No. 24-30115

In the United States Court of Appeals for the Fifth Circuit

DOROTHY NAIRNE, DOCTOR; CLEE E. LOWE, REVEREND; ALICE WASHINGTON, DOCTOR; BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE; LOUISIANA STATE CONFERENCE OF THE NAACP; STEVEN HARRIS, REVEREND,
Plaintiffs-Appellees

v.

NANCY LANDRY, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF LOUISIANA,
Defendant-Appellant

STATE OF LOUISIANA, BY AND THROUGH ATTORNEY GENERAL ELIZABETH B. MURRILL; PHILLIP DEVILLIER, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE LOUISIANA HOUSE OF REPRESENTATIVE; CAMERON HENRY, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE LOUISIANA SENATE,
Intervenors-Appellants

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee

On Appeal from the United States District Court
for the Middle District of Louisiana, No. 3:22-CV-178

PETITION FOR INITIAL HEARING EN BANC

ELIZABETH B. MURRILL
Attorney General of Louisiana
OFFICE OF THE ATTORNEY GENERAL
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 506-3746

(Additional counsel listed in signature block)

J. BENJAMIN AGUIÑAGA
Solicitor General
AguinagaB@ag.louisiana.gov
MORGAN BRUNGARD
KELSEY SMITH
Deputy Solicitors General
AUTUMN HAMIT PATTERSON
Special Ass't Solicitor General
Counsel for the State of Louisiana

CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required here because, under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellants—as "governmental" parties—need not furnish a certificate of interested persons.

INTRODUCTION AND RULE 35(B)(1) STATEMENT

This case presents a threshold issue "of exceptional importance" warranting initial hearing en banc. Fed. R. App. P. 35(a)(2). Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301. But Section 2 is "silent" in one key respect—"the existence of a private right of action" to enforce it. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1213 (8th Cir. 2023), *reh'g en banc denied* 91 F.4th 967 (8th Cir. 2024). For that reason, the Eighth Circuit recently held that "Congress [did not] give private plaintiffs the ability to sue under § 2." *Id.* at 1206.

If this case were in the Eighth Circuit, the decision below would be reversed outright. That is because this case involves a Section 2 claim by private plaintiffs challenging Louisiana's state House and Senate districts—a claim that would be dismissed in the Eighth Circuit for lack of a private right of action. The district court permitted this case to

proceed, however, under a single paragraph in *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023), in which the Court briefly concluded "that there is a right for these Plaintiffs to bring these claims," *id.* at 588.

Respectfully, that paragraph—which was written before *Arkansas State Conference NAACP*—is incorrect. And *Robinson* places this Court on the wrong side of a circuit split with the Eighth Circuit on an issue of exceptional importance.

* * *

This case is an ideal vehicle to resolve the split over the following question presented:

> Whether Section 2 of the Voting Rights Act contains an implied private right of action.

And initial hearing en banc on this question is warranted for three separate reasons.

First, initial en banc consideration would conserve the Court's and the parties' time and resources. By preserving the implied-right-of-action issue below, Appellants have made clear that they intend to press the issue on appeal. Panel-stage briefing on this threshold issue also would be pointless under the rule of orderliness. Appellants thus seek to advance judicial economy—as this Court has done—through "initial en

banc hearing … without requiring the matter to percolate uselessly through a panel." *Williams v. Catoe*, 946 F.3d 278, 279 (5th Cir. 2020) (en banc). And if the en banc Court rules in Appellants' favor, that dismissal on clean legal grounds would obviate the need for a panel to spend extraordinary time and resources reviewing the district court's 91-page opinion for alleged Section 2 violations across nearly 150 House and Senate districts.

Second, the issue presented falls directly within the criteria for en banc review. Specifically, *Robinson*'s paragraph finding a private right of action under Section 2 squarely "conflicts with the authoritative decision[] of [another] United States Court of Appeals," Fed. R. App. P. 35(b)(1)(B)—namely, the Eighth Circuit's decision in *Arkansas State Conference NAACP*. And notably, the procedural complications that made *Robinson* a poor vehicle for en banc review do not exist here.

Third, on the merits, the Eighth Circuit was exactly right to hold that Section 2 does not contain an implied private right of action. "Any mention of private plaintiffs or private remedies … is missing" in the Voting Rights Act. *Ark. State Conf. NAACP*, 86 F.4th at 1210. And "silence is not golden" under the Supreme Court's implied-right-of-action

precedents. *Id.* In fact, "Congress not only created a method of enforcing § 2 that does not involve private parties, but it also allowed someone else to bring lawsuits in their place"—the Attorney General of the United States. *Id.* at 1211. Textual clues like this reinforce that Section 2 does not contain an implied private right of action.

For these reasons, the Court should grant initial hearing en banc to bring its precedent in line with the Supreme Court's implied-right-of-action precedents and the Eighth Circuit's decision in *Arkansas State Conference NAACP*.

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STATEMENT OF THE ISSUE

The issue presented is:

Whether Section 2 of the Voting Rights Act contains an implied private right of action.

STATEMENT OF THE CASE

The Louisiana Constitution sets the number of state legislative districts in Louisiana: 39 Senate districts and 105 House districts. La. Const. art. III, § 3. In early 2022, the Legislature passed S.B. 1 (establishing the current Senate districts) and H.B. 14 (establishing the current House districts). The private plaintiffs in this case, a group of Black voters and two nonprofit organizations, sued the Secretary of State alleging that S.B. 1 and H.B. 14 unlawfully dilute Black voting strength in violation of Section 2 of the Voting Rights Act. ROA.9122.[1] The Attorney General of Louisiana, the Louisiana Senate President, and the Louisiana Speaker of the House intervened as defendants. ROA.627–32. Their successors in office and the Louisiana Secretary of State are the Appellants here.

The district court held a seven-day bench trial in November and December 2023. *Id.* On February 8, 2024, the district court issued a 91-

[1] The U.S. Department of Justice intervened for the limited purpose of defending the constitutionality of Section 2. The Department did not join the case as a plaintiff.

page order (and a 15-page appendix with findings and conclusions, ROA.9213–27), concluding that "Plaintiffs have satisfied their burden of proving that the Louisiana State House and Senate electoral maps enacted by the Louisiana Legislature (S.B. 1 and H.B. 14) violate § 2 of the VRA." ROA.9122.

Relevant here, the district court considered, and rejected, Appellants' argument that Section 2 does not contain an implied private right of action. The district court agreed that "a circuit split does exist" between *Robinson* and the Eighth Circuit's decision in *Arkansas State Conference NAACP*. ROA.9140. But the court deemed itself "bound" by *Robinson*'s paragraph absent a contrary "en banc decision [by this Court] or the Supreme Court." ROA.9138. Accordingly, the court denied Appellants' motions to dismiss on the implied-right-of-action issue because "the Fifth Circuit has already concluded that Section 2 provides a right of action to private plaintiffs." *Id.*

Following a lengthy discussion regarding alleged Section 2 violations, the district court ordered "that elections under S.B. 1 and H.B. 14 be and are hereby ENJOINED." ROA.9212. The district court's order also states that "[t]he State is hereby permitted a reasonable period of

time, to be determined by the Court following submittals by the parties, to address the Court's findings and implement State House and Senate election maps that comply with § 2 of the Voting Rights Act." *Id.* Appellants appealed, and their opening briefs are due May 23, 2024.

ARGUMENT

The Court should grant initial hearing en banc on the question whether Section 2 contains an implied private right of action. Answering that question now would avoid wasted time and resources in panel-stage proceedings if, as Appellants argue, the Court need decide no more to resolve this case. The issue presented also squarely satisfies the en banc criteria because the Court's paragraph in *Robinson* conflicts with the Eighth Circuit's decision in *Arkansas State Conference NAACP*. And on the merits, the Eighth Circuit's well-reasoned decision rightly concludes that Section 2 does not contain an implied private right of action. This Court should take the case en banc and hold the same.

I. INITIAL HEARING EN BANC WOULD CONSERVE TIME AND RESOURCES.

Basic principles of efficiency and judicial economy counsel in favor of initial hearing en banc on the question whether Section 2 contains an implied private right of action. That is so in two interrelated respects.

First, panel-stage proceedings on the question presented would be a waste of time and resources. As the district court recognized, *Robinson* "bound" the district court to hold that Section 2 contains an implied private right of action. ROA.9138. Under a straightforward application of the rule of orderliness, therefore, a panel of this Court, too, would be duty bound to follow *Robinson*. *See, e.g.*, *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 234 (5th Cir. 2023). And only after that predetermined decision—and futile briefing on the issue—would Appellants be able to press the issue before the full Court.

This is precisely the sort of situation where the Court traditionally opts to "grant[] [a] petition for initial en banc hearing as an efficient means of revisiting the issue [presented] without requiring the matter to percolate uselessly through a panel." *Williams*, 946 F.3d at 279. Because the implied-right-of-action issue is destined for the full Court, it makes good sense to take that issue en banc now to avoid unnecessary proceedings at the panel stage.

Second, the risk of wasted time and resources is especially acute here because of the impending (and potentially unnecessary) burden on a panel of this Court and the parties. Specifically, the various parties are

poised to file numerous briefs addressing over 100 pages of district court findings and conclusions regarding alleged Section 2 violations spanning nearly 150 state legislative districts. And a three-judge panel will be tasked with adjudicating numerous and complex Section 2 issues. Make no mistake: Appellants would prevail on those issues because the district court misapprehended the law and the facts. But the point is that this extensive effort will be pointless if—as Appellants argue and as the Eighth Circuit has held—Plaintiffs' lawsuit fails for lack of a private right of action. To avoid that unnecessary burden on a panel and the parties, the Court should address the threshold implied-right-of-action question now.

II. THE EXISTING CIRCUIT SPLIT SQUARELY SATISFIES THE EN BANC CRITERIA.

En banc review now is especially warranted because this is a textbook candidate for such review. En banc review is reserved for "question[s] of exceptional importance." Fed. R. App. P. 35(a)(2). And, as one example, "a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B).

That is the case here. In *Robinson*, this Court briefly considered "whether Section 2 can be enforced by private parties," and it acknowledged that "[t]here is no cause of action expressly created in the text of Section 2." 86 F.4th at 587. Nonetheless, the Court concluded "that there is a right for [private plaintiffs] to bring these claims." *Id.* Ten days later, however, the Eighth Circuit issued *Arkansas State Conference NAACP*, which directly splits with *Robinson*. The Eighth Circuit asked, "Did Congress give private plaintiffs the ability to sue under § 2 of the Voting Rights Act?" 86 F.4th at 1206. The Eighth Circuit concluded that "[t]ext and structure reveal that the answer is no." *Id.* at 1206–07. And the Eighth Circuit then denied rehearing en banc, with the full Eighth Circuit thus standing behind the panel's conclusion.

This is—as the district court below put it—"a circuit split." ROA.9140. And given that this Court did not have the benefit of the Eighth Circuit's analysis in writing *Robinson*, it makes good sense to eliminate the circuit split by considering this issue en banc now.

Notably absent, moreover, are the procedural complications arising from the litigation posture in *Robinson*, which made it a poor vehicle for en banc review. *Robinson* was complicated by the fact that the State was

technically the prevailing party, because the panel vacated a preliminary injunction against the State's congressional map. 86 F.4th at 602. In addition, the panel decision outlined an expedited schedule under which post-remand proceedings would need to unfold in advance of the 2024 Louisiana congressional elections. *Id.* at 601–02. These circumstances combined to counsel against en banc review in *Robinson* on the implied-right-of-action issue.

But no such obstacles exist here. At this pre-panel stage of the case, Appellants have received no relief from this Court—and the most straightforward basis for resolving this otherwise-complicated appeal is to hold that Section 2 does not contain an implied private right of action. There also is no election-compelled exigency. The next elections under the enjoined House and Senate maps would not occur until 2027. Accordingly, this is an unusually good vehicle to address the issue en banc because, under the status quo, there is no need for hurried proceedings in either the district court or this Court.[2]

[2] Two months ago, the private plaintiffs filed a motion for a special election in November 2024, ROA.9245–61, which Appellants opposed, ROA.9280–9300. The district court has not acted on that motion. If the district court orders any manner of interim relief, Appellants will seek a stay of that order pending appeal from the district court and, if necessary, this Court.

For these reasons, the issue presented is an exceptionally important question that warrants en banc treatment.

III. SECTION 2 DOES NOT CONTAIN AN IMPLIED PRIVATE RIGHT OF ACTION.

Finally, it bears noting that en banc review is particularly appropriate here to correct course on the merits. On that score, the Eighth Circuit's decision in *Arkansas State Conference NAACP* maps the route to the right result. And the Court's contrary conclusion in *Robinson* warrants a closer look and reconsideration.

First, start with the straightforward implied-right-of-action analysis. As the Eighth Circuit observed, "[u]nder the modern test for implied rights of action, Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it." 86 F.4th at 1209. In the Voting Rights Act, it is at best "unclear whether § 2 creates an individual right" because Section 2's text cuts in opposite directions—by both outlining "a 'general proscription' of 'discriminatory conduct'" (which suggests no individual right) and focusing on a class of individuals "subject to discrimination in voting" (which might *imply*, but does not actually create, a right). *Id.* at 1209–10. Section 2's text thus lacks "'the sort of *rights-creating language* needed to imply a private right of action.'"

See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman, 981 F.3d 347, 374 (5th Cir. 2020) (Elrod, J., concurring) (emphasizing that "'where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action'" (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002))).[3]

And even "[g]reater clarity exists on the private-remedy question." *Ark. State Conf. NAACP*, 86 F.4th at 1210. That is because Section 2 "itself contains no private enforcement mechanism." *Id.* And "[a]ny mention of private plaintiffs or private remedies … is missing." *Id.* In fact, "[t]he Voting Rights Act lists only one plaintiff who can enforce § 2: the Attorney General." *Id.* at 1208 (citing 52 U.S.C. § 10308(d)). That is

[3] One related point bears mentioning: In a footnote below, ROA.9095–96 n.3, Plaintiffs suggested that referencing "42 U.S.C. § 1983" in "Count 1: Section 2 of the Voting Rights Act and 42 U.S.C. § 1983" of their Complaint would magically save their case in the event Section 2 does not contain an implied private right of action—because Plaintiffs could just enforce Section 2 through Section 1983. The district court ignored that footnote entirely, and perhaps for good reason: Plaintiffs are wrong. If, as just explained, Section 2 does not create an individual right, then Section 1983—which requires a preexisting "right[] … secured by the Constitution and laws," 42 U.S.C. § 1983—cannot be an enforcement vehicle for Section 2. Moreover, the "comprehensive remedial scheme for the enforcement of" the VRA discussed below "creates a presumption that Congress intended to foreclose resort to more general remedial schemes to vindicate" any such right. *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999).

"all the text provides." *Id.* at 1210. "Congress not only created a method of enforcing § 2 that does not involve private parties, but it also allowed someone else to bring lawsuits in their place." *Id.* at 1211. It naturally follows, therefore, that "[i]f the text and structure of § 2 and § 12 show anything, it is that 'Congress intended to place enforcement in the hands of the [Attorney General], rather than private parties.'" *Id.* The upshot: Section 2 does not contain an implied private right of action.

Second, this Court's reasoning to the contrary in *Robinson* is mistaken. There, the Court said that "[w]e consider most of the work on this issue to have been done by our *OCA-Greater Houston*[*v. Texas*, 867 F.3d 604 (5th Cir. 2017),] holding that the Voting Rights Act abrogated the state sovereign immunity anchored in the Eleventh Amendment." *Robinson*, 86 F.4th at 588. The Court reasoned that "Congress should not be accused of abrogating sovereign immunity without some purpose"—and "[t]he purpose surely is to allow the States to be sued by someone." *Id.* The Court observed that Section 3 of the Act "provides that proceedings to enforce voting guarantees in any state or political subdivision can be brought by the Attorney General or by an 'aggrieved person.'" *Id.* (quoting 52 U.S.C. § 10302). The Court thus concluded that

"the Plaintiffs here are aggrieved persons, that our *OCA-Houston* decision has already held that sovereign immunity has been waived, and that there is a right for these Plaintiffs to bring these claims." *Id.*

Respectfully, that reasoning is mistaken in several respects. To start, the "work" *OCA-Houston* does here is virtually non-existent: It is a single sentence that summarily says, "The VRA, which Congress passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity." *OCA-Greater Houston*, 867 F.3d at 614. That unelaborated sentence is itself incorrect—and the full Court should take this opportunity to say as much if it believes that step is necessary in the analysis. *See Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 662 (11th Cir. 2020) (Branch, J., dissenting) (explaining, in the context of a later-vacated decision, that *OCA-Greater Houston* is profoundly wrong because "nothing" in the Voting Rights Act's text "abrogates state sovereign immunity such that private individuals can sue the State in federal court"). With that mistaken premise omitted, the paragraph in *Robinson* collapses.

More fundamentally, the Court's reasoning based on the "aggrieved person" language—that the inclusion of this language in Section 3 creates

a private right of action—is mistaken, as the Eighth Circuit recognized. Section 3 refers to a "proceeding instituted by the Attorney General or an aggrieved person," though it originally referenced only the Attorney General. 52 U.S.C. § 10302(c). When Congress "added the reference to 'aggrieved person[s],'" "'[t]he most logical deduction from' this change 'is that Congress meant to address those cases brought pursuant to the private right[s] of action that' already existed or that would be created in the future"—*not* that Congress meant to create a new private right of action altogether. *Ark. State Conf. NAACP*, 86 F.4th at 1211 (quoting *Morse v. Republican Party of Va.*, 517 U.S. 186, 289 (1996) (Thomas, J., dissenting)). That is so for numerous reasons.

One, the text: "The next phrase after 'aggrieved person' mentions 'a proceeding under any statute,' which most reasonably refers to statutes that already allow for private lawsuits." *Id.* (quoting 52 U.S.C. § 10302(a)). "An already existing proceeding, in other words, not a new one created by § 3"—"[a]fter all, 'institut[ing] a proceeding' requires the underlying cause of action to exist first." *Id.* (quoting 52 U.S.C. § 10302(a)).

Two, history and structure: "In 1965, no one would have thought that § 3 created a cause of action in favor of the Attorney General, the only person listed in the original version"—because Section 12 of the Act "already gave the Attorney General the ability to bring one." *Id.* (citing § 10308(d)). "[A] second, duplicate authorization for the Attorney General to sue" would make zero sense. *Id.* And it would be stranger still to think that, when Congress "add[ed] 'or an aggrieved person' to a provision that created *no right of action*," that addition magically "transform[ed] [the provision] into one that creates *many*." *Id.* at 1211–12 (emphases added).

In short, this Section 3 argument depends on "the idea that Congress decided to transform the enforcement of 'one of the most substantial' statutes in history by the subtlest of implications." *Id.* at 1213. That is "[i]mplausible, to say the least, when measured against the explicit enforcement mechanisms found elsewhere in the Voting Rights Act." *Id.*; *see also Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699, 701 & n.1 (5th Cir. 2017) (Elrod, J., dissenting from the denial of rehearing en banc) (emphasizing that, on the "the issue of whether there [is] any private right of action in the statute," "'Congress … does not … hide elephants in mouseholes'"). "'Congress … knows how to create a

cause of action,' and it did not do so here." *Ark. State Conf. NAACP*, 86 F.4th at 1213.

* * *

For many years, federal courts have assumed, without deciding, that Section 2 contains an implied private right of action. And the dissent in *Arkansas State Conference NAACP* urged courts to "follow [that] existing precedent" because the issue "is best left to the Supreme Court in the first instance." *Id.* at 1219 (Smith, C.J., dissenting). But it makes little sense to follow cases that do not "actually *decid[e]* that a private right of action exists." *Id.* at 1215 (maj. op.). As a "court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), moreover, the Supreme Court cannot reach this issue unless the federal courts of appeals address it. And in a case such as this—where significant time and resources will be unnecessarily expended absent the full Court's intervention, and where a paragraph in this Court's precedent places it on the wrong side of a circuit split with the Eighth Circuit—initial hearing en banc is warranted to actually decide the issue presented.

CONCLUSION

The Court should grant initial hearing en banc on the question whether Section 2 of the Voting Rights Act contains an implied private right of action.

Date: April 23, 2024

Respectfully submitted,

/s/ Richard B. Raile
KATHERINE L. MCKNIGHT
E. MARK BRADEN
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 861-1711
rraile@bakerlaw.com

MICHAEL W. MENGIS
BAKER & HOSTETLER LLP
811 Main Street, Suite 1100
Houston, TX 77002

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ROBERT J. TUCKER
ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215

Counsel for Phillip DeVillier and Cameron Henry

/s/ J. Benjamin Aguiñaga
ELIZABETH B. MURRILL
Attorney General of Louisiana
J. BENJAMIN AGUIÑAGA
Solicitor General
MORGAN BRUNGARD
KELSEY SMITH
Deputy Solicitors General
AUTUMN HAMIT PATTERSON
Special Ass't Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

Counsel for the State of Louisiana

/s/ Phillip J. Strach
PHILLIP J. STRACH
ALYSSA M. RIGGINS
CASSIE A. HOLT
NELSON MULLINS RILEY
& SCARBOROUGH LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
(919) 329-3800
phillip.strach@nelsonmullins.com

JOHN C. WALSH
JOHN C. CONINE, JR.
SHOWS, CALI & WALSH, L.L.P.
628 St. Louis St.
P.O. Box 4225
Baton Rouge, LA 70821

Counsel for the Secretary of State

CERTIFICATE OF SERVICE

I certify that on April 23, 2024, I filed the foregoing brief with the Court's CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record.

/s/ J. Benjamin Aguiñaga
J. BENJAMIN AGUIÑAGA

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that this brief complies with:

(1) the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,711 words, excluding the parts of the brief exempted by Rule 32(f); 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 Century Schoolbook) using Microsoft Word 2016 (the same program used to calculate the word count).

/s/ J. Benjamin Aguiñaga
J. BENJAMIN AGUIÑAGA

Date: April 23, 2024