

1 **IN THE COURT OF APPEALS FOR THE STATE OF OREGON**
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3 **BRYN HAZELL, FRANCIS NELSON,**
4 **TOM CIVILETTI, DAVID DELK,**
5 **GARY DUELL, JOAN HORTON, and**
6 **KEN LEWIS,**

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8 **Plaintiffs-Appellants/Cross-Respondents,**

9
10 **v.**

11
12 **KATE BROWN, Secretary of State of the**
13 **State of Oregon, and**
14 **JOHN KROGER, Attorney General of the**
15 **State of Oregon,**

16
17 **Defendants-Respondents/Cross-**
18 **Respondents.**

19
20 **and**

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22 **CENTER TO PROTECT FREE SPEECH,**
23 **INC., an Oregon nonprofit corporation, and**
24 **FRED VANNATTA,**

25
26 **Intervenor-Defendants-**
27 **Respondents/Cross-Claimants-Appellants**
28

No. A137397

**MOTION TO CERTIFY
TO SUPREME COURT**

**Jointly filed by
all Plaintiffs**

**ORS 19.405(1)
ORAP 10.10.**

**Marion County Circuit
Court Case No. 06C-
22473**

29
30 **MOTION**

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32 The Hazell Plaintiffs (BRYN HAZELL, FRANCIS NELSON, TOM
33 CIVILETTI, DAVID DELK, and GARY DUELL) and the Horton Plaintiffs (JOAN
34 HORTON and KEN LEWIS) jointly move that this Court certify these consolidated
35 cases to the Oregon Supreme Court, pursuant to ORS 19.405(1) and Rule 10.10,
36 Oregon Rules of Appellate Procedure.

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MEMORANDUM OF AUTHORITIES

The record of this case contains detailed primary historical sources directly bearing upon the historical meaning and interpretation of Oregon Constitution, including Article I, § 8 and Article II, § 8, which have never before been presented to Oregon appellate courts. This historical documentation includes:

1. Pre-1857 statutes from New York, Texas and Maryland¹ regulating or prohibiting monetary contributions to candidate campaigns in effect decades before the drafting of the Oregon Constitution (including in states with free speech clauses essentially identical to Article I, § 8); and
2. Significant new information about the sources for the Oregon Constitution which greatly expands the early research of Charles Henry Carey, *THE OREGON CONSTITUTION PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857* (1926) and

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1. In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket. *Jackson v. Walker*, NYSup, 5 Hill 27 (1843). Referring to the policy behind New York's campaign contribution limits passed in 1829, a court stated in 1858:

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[I]ts provisions were designed to prohibit contributions in money to a common fund to be expended for election purposes, and which might be employed by unscrupulous men to demoralize and corrupt the electors and to defeat the public will.

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Hurley v. Van Wagner, 28 Barb 109, NYSup (1858).

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By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed any candidate before an election or primary election") "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." *ELECTIONS LAWS OF THE STATE OF MARYLAND*, (Lucas 1852), p. 90.

1 the Oregon Law Review (April 1926) article by W.C. Palmer.²
2 This history of the Oregon Constitution includes the existence of
3 statutory limits on political contributions in other jurisdictions prior
4 to the Oregon Constitutional Convention.
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6 Such detailed and heretofore unavailable research (uncontroverted by any party
7 in this case) will be relevant and valuable in the Oregon Supreme Court's
8 consideration of two other pending cases directly addressing (1) election campaigns
9 and (2) gifts to candidates and public officeholders:

- 10 1. Currently pending before the Court on Petition for Review is *State v.*
11 *Moyer*, 225 Or App 81, 200 P3d 619 (2009) (now S056990), in which
12 defendant challenges the constitutionality of a ban on political donations
13 in a "false name" as not allowed by Article I, § 8; and
- 14 2. *Vannatta v. Oregon Government Ethics Commission*, A140080
15 [hereinafter *Vannatta v. OGE*], is also currently pending before this
16 Court of Appeals, but SB 577 (signed into law on June 16, 2009) directs
17 this Court to immediately certify that case to the Oregon Supreme Court.
18 Plaintiffs therein challenge the constitutionality of limits on gifts to public
19 officeholders and candidates, also as not allowed by Article I, § 8.

20 Among the reasons for certifying this case is to assure judicial economy and
21 consistency in deciding all of these cases, which are closely related in their
22 arguments and their need for examination of the Oregon Constitution and its history.
23 Certification of this case will aide in the administration of justice in that only the
24 record in the instant case contains the voluminous historical research necessary to

25 2. W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OREGON LAW REVIEW
26 200, 214 (1926).

1 assure timely consideration of the relevant historical record in all three disputes.

2 Finally, money in politics is a matter of public interest and concern, and it is
3 necessary to maintain public trust in the integrity of elections and the conduct of
4 elected officials to resolve all these disputes in time for the next general election
5 cycle. The opportunity for comprehensive and simultaneous consideration of the
6 Oregon Constitutional issues and historical materials in a single forum is a "novel"
7 circumstance and opportunity militating in favor of certification to the Oregon
8 Supreme Court. *Bunn v. Roberts*, 302 Or 72, 77, 726 P2d 925 (1986).

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10 **I. HAZELL V. BROWN IS CLOSELY RELATED TO STATE V. MOYER.**

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12 *State v. Moyer*, 225 Or App 81, 200 P3d 619 (2009) (now S056990), is before
13 the Oregon Supreme Court. Appellants' opening brief was filed on June 8; the
14 State's answering brief was due July 1, with an extension sought to July 29. Here,
15 the Court of Appeals en banc upheld the constitutionality of ORS 260.402, which
16 forbids political campaign contributions "in any name other than that of the person
17 who in truth provides the contribution." One central issue is whether this restriction
18 on campaign contributions is within the historical exception prong of *State v.*
19 *Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). On that specific issue, the Court
20 of Appeals split 4-6, with only 4 Judges (those joining the Court's opinion) holding
21 that ORS 260.402 fell within an historical exception and the other 6 Judges (the
22 dissenters plus Judges Brewer and Edmonds) holding otherwise. Thus, a majority of
23 the Judges concluded that ORS 260.402 was not within an historical exception to
24 the free speech provisions of Article I, § 8, based upon this conclusion:

1 As a matter of specific predicate, there was no well-established regulation
2 of political campaign contributions at the time of the enactments of the
3 federal and state constitutions. In *Vannatta [v. Keisling]*, 324 Or 514,
4 931 P2d 770 (1997)], the Supreme Court found that, "[a]t the time of
5 statehood and the adoption of Article I, section 8, there was no
6 established tradition of enacting laws to limit campaign contributions."
7 324 Or at 538, 931 P2d 770. As noted above, Oregon voters initiated
8 and then adopted the state's first campaign finance law, the Corrupt
9 Practices Act, at the June 1908 election. Or Laws 1909, ch. 3. At the
10 time of the adoption of the Oregon Constitution in 1859, then, the
11 regulation of campaign contributions and political campaigns was a half
12 century away.

13
14 Historical research done after the 1997 decision in *Vannatta* now factually disproves
15 each of statements about the history of the law made in the above paragraph from
16 the opinion. There were indeed state bans and limits on political campaign
17 contributions prior to 1857.³ Further, Oregon legislators (many of whom had been
18 delegates to the Oregon Constitutional Convention) adopted limits on money and
19 "influence" in politics in 1864 and 1870, without concern for the Article I, § 8, they
20 had so recently included in the Oregon Constitution.

21 Here is an example of how that research provides significant new context of
22 importance to judicial review: LaFayette Grover and other delegates to the Oregon
23 Constitutional Convention in 1857 had with them the texts of the 1845 Texas

24 3. On another point of historical explication, the Horton Plaintiffs Opening Brief
25 (pp. 16-38), through dozens of primary sources, shows that the word "elections"
26 had come to mean an entire political campaign both in legislative circles and
27 common usage and was so understood by the early decades of the 19th Century.
28 This primary evidence compiled from journals and letters, novels, newspapers,
29 oratory, legislative debates, and campaign materials undermines the conclusion
30 expressed in *Vannatta v. Keisling*, *supra*, 324 Or at 530-31, that "elections" had
31 not assumed its present-day meaning by 1857, a "conclusion" based solely on
32 WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) and not
33 supported by the facts of actual American formal and vernacular usage.

1 Constitution (and other state constitutions),⁴ which contained provisions nearly
2 identical to both Oregon Constitution Article I, § 8, and Article II, § 8.⁵

3 Texas Constitution of 1845, Article I, § 5:

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5 Every citizen shall be at liberty to speak, write, or publish his
6 opinions on any subject, being responsible for the abuse of that
7 privilege; and no law shall ever be passed curtailing the liberty
8 of speech or of the press.
9

10 Texas Constitution of 1845, Article 16, § 2, second sentence:

11
12 The privilege of free suffrage shall be protected by laws
13 regulating elections, and prohibiting under adequate penalties
14 all undue influence therein from power, bribery, tumult, or
15 other improper practice.
16

17 In 1856, under that 1845 Texas Constitution with the same freedom of speech
18 and elections regulation clauses as were included in the Oregon Constitution in the
19 1857 convention, Texas codified "furnish[ing] money to another, to be used for the
20 purpose of promoting the success or defeat of any particular candidate," among
21 "Offences [*sic*] Affecting the Rights of Suffrage," punishable by fines.⁶ By 1870,
22 Grover was Governor of Oregon and signed into law the Frauds In Elections Act,

23 4. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 -- Part*
24 *II*, 39 WILLAMETTE LAW REVIEW 245, 456 n15 (Spring 2003).

25 5. Such provisions were common in state constitutions. Freedom of speech clauses
26 essentially identical to Oregon's were adopted in 36 other states. Opening Brief
27 of Hazell Plaintiffs, p. 32. Regulation of elections clauses essentially identical to
28 Oregon's were adopted in 8 other states. Opening Brief of Horton Plaintiffs, p.
29 31.

30 6. DIGEST OF THE GENERAL STATUTES OF THE STATE OF TEXAS, (Goldham &
31 White 1859). Excerpts from General Statues of the State of Texas published in
32 1859, Title VIII, "Offences Affecting the Right of Suffrage" (ER 30 of the
33 Horton Plaintiffs).

1 which limited what we would now call "political speech" meant to influence
2 potential voters. Grover's familiarity with Texas law adds new context for
3 discerning the understanding of delegates to the Oregon Constitutional Convention
4 of the regulation of election campaigns.

5 In 1864 and 1870, the Oregon Legislature adopted criminal sanctions for
6 election violations as "Crimes Against Public Justice," thus giving concrete
7 examples to the kinds of "improper conduct" the Legislature could control under the
8 recently adopted Constitutional powers of Article II, §§ 7 and 8. The listed offenses
9 could occur (1) long before the "day of" the election and (2) which corrupted the
10 election process and without actual *quid pro quo* bribery or force, such as offering
11 any "thing whatever," directly or indirectly, "with intent to influence" the voter.⁷

12 Despite Article I, § 8, of the recently adopted Oregon Constitution, the 1864
13 Act also provided criminal penalties for failure to speak and disclose an interest or
14 the interest of principal when lobbying (fine and imprisonment), a statute arguably
15 quite close in intent to the prohibition against political contributions in a false name
16 under scrutiny in *Moyer*.⁸ In 1870 the Oregon Legislature made it criminal to

17 7. Crimes Against Public Justice Act of 1864, (October 19, § 616), Or Gen Laws
18 (Deady 1972), T II, c 5, § 627, later codified at Hill's Code Or, T II, c 5, § 1843.

19 8. Crimes Against Public Justice Act of 1864 (October 19, § 622), Or Gen Laws
20 (Deady 1972), T II, c 5, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.
21 This was not "some" restraints on "one or another" form of speech, but a specific
22 prohibition on misleading silence and withholding information in order to create a
23 false impression of non-involvement, certainly closely approaching the level of
24 specificity required by *State v. Ciancanelli*, 339 Or 282, 121 P3d 613, 618
25 (2005).

1 "persuade" any legal voter not to vote.⁹ Penalties for such persuasion was
2 imprisonment, and/or a fine of \$100 to \$1,000, and a lifetime ban from holding
3 office.

4 Addison Gibbs, a lawyer (and law partner of Convention delegate, George H.
5 Williams), was Governor at the time of the passage of the Crimes Against Public
6 Justice Act of 1864. LaFayette Grover was Governor at the time of the passage of
7 the Frauds in Elections Act on October 22, 1870. Neither vetoed nor objected that
8 these laws regulating campaigning were not authorized under Article II, §§ 7 or 8,
9 or were somehow prohibited by Article I, § 8, of the recently adopted Oregon
10 Constitution. Thus, it is incontrovertible that the Oregon Legislature adopted limits
11 on political campaign money as early as 1864, 44 years prior to the 1908 initiative
12 cited as the first instance of such regulation in *Moyer*.

13 The foregoing is only one example of how the historical analysis presented in
14 *Hazell v. Brown* is directly related to issues in *State v. Moyer*.

16 9. Frauds in Election Act (October 22, 1870, § 3), Or Gen Laws (Deady 1874), T II,
17 c 5, § 634, Hill's Code Or, T II, c 5, § 1850:

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19 Any person who shall, in the manner provided in the preceding section
20 [promises of favor or reward, or otherwise], induce or persuade any
21 legal voter to remain away from the polls, and not vote at any general
22 election in this state, shall, on conviction, be deemed guilty of a
23 felony.

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25 The prohibited conduct was not bribery but was mere persuasion, which was
26 certainly an exercise of what we today would call "political speech."

1 **II. HAZELL V. BROWN IS CLOSELY RELATED TO VANNATTA V.**
2 **OREGON GOVERNMENT ETHICS COMMISSION.**

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4 *Vannatta v. OGEC*, A140080, is currently in briefing before the Court of
5 Appeals, with the State’s answering brief due on July 8 (but a motion for extension
6 of time is expected). On June 15, the Governor signed SB 577, which directs this
7 Court to grant a motion to certify that case to the Oregon Supreme Court.

8 *Hazell v. Brown* is closely related to *Vannatta v. OGEC*. Among the State’s
9 central arguments in defense of the gift limit at issue in the case are that:

- 10 1. Gifts to public officials and candidates do not contain an inherent
11 political message;
12 2. Gifts to public officials and candidates are not intrinsically
13 expressive and
14 3. Restrictions on gifts to public officials and candidates are not aimed
15 at the content of any message.
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18 Thus, argues the State, a gift to a public official or candidate is not expression that
19 is governed by the free speech clause, Article I, § 8. The gift is either (1) made
20 with the expectation of something in return, in which case it is a bribe and not
21 protected by Article I, § 8; or (2) made with no expectation of something in return,
22 in which case it does not express a message and thus is not speech. Further, even if
23 a gift is not bribery and does express a message, SB 10 (2007) limits the gifts, not
24 the content of any message.

25 These same rationales appears equally applicable to gifts and to campaign
26 contributions, yet the State in *Hazell v. Brown* takes the opposing position that all
27 limits on campaign contributions are prohibited by Article I, § 8, regardless of the
28 motivation of the contributor. The State also contends that limiting campaign

1 contributions necessarily restricts the contents of a message. It is difficult to
2 perceive a basis for these two completely opposing positions, both simultaneously
3 urged by the State.

4 The interplay between *Hazell v. Brown* and *Vannatta v. OGE* is intense.
5 After all, if the Oregon Constitution does not allow any limits on political
6 contributions, there would appear to be no way to enforce a limit on gifts to public
7 officials and candidates, because any gift to an elected official or candidate could
8 merely be labeled a "campaign contribution" and thereby evade all limits, whether
9 or not the official ever again runs for office.¹⁰ The substitution of campaign
10 contributions in place of gifts to accomplish the same outcome, such as lavish trips
11 to Hawaii resorts, has already occurred. As noted in the Brief of Amicus Curiae
12 Better Government Project, p. 18:

13 The practical distinction between gifts and campaign contributions,
14 however, is nonexistent. It is legal in Oregon to use campaign
15 contributions for trips to Hawaii, Blazer tickets, home mortgage
16 payments, and even payments to friends or relatives for doing
17 unsupervised work for the officeholder. In fact, the last round of the
18 widely publicized trips to Hawaii to meet with lobbyists for the beer and
19 wine distributors were paid for with campaign contributions from the beer
20 and wine distributors.

21
22 Three Oregon legislators used campaign or personal money in May
23 to fly to Hawaii, where they accepted \$30,000 in campaign
24 contributions from beer and wine distributors at the group's biennial
25 conference.

26 * * *

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29 Paul Romain, director and lobbyist for the Oregon Beer and Wine
30 Distributors Association, said he checked with the state Elections

31 10. An elected official can maintain a campaign account, whether or not she again
32 runs for office.

1 Division beforehand and was told lawmakers could use campaign
2 money to travel to an out-of-state fundraiser for their political action
3 committee.
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5 "I found out that if they get a PAC contribution, yes, they can use
6 their PAC money to go get that PAC contribution," Romain said.
7 "It's the same thing as driving to Medford to get something. It just
8 happens to be Hawaii versus Scappoose or Sunriver or some place
9 like that."

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11 D. Hogan & J. Har, *2006 Hawaii trip hosted by beer and wine lobby pays off*
12 *for legislators*, OREGONIAN (September 28, 2006).¹¹ * * * Campaign
13 contributions can be readily substituted in place of gifts.¹²
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16 **III. THE CIRCUMSTANCE OF THREE SIMULTANEOUS CASES**
17 **HINGING UPON THE SAME CONSTITUTIONAL PROVISIONS AND**
18 **HISTORICAL RESEARCH IS INDEED NOVEL.**
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20 Voters passed Measure 47, at issue in this case, in November 2006. None of
21 its provisions have been enforced. In the 2008 election cycle, over \$33.5 million
22 was spent on state and local candidate races and advertising which would have been
23 subject to the contribution limits and advertising disclosure terms of Measure 47.¹³

24 The public and press editorials have also shown strong support for limits on
25 gifts to public officeholders and candidates, currently being challenged as

26 11. http://blog.oregonlive.com/politics/2006/09/2006_hawaii_trip_hosted_by_bee.html.

27 12. David Steves, *Political gray areas in spotlight*, EUGENE REGISTER-GUARD,
28 November 16, 2006:
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30 Those lobbyists may find themselves barred from picking up the tab, he
31 [lobbyist Jim Markee] said, but they'll make up for it by telling the official,
32 "Here, I can give you a campaign contribution to pay for that."

33 13. See National Institute on Money in State Politics, Oregon 2008
34 (http://www.followthemoney.org/database/state_overview.phtml?s=OR&y=2008).
35 This number is usually higher in years with an election for Governor, which was
36 absent in 2008.

1 unconstitutional in *Vannatta v. OGEC*. The underpinnings of the current election
2 contribution reporting system is challenged as unconstitutional in *Moyer*. All of
3 these challenges to statutes enacted by the voters or by the Legislature hinge on
4 Article I, § 8. Under *Robertson*, consideration of all these challenges should rely on
5 a more complete history of limits on money in politics prior to adoption of the
6 Oregon Constitution.

7 These three simultaneous challenges to limits on campaign contributions,
8 required truthful disclosure of such contributions, and limits on gifts is a novel
9 concurrence of events in Oregon history. Certification is desirable, even necessary,
10 to allow for efficient, complete, and consistent resolution of these cases to maintain
11 public trust in the integrity of the elections system and public officials and the
12 timely judicial review of matters of public concern.

13 **IV. THE SUPREME COURT COULD EFFICIENTLY HANDLE ALL** 14 **THREE CASES.**

15 Briefing is complete is *Hazell v. Brown* in the Court of Appeals. In the other
16 two cases, the State's answering brief is due on July 1 (*State v. Moyer*) or July 8
17 (*Vannatta v. OGEC*), although the State intends to file for extensions of time.
18 Thus, the Supreme Court could efficiently handle all three cases.

19 In *Hazell v. Brown*, the State has chosen not to brief the issues pertaining to
20 the application of or revisiting of *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770
21 (1997), on the assumption that the Court of Appeals would not address those issues.
22 Respondents/Cross Respondents' Brief, p. 49. Appellants would not object to
23 allowing a round of briefing before the Oregon Supreme Court pertaining to those
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1 issues, with the State filing an answering brief on these issues and Appellants filing
2 a reply brief.

3 Not certifying *Hazell v. Brown* would allow the other two cases to proceed to
4 decision without the benefit of the very extensive and applicable briefing in *Hazell*
5 *v. Brown* on the history of political campaign money regulation prior to adoption of
6 the Oregon Constitution. It documents such regulation in England from the late 17th
7 Century¹⁴ in many of the United States, before 1857, in details which cannot be
8 completely advanced within this Motion for Certification. Failure to certify would
9 materially increase the prospects for incomplete consideration of the full history of
10 such provisions in the other two cases and for inconsistent resolution of the three

11 14. *Duke v. Asbee*, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850), traces limits
12 to the "British Statute passed in the 7th of William the 3rd, ch 4th." William III
13 reigned as King of England from 1689 until his death in 1702. The statute was
14 passed in the "seventh year of King William, called, an act for preventing the
15 charge and expence in the election of members to serve in parliament * * *."
16 William Thomas Roe, APPENDIX TO A TREATISE ON THE LAW OF ELECTIONS
17 (1812), p. xxvi.

1 closely related cases.

2 Dated: July 1, 2009

Respectfully Submitted,

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6 /s/ Linda K. Williams

/s/ Daniel Meek

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14
15 Attorney for Horton Plaintiffs

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original and SERVED the foregoing APPELLANTS' MOET - REPLY AND CROSS-ANSWERING BRIEFS by eFile this date.

Dated: July 1, 2009

/s/ Daniel W. Meek

Daniel W. Meek

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