IN THE

SUPREME COURT OF INDIANA

Cause No. 15A01-1110-CR-00550

DANIEL BREWINGTON, Appellant, v. STATE OF INDIANA, Appellee.	) Appeal from Dearborn County Superior Court II) Cause No. 15D02-1103-FD-0084) The Honorable Brian Hill,) Special Judge

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PETITION TO TRANSFER TO THE INDIANA SUPREME COURT

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QUESTIONS PRESENTED ON TRANSER

1. Whether Indiana Code § 35-45-2-1(a)(2), which defines criminal intimidation to include harsh criticism of a prior lawful act, must be interpreted narrowly to avoid criminalizing speech protected by the First Amendment, including the conduct the U.S. Supreme Court held was protected in *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886 (1982).

2. Whether convictions for intimidation and attempted obstruction of justice must be reversed under *Street v. New York*, 394 U.S. 576 (1969), when (1) the indictments charged conduct that is protected under the First Amendment as well as conduct that is potentially unprotected; and (2) the jury returned general verdicts.

3. Whether Article I, § 9 of the Indiana Constitution, as interpreted in *Price v. State*, 622 N.E.2d 954 (Ind. 1993), limits prosecutions for crimes other than disorderly conduct, including intimidation and obstruction of justice.

4. Whether a grand jury witness may be convicted for perjury for a statement that was (1) not false; and (2) cut short by the prosecutor before the witness could fully explain his answer.

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On October 6, 2011, a jury convicted Daniel Brewington of the following charges: intimidation of Dr. Edward Connor, class A misdemeanor (Count I); intimidation of Judge James Humphrey, class D felony (Count II); intimidation of Heidi Humphrey, class A misdemeanor (Count III); attempted obstruction of justice, class D felony (Count IV); and perjury, class D felony (Count V). (Ct. App. Slip Opinion ("Op.") 7). These charges arose from Brewington's conduct during and after divorce proceedings in Ripley Circuit Court. (Op.3). The following is a brief summary of the facts giving rise to this prosecution; a more thorough description is found in the parties' appellate briefs.

A. Background

Brewington's wife filed a petition for divorce in Ripley County in January 2007. (Op.3). The case was eventually assigned to Special Judge James Humphrey (Dearborn Circuit Court). (Op.3-4). Brewington was initially represented by counsel, but later represented himself. (Op.4). Both parents sought custody of their two daughters, and while Brewington was represented by counsel, they agreed to hire Dr. Connor, a Kentucky-based psychologist, for a custody evaluation. (Op.3). On September 7, 2007, Dr. Connor issued his evaluation, recommending that joint custody was inappropriate, that Melissa have primary physical custody, and that Brewington have liberal visitation. (Op.3).

Subsequently, Brewington (now pro se) initiated a lengthy correspondence with Dr. Connor, at first seeking correction of what Brewington believed were numerous errors and misstatements in the evaluation. (Op.4). Brewington eventually demanded a copy of Dr. Connor's case file (including all notes and test data). (Op.4). When Dr. Connor refused,

Brewington claimed that he was in breach of his contract, had violated his professional duties, and committed various torts and criminal acts. (Op.4). Brewington eventually requested that Dr. Connor retract his evaluation and withdraw from participation in this divorce. (Op.4).

Judge Humphrey conducted a three-day final hearing in May and June of 2009. (Op.4) On August 17, 2009, Judge Humphrey issued his final decree, awarding Melissa sole legal and physical custody. (Op.4). Brewington was denied visitation unless he completed a series of steps: a mental health evaluation, followed by a period of supervised visitation, then petitioning for unsupervised visitation. (Op.5). Brewington moved for relief from judgment, followed by an unsuccessful appeal. (Op.5).

During the divorce proceedings, Brewington created two Internet sites discussing his experiences. (Op.6). Brewington sometimes used caustic and vitriolic language when discussing Dr. Connor and Judge Humphrey. (Op.6). In one post, Brewington requested his readers to send complaints about Judge Humphrey to the Dearborn County "Ethics & Professionalism Committee Advisor" to the Indiana Supreme Court, identified as Heidi Humphrey. (Op.5-6). Brewington listed the Humphreys' home address; however, he did not identify Heidi Humphrey as Judge Humphrey's wife, and did not identify the address as their home address. (Op.5-6).

B. Brewington's Prosecution

A grand jury investigation began in Dearborn County in February 2011, which examined Brewington's correspondence with Dr. Connor and Internet postings. (Op.6). Brewington testified, and asserted that he was not certain whether Heidi Humphrey was Judge Humphrey's wife when he first posted her name. (Op.6). The grand jury returned a six-count indictment,

including the five counts listed above, and one count of illegal disclosure of grand jury proceedings. (Op.6-7).

Brewington filed a pretrial motion to dismiss based in part on the First Amendment, which the court denied. (Supp.App.2-6). At the close of the State's case-in-chief, Brewington moved for judgment on the evidence. (Tr.426-29). The court denied the motion, and the jury returned a verdict convicting Brewington of three counts of intimidation (one each for intimidation of Dr. Connor, Judge Humphrey, and Heidi Humphrey), one count of attempted obstruction of justice (for intimidating Dr. Connor), and one count of perjury. (Op.7).

C. Brewington's Appeal

Brewington raised the following issues on appeal: First, that the statutes for intimidation (I.C. §35-45-2-1(a)(2)) and attempted obstruction of justice (I.C. § 35-44.1-2-2), as charged, must be interpreted consistent with the First Amendment and Article I, § 9 of the Indiana Constitution. Because the jury was not instructed on the State's burdens under these constitutional provisions, Brewington's convictions must be reversed. Second, that there was insufficient evidence to support Brewington's convictions for intimidation, attempted obstruction of justice, and perjury. Third, that Brewington's convictions on counts I and IV violated Double Jeopardy. Finally, that the court improperly empaneled an anonymous jury, improperly admitted evidence, and utilized improper jury instructions.

The Court of Appeals reversed in part and affirmed in part. The court vacated Brewington's convictions on Count I (intimidation of Dr. Connor) due to Double Jeopardy, and Count III (intimidation of Heidi Humphrey) due to insufficient evidence. The court affirmed the other convictions.

ARGUMENT

This criminal prosecution raises serious issues concerning free speech and prosecutorial misconduct. The Court of Appeals decided these issues incorrectly.

First, the court interpreted I.C. § 35-45-2-1(a)(2) in a way that criminalizes conduct that the U.S. Supreme Court previously held was protected speech. This interpretation is unconstitutionally overbroad.

Second, Supreme Court precedent requires reversal of Brewington's conviction for attempted obstruction of justice because the indictment charged conduct that is clearly protected speech, as well as conduct that was arguably unprotected.

Third, the court failed to consider any limitations under Article I, § 9 of the Indiana Constitution on prosecutions for intimidation and obstruction of justice.

Finally, the court condoned significant prosecutorial misconduct when it affirmed Brewington's conviction for perjury. This conviction should be reversed to send a message to prosecutors that grand jury proceedings cannot be used to manufacture convictions.

I. Standard of Review

Brewington was prosecuted in large part based on his speech—for "intimidating" Judge Humphrey on his websites, and attempting obstruction of justice by "intimidating" Dr. Connor in correspondence and on his websites. In such prosecutions, the First Amendment imposes certain obligations on reviewing courts.

First, the court must "'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499

(1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)). This extends to questions of whether the defendant's speech "is within one of the few classes of 'unprotected' speech." *Id.* at 503. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 504-05.

Second, a conviction must be reversed "[w]hen a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation," because "there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Street v. New York*, 394 U.S. 576, 588 (1969). *See also NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 931 (1982). Thus, if the Court finds that conduct charged in an indictment was protected speech, Brewington's conviction on that charge must be reversed.

II. Intimidation of Judge Humphrey

The Court of Appeals's interpretation of the intimidation statute is unconstitutionally overbroad and conflicts with decisions of the United States Supreme Court.

Indiana Code § 35-45-2-1(a)(2) makes it a crime to "communicate[] a threat to another person, with the intent ... that the other person be placed in fear of retaliation for a prior lawful act." "Threat" is defined to include statements of an intention to "unlawfully injure the person threatened," "expose the person threatened to hatred, contempt, disgrace or ridicule,"[1] and

[1] Hereinafter "harsh condemnation."

"falsely harm the credit or business reputation of the person threatened." I.C. §§ 35-45-2-1(c)(1), (c)(6), and (c)(7).

A statute is overboard under the First Amendment if it "prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 515 U.S. 234, 244 (2002). The intimidation statute is facially overbroad because it allows conviction for threatening harsh condemnation in retaliation for a prior lawful act.[2] The Supreme Court held that this precise conduct was protected speech in *Claiborne Hardware*, 458 U.S. at 909-10. Therefore, to avoid striking the statute down, this Court must interpret it consistent with *Claiborne Hardware*.

Claiborne Hardware arose from a 1960s boycott of white-owned businesses in Mississippi by black citizens and a successful lawsuit by some affected businesses against the boycott organizers. *Id.* at 888-89, 893. The Mississippi Supreme Court affirmed the judgment, finding that some of the organizers' conduct was unprotected speech, which rendered the entire boycott unlawful. *Id.* at 894-95.

The U.S. Supreme Court reversed, holding that much of the conduct on which liability was based was protected speech, so the verdict could not stand. *Id.* at 918, 933-34. The state courts relied in part on the organizers' practice of standing outside boycotted stores and recording names of black patrons, then publicizing those names. *Id.* at 903-04, 921. The Supreme Court held that this was protected speech. Liability could not be imposed merely because "those persons were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." *Id.* at 904. *See also id.* at 909-10 (holding that speech did not lose protection merely because it sought "to persuade others to join the boycott through social pressure and the 'threat of social ostracism.'"); *Organization for a Better Austin v. Keefe*,

[2] This Petition only discusses subsection (c)(6), because that is the only portion the Court of Appeals addressed. The remaining portions are discussed in Brewington's appellate briefing.

402 U.S 415, 417-18 (1971) (holding that community organization's protest of real estate broker's business practices was protected speech: "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.").

Threatening harsh condemnation in retaliation for prior lawful acts is protected speech, unless it falls within a separate category of unprotected speech, such as threatening violence or "fighting words." *Claiborne Hardware*, 458 U.S. at 921-22, 927-28. Brewington submits that a false statement of fact made with actual malice might also suffice. *See Sullivan*, 376 U.S. at 271; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

The Court of Appeals rejected these limitations, holding that a threat is unprotected if it is intended to make the subject fear retaliation for a prior lawful act. (Op.20). The court relied on two incorrect assumptions. First, that I.C. § 35-45-2-1(a)(2) was premised on blackmail, for which truth is irrelevant. (*See* Op.17-18). This reliance is misplaced. "Blackmail" is a "threatening demand made without justification." *Black's Law Dictionary* 163 (7th Ed. 1999). Blackmail implies quid pro quo (do X or I'll tell people about Y). Indiana Code § 35-45-2-1(a)(1) requires a "threatening demand," and is analogous to blackmail. Subsection (a)(2), threat in retaliation for prior lawful act, does not.

Second, the court assumed that the statute's requirement that the subject fear retaliation for a prior lawful act eliminates First Amendment concerns. (Op.20). This directly conflicts with *Claiborne Hardware*. The boycott organizers intended to put boycott violators in fear of being subject to harsh condemnation (being branded traitors) in retaliation for a prior lawful act (patronizing boycotted stores). What the Court of Appeals called intimidation, the Supreme Court called protected speech.

To avoid conflict with *Claiborne Hardware* and *Keefe*, this Court must read I.C. § 35-45-2-1(a)(2) to require proof that the speech at issue falls into a previously denominated category of unprotected speech.

The Court of Appeals further held that even if actual malice must be proved, "there was ample evidence" for the jury to find that Brewington made false accusations with actual malice. (Op.19-20). The court cited Brewington's statements that Judge Humphrey was a "child abuser" (because he contended that separating children from a fit parent is harmful), was "corrupt," and engaged in "illegal/unethical behavior." (Op.19). This holding conflicts with Supreme Court precedent.

First, the Supreme Court has held that similar speech was protected speech. A statement cannot be defamation unless it makes an explicit or implicit factual claim. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). Furthermore, hyperbole, metaphor, and similar rhetorical intensifiers do not give rise to liability. *Greenbelt Co-Op Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974).

Bresler arose from a developer's (Bresler) contentious negotiations with the city over a land sale, which was criticized at city council meetings as "blackmail." 398 U.S. at 7-8. After a newspaper reported on these meetings, including the blackmail comments, Bresler successfully sued for defamation. *Id.* The Supreme Court reversed, holding that using the term "blackmail" in this context was protected speech. *Id.* at 14. The Court held that it was "simply impossible" that any reader would understand this to be an accusation of crime, but rather would read it as hyperbole expressing the opinion that Bresler's legal bargaining position was unreasonable. *Id. See also Austin*, 318 U.S. at 285-86 (union newsletter calling a scab a "traitor" was not defamatory; the term was "mere rhetorical hyperbole, a lusty and imaginative expression of the

contempt felt by union members.")

Brewington's use of "child abuser," in context, cannot reasonably be understood to allege criminal conduct. This was hyperbole, perhaps uncivil, but no different from *Bresler* or *Austin*. The Court of Appeals thought differently. It believed these statements went beyond criticism and misrepresented Judge Humphrey's decision. The court based this on its opinion that his decision was reasonable and correct. However, Brewington need not agree, even if he was being unreasonable. The First Amendment protects unreasonable opinions. *See, e.g., Snyder v. Phelps*, 131 S.Ct. 1207, 1216-18 (2011) (First Amendment protects church members' statements that god punishes America for accepting homosexuality by killing soldiers). The First Amendment protects Brewington's ability to express any honestly held disagreement with Judge Humphrey's decision. For similar reasons, Brewington's allegations of criminal/unethical behavior and corruption were hyperbole, not defamation. *See* Appellant's Br.34-35.

Further, the court's alternative holding applied the wrong harmless error standard. Because the First Amendment requires proof of a false statement with actual malice, the jury must be instructed on this element. *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Neder v. U.S.*, 527 U.S. 1, 7 (1999). When the jury is not instructed on an element of the offense, the verdict must be reversed unless the court can conclude beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. U.S.*, 527 U.S. 1, 15 (1999). The Court of Appeals affirmed under a lesser standard: that there was "ample evidence" for the jury to find actual malice. (Op.19-20). Because a jury could find that Brewington's statements were mere hyperbole, the court's alternative holding must be rejected.

The Court of Appeals's holding on the charge for intimidation of Judge Humphrey cannot be reconciled with *Claiborne Hardware*, *Keefe*, *Bresler*, *Austin*, and *Neder*. Therefore,

this Court should grant transfer, exercise its duty of independent appellate review, and, for the reasons set forth in Brewington's appellate briefing, find that there is insufficient evidence to support this conviction.

III. Attempted Obstruction of Justice

The Court of Appeals should have reversed Brewington's conviction for attempted obstruction of justice for two reasons. First, the indictment included clearly protected speech as well as arguably unprotected speech, so *Street* requires reversal. Second, the court's interpretation of the obstruction statute was overbroad, and allows conviction for many non-criminal acts.

Vacating Brewington's conviction for intimidation of Dr. Connor did not eliminate all of the constitutional concerns about Brewington's conviction for attempted obstruction of justice. Brewington's indictment alleged that he committed attempted obstruction of justice by intimidating Dr. Connor on or between August 1, 2007 and February 27, 2011. (Appellant's Br.17). Thus, the jury still considered all of Brewington's statements to and about Dr. Connor for the obstruction charge.

Much of Brewington's speech concerning Dr. Connor mirrored Brewington's speech about Judge Humphrey. (*See* Appellant's Br.10, 34-35). It threatened harsh condemnation, but did not fall into any defined category of unprotected speech.

Brewington was charged in a single indictment for attempted obstruction of justice for all of the allegedly "intimidating" statements from August 1, 2007, and February 27, 2011. The jury returned a general verdict, and did not differentiate between any of Brewington's statements. Because at least some of this speech was unquestionably protected, *Street* requires reversal.

Street, 394 U.S at 588. The Court of Appeals improperly restricted its review to correspondence sent between August 2007 and August 2009, and only to conduct that it believed supported the jury verdict. (Op.23) This was contrary to *Street*, and requires reversal.

Additionally, the State contended that Brewington's correspondence to Dr. Connor, threatening legal action unless Dr. Connor withdrew his evaluation and/or ceased participating in the proceedings, was attempted obstruction of justice. (Op.28). Essentially, the State alleged that Brewington attempted to coerce Dr. Connor to keep him from participating.

The State's approach is overbroad, and criminalizes much innocent behavior. Under the State's theory, anyone who "knowingly or intentionally induce[s] by threat ... a witness ... in an official proceeding ... to withhold ... any information, document, or thing" commits attempted obstruction of justice. *See* Appellant's Br.17. However, there are many lawful ways in which someone can attempt to stop a witness from testifying or producing evidence. These include:

- A prosecutor who believes a witness is lying threatening to prosecute the witness for perjury if he repeats that lie in court.
- A plaintiff in a lawsuit who believes her adversary has falsified a piece of evidence threatening to seek sanctions if the adversary uses it in the proceedings.
- A civil defendant threatening a lawsuit for abuse of process if the plaintiff does not withdraw a vexatious lawsuit.
- A party threatening to seek legal sanctions after learning that a court-appointed expert falsified her credentials.

As these examples show, not every threat intended to prevent someone from participating in official proceedings is obstruction of justice. They *promote* justice, and are protected by the First Amendment. *See State v. Pauling*, 69 P.3d 331, 335-37 (Wash. 2003) (imposing First

Amendment limitations on Washington's intimidation statute). The Court must adopt limiting principles to avoid criminalizing innocent conduct. The Court should find guidance in the approach taken by several federal circuit courts interpreting federal extortion/blackmail statutes. The seminal case in this line is *U.S. v. Jackson*, 180 F.3d 55 (2d Cir. 1999). *See also Pauling*, 69 P.3d at 335-37. The *Jackson* Court developed a test to differentiate appropriate coercion (such as the above examples) from wrongful threats: wrongful threats have no nexus to a claim of right. *Jackson*, 180 F.3d at 70-71. A threat has a nexus to a claim of right when making the threat or carrying it out would each lead to the desired result; on the other hand, carrying out a threat with no nexus to a claim of right will not lead to the desired outcome. *Id. See also U.S. v. Coss*, 677 F.3d 278, 283-88 (6th Cir. 2012).

The Court should adopt this limiting principle. Many of Brewington's "threats" to Dr. Connor are lawful under this standard. For example, if Dr. Connor's evaluation contained numerous errors, Brewington could demand its withdrawal and lawfully threaten legal sanctions if he refused.[3]

The Court should reverse Brewington's conviction for attempted obstruction under *Street*. Because this charge implicates First Amendment rights, the Court should exercise its independent appellate review and find that Brewington's conduct had a sufficient nexus to a claim of right, and enter a judgment of acquittal. Alternatively, the Court should remand for a new trial under the *Jackson* standard.

[3] The Court should require a good faith belief in the claim of right. Honest mistakes should not be criminalized.

IV. Article I, § 9

The Court of Appeals held that Article I, § 9 imposes no limits on prosecutions for intimidation or obstruction of justice. (Op.34-35). The court held that *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996), and *Price v. State*, 622 N.E.2d 954 (Ind. 1993), only apply to disorderly conduct.

This holding significantly misunderstands the nature of constitutional rights. Section 9 prohibits the government from restricting free expression. It does not merely limit the manner in which the government can proscribe conduct, nor does it only restrain disorderly conduct prosecutions. If that were the case, the State could circumvent *Price* and its progeny merely by passing a new law (something other than disorderly conduct) or by charging another crime, making the protections of § 9 illusory—offering no protection at all.

Fortunately, nothing in *Price* or its progeny suggests the limitations the Court of Appeals inferred. *See Price*, 622 N.E.2d at 957.

The Court of Appeals's holding on § 9 conflicts with *Price* and its progeny. The Court should grant transfer and reverse Brewington's convictions for intimidation of Judge Humphrey and attempted obstruction of justice.

V. Perjury

Brewington was convicted of perjury for testifying at the grand jury that he was not certain that Heidi Humphrey was Judge Humphrey's wife. At the grand jury, Brewington was asked about a blog post in which he requested that people write letters to Heidi Humphrey (identified as an "Ethics and Professionalism advisor" to the Indiana Supreme Court).

Appellant's Br.36. Brewington testified that he obtained the address from the assessor's website. The following colloquy was held:

> Mr. Negangard: It said James Humphrey who happens to be the name of your judge and you're under oath and you're actually expecting this Grand Jury to believe that you didn't know that that was his wife?
>
> Dan: Oh, it very well could be a possibility. I'm not from Dearborn County. I don't know but the thing is ...

(Tr.421-22). Brewington was then interrupted and not allowed to elaborate further. (App.42). This was the alleged perjury.

At trial, Sheriff Kreinhop demonstrated a search of the assessor's website: a search for "Heidi Humphrey" yielded no results, while searching "Humphrey" yielded three, including an address for Heidi and James Humphrey. (Tr.405-08). No further evidence was presented concerning Brewington's knowledge of Judge Humphrey's marital status.

This evidence was insufficient to prove beyond a reasonable doubt that Brewington testified falsely. He said he was not certain whether they were married, and the State offered no evidence showing otherwise. The assessor's website did not list their marital status. Brewington did not testify that he doubted that they were married, or even that he suspected that they were not. He only stated that he was uncertain.

The Court of Appeals erred in holding that this evidence was sufficient to sustain Brewington's perjury conviction. It also sanctioned the prosecutor's misconduct. The testimony cited above shows that Brewington was cut off mid-sentence. Brewington could not complete his explanation later. The State should not be able to prosecute a witness for perjury based on an incomplete statement when the State is responsible for it being incomplete.

"The grand jury is a powerful arm of the court. When properly used it can be a great

force in helping protect the rights of society[.] ... It should never be permitted to become an engine of oppression[.]" *State ex rel. Reichert v. Youngblood*, 73 N.E.2d 174, 179 (Ind. 1947). Grand juries are meant to seek the truth, not to play "gotcha."

The Court should grant transfer and reverse. Affirming this conviction would condone the State's conduct before the grand jury. The prosecutor manipulated the grand jury proceedings, obtaining an incomplete answer he used to produce a conviction—a significant departure from appropriate practice.

CONCLUSION

For these reasons, Brewington respectfully requests the Court grant transfer, vacate the decision of the Court of Appeals, reverse his convictions for intimidation, attempted obstruction of justice and perjury, and enter verdicts of acquittal. Alternatively, Brewington asks for a new trial on the charges of intimidation and attempted obstruction of justice at which his federal and state constitutional rights will be given full protection.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief contains fewer than 4200 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record *via* first class U.S. Mail, postage pre-paid this 14th day of February, 2013:

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