SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 18334

BROWN & BROWN, INC.

v.

RICHARD BLUMENTHAL, ATTORNEY GENERAL

RICHARD BLUMENTHAL, ATTORNEY GENERAL

v.

BROWN & BROWN INC.

BRIEF OF AMICI CURIAE THE CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION, INC., THE INSURANCE ASSOCIATION OF CONNECTICUT, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, THE AMERICAN INSURANCE ASSOCIATION, and THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA WITH ATTACHED APPENDIX

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The Connecticut Business & Industry Association, Inc. ("CBIA"), the Insurance Association of Connecticut ("IAC"), the National Association of Mutual Insurance Companies ("NAMIC"), the American Insurance Association ("AIA"), and the Property Casualty Insurers Association of America ("PCIA") (collectively, the "Amici"), submit this brief to assist the Court as it determines the scope of protection that the Connecticut Antitrust Act, Conn. Gen. Stat. § 35-24 *et seq.* (the "Act"), affords to confidential, proprietary information obtained by the Connecticut Office of the Attorney General ("Attorney General") during an antitrust investigation, and to explain the sweeping implications of this case for the business community represented by Amici.

The Court granted permission to the Amici to file a brief in the first appeal of this dispute, 288 Conn. 646 (2008) and the Amici filed a brief in that appeal.

1. CBIA

CBIA is the state's largest statewide business organization, with more than 10,000 member companies. It offers its members a wide array of resources and services related to legal, economic and social aspects of running a business, and it presents the views of its members on public policy and legal issues to regulatory, legislative and judicial authorities. The Connecticut Supreme Court has granted CBIA permission to file amicus curiae briefs in many appeals, with CBIA presenting in those cases the broad perspective of business in seeking fairness and balance in the application and development of the law. *See, e.g.*, *Mass. Mut. Life Ins. Co. v. Blumenthal*, 281 Conn. 805, 806 (2007) (CBIA appearing as amicus curiae in an action adjudicating the meaning of the Connecticut Antitrust Act).

2. IAC

IAC is a voluntary trade association, representing more than two dozen insurance and financial companies doing business in Connecticut. All of IAC's members have an interest in fair regulation of Connecticut businesses. The Connecticut Supreme Court has granted IAC permission to appear as amicus curiae in other matters. *See, e.g., Reichhold Chems., Inc. v. Hartford Accident & Indem. Co.*, 252 Conn. 774, 776 (2000) (examining issues of excess coverage under comprehensive general liability policies).

3. NAMIC

Founded in 1895, NAMIC is a full-service national trade association serving the property and casualty insurance industry, with more than 1,400 member companies that underwrite more than 40 percent of the property and casualty insurance premium in the United States. NAMIC members are small farm mutual companies, state and regional insurance companies, risk retention groups, national writers, reinsurance companies, and international insurance giants. Many federal and state appellate courts have granted NAMIC permission to appear as amicus curiae. *See, e.g., Davidson v. Slater*, 914 A.2d 282 (N.J. 2007).

4. AIA

AIA is a leading national trade association representing major property and casualty insurers writing business in Connecticut, nationwide and globally. AIA members collectively underwrote over $2.6 billion in direct property and casualty premiums in this State (nearly 40 percent of this market) in 2005. AIA members, including companies in Connecticut, range in size from small companies to the largest insurers with global operations, including some of this State's largest employers. AIA advocates on issues of importance to the property and

casualty insurance industry and marketplace in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. AIA has been granted permission by the Connecticut Supreme Court to appear as amicus curiae. *See Hanson v. Transp. Gen., Inc.*, 245 Conn. 613, 614 (1998) (examining the meaning of the Connecticut Workers Compensation Act).

5. PCIA

PCIA is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. PCIA members write over $184 billion in annual premiums, 40.7 percent of the nation's property and casualty insurance, 50.8 percent of the U.S. automobile insurance market, 39.6 percent of the homeowners market, 33.5 percent of the commercial property and liability market, and 41.6 percent of the private workers compensation market. Federal and state appellate courts have granted PCIA permission to appear as amicus curiae in many cases. *See, e.g., Gen. Const. Co. v. Castro*, 546 U.S. 1130 (2006) (granting PCIA leave to file amicus curiae brief in support of petition for writ of certiorari).

I. INTRODUCTION[1]

Amici, as leading trade organizations for Connecticut businesses and the insurance and financial industries, are gravely concerned that the trial court decision will eviscerate the protection of trade secrets and other sensitive commercial information that is an essential part of the Connecticut Antitrust Act and a critical component of a competitive market.[2] Although the Antitrust Act is plainly intended to prevent the Attorney General from disclosing confidential documents he obtains in an investigation, the Attorney General asks this Court to read the language to achieve the exact opposite result -- providing the Attorney General with unfettered discretion to disclose such information to anyone, including the competitors of the company providing the information. Allowing such unlimited disclosures will destroy the value of trade secrets and harm companies' ability to compete effectively in the market. It will also deter the business community, including third-party witnesses, from cooperating with Attorney General investigations, thereby undermining the very purpose for which the Attorney General asks the Court to adopt his extraordinary reading of the Act.

II. ARGUMENT

A. The Trial Court Decision and the Attorney General's Position Fail to Recognize the Value of Proprietary Information.

1. Confidential Business Information Is Valuable Intellectual Property Recognized by Law.

Connecticut law has long recognized the importance of protecting confidential and proprietary business information. *See, e.g., Lydall, Inc. v. Ruschmeyer*, 282 Conn. 209, 220

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[1] No counsel for either party wrote this brief in full or in part. No counsel or party contributed to the cost of preparation or submission of this brief.

[2] Amici adopt the arguments of the opening brief and reply brief filed by Plaintiff-Appellant Brown & Brown regarding the meaning of Conn. Gen. Stat. § 35-42 and the applicability of the Practice Book to the Attorney General's practice.

(2007) (company's plan for marketing a line of products is trade secret); *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59, 83 (1999) (confidential business information kept secret from employees can be trade secret); *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 126 (1966) (details of company's costs, pricing and bidding constitute trade secret); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984) (proprietary business information is protected intellectual property). Connecticut statutes protect trade secrets and other confidential information, recognizing the harmful effects of allowing disclosure of such information.[3] Under the Connecticut Uniform Trade Secrets Act ("CUTSA"), for example, parties may seek an injunction to prohibit the misappropriation and use of trade secrets. Conn. Gen. Stat. § 35-52. Nearly every state provides similar protection of trade secrets.[4]

Trade secrets by definition hold economic value for the company and potentially for competitors. *See* Conn. Gen. Stat. § 35-51(d) (a "trade secret . . . [d]erives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use"). Connecticut courts have recognized that disclosing commercial data may result in greater harm to a company than failure to disclose would cause to the public. *Aetna, Inc. v. Fluegel*, No. HHDCV 07403345S, 2007 WL 4573800, at *3 (Conn. Super. Ct. Nov. 27, 2007) ("[T]he general public has little interest in

[3] *See, e.g.,* Conn. Gen. Stat. § 35-50 *et seq.* (misappropriating trade secrets is actionable conduct); Conn. Gen. Stat. § 22a-60 (protecting trade secrets, commercial and financial information submitted to the Environmental Protection Agency for compliance with pesticide control statute).

[4] At least forty-five states and the District of Columbia have adopted some form of the Uniform Trade Secret Act. *See* Robert Graham Gibbons and Bryan J. Vogel, *Increasing Importance of Trade Secret Protection in the Biotechnology, Pharmaceutical and Medical Device Fields*, 89 J. Pat. & Trademark Off. Soc'y 261, 264 (2007). In addition, although it has not adopted the UTSA, Massachusetts criminalizes the stealing of trade secrets. Mass. Gen. Laws. ch. 266 § § 30, 60A.

the details of trade secrets while, conversely, parties have a strong and overriding interest in protecting trade secrets and their confidential business relations . . . could be damaged irreparably if [their] proprietary secrets were put in the public domain.") (internal quotation marks omitted).

Trade secrets and confidential business information are the means by which a company maintains its competitive edge. *See Lydall,* 282 Conn. at 233 ("purpose of trade secret statute is 'to prevent one [person] or business from profiting from a trade secret developed by another, because it would thus be acquiring a free competitive advantage'") (quoting *Omnitech Int'l, Inc. v. Clorox Co.,* 11 F.3d 1316, 1325 (5th Cir. 1994)); *see also La France v. Hart*, 6 Conn. Supp. 286, 286 (Conn. Super. Ct. 1940) (holding that former employee's use of employer's trade secret is "is unfair competition and, therefore, unlawful").

Confidential information and trade secrets hold value not only for individual companies; they are also important to the operation of a competitive market and valuable to society at large. As this Court has observed, the promotion of the State's general economy was one of the legislature's main goals for enacting the CUTSA. *See Lydall*, 282 Conn. at 233 ("One of the primary purposes of our trade secret statute is to encourage businesses to invest resources in invention and discovering more efficient methods of production."). Accordingly, theft of trade secrets is not only a civil cause of action between private parties, but a criminal offense as well. Conn. Gen. Stat. § 53-a-124.

Congress underscored the importance of trade secrets to the national economy when it passed the Economic Espionage Act of 1996, 18 U.S.C. § 1831 et seq., ("EEA"),

which criminalizes the theft of trade secrets by both foreign and domestic actors. [5] *See also Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991) (Posner, J.) ("The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property."). Because trade secrets by their nature are not traded on the open market, one way to determine their economic value is through the cost of their loss. Judging from estimates of the cost of economic espionage, trade secrets are very valuable. The theft of corporate trade secrets by foreign countries alone is estimated to cost American companies anywhere from $20 billion to $100 billion annually.[6] A trade secret lost by uncontrolled disclosure costs just as much as one that is stolen. Protecting confidential business information is thus an essential part of protecting businesses' ability to compete and preserving competitive markets.

2. The Attorney General's Position Disregards the Value of Trade Secrets.

The Attorney General maintains that he has unfettered discretion to advance an antitrust investigation by disclosing any information (including trade secrets and other confidential information) gathered in the course of the investigation to "anyone" -- including the producing party's competitors. Appellee's Br. at 17, 18. Such disclosures could be disastrous to a business, and to consumers as well if a competitor uses the information for

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[5] As Senator Rockefeller explained, "Intellectual property is the seed corn that builds our national property, our social well-being, and our international competiveness. When the intellectual property of Americans is not protected, our country loses not only jobs, production and profits today, but also our ability to under take the research and the investments that lead to future technological progress tomorrow." Peter J.G. Toren, *The Prosecution of Trade Secrets Theft Under Federal Law*, 22 Pepperdine L. Rev. 59, 60 n.5 (1994) (quoting 138 Cong. Rec. S15965-01 1992 (daily ed. Oct. 1, 1992)).

[6] Christopher A. Ruhl, *Corporate and Economic Espionage*, 33 Val. U. L. Rev. 763, 765 n. 14 (1999).

anticompetitive purposes. The Attorney General compounds these risks by insisting that he can file any confidential documents in court, with no notice to the producing party and no court-imposed restrictions, Appellee Br. at 15 -- effectively saying to the business community that at no point in the process will trade secrets and other confidential business information be protected.

The Attorney General cavalierly dismisses these concerns, giving no weight to importance of protecting confidential information that is embodied in Connecticut law. He contends that "[t]he very nature of investigating antitrust violations necessarily brings to light the confidential and commercially sensitive business practices of target companies." Appellee's Br. at 17. This, of course, is untrue. Law enforcement agencies routinely conduct investigations without disclosing confidential business information. Assuming that companies protect confidential information only to further illegal business practices, the Attorney General tosses aside concerns about disclosing confidential information to competitors, on the ground that "any competitor" will already know the content of subpoenaed material "as a result of their participation in the contract or conspiracy being investigated." Appellee's Br. 17-18. The assumption that any competitor to whom disclosure is made is a part of an illegal contract or conspiracy belies the very purpose of investigating, which is to determine whether there have been such violations of the law.

Anyone to whom the Attorney General discloses confidential business information, including a producing party's competitors, will learn business secrets. The damage is done once the information is released, because proprietary information is valuable to the company

that owns it only while it remains within the company's control.[7] See 2 *Callman on Unfair Competition, Trademarks & Monopolies* § 14:22 (4th ed.); *see also Ruckelshaus*, 467 U.S. at 1002-04 (company's property rights in trade secrets are extinguished with disclosure).[8]

B. The Trial Court Decision and The Attorney General's Position on Appeal Upset The Statute's Balance Between Conducting Effective Antitrust Investigations And Protecting Trade Secrets

1. The Decision Below Would Enhance the Attorney General's Investigative Power While Effectively Eliminating the Protection of Confidential Information.

The Antitrust Act granted the Attorney General broad subpoena powers and gave him the specific tools the legislature deemed necessary for effective investigation.[9] The legislature, however, also recognized the need to protect proprietary information obtained in the course of Attorney General investigations, and balanced these two critical interests by explicitly proscribing disclosure of subpoenaed information. Conn. Gen. Stat. § 35-42(c) & (e). *See* Appellant's Opening Br. at 15-20 (discussing legislative history of § 35-42).

The Attorney General's position, adopted by the trial court, considers only the

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[7] *See, e.g., Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987) (requested discovery would cause party to "suffer considerably from disclosure of its trade secrets because disclosure would effectively include most of [party's] competitors, all parties to the pending lawsuits.")

[8] The loss of value for trade secrets and confidential business information is particularly acute because, unlike other forms of intellectual property such as patents, copyright, and trademarks, the value of a trade secret or confidential information lies in its secrecy, not merely in its use. Thus it is very difficult to restore value to a trade secret that has been disclosed. *See* Robert Graham Gibbons and Bryan J. Vogel, *supra* note 4, at 266.

[9] This Court has made it clear that the Attorney General does not have inherent or implicit powers beyond those expressly granted by the legislature. *Blumenthal v. Barnes,* 261 Conn. 434, 455-56 (2002). Courts have carefully scrutinized previous claims by the Attorney General of broad investigative power to ensure consistency with limits imposed by the legislature. *See, e.g., Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 111 (2d Cir. 2002) (no authority to maintain ERISA action); *Tomasso Bros., Inc. v. Blumenthal*, No. CV03-08296632, 2004 WL 574669, at *1 (Conn. Super. Ct. Mar. 15, 2004) (Attorney General's subpoena exceeded the scope of his authority).

Attorney General's interest in investigating possible antitrust violations and disregards the legislature's interest in protecting confidential information. *See* Mem. Dec. at 447. He construes statutory provisions aimed at preventing disclosure, Conn. Gen. Stat. § § 35-42(c) (documents furnished to the Attorney General "shall not be available to the public") and (e) (interrogatory responses "shall not be available for public disclosure"), as giving him unlimited discretion to disclose such documents, so long as he does not disclose them to ***every*** member of the public. Under this contorted reading of the statute, by barring disclosure to the public, the legislature actually vested the Attorney General with unlimited authority to disclose confidential documents to ***anyone***, including authority to disclose trade secrets and highly sensitive business information to the producing party's competitors. Even confidential information provided by a witness who is not the target of the investigation could be disclosed to anyone. If adopted by this Court, the Attorney General's position would effectively eliminate the protection of confidentiality and the balance the legislature sought to achieve.[10]

The decision below and the Attorney General's position on appeal contradict the longstanding interpretation of the Antitrust Act's protection of confidential materials, on which the business community has relied for 35 years -- since *Mobil Oil Corp. v. Killian,* 30 Conn. Supp. 87 (Conn. Super. Ct. 1973). In that case, the court stated that "[n]one of the information obtained by this subpoena is available for export to any other person [other than the Attorney General or his designee] during the civil investigative stage." *Id.* at 96. The Attorney General evidently shared the same understanding when he petitioned the court over ten years later

[10] To the extent the Attorney General believes as a matter of public policy that his authority to investigate antitrust violations trumps the protection of trade secrets and other confidential information, this is a policy argument that should be directed to the legislature, not this Court. *See Herald Publ'g Co. v. Bill*, 142 Conn. 53, 63 (1955) (public policy is the province of the legislature, not the court); *see also Vollemans v. Town of Wallingford*, 103 Conn. App. 188 (2007) (McLachlan, J., dissenting) (same).

for permission to disclose certain information received by during the course of an antitrust investigation. In *State v. Mobil Oil Corp.*, No. 325640, 1989 WL 265298, at *1 (Conn. Super. Ct. Jan 12, 1989), the court ruled that "[o]nce a civil action is brought by the Attorney General, *the absolute proscription of General Statutes § 35-42(c) does not apply.*" *Id.* at *2 (emphasis added). Dramatic shifts in the workings of antitrust law, that disrupt settled expectations, are best left to the legislature.

2. The Attorney General's Assurances That He Will Exercise His Discretion Wisely Do Not Address the Legislature's, or Amici's, Concern About Protecting Trade Secrets and Other Confidential Business Information.

In asking this Court to adopt his sweeping reading of the statute, the Attorney General tries to assure the Court that he will exercise his discretion to disclose trade secrets and other confidential business information wisely, and will only make such disclosures "as reasonably necessary to pursue his investigation." Mem. Dec. at 445. He insists that he is "already striking an appropriate balance" between advancing investigations and protecting confidential, subpoenaed materials. Appellee's Br. at 18.

For Amici and the business community, this is no assurance at all. If this Court holds that the statute gives the Attorney General unfettered discretion to disclose highly sensitive information to anyone, it hardly matters what this Attorney General's practice has been. How an Attorney General exercises his discretion will depend on the views of whoever is the current occupant of that office, the electoral climate at the time, the particular circumstances surrounding the investigation at issue, and other factors. Amici that are compelled to produce highly sensitive information, the protection of which is crucial to their businesses, can take no comfort in the fact that the Attorney General may choose to exercise his unlimited authority to

disclose that information sparingly.[11] The proper balance is not one that is left to the Attorney General's discretion, but the one struck by the legislature in enacting sections 35-42(c) and (e) of the Act.

C. The Trial Court's Ruling Will Inevitably Result In Less Cooperation by Subpoenaed Parties.

It is sound public policy to encourage cooperation with government investigations, because such cooperation is "an end with unquestioned benefits to the [state]." *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1193 (10th Cir. 2006); *see also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) (cooperation with investigating government agency "undoubtedly" results in considerable government savings and encourages settlements). Reading the Antitrust Act as giving unlimited discretion to the Attorney General to disclose trade secrets and other sensitive business information would undermine that policy.[12]

The current case is instructive. Appellant cooperated with the investigation until the Attorney General refused to observe the Act's confidentiality provisions. The subsequent litigation has lasted nearly four years. *See also Mobil Oil Corp. v. Killian*, 30 Conn. Supp. 87, 91 (Conn. Super. Ct. 1973) (limiting the Act's confidentiality protections "would only breed

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[11] Moreover, in giving the Attorney General sole discretion to decide when, to whom, and on what terms he may disclose confidential information, the trial court decision provides the Attorney General with unlimited authority that the legislature has not expressly granted to his office. *See Barnes*, 261 Conn. at 455-56.

[12] The Attorney General has recognized the connection between protecting confidential information and promoting corporate cooperation. In written testimony before the Senate Judiciary Committee, the Attorney General stated that protecting volunteered confidential business information "will encourage more businesses to voluntarily provide the Attorney General's office with documentary and testimonial information on anti-competitive practices." Testimony of Attorney General Richard Blumenthal before the Judiciary Committee in Support of Senate Bill 964, An Act Concerning the Connecticut Antitrust Act, March 6, 2009. Senate Bill 964 became Public Act 09-68. [A1].

litigation and encourage everyone investigated to challenge the sufficiency of the notice"); *Ajello v. Hartford Fed. Sav.& Loan Ass'n*, 32 Conn. Supp. 198, 210 (Conn. Supp. Ct. 1975) (noting that reading the Act "in an overly strict manner would only spawn unnecessary litigation"). The construction of the Act for which the Attorney General argues would impede the cooperation he seeks.

The chilling effect would be most pronounced when the Attorney General seeks information from third-party witnesses.[13] Adopting the Attorney General's position would encourage third party witnesses to construe requests narrowly and to challenge the scope and authority of subpoenas. *See A. Michael's Piano, Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 141 (2d Cir. 1994) (if "every document in the possession of [the government] was freely available to the press or public," government requests for information would be construed in the narrowest manner and would produce a bare minimum of information in response).[14]

III. CONCLUSION

For the reasons stated above, the Amici respectfully request that this Court preserve the balance embodied in the Antitrust Act and protect from disclosure confidential information obtained by the Attorney General under the Act.

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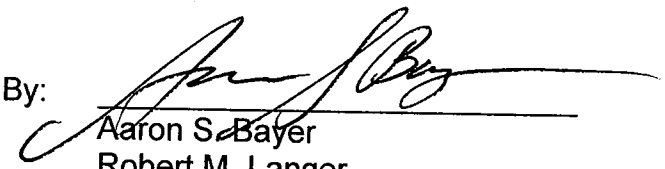
[13] Unlike the target of an investigation, a third-party witness cannot be said to have jeopardized its information by its alleged conduct. Nonparty witnesses, therefore, typically enjoy protection from the courts who consider nonparty status in determining whether discovery requests for confidential information are unduly burdensome. *See Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987) (affirming restriction of discovery where nonparty status "weigh[ed] against disclosure"); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (nonparty status significant in determining whether discovery demand "constitute[ed] an undue burden").

[14] The Attorney General argues that Appellant's reading would require a "secret antitrust docket," Appellee's Br. at 19. No new docket is needed. Connecticut law already has procedures for protecting trade secrets whereby a court may grant "protective orders in connection with discovery procedures, hold in-camera hearings, seal the record of the action and order any person involved in the litigation not to disclose an alleged trade secret." Conn. Gen. Stat. § 35-55.

Respectfully submitted,

AMICI CURIAE
THE CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION, INC., THE INSURANCE ASSOCIATION OF CONNECTICUT, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, THE AMERICAN INSURANCE ASSOCIATION, and THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

By: 

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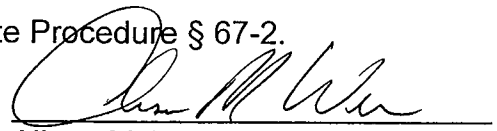
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amici Curiae complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 67-2.



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CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of June, 2009, a copy of the foregoing Brief of Amici Curiae was served by first-class mail, postage prepaid, upon all counsel and pro se parties of record, and upon the trial judge, as follows:

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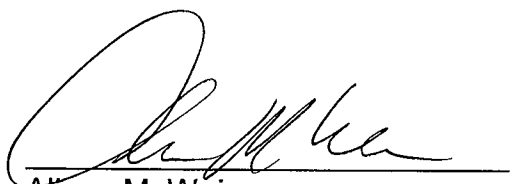

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