IN THE UNITED STATES COURT OF APPEALS

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ARGUMENT

I. Section 2709's Enforcement Procedures are Constitutional

[redacted]

Both On Their Face and As Applied

[redacted]

A. Federal Law Authorizes Pre-Enforcement Judicial Review of NSLs and Permits Disclosure to Counsel and Courts

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pre-enforcement judicial review of NSLs is expressly authorized by statute. And

Section 2709(c) prohibits disclosure to "anyone," it literally means *anyone* – even other officers, employees, and agents of the recipient. Brief for the Plaintiffs-Appellees ("Plaintiffs Br.") at 28-29, 38.

This rigid reading of Section 2709(c) suffers from two distinct problems. First, it renders the NSL statute unworkable on its own terms. If the plaintiffs' reading is correct, the individual officer, employee, or agent who happens to receive the NSL from the government is prohibited from disclosing the NSL to anyone else within the company. Thus, for example, if an NSL were received by an attorney in the general counsel's

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Construction Trades Council, 485 U.S. 568, 575 (1988). At most, the plaintiffs have demonstrated that it is possible to read Section 2709(c) in two different ways, one of which permits disclosure to counsel and one of which prohibits it. In that situation, it is incumbent on the courts to adopt the reading that avoids, rather than produces, a collision between Congress and the Constitution. The plaintiffs can prevail only if

B. Section 2709 Is Not Applied in an Unconstitutionally Coercive Manner

1. The district court held that even if pre-enforcement judicial review is available as a theoretical matter, Section 2709 violates the Fourth Amendment "as applied" because it is implemented in a manner that (in the district court's view) effectively coerces recipients into forgoing their right to judicial review. As explained in our opening brief, this "as applied" holding founders at the outset on one

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could lead to violations of the Fourth Amendment in other cases. Doe cannot invoke the Fourth Amendment rights of other parties to obtain relief for itself, for "Fourth Amendment rights are personal rights which * * * may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). And because there is no

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Gonzales, No. 3:05cv1256 JCH (D. Conn.).

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properly before the Court, it has no merit. The terms of NSLs issued under Section 2709 are no more inherently coercive than the terms of grand jury subpoenas issued under Rule 17, yet no one (including the plaintiffs here) has suggested that grand jury subpoenas deprive recipients of their Fourth Amendment right to judicial review.

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and hence have less coercive potential than NSLs, this Court's decision in *United*

This Court's decision in *Rattner* v. *Netburn*, 930 F.2d 204 (1991), on which the

as applied "in a given case," that theoretical possibility is utterly insufficient to support facial invalidation of Section 2709 under the First Amendment's overbreadth doctrine. Defendants Br. 41-49. The plaintiffs reiterate the district court's First

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1. As an initial matter, it is important to understand that the plaintiffs' First Amendment concerns, like those of the district court, are predicated on the supposed

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Supreme Court has made clear, the overbreadth doctrine is to be employed "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). A statute may be invalidated on its face only if the allegedly unconstitutional overbreadth is "substantial," both "in an absolute sense" and "relative to the scope of

strongly toward the opposite conclusion: the typical NSL will *not* lead to the

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(1953), NSLs cannot be used as a tool to seek out persons engaged in unpopular or

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or transactional information associated with a particular account is relevant to an

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of such information is theoretically *possible* – but the bare possibility of such disclosures in particular cases is manifestly insufficient to invalidate Section 2709 on its face, as the district court has done, any more than the theoretical possibility that grand jury subpoenas may elicit information protected by the First Amendment in a particular case is sufficient to declare Rule 17 facially unconstitutional.

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American Constitutional Law Foundation, Inc., 525 U.S. 182, 198-99 (1999) (statute requiring initiative petition circulators to wear badges that "reveal their identities at the same time they deliver their political message'"); *McIntyre*, 514 U.S. at 338 (statute requiring election-related publications to bear name of person responsible for

government through an NSL, there may well be no impact to the First Amendment interests that anonymity is designed to protect.

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Finally, even in the exceptional case where the government does obtain the identity of an anonymous speaker pursuant to an NSL, that result does not run afoul of the First Amendment. Whatever weight the First Amendment may attach to preserving a speaker's anonymity in other contexts, such as private civil litigation, that interest is categorically outweighed by the compelling public interest in detecting and, if possible, preventing criminal activity. That is the teaching of the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

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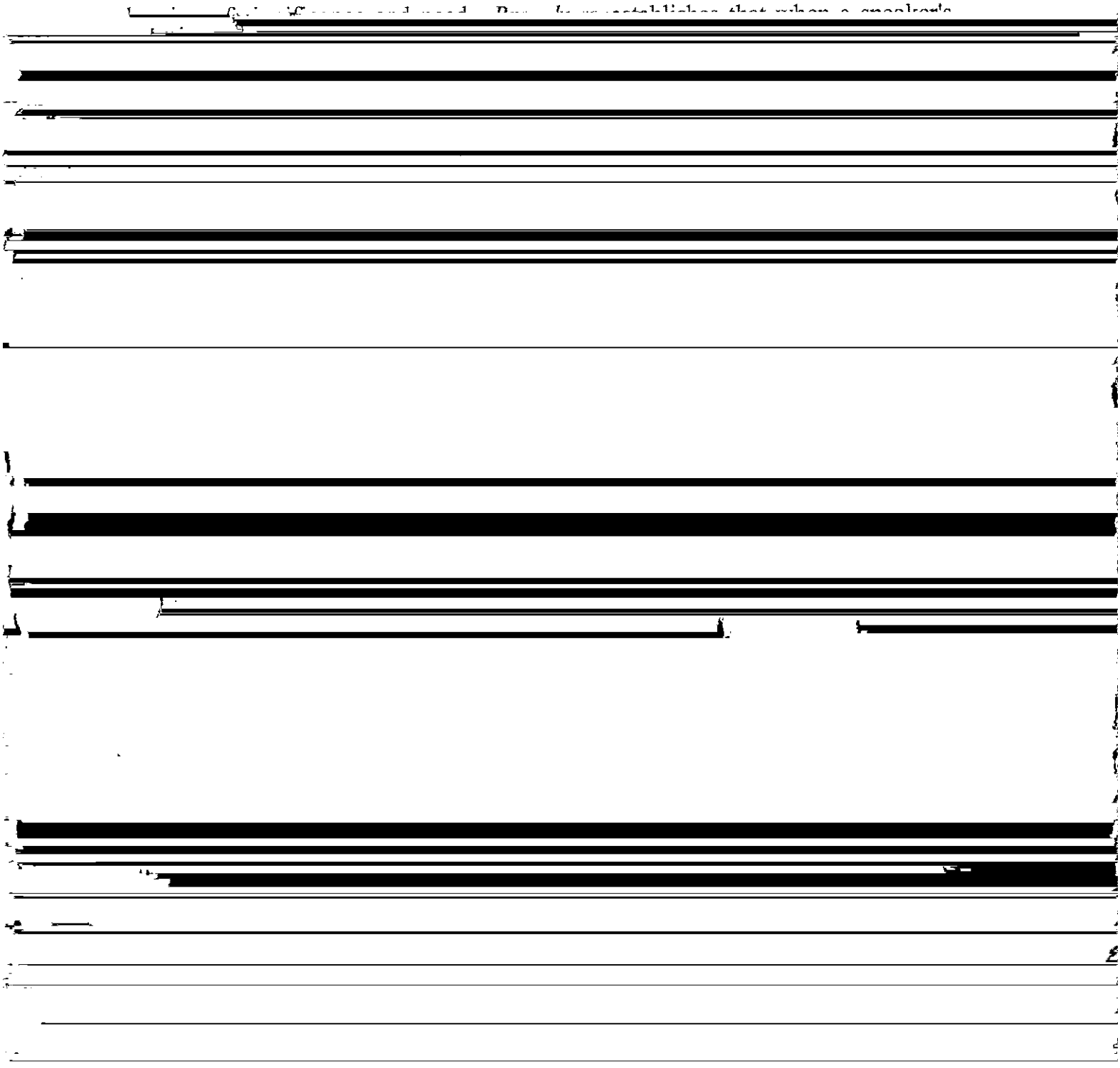
for the information is sufficiently compelling" to justify the imposition on the source's interest in anonymity. *Id.* at 679-80.

The Supreme Court squarely rejected this request and held that the First Amendment does not provide even a qualified privilege against complying with a grand jury subpoena that seeks a confidential source's identity. 408 U.S. at 681-708; see *United States* v. *Cutler*, 6 F.3d 67, 70-73 (2d Cir. 1993); *In re Grand Jury Subpoena*, 397 F.3d 964, 968-72 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005).

Amendment, or that such disclosures may be had only on the basis of a heightened



identity is relevant to a criminal investigation, the government's interest in "securing the safety of the person and property of the citizen" from criminal activity categorically outweighs whatever interest the speaker may have in preserving his

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Branzburg – and to do so in a setting where the government's interests are even more compelling than those at issue in *Branzburg* itself.

II. The Non-Disclosure Provision Is Not Facially Unconstitutional

Acts of Congress are not carpets, to be unraveled by pulling at threads. Yet

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terrorism and counterintelligence investigations in *every* case. And even if it were appropriate to enjoin the operation of the non-disclosure provision in its entirety,

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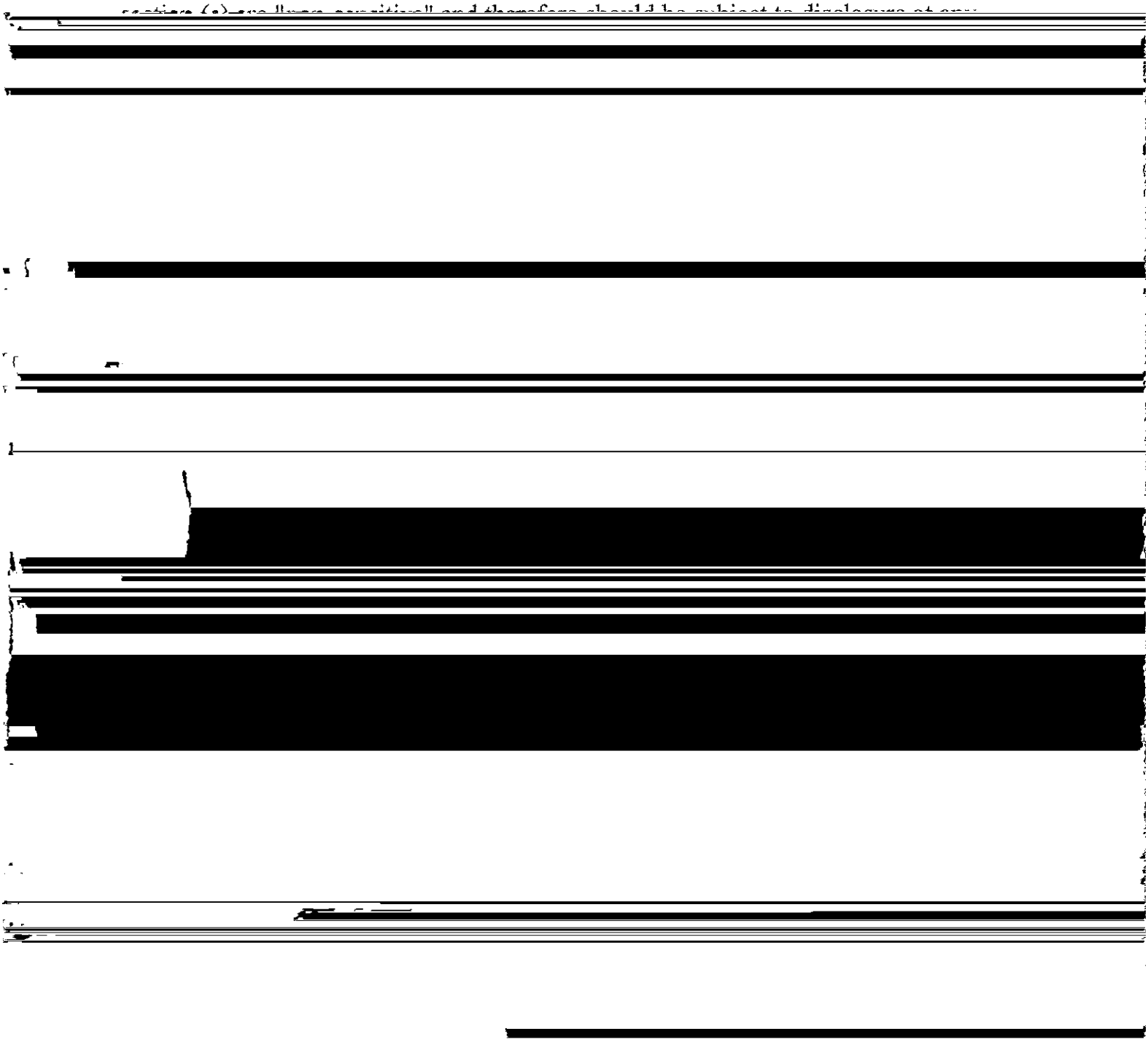
of an individual investigation or the arrest or conviction of a particular suspect. As explained by the Assistant Director of the FBI's Counterintelligence Division, terrorist and foreign intelligence agencies "have the sophistication and capability to closely analyze publicly available information concerning the United States' intelligence gathering activities," and they "can and do piece together publicly available information – sometimes innocuous details standing on their own – to determine the scope, focus, and progress of ongoing counter-terrorism or counterintelligence investigations * * * ." A-171. Disclosure of NSLs can allow terrorist or foreign counterintelligence organizations to monitor the government's methods and capabilities of gathering evidence through NSLs, and that information can be used to avoid detection in other investigations. *Id.* at A-177, 180. Thus, disclosure of an NSL can jeopardize the government's counter-terrorism and

disclosing information about the government's intelligence-gathering activities and capabilities does not depend on who holds and discloses the information. It is the disclosure itself, not its source, that determines the harm and justifies the prohibition.

The plaintiffs also argue that certain types of information subject to sub-



time, even during the course of the investigation in which the NSL has been issued.

in a particular case may tell the provider itself very little, but the same information has far more value to the subject or subjects of the investigation.

At a more general level, the plaintiffs and their *amici* repeatedly suggest that the non-disclosure requirement prevents meaningful public debate about the wisdom of desirability of Section 2709. If that suggestion requires any refutation, it is pro-

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Were Unconstitutional, Facial Invalidation Is Unwarranted

The plaintiffs argue that the government cannot prohibit disclosure in every case simply because secrecy is necessary in some cases. Plaintiffs Br. 14-16. But that argument has a logical corollary that the plaintiffs ignore: the district court

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harm that will result from the disclosure of information," in acknowledgment of the

those risks and the courts' relative lack of expertise to "second-guess the executive's

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Having erroneously concluded that the non-disclosure provision may not be

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have preferred that NSLs be abandoned altogether rather than being used where prudence permits.

The plaintiffs make no attempt to refute this showing. They do not deny that many NSL recipients (in contrast to Doe itself) are prepared to assist the FBI's

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from invalidating more of the statute than is necessary" (*Alaska Airlines* v. *Brock*, 480

U.S. 678, 683 (1987)) requires reversal of the judgment below to the extent that it

CERTIFICATE OF COMPLIANCE

1. This brief complies with the [redacted] limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been

I hereby certify that on August 26, 2005, I filed and served the foregoing

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