

Nos. 11-14532-CC and 11-14674-CC

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES,**  
*Appellant and Cross-Appellee,*  
v.  
**STATE OF ALABAMA, ET AL.,**  
*Appellees and Cross-Appellants.*

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**On Cross-Appeals from the United States District Court  
for the Northern District of Alabama  
Case No. 2:11-cv-2746-SLB**

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**REPLY BRIEF FOR CROSS-APPELLANTS ALABAMA  
AND GOVERNOR BENTLEY**

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**February 13, 2012**

**CERTIFICATE OF INTERESTED PERSONS**

The following is a list of all **additional** known judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

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## ARGUMENT

Even on the few issues in the cross-appeal, the United States' argument highlights just how critical the Supreme Court's decision in *Arizona*, which is set for oral argument on April 25, is going to be. In challenging Section 13's harboring prohibition, the United States is relying on the same erroneous implied-preemption theory that is animating its challenge to Section 10. *See U.S. v. Ala.* Red Br. 35-41 (discussing why the United States' challenge to Section 10 fails). In challenging Section 11(a)'s prohibition on soliciting and accepting employment, the United States presumably is making the same arguments it will offer against Section 11(a)'s Arizona-law parallel. And even on the two Alabama sections that have no Arizona counterpart—Section 16's tax-deduction provisions and Section 17's cause-of-action provisions—the United States is relying on the erroneous proposition, central to its argument against Arizona's version of Section 11(a), that the presumption against preemption does not apply to state employment regulations. The Supreme Court should reject each of those arguments in *Arizona*, and this Court should do the same here.

### **A. The District Court abused its discretion when it enjoined Section 13.**

In defending the District Court's injunction of Section 13, the United States eschews the lower court's reasoning and instead adopts the same sweeping preemption theory that it is advancing against Section 10. The United States



contends that States may not legislate in an area where Congress has already trodden, even when those laws are symmetrical and even when they advance the same goals. *See* U.S. Reply Br. 50 (“Section 13 would thus be preempted even if it were wholly congruent with federal law.”). This premise is based on a mistaken reading of *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288 (2000).

The United States is wrong to suggest that *Crosby* stands for the proposition that ““conflict is imminent”” whenever ““two separate remedies are brought to bear on the same activity.”” U.S. Reply Br. 49 (quoting *Crosby*, 530 U.S. at 3780). Conflict was imminent in *Crosby* because the federal government had imposed specific, intentionally limited sanctions on Burma, and Massachusetts had enacted its own set of sanctions. Massachusetts’s law “conflict[ed] with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.” *Crosby*, 530 U.S. at 378. Section 13 does no such thing. Section 13 simply establishes state crimes for conduct that Congress also prohibits, and it prohibits no activity that Congress intended to protect.

If the United States’ theory were right, then a host of state laws would be preempted. For example, state drug laws that criminalize the same conduct as federal law would be forced aside. State and federal laws often operate on parallel

tracks, with defendants being prosecuted in both state and federal court for the same conduct. *Cf. United States v. Burgest*, 519 F.3d 1307, 1310 (11th Cir. 2008) (holding, in a drug prosecution, “that where conduct violates laws of separate sovereigns, the offenses are distinct for purposes of the Sixth Amendment right to counsel”); *accord Abbate v. United States*, 359 U.S. 187, 194, 79 S.Ct. 666, 670 (1959) (“It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”) (quoting *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 142 (1922)).

State and federal criminal charges “originate[] from autonomous sovereigns that each ha[ve] the authority to define and prosecute criminal conduct.” *Burgest*, 519 F.3d at 1310 (internal quotation marks omitted). Thus, when state parallel-enforcement provisions are consistent with Congress’s goals, they are not conflict preempted. *See U.S. v. Ala. Red Br.* 55, 37-40. As explained below, this principle means that the District Court should not have enjoined Section 13—either because the statute is sufficiently congruent with the federal provision, or because the District Court should have enjoined only the non-congruent parts.

***1. Section 13 is sufficiently congruent with federal law to avoid conflict preemption.***

To the extent Section 13's provisions differ from federal law, those differences do not create a conflict. A "mere difference between state and federal law is not conflict." *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008). Section 13 shares the same goal as federal law: to prevent harboring of unlawfully present aliens. Nor does Section 13 "directly interfere[]" with the operation of the federal program." *See Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1983 (2011). In an effort to create a conflict where none exists, the United States attempts to magnify the differences between the federal anti-harboring laws and Section 13. But these differences do not stand as an obstacle to Congress's purposes and objectives.

The United States is wrong to suggest that Section 13(a)(3), which makes it a crime for someone to conspire to be transported in furtherance of his or her unlawful presence, represents a stark departure from federal law. U.S. Reply Br. 50-51. The United States cites no federal statute for its proclamation that Congress has not criminalized an alien's movement in the United States. *Id.* at 51. Instead, it relies on a single citation to dicta in a Ninth Circuit opinion. That decision—which did not address conspiracy—considered whether an upward departure was warranted under the Sentencing Guidelines for high-speed chases involving the illegal transportation of unlawfully present aliens. *United States v. Hernandez-*

*Rodriguez*, 975 F.2d 622, 625 (9th Cir. 1992). In deciding that the driver could receive a sentencing enhancement for recklessly endangering the passengers’ lives, the Ninth Circuit opined that “[t]he alien passengers cannot be considered ‘participants in the offense’ because they are not criminally responsible for smuggling under 8 U.S.C. § 1324.” *Id.* at 626. The court continued, “[e]ven if the unlawful aliens hidden in the appellant’s vehicle were participants in the smuggling offense, it is far from clear that they ‘willingly participated in the flight,’” a requirement under the Guidelines. *Id.* Critically for present purposes, the court did not hold that aliens cannot conspire to be transported under federal law, and the dicta the United States cites is far from a definitive statement of Congress’s intent. In fact, Section 1324 and the federal conspiracy statute suggest the opposite—that federal law recognizes a conspiracy charge for “self-smuggling.” *See* 8 U.S.C. §1324(a)(1)(A)(v)(I) (imposing criminal penalties on “[a]ny person” who “engages in any conspiracy to commit any” of the anti-harboring provisions); 18 U.S.C. §371 (prohibiting “two or more persons” from “conspir[ing] either to commit any offense against the United States, or to defraud the United States”).

Likewise, Section 13(a)(2), which prohibits inducing unlawfully present aliens to enter Alabama, is not a meaningful departure from federal law. The Alabama Legislature’s decision to prohibit inducing unlawfully present persons to enter “Alabama,” rather than, as the federal statute provides, the “United States,”

simply reflects the reality that state law operates only within the state borders. “No State can legislate except with reference to its own jurisdiction.” *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592, 594 (1881). Alabama’s choice to limit the geographic scope of its laws stands as no obstacle to Congress’s objectives here.

Nor can the United States fall back on the dormant Commerce Clause argument it advanced in the District Court. *See* U.S. Reply Br. 52 (stating that Section 13(a)(2) “contravenes the constitutional principle that States are not permitted to erect internal barriers to migration within the United States”). The District Court soundly rejected this argument, *see* Doc 93-Pg 85-86, as did the district court in *United States v. Arizona*, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010). Section 13(a)(2) operates only within the State and does not preclude interstate transportation of unlawfully present persons. As the District Court explained, “[t]he United States has not established that Section 13 discriminates against out-of-state residents on its face.” Doc 93-Pg 85. “Nor has it established that any burden imposed on interstate commerce ‘is clearly excessive in relation to the putative local benefits . . . .’” *Id.* at 86.

The third difference the United States attempts to capitalize on—the specification in Section 13(a)(4) that harboring includes entering into a rental agreement with a person who is not lawfully present—likewise does not stand as

an obstacle to Congress's objectives. That provision simply clarifies what is already implicit in federal law: that knowingly offering a dwelling to an unlawfully present alien can constitute harboring.

The Third Circuit did hold, erroneously, that a similar rental ordinance was preempted. But the Supreme Court has vacated and remanded that decision for further consideration in light of *Whiting*. See *Lozano v. City of Hazleton*, 620 F.3d 170, 224 (3d Cir. 2010), *vacated and remanded sub nom. City of Hazleton v. Lozano*, 131 S.Ct. 2958 (2011). The Third Circuit has not issued a decision on remand, and its original reasoning was wrong. In fact, the original holding was premised on the erroneous conclusion that “Hazleton’s housing provisions regulate which aliens may live there” and constitute a “regulation of immigration” that is preempted by the Constitution’s exclusive delegation of that power to Congress. *Lozano*, 620 F.3d at 220. As Alabama and Governor Bentley have explained, the Supreme Court held in *DeCanas v. Bica* that an impermissible regulation of immigration determines only “who should or should not be admitted into the country, and the conditions under which a *legal* entrant may remain.” 424 U.S. 351, 355, 96 S.Ct. 933, 936 (1976) (emphasis added). The District Court here correctly observed that Section 13(a)(4) does not regulate the housing conditions of legal immigrants. Doc 93-Pg 73-74.

The Third Circuit was wrong to conclude that state and local laws prohibiting the leasing of property to unlawfully present aliens stand as obstacles to Congress's objectives and purposes. Instead, as the Second Circuit has observed, when enacting the harboring statute, "members of Congress appear to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act." *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975).

***2. In the very least, the District Court should have issued a narrow injunction severing only the offending provisions.***

Even if the differences between Section 13 and its federal counterpart somehow frustrated Congress's purposes, the proper course of action would have been for the District Court to enjoin only those parts of Section 13 that are incongruent with federal law. *See U.S. v. Ala.* Red Br. 58-59; *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329, 126 S.Ct. 961, 967 (2006). The only response that the United States offers is to again suggest that even perfect symmetry between state and federal law is not sufficient to escape preemption. *See U.S. Reply Br.* 50. But as Alabama and Governor Bentley have explained, that sweeping preemption theory is wrong. *See supra* at 1-3.

The United States is also wrong to suggest that Congress impliedly preempted state harboring laws by expressly providing that state officials could make arrests for violations of the federal anti-harboring provisions. *See U.S. Reply*

Br. 49-50 (citing 8 U.S.C. §1324(c)). If anything, this provision simply highlights the reality that Congress wanted to encourage the States’ participation in the enforcement of the prohibition of illegal immigration. In any event, this provision simply makes clear that state officials can make arrests for federal violations. It says nothing about whether States can independently prohibit their own residents from harboring and concealing persons who are in violation of the law.

Nor can the United States justify an injunction against the entirety of Section 13—or, for that matter, any other provision of HB56—on its general assertions that HB56 does not account for the possibility that a “particular alien who is unlawfully present” at a given point in time will “ultimately” not be removed from the country. *See* U.S. Reply Br. 21. The federal anti-harboring laws, for their part, do not contain this nuance. Section 1324 makes it illegal to harbor an alien who “has come to, entered, or remains in the United States in violation of law,” whether or not the federal government later changes the alien’s status. 8 U.S.C. §1324(a)(1)(A)(iii). In fact, Section 1324(a)(2) imposes penalties on persons who bring unauthorized aliens into the United States “regardless of any official action which may later be taken with respect to such alien.” Congress thus wanted to prohibit the harboring not just of those persons who are eventually deported, but of all persons unlawfully present. But even if Congress had only prohibited the harboring of persons who have been ordered deported, an injunction declaring



Section 13 facially invalid would not be appropriate. To succeed on its facial challenge to a state statute, the United States would need to “establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987). Because Section 13 prohibits harboring of at least some persons who indisputably are not properly in the United States, it is not facially invalid.

**B. IRCA does not preempt the Act’s employment provisions.**

The United States’ arguments on the remaining three provisions rise and fall on its mistaken premise that the presumption against preemption does not apply to state employment laws that operate in this area. Congress never manifested a clear intention to preclude States from imposing sanctions like the ones in Section 11(a), and IRCA’s text is at least ambiguous as to whether it preempts tax-deduction and private-cause-of action provisions like those in Sections 16 and 17. Yet the United States asserts that these provisions are preempted on the theory that no presumption against preemption applies. U.S. Reply Br. 46.

The United States is wrong. The Supreme Court has made clear that the presumption is particularly strong when it comes to state laws regulating the employment relationship—even when those laws deal with unauthorized aliens. ““States possess broad authority under their police powers to regulate the employment relationship,”” and ““prohibit[ing] the knowing employment ... of

persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [the State's] police power.” *Whiting*, 131 S.Ct. at 1974 (quoting *DeCanas*, 424 U.S. at 356 (citation omitted)) (brackets in *Whiting*). *DeCanas* explained that the courts “will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship . . . in a manner consistent with pertinent federal laws.” 424 U.S. at 357. Both the District Court and the Ninth Circuit in *Arizona* therefore held that the presumption against preemption applies with respect to these laws’ employment-related provisions. *See* Doc 93-Pg 37; *United States v. Arizona*, 641 F.3d 339, 357 (9th Cir. 2011), *cert. granted*, 132 S.Ct. 845 (2011). Those courts were right about that, and this means the United States’ challenges to the three employment-related provisions must fail.

***1. IRCA does not impliedly preempt Section 11(a).***

With the presumption against preemption properly in place, the United States’ challenge to Section 11(a) cannot succeed. In passing IRCA, Congress rejected proposals to pass a set of federal sanctions against workers, and then enacted a preemption clause that preempted *only* state sanctions against employers. *See U.S. v. Ala.* Red Br. 61-66. To prevail on its challenge to Section 11(a), the United States would need to offer substantial evidence that despite this sequence of events, Congress nevertheless had “the manifest purpose” of preempting state

sanctions against employees, too. *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 1195 (2009). The United States cannot make that showing.

The United States cannot get around the problem by speculating that Congress chose not to preempt employee-based sanctions because there had been no “proliferation,” at that time, “of state sanctions against employees.” U.S. Reply Br. 45 (emphasis omitted). Congress had considered imposing employee-based sanctions during that process, so it hardly would have been unaware that States might consider proposals along the same lines. The alternative explanation—namely, that Congress simply chose to let the States regulate in this area if they wished—is, in the very least, plausible. The presumption against preemption means that “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.” *Altria Group v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 543 (2008) (internal quotation marks omitted).

The United States cannot circumvent the presumption by asserting that employee-based sanctions would be contrary to Congress’s “comprehensive scheme with calibrated sanctions and a specified role for state and local governments.” U.S. Reply Br. 46. To the extent IRCA is a “comprehensive scheme,” it is comprehensive *as to employers*. In creating this scheme, Congress made manifest its intent to preclude States from imposing additional sanctions

against those employers. But Congress hardly made manifest a parallel intent to preclude States from imposing sanctions against *employees*. As the Supreme Court explained in *Hines v. Davidowitz*, “where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.” 312 U.S. 52, 68 n.22, 61 S.Ct. 399, 405 n.22 (1941). And as the Court explained in a different context, “[i]t is quite wrong to view” a federal “decision not to adopt a regulation” as “the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65, 123 S.Ct. 518, 527 (2002).

The United States has offered no theory as to why state-imposed sanctions on employees would interfere with IRCA’s purposes and objectives, and none is apparent. Section 11(a) simply reinforces the federal policy against the employment of unauthorized aliens. *See I.N.S. v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194, 112 S. Ct. 551, 558 (1991) (“We have often recognized that a ‘primary purpose in restricting immigration is to preserve jobs for American workers.’” (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809 (1984))). It is implausible that Congress would have wanted to focus federal resources on sanctioning employers, but simultaneously would have wanted to

affirmatively preclude States from furthering the same policy by sanctioning those who unlawfully seek employment.

## ***2. IRCA does not preempt Section 16.***

The United States' argument on Section 16 faces similar problems. By prohibiting state "sanctions" against employers, Congress hardly made clear that as a result, States would be required to grant employers tax deductions for the wages they pay to unauthorized aliens. *U.S. v. Ala.* Red Br. 66-67. A decision not to make a particular activity tax-deductible is not a "sanction" in the ordinary sense of that word, so the presumption against preemption means Section 16 is valid.

The United States is wrong when it asserts that this tax-deduction provision is the functional equivalent of "a surtax or a fine." U.S. Reply Br. 54. The Supreme Court has long recognized that there is a fundamental distinction between "sanctions" on the one hand and denials of governmental benefits on the other. *See Bowen v. Roy*, 476 U.S. 693, 703, 106 S.Ct. 2147, 2154 (1986) (upholding distinction between criminal sanctions and denial of benefits in challenges brought under Free Exercise Clause). A fine or surtax would require an employer to make a payment to the government, out-of-pocket, as a penalty for employing unauthorized workers. The tax-deduction provision, on the other hand, merely means that those employers will not be able to force the government to grant them a benefit for their illegal acts.

The United States is also mistaken when it asserts that IRCA’s savings clause—which saves from preemption sanctions imposed through “licensing and similar laws”—shows that Congress believed that it was expressly preempting laws that merely decline to grant benefits to the employers of unauthorized aliens. When the government revokes a license, it takes something away. *Cf. Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1987, 1990 (2011) (Breyer, J., dissenting) (referring to the revocation of a business license as the “business death penalty”). Courts thus have long categorized license revocation as a form of “sanction.” *Emory v. Texas State Bd. of Med. Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984); *accord Taylor v. Dist. of Columbia*, 606 F. Supp. 2d 93, 96 (D.D.C. 2009); *Cohen v. Hurley*, 366 U.S. 117, 125, 81 S.Ct. 954, 959 (1961), *overruled in part by Spevack v. Klein*, 385 U.S. 511, 513, 87 S.Ct. 625, 627 (1967). They do not appear to have used that word to refer to provisions that merely decline to make certain expenses tax-deductible.

The United States errs further when it suggests that in the very least Section 16(b), which imposes a fine on employers that wrongly take the deduction, transforms the provision into a prohibited “sanction.” *See* U.S. Reply Br. 54. IRCA preempts only those laws that impose sanctions on employers for the act of employing unauthorized workers. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2010). Section 16(b) does not impose

any sanction on an employer for that act. It instead imposes sanctions on employers for the act of taking the deduction when they are not entitled to do so. A business that employs unauthorized workers need not pay the fine so long as it does not take the deduction.

If Section 16(b) were to create a preemption problem, the right remedy would not be to enjoin Section 16 in its entirety, but rather to enjoin only Section 16(b). *See U.S. v. Ala.* Red Br. 58-59 (citing *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329, 126 S.Ct. 961, 967 (2006)). But Section 16(b) creates no preemption problems in any event, and this Court should uphold Section 16 in its entirety.

### ***3. IRCA does not preempt Section 17.***

The United States cannot get around the presumption against preemption on Section 17, either. Congress did not make clear, when it passed the IRCA preemption clause, that it was precluding States from affording their lawful workers a right to obtain lost wages from employers that displace them in violation of the law. This is so because numerous courts have said that compensatory remedies, paid to private parties, are not sanctions. *See U.S. v. Ala.* Red Br. 68 (citing *Madeira v. Affordable Housing Found.*, 469 F.3d 219, 239-40 (2d Cir. 2006); *Jie v. Liang Tai Knitwear*, 107 Cal. Rptr. 2d 682, 690 n.7 (Cal. Ct. App. 2001); *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at

\*11 (E.D. Wash. Sept. 27, 2000), *rev'd on other grounds*, 301 F.3d 1163 (9th Cir. 2002)). The Alabama Legislature enacted Section 17 against the backdrop of those decisions.

The United States is wrong when it asserts that those decisions are irrelevant because they did not deal with provisions like Section 17. In one of the cases, the court was addressing employees' state-law claims seeking compensatory damages for "the lower wages paid" to them by their employers as a result of the employers' scheme to "depress employee wages" by "knowingly hir[ing] at least 50 undocumented workers per year." *Mendoza*, 2000 WL 33225470, at \*2. The United States presumably would call that claim a preempted "sanction," but the court disagreed. It held that IRCA's "preemption language . . . refers only to 'civil or criminal sanctions,' 8 U.S.C. § 1324a(h)(2), which does not cover plaintiffs' claims for civil money damages." *Id.* at \*11. Likewise, although the other two precedents did deal with different kinds of claims, their reasoning suggests that provisions like Section 17 are not preempted. One of these courts said "[c]ompensatory damages for personal injury do not reasonably equate to sanctions." *Madeira*, 469 F.3d at 239. The other said "a statutory reference to sanctions does not equal a reference to damages." *Jie*, 107 Cal. Rptr. 2d at 690 n.7. In light of that distinction, Congress's use of the word "sanctions" did not manifest an unambiguous intent to preempt causes of action for compensatory damages.



The fact that remedies set out in Rule 11 of the Federal Rules of Civil Procedure are “sanctions” does not call that conclusion into question. *See* U.S. Reply Br. 56. Rule 11 makes remedies for attorney misconduct punitive, not compensatory. These remedies are thus not geared toward full compensation of the other party, but instead are “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.” FED. R. CIV. P. 11(c)(4).

In the face of these problems, the United States falls back on an assertion that Section 17’s remedy is not truly “compensatory.” *See* U.S. Reply Br. 56-57. Alabama and Governor Bentley explained in their opening brief why that assertion is mistaken. *See U.S. v. Ala.* Red Br. 69-70. Because Section 17 is best read as compensatory, the presumption against preemption means that it, like the other provisions at issue in the cross-appeal, should stand.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I certify this brief complies with the applicable type-volume limitation under Rule 28.1(e)(2) of the Federal Rules of Appellate Procedure. According to the word count in Microsoft Word 2007, there are 4,165 words in this brief. I also certify this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). I prepared this brief in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Times New Roman font.

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## CERTIFICATE OF SERVICE

On February 13, 2012, I filed and served this brief via PACER. On that same day, I dispatched this brief to Federal Express for delivery to the Court within three business days. I served the following attorneys for the United States by electronic mail:

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