.3d at 397 (published guidance "explain[ing] [the agency's] interpretation of the applicable regulatory requirements and clarify[ing] the types of analyses and demonstrations that might meet them"); *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (letter informing private entity that EPA disagreed with its interpretation of a statute).

Indeed, industry leaders widely recognize the value of informal guidance in many contexts. In a pathbreaking report for the Administrative Conference of the United States based on interviews with dozens of industry participants, Professor Nicholas Parrillo reported that "for most regulated parties most of the time, guidance is a much-needed resource that they would not want to do without—and may actively demand." Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, Admin. Conf. of the U.S. 35 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf ("ACUS Report"). "[E]ven those who argued that [an agency] improperly over-used guidance on some subjects simultaneously wanted the agency to issue *more* guidance *faster* on other subjects." *Id.* at 36. This is because "guidance increases an agency

program's integrity and efficiency and shields regulated parties against unequal treatment, unnecessary work, and unnecessary risk." *Id.* at 28. Discouraging such guidance would have negative consequences, as "adjudication in the absence of guidance can be inefficient" for both government and industry, while "enforcement without this warning results in disruption and reputational injury for the target firms." *Id.* at 29.

Walmart's and its *amici*'s efforts to paint this salutary practice as a threat to liberty are long on rhetoric, but glaringly short on specifics. When one actually digs into the types of documents they decry, their beneficial nature is clear. For example, the Competitive Enterprise Institute ("CEI") protests its estimate of 73,424 guidance documents across the federal government. CEI Br. at 9 (citing Clyde Wayne Crews, *Executive Order 13,891 Sub-Regulatory Guidance Document Portal Tops 70,000 Entries*, CEI (Sept. 10, 2020), https://cei.org/blog/executive-order-13891-sub-regulatory-guidance-document-portal-tops-70000-entries/). But nearly a quarter of these documents are "letters of interpretation" issued by the National Highway Traffic Safety Administration

("NHTSA") in response to individual queries, dating back to 1967.[2] For more than 50 years, entrepreneurs, automobile manufacturers, car dealers, individual consumers, and others have relied on this service to access NHTSA's expertise on the complex and vital public safety regulations surrounding cars, school buses, bicycles, and more.

This is a massive benefit to the regulated community—not a "risk to the rule of law." CEI Br. at 9. But if Walmart and *amici*'s position were accepted, this vital public service would be in jeopardy, as NHTSA would have to worry about a preemptive lawsuit any time somebody that NHTSA believed might have violated the law disagreed with its interpretation. The vast majority of documents that *amici* vaguely reference to create the impression of runaway, unaccountable bureaucracy are of this entirely unobjectionable nature.

Walmart's *amici* assert that agencies use informal guidance to circumvent notice-and-comment rulemaking requirements. *E.g.*, CEI Br. at 9. But empirical analysis shows that "the unverified assumption that guidance is used improperly" is incorrect: "Agencies do not commonly use

[2] *See* Crews, *Executive Order 13,891*, *supra*; "NHTSA's Interpretation Files Search," https://isearch.nhtsa.gov/.

guidance to make important policy decisions outside the notice and comment process . . . .” Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 821 (2010). *Amici*’s broadside against guidance in the abstract is thus as unfounded as it is irrelevant.

Walmart’s *amici* go even further astray in suggesting that judicial deference to agency guidance makes such guidance inappropriate or requires a remedy in cases such as this. One brief claims that companies are cowed by improper guidance because of *Chevron* deference. U.S. Chamber of Commerce Br. at 13-14. This is a red herring; the Supreme Court has held that, in the vast majority of cases, “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

Another *amicus* brief asserts that informal guidance becomes effectively binding due to *Auer* deference. CEI Br. at 5. The Supreme Court has repeatedly rejected this exact argument. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (“[I]nterpretive rules, even when given *Auer*

deference, do not have the force of law."); *accord Perez v. Mtge. Bankers Ass'n*, 575 U.S. 92, 103 n.4 (2015). Moreover, *Auer* deference likely would not even apply to the litigation positions and statements from settlement negotiations that Walmart and its *amici* primarily decry, because it is given only to interpretations that "emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Kisor*, 139 S. Ct. at 2416. In particular, courts "should decline to defer to a merely 'convenient litigating position.'" *Id.* at 2417 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).[3] In sum, "the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation." *Id.* at 2424-25 (Roberts, J., concurring).

B. Informal Guidance Is Appropriate and Valuable When Enforcement Is a Possibility

Walmart suggests that informal guidance becomes problematic when an agency informs an entity that it might file an enforcement

[3] Here again, the only document Walmart challenges that seems even a plausible candidate for *Auer* deference is the Pharmacist's Manual, which does not say what Walmart claims it says. *See supra* n.1.

action. It also claims that it is unfair to smaller entities. Neither of these claims is correct.

As a preliminary matter, Walmart's approach would sweep far wider than Walmart suggests, opening the floodgates to a deluge of pre-enforcement challenges. Many of the statutes and regulations that the Executive Branch enforces have flexible standards that require some measure of interpretation, such as the "unfair methods of competition" and "unfair or deceptive acts or practices" in the Federal Trade Commission Act, 15 U.S.C. § 45; the "restraint of trade" in the Sherman Antitrust Act, 15 U.S.C. § 1; or, as most relevant here, the "usual course" and "suspicious orders" of the CSA's implementing regulations, 21 C.F.R §§ 1306.04(a), 1301.74(b).

When the government believes somebody has broken one of these laws, that somebody usually disagrees. Because such laws involve standards open to interpretation, the government necessarily must say how it interprets them in its communications with the alleged violator. Under Walmart's theory, *every* such instance would justify pre-enforcement review seeking an advisory opinion about how the law should be interpreted in the abstract, divorced from the facts of a specific

case. But "pre-enforcement review is the exception rather than the rule." *Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999). Walmart's approach would make pre-enforcement challenges available in every case involving a statute or regulation with any room for interpretation, turning the rule into the exception.

But even putting aside the prospect of allowing a pre-enforcement suit by every alleged violator of some of the nation's most critical protections of consumers and small businesses, Walmart's argument is misguided. Any coercive effect that threats of enforcement have exists regardless whether the agency discloses its legal thinking to the public or the alleged violator. It is the enforcement action that places pressure, not the guidance—and few propositions are better established than an agency's unreviewable discretion in initiating enforcement actions. *See, e.g.*, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950). Moreover, as Professor Parrillo explained, regulated entities' incentives to follow guidance primarily stem from sources other than potential enforcement. *See* ACUS Report at 37-64 (discussing pre-approval requirements, companies' desire to maintain constructive relationships

with regulators, and the role of intra-firm constituencies for following guidance).

Walmart and its *amici* also claim that their quest for pre-enforcement review would benefit smaller firms. *See, e.g.*, Appellant's Br. at 43-44. This is backward: it is primarily massive firms like Walmart that have the resources to retain multiple national law firms to pursue novel legal theories in their own preemptive action at the same time that they expect to be sued in another court for their alleged violations. Smaller firms *depend* on agencies' ability to advise them how they could avoid enforcement actions—the very ability Walmart seeks to constrain here. Similarly, small businesses and consumers rely on the Executive branch's enforcement authority to ensure an even economic playing field and prevent dominant corporations from acting to the detriment of their counterparties, competitors, suppliers, and customers.

C. Walmart's Inability to Plead an APA Claim Shows That DOJ's Statements Are Not the Source of Any Harm

Walmart claims that "Defendants have announced unlawful interpretations that qualify as 'rules'" under the APA. Appellant's Br. at 32. Through these purported rules, it says, "the Government sought to impose new obligations on pharmacists far beyond what the CSA and its

implementing regulations require." *Id.* at 13-14. Thus, according to Walmart, the Government threatened to sue it not for violating the CSA, but "violating [the Government's] interpretations" of the CSA. *Id.* at 4. Similarly, Walmart's *amici* describe Defendants' actions as "final agency action," CEI Br. at 21, that "impose[s] binding obligations," U.S. Chamber of Commerce Br. at 9.

If these allegations were correct, Walmart would have a well-established way to challenge Defendants' conduct: an action under Section 706 of the APA. "An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). And legislative rules require notice and comment. *See, e.g.*, *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999). This would be the case regardless of what label the agency gives to the action creating the obligations. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *Philip Morris USA Inc. v. FDA*, 202 F. Supp. 3d 31, 45-48 (D.D.C. 2016).

Thus, if Walmart truly believed that Defendants' statements had "impose[d] new obligations on pharmacists far beyond what the CSA and its implementing regulations require," Appellant's Br. at 13-14, it would have filed a routine APA action alleging that DOJ had issued legislative rules without providing notice and an opportunity to comment, and taken action that was arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2). Yet Walmart chose not to file an APA claim; indeed, it expressly disavows any such claim. Appellant's Br. at 1 ("Walmart had not sued under the APA.").[4]

This undermines both Walmart's claims of harm and *amici*'s portrait of unaccountable government. Congress provided a statutory

[4] This is presumably because it is not Defendants' *statements* that cause any harm, but Defendants' *enforcement*. If Defendants had said nothing to Walmart about its legal theories, but only said that they would file suit, the effect on Walmart would be the same. Of course, Walmart cannot challenge Defendants' enforcement decisions; "the decision to prosecute is . . . not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also, e.g.*, *Mytinger & Casselberry*, 339 U.S. at 599 ("The harm to property and business can [] be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts.").

pathway to invalidate agency actions that create new obligations on private entities. Walmart presents no reason to believe that, *if* its allegations were credible, that pathway would be inadequate. The principal cases that it and its *amici* rely on show exactly this, allowing a challenge *under the APA* or a comparable statutory cause of action. *See Sackett v. EPA*, 566 U.S. 120 (2012) (APA); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (same); *Appalachian Power*, 208 F.3d 1015 (same); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430 (D.C. Cir. 1986) (APA and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136n).[5] When those cases held that there was a remedy for effectively binding government conduct, they were referring to an APA claim—not the free-wheeling advisory opinion requested by Walmart.

The specter of covert government rulemaking—whether in general or in this specific case—is thus illusory.

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[5] The most notable exception is *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000). But that case, as one court recently observed, "did not consider the issue of jurisdiction, and 'it is well settled that cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists.'" *Hemp Indus. Ass'n v. U.S. DEA*, --- F. Supp. 3d ----, 2021 WL 1734920, at *11 (D.D.C. May 3, 2021) (quoting *John Doe, Inc. v. DEA*, 484 F.3d 561, 569 n.5 (D.C. Cir. 2007)).

II. Dismissal May Be Affirmed for Failure to State a Claim

This Court "may affirm on any grounds supported by the record, even if those grounds were not relied upon by the lower courts." *In re Plunk*, 481 F.3d 302, 305 (5th Cir. 2007). Even if the Court were to find that Walmart had somehow overcome the hurdle of sovereign immunity, it should still affirm the dismissal due to the Complaint's failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (b)(6).[6]

As the Government explained below and the Fifth Circuit has repeatedly held, "[a] petition for a declaratory judgment concerning federal law is not sufficient to create federal jurisdiction; 'hence the relevant cause of action must arise under some other federal law.'" *Gaar v. Quirk*, 86 F.3d 451, 453 (5th Cir. 1996) (quoting *Lowe v. Ingalls*

[6] In the District Court, Defendants raised Walmart's failure to state a claim under the rubric of Rule 12(b)(1). The Court may construe this as a motion to dismiss under Rule 12(b)(6) because "[w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action" is to "deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981); *see also, e.g.*, *Aldridge v. United States*, No. 06-cv-50, 2006 WL 2423417, at *1 n.2 (N.D. Tex. Aug. 22, 2006) ("Although the Government moves to dismiss pursuant to 12(b)(1), the Court construes this motion pursuant to 12(b)(6), a more appropriate vehicle . . . .").

Shipbuilding, 723 F.2d 1173, 1179 (5th Cir. 1984)). "[T]he Declaratory Judgments Act is not an independent source of federal jurisdiction, the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (citation omitted). No statute or constitutional provision provides a cause of action here, and no judicially remediable right exists. Therefore, dismissal should be affirmed even if Walmart could show a waiver of sovereign immunity.

The cases Walmart cites to suggest that the Declaratory Judgment Act independently provides jurisdiction and a cause of action are all inapposite. As discussed above, most involved claims under the APA. *See supra* p. 17. The language Walmart quotes from *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), meanwhile, refers to challenges directly under the Constitution—as the part of the sentence Walmart elides makes clear. *Compare id.* at 128–29 ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—*for example, the constitutionality of a law threatened to be enforced*." (emphasis altered)) *with* Appellant's Br. at 1, 22-23 (omitting

the italicized language). While litigants may in some cases preempt private disputes by invoking the cause of action their counterparty would bring, *see, e.g.*, *Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603, 607 (5th Cir. 1983), Walmart cites no precedent for allowing an alleged violator to block an agency's enforcement discretion and turn the prosecutor into defendant. *See supra* n.4. The cases are clear: where Congress, the Constitution, and state law do not provide a cause of action, the Declaratory Judgment Act does not authorize relief. *Cf. Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) ("We cannot create a cause of action . . . . That job belongs to Congress, not the Federal Judiciary.").

CONCLUSION

For the foregoing reasons and those in Defendants' brief, the decision of the District Court should be affirmed.

Dated: July 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021, I caused the foregoing to be served upon all counsel of record via the Clerk of Court's CM/ECF notification system.

/s/ Jeffrey B. Dubner
Jeffrey B. Dubner

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). *See* Fed. R. App. P. 29(a)(4)(G), (a)(5).

This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared using Microsoft Word in 14-point Century Schoolbook font, a proportionally spaced typeface.

/s/ Jeffrey B. Dubner
Jeffrey B. Dubner