19-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Appellant,

v.

JUMANA NAGARWALA, et al.,

Appellees.

On Appeal from the United States District Court for the
Eastern District of Michigan – No. 17-cr-20274

MOTION OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the U.S. House of Representatives moves to intervene in this action to defend the constitutionality of 18 U.S.C. § 116(a), which criminalizes the practice of female genital mutilation ("FGM"). Intervention is warranted here because the Department of Justice has announced that it will not defend the constitutionality of the FGM statute on appeal and 28 U.S.C. § 530D recognizes the authority of the House to intervene to defend the validity of an Act of Congress when the Justice Department refuses to do so. Should the present motion be granted, the House requests to file its opening brief within 30 days of the Court's ruling on the motion.[1]

INTRODUCTION AND BACKGROUND

Recognizing that FGM is a serious public health problem of national and international dimension, the United States Congress enacted Section 116(a), which has been in place for more than two decades. According to the federal Centers for Disease Control and Prevention, more than 500,000 women and girls in the United States have either been victims of FGM or are at risk of it.[2] And, as the Justice

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[1] The House of Representatives Bipartisan Legal Advisory Group, which consists of the Speaker, Majority Leader, Majority Whip, Republican Leader, and Republican Whip, "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the House of Representatives, 116th Cong., *available at* https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf. The Republican Leader and the Republican Whip do not agree with intervention by the House here.

[2] Howard Goldberg et al., Centers for Disease Control & Prevention, *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at*

Department noted in its district court briefing in this case, more than 200 million women and girls have been the victims of FGM worldwide.[3] Moreover, FGM provides no health benefits and poses "immediate and long-term health risks and complications," which include "severe pain and bleeding, infection, problems with urination, painful genital scarring, decreased sexual pleasure and/or reduced sexual functioning, childbirth complications, depression, anxiety, and post-traumatic stress disorder."[4]

The practice of FGM has been widely and vigorously condemned by the international community, which "has long viewed it as an extreme form of gender-based violence reflecting deep-rooted inequality and as a violation of the rights of children."[5] Indeed, the United States has joined at least 59 countries worldwide in outlawing FGM.[6]

In 1996, Congress enacted 18 U.S.C. § 116(a), providing that "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora

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Risk, 2012, 131 Pub. Health Reports 1, 4 (Mar.-Apr. 2016), https://perma.cc/KX5J-D8PA.

[3] Opp. to Mot. to Dismiss 4 (Dkt. No. 336) (citing Ex. 1, UNICEF, *Female Genital Mutilation/Cutting: A Global Concern* (Feb. 2016), https://perma.cc/4VPF-8R6N).

[4] *Id.* at 5 (citing Ex. 2, World Health Organization, *Female Genital Mutilation* (Jan. 31, 2018), at 2, https://perma.cc/HY65-BBAN (WHO Fact Sheet)); *see also Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (discussing serious health consequences of FGM).

[5] Opp. to Mot. to Dismiss 4, *United States v. Nagarwala*, No. 17-CR-20274 (E.D. Mich. Sept. 12, 2018) (Dkt. No. 336) (citing WHO Fact Sheet, at 1).

[6] *See* WHO Fact Sheet, at 4.

or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both." This case is the first federal prosecution under Section 116(a). Defendants are a physician who performed FGM on young girls in a clinic in Michigan, others who assisted in the surgical procedures, and parents of the minor victims. Five of the victims resided in states other than Michigan and were transported across state lines for the purpose of subjecting them to FGM. As relevant here, defendants were charged with committing, and conspiring to commit, acts of FGM in violation of Section 116(a) and 18 U.S.C. § 371. *See* Third Superseding Indictment, *United States v. Nagarwala*, No. 17-CR-20274 (E.D. Mich. Sept. 12, 2018) (Dkt. No. 334).

Defendants moved to dismiss the Section 116(a) counts, arguing that Congress lacked authority under the Constitution to enact the FGM prohibition. The Department of Justice opposed dismissal, defending the constitutionality of the statute under the Treaty Power and the Commerce Clause. The district court granted the motion to dismiss, holding the statute invalid. That court concluded that "Congress had no authority to enact 18 U.S.C. § 116(a) under" either the Necessary and Proper Clause as a means of implementing the Federal Government's treatymaking authority or under the Commerce Clause. Op. and Order 27, *United*

States v. Nagarwala, No. 17-CR-20274 (E.D. Mich. Nov. 20, 2018) (Dkt. No. 370).[7]

The Justice Department filed a timely notice of appeal to this Court. After receiving two extensions of time to file its opening brief, on April 10, 2019, the Solicitor General of the United States informed Congress, pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii), that the Justice Department has determined that it "lacks a reasonable defense" of Section 116(a), and will not defend its constitutionality on appeal.[8] To protect the interests of the House in deciding whether to intervene under Section 530D, the United States requested an additional 30-day extension of time to June 3, 2019, in which to file its opening brief. Mot. for Extension 1, *United States v. Nagarwala*, No. 19-1015 (6th Cir. Apr. 15, 2019). That extension motion remains pending.

The House, as part of a coordinate branch of the Federal Government, has a unique interest in defending its own enactments against judicial invalidation when the Executive Branch has abandoned its defense of those enactments. The Supreme Court has "long held that Congress is the proper party to defend the validity of a [federal] statute" when the agency "charged with enforcing the statute" agrees with

[7] Counts Seven and Eight of the Third Superseding Indictment, which charged one defendant with violating 18 U.S.C. § 2423(e) and four defendants with violating 18 U.S.C. § 1512(k), are not implicated by the district court's decision on the constitutionality of Section 116(a).

[8] Letter from Noel J. Francisco, Solicitor General, to Jerrold Nadler, Chairman, House Committee on the Judiciary, at 2 (Apr. 10, 2019), https://perma.cc/U469-TKU8.

the party challenging the statute that it is unconstitutional. *INS v. Chadha*, 462 U.S. 919, 940 (1983). Indeed, Section 530D(b)(2) recognizes the authority of the House to intervene when the Department declines to defend the constitutionality of an Act of Congress.

This case is highly unusual because the Justice Department—after having brought criminal charges against the defendants pursuant to a federal statute—is now declining to defend that criminal statute. If this Court on appeal reverses the district court's decision that Section 116(a) is unconstitutional, that judgment will make it possible for the Justice Department to exercise its discretion to move forward with the prosecutions it initiated here under Section 116(a), if it wishes to do so.

The House moves to intervene here solely to defend the constitutionality of Section 116(a). *See Friends of Tims Ford v. TVA*, 585 F.3d 955, 963 n.1 (6th Cir. 2009) ("Federal courts have the authority to apply appropriate conditions or restrictions on an intervention as of right."). This action by the House is analogous to what the Executive Branch does when it intervenes in pending litigation under 28 U.S.C. § 2403(a), in order to defend the constitutionality of an Act of Congress. On the rare occasions when the Executive Branch has abandoned its defense of Congressional enactments, one or more houses of Congress have frequently stepped in to fill that gap so that a federal entity is defending the federal statute. In this instance, intervention by the House is warranted because reasonable arguments can be made in defense of Section 116(a). The House's participation in this suit will thus materially

aid this Court in determining whether the FGM statute can survive constitutional scrutiny, and thereby serve as a basis for defendants' prosecution in federal court.

ARGUMENT

INTERVENTION BY THE HOUSE OF REPRESENTATIVES TO DEFEND THE CONSTITUTIONALITY OF THE FGM STATUTE (WHICH THE JUSTICE DEPARTMENT HAS REFUSED TO DEFEND ON APPEAL) IS APPROPRIATE HERE.

Intervention should be granted here because the Justice Department has declined to defend an Act of Congress, and the generally applicable standards for intervention are met.

A. As noted above, federal law provides that either house of Congress may intervene in a pending case to defend the constitutionality of a Congressional enactment that the Executive Branch declines to defend. 28 U.S.C. § 530D(b)(2).

Under this provision, whenever the Justice Department elects not to defend the constitutionality of a federal statute, it must inform Congress of that decision "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding." This statute thus contemplates that each house of Congress may "intervene" in a pending proceeding to defend the constitutionality of a federal statute whose defense the Department has abandoned. Section 530D(b)(2) further requires that the House and Senate be afforded sufficient notice to intervene in such cases "in timely fashion."

Intervention is particularly appropriate in these circumstances, given the Supreme Court's admonition that "Congress is the proper party to defend the validity

of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968), *United States v. Lovett*, 328 U.S. 303 (1946)); *see also* 462 U.S. at 930 n.5, 939 (noting that the House and Senate had formally intervened in the court of appeals after the Executive Branch ceased defending the federal law at issue).

On the same reasoning, only several years ago, numerous courts permitted the House Bipartisan Legal Advisory Group to intervene when the Justice Department declined to defend the federal Defense of Marriage Act's constitutionality.[9] When the issue of DOMA's constitutionality reached the Supreme Court in *United States v. Windsor*, the Court commended the House for its "sharp adversarial presentation of the issues" and its "capable defense of the law." 570 U.S. 744, 761, 763 (2013). The Supreme Court in *Windsor* further remarked on the important role the House played in presenting the issues for review, explaining that "it poses grave challenges to the

[9] *See, e.g.*, *Bishop v. Smith*, 760 F.3d 1070, 1076 (10th Cir. 2014) ("[BLAG] was permitted to intervene to defend the law."); *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013); *Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012); *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 924–25 (N.D. Ill. 2012) ("The House has an interest in defending the constitutionality of legislation which it passed when the executive branch declines to do so."); *McLaughlin v. Hagel*, 767 F.3d 113, 115 n.1 (1st Cir. 2014); *Aranas v. Napolitano*, No. 12-1137, 2013 WL 12251153, at *1 (C.D. Cal. Apr. 19, 2013); *Cooper-Harris v. United States*, No. 2:12-cv-00887, 2013 WL 12125527, at *1 (C.D. Cal. Feb. 8, 2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 298 (D. Conn. 2012); *Lui v. Holder*, No. 2:11-CV-01267, 2011 WL 10653943, at *1 (C.D. Cal. Sept. 28, 2011).

separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court." *Id.* at 762.

Courts have routinely granted motions to intervene filed by one or both houses of Congress when the Justice Department has declined to defend a federal statute's constitutionality. Just this year, the U.S. Court of Appeals for the Fifth Circuit granted a motion to intervene filed by the House after the Justice Department ceased defending the Affordable Care Act. *See* Order, *Texas v. United States*, No. 19-10011 (5th Cir. Feb. 14, 2019). Earlier examples abound. *See Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) ("The House . . . [successfully] moved to intervene in order to defend the constitutionality of the statute."); *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986) (upholding constitutionality of federal statute that the Department refused to defend after allowing the House to intervene to defend the statute); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986) ("There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the [federal law at issue]" (citing *Chadha*, 462 U.S. at 940)).[10] Indeed, the House is unaware of *any* instance in which a

[10] *See also Synar v. United States*, 626 F. Supp. 1374, 1378–79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Barnes v. Carmen*, 582 F. Supp. 163, 164 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *rev'd on mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *In re Prod. Steel, Inc.*, 48 B.R. 841, 842 (Bankr. M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 233 (Bankr.

federal court has denied a motion to intervene filed by either house of Congress to defend a federal statute left undefended by the Executive Branch.

B. The House readily satisfies the applicable standards for intervention. Although Federal Rule of Civil Procedure 24 does not directly govern intervention in this appeal in a criminal case, the standards in the Rule should be applied here.

The federal courts of appeals have applied Rule 24 standards to intervention on appeal. *See Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) ("[I]ntervention in the courts of appeals is governed by the same standards as in the district court."); *see also Automobile Workers, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Elliott Indus. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1102 (10th Cir. 2005); *Warren v. C.I.R.*, 302 F.3d 1012, 1014–15 (9th Cir. 2002); *In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978); *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975).

Similarly, although the Federal Rules of Criminal Procedure do not specify a standard for resolving motions to intervene in criminal proceedings, courts have allowed such intervention when "a third party's constitutional or other federal rights

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M.D.N.C. 1985); *In re Tom Carter Enters.*, 44 B.R. 605, 606 (Bankr. C.D. Cal. 1984); *In re Benny*, 44 B.R. 581, 583 (Bankr. N.D. Cal. 1984), *aff'd in part & dismissed in part*, 791 F.2d 712 (9th Cir. 1986); *cf. Karcher v. May*, 484 U.S. 72, 80 (1987) ("The [New Jersey] Legislature was permitted to intervene because it was responsible for enacting the statute and because no other party defendant was willing to defend the statute. The Legislature sought to perform a task which normally falls to the executive branch . . . .") (quoting *May v. Cooperman*, 578 F. Supp. 1308, 1316 (D.N.J. 1984)).

are implicated." *United States v. Carmichael*, 342 F. Supp. 2d 1070, 1072 (M.D. Ala. 2004). For example, such motions have been granted "to assert the public's First Amendment right of access to criminal proceedings," *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008); "to challenge production of subpoenaed documents on the ground of privilege," *United States v. Cuthbertson*, 651 F.2d 189, 193 (3d Cir. 1981); and to allow a sitting U.S. Senator to attempt to halt grand-jury testimony that would have implicated the Senator's rights under the Speech or Debate Clause, *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972). Intervention has been permitted in these circumstances—and on appeal more generally—because federal courts are authorized to "'formulate procedural rules not specifically required by the Constitution or the Congress' to 'implement a remedy for violation of recognized rights.'" *Aref*, 533 F.3d at 81 (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

Rule 24(a) governs "Intervention of Right"—those situations in which a third party is legally entitled to intervene in a pending proceeding. Under Rule 24(a)(2),

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Thus, a proposed intervenor must show that "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v.*

Zelman, 636 F.3d 278, 283 (6th Cir. 2011). The House's motion satisfies these four requirements—each of which must be "broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991)).

First, the House filed this motion in a timely fashion—just 20 days after learning that the Justice Department had decided not to defend the FGM statute, and just 15 days after the Justice Department requested an extension "to allow the House additional time" to submit this motion. Mot. for Extension 2, *United States v. Nagarwala*, No. 19-1015 (6th Cir. Apr. 15, 2019). Indeed, Section 530D(b)(2)'s reporting requirement is designed to enable Congress to fulfill Rule 24(a)'s timeliness requirement when one or both houses wish to intervene in defense of a federal statute. *See* 28 U.S.C. § 530D(b)(2) ("A report shall be submitted . . . within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene *in timely fashion* in the proceeding . . . .") (emphasis added).

Second, for the reasons recognized by the Supreme Court in *Chadha* and the additional cases cited above, the House "possesses a substantial legal interest in the case," *Blount-Hill*, 636 F.3d at 283—namely, "an interest in defending the constitutionality of legislation which it passed when the executive branch declines to do so." *Revelis*, 844 F. Supp. 2d at 925; *see also Windsor*, 570 U.S. at 804 (Alito, J., dissenting) (referring to the House's "interests in this matter"); *Ameron, Inc.*, 787 F.2d

at 888 n.8 (affirming that "Congress has standing to intervene whenever the executive declines to defend a statute").

This institutional prerogative falls squarely within this Court's "rather expansive notion of the interest sufficient to invoke intervention of right." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally."). If any doubt remains about whether a claimed interest suffices, it "should be resolved in favor of recognizing an interest under Rule 24(a)." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (quoting *Mich. State AFL-CIO*, 103 F.3d at 1247).

No such doubt exists here. In a closely analogous context, this Court determined that Ohio's "General Assembly ha[s] an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced." *Ne. Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006). Congress enjoys the same interest in defending the validity of its own enactments.

Moreover, this Court's cases recognize that even nongovernmental entities can have an adequate "interest in the validity of legislation." *Mich. State AFL-CIO*, 103 F.3d at 1245. If that is true of "a public interest group that is involved in the process leading to adoption of legislation," *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007) (quoting *Mich. State AFL-CIO*, 103 F.3d at 1245), then it

is certainly true of the legislative institutions that enacted the challenged statute. *See also Karcher v. May*, 484 U.S. 72, 84 (1987) (White, J., concurring in the judgment) ("[W]e have now acknowledged that the New Jersey Legislature . . . ha[d] the authority to defend the constitutionality of a statute attacked in federal court."); *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.").

Moreover, as noted earlier, it is plain that reasonable arguments can be made in support of the constitutionality of Section 116(a). In light of that fact, intervention by the House here is warranted.

Third, absent intervention, the House's interest in the defense of its duly enacted statutes—a defense ordinarily undertaken by the Justice Department—will be significantly impaired. *See Ne. Ohio Coalition*, 467 F.3d at 1008 (recognizing that "potential *stare decisis* effects can be a sufficient basis for finding an impairment of interest" in the validity of legislation) (citing *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (affirming a state legislature's standing to challenge an initiative that "strip[ped] the Legislature of its alleged prerogative to initiate redistricting").

Fourth, and relatedly, no existing party will "adequately represent the [House]'s interest" in ensuring that the FGM statute receives a vigorous constitutional defense. *Blount-Hill*, 636 F.3d at 283. The Executive Branch and defendants agree—

incorrectly—that the FGM statute is unconstitutional. Therefore, only if the House's motion is granted will that statute receive the defense it deserves.

Finally, at a minimum, the House's motion satisfies the standard for permissive intervention under Rule 24(b). Under that Rule, "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The House's "claim that the [FGM statute is] valid" plainly "presents a question of law common to the main action." *Mich. State AFL-CIO*, 103 F.3d at 1248. Moreover, intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). By intervening, the House seeks to ensure (rather than frustrate) a proper determination of the original parties' rights by defending the constitutionality of the statute under which this prosecution was initiated. Granting the present motion is therefore "the most effective way to achieve a full and fair resolution of the case." *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013).

CONCLUSION

For the foregoing reasons, this Court should grant the House's motion to intervene solely in order to defend the constitutionality of Section 116(a). The House further requests that it be permitted to file its opening brief within 30 days of the Court's ruling on this motion.

Dated: April 30, 2019

Respectfully submitted,

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[11] Attorneys for the Office of General Counsel of the U.S. House of Representatives, including "any counsel specially retained by the Office of General Counsel," are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

/s/ Daniel B. Rice
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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 27(d)(2)(A) because it contains 3,806 words, exclusive of the portions of the brief that are exempted by Rule 32(f).

I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point roman-style Garamond font.

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