No. 109PA22 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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DUSTIN MICHAEL MCKINNEY, GEORGE JERMEY MCKINNEY, and JAMES ROBERT TATE,

Plaintiffs-Appellants,

STATE OF NORTH CAROLINA,

Intervenor-Appellant,

v.

GARY SCOTT GOINS and THE CASTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

From Wake County

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent companies doing business in North Carolina and their insurers. Accordingly, *amici* have a substantial interest in ensuring that North Carolina law continues to adhere to traditional constitutional law principles recognizing that the legislative revival of time-barred claims, as in the SAFE Child Act, violates due process by impairing vested rights.

The American Tort Reform Association ("ATRA") is a broad coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. Over the past two decades, ATRA and its members have become alarmed as state legislatures consider eliminating or vastly extending statutes of limitations and reviving time-barred claims. While this case arises in the context of childhood sexual abuse, legislation of this type, left unchecked by courts, will undoubtedly spread to other cases involving sympathetic plaintiffs or causes, jeopardizing the predictability and reliability of the civil justice system.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA

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[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and write more than $10 billion in premiums in the State of North Carolina. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

STATEMENT OF THE CASE

Amici adopt Defendants-Appellees' Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina, like many jurisdictions, has long held that a "statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail" because "it takes away vested rights of defendants." *Wilkes County v. Forester*, 204 N.C. 163, 170, 167 S.E. 691, 695 (1933). The provision of the SAFE Child Act, S.L. 2019-245, § 4.2(b), purporting to create a two-year window to revive any time-barred civil action for injuries stemming from child sexual abuse, is precisely this type of prohibited law. In many cases, including here, plaintiffs have used the revival period to assert claims alleging organizations, long ago, were negligent when hiring or supervising employees and volunteers. This Court has

made clear that such laws are unconstitutional and "cannot be resuscitated." *Wilkes County*, 204 N.C. at 170, 167 S.E. at 695.

That the SAFE Child Act implicates claims of sympathetic plaintiffs, as in this case, should not affect the Court's established vested-rights analysis. Tort law, by its very nature, deals with horrible situations—accidents resulting in serious injuries that have a dramatic impact on a person's life, products that allegedly cause a person's death, and diseases that may have been contracted through exposure to toxic substances, for example. Statutes of limitations exist in these situations, and for all civil actions, because these limits are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Allowing the SAFE Child Act's claims-revival provision to pass constitutional muster would effectively nullify any constitutional safeguards on the General Assembly's ability to reopen the courthouse doors to stale claims in which records and witnesses are no longer available. Indeed, in some cases naming nonprofit organizations, public or private schools, or businesses that provide services to children, the perpetrator of the abuse may be dead and staff from that period may be long gone.

Such a decision would also move North Carolina outside the legal mainstream with respect to due process protections. The "great preponderance" of state appellate courts, like this Court, have long rejected legislation purporting to

revive time-barred claims. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). These courts often reason that doing so violates due process. *See, e.g.*, *Mitchell v. Roberts*, 469 P.3d 901, 903 (Utah 2020).

This Court should recognize that altering North Carolina's constitutional analysis to permit the SAFE Child Act's purported claims-revival would significantly undermine due process and the finality statutes of limitations provide, not just in the context of this case, but in any type of civil action. It would make determinations of liability in any type of civil action less accurate and more prone to deep-pocket jurisprudence, frustrate the ability of individuals and organizations to properly evaluate liability risks, and subject entities to a risk of indefinite liability.

For these reasons, the Court should affirm the ruling below.

ARGUMENT

I. INVALIDATING THE SAFE CHILD ACT'S CLAIMS-REVIVAL PROVISION IS CONSISTENT WITH THE MAJORITY APPROACH AMONG STATES

In *Wilkes County*, this Court broadly reviewed cases from North Carolina and other jurisdictions, as well as treatises, and recognized that in "most jurisdictions it is held that after a cause of action has become barred by the statute of limitation, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the legislature has power to divest that

right and revive the cause of action." 204 N.C. at 169, 167 S.E. at 694 (quoting 6 R.C.L. § 308 p. 320). That was an accurate statement of the state of the law when *Wilkes County* was decided in 1933, and it remains so today.[2]

Since *Wilkes County*, this Court has consistently held that the General Assembly cannot revive time-barred claims without violating defendants' vested rights.[3] This is also the case regardless of any distinction between statutes of limitation and repose.[4] North Carolina's longstanding rejection of legislative

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[2] *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1739 (2012) (observing it was "orthodox constitutional theory" that "due process" prohibited retroactive legislation that interfered with vested rights); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 237 (1927) (same).

[3] *See, e.g., Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 234, 328 S.E.2d 274, 276 (1985) ("If plaintiff's claim was already barred . . . it could not be revived"); *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) ("If this action was already barred when it was brought . . . it may not be revived by an act of the legislature . . . ."); *Lester Brothers, Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) ("A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void.") (citations omitted); *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 710, 104 S.E.2d 858, 860 (1958) (finding expired statute of limitations "could not be enlarged by subsequent statute" because "[a]ny attempt to do so would be to deprive the defendants of vested rights"); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) ("A right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly.").

[4] The distinction between statutes of limitations and repose merely speaks to the time a cause of action accrues and does not alter a vested-rights analysis when the relevant time period has expired. *See Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) ("Unlike statutes of limitations, which run from the time a cause of action accrues, '[s]tatutes of repose . . . create time limitations

attempts to revive time-barred claims remains consistent with the current approach applied in most jurisdictions in the United States.

As several state high courts have recognized, the majority rule among jurisdictions continues to be that a legislature cannot adopt retroactive laws that revive a time-barred claim without violating defendants' due process rights.[5] These

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which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.'") (quoting *Trustees of Rowan Tech. Coll.*, 313 N.C. at 234 n.3, 328 S.E.2d at 276-77 n.3). As this Court has made clear, "[s]tatutes of limitation may be characterized as a *right* not to be sued beyond the time limited." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 663, 194 S.E.2d 521, 535 (1973) (emphasis added).

[5] *See Johnson v. Garlock, Inc*., 682 So. 2d 25, 28 (Ala. 1996) ("The weight of American authority holds that the bar does create a vested right in the defense."); *Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc*., 415 A.2d 814, 816-17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that there is a substantive right in a statute of limitations after the prescribed time has completely run and barred the action); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (recognizing constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions"); *Kelly*, 678 A.2d at 883 (recognizing the "great preponderance of state appellate courts" reject claims-revival laws under due process analysis) (cleaned up); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which

states generally apply a vested-rights analysis that is consistent with North Carolina law, whether they do so through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision.[6] Courts have also applied these constitutional principles to reject the legislative revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

In 2020, the Utah Supreme Court became the latest state high court to find a law reviving time-barred claims unconstitutional under a vested-rights analysis

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attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process.").

[6] *See, e.g.*, *Garlock*, 682 So. 2d at 27-28; *Lilly*, 823 S.W.2d at 885; *Jefferson County Dep't of Social Services v. D.A.G.*, 607 P.2d 1004 (Colo. 1980); *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009); *Skolak v. Skolak*, 895 N.E.2d 1241, 1243 (Ind. Ct. App. 2008); *Frideres*, 540 N.W.2d at 266-67; *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854-55 (Ky. 2003); *Hall v. Hall*, 516 So. 2d 119, 120 (La. 1987); *Henry v. SBA Shipyard, Inc.*, 24 So. 3d 956, 960-61 (La. Ct. App. 2009); *Dobson*, 415 A.2d at 816-17; *Doe*, 862 S.W.2d at 341-42; *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773-75 (Neb. 1991); *Gould v. Concord Hosp.*, 493 A.2d 1193, 1195-96 (N.H. 1985); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Lewis v. Pennsylvania R. Co.*, 69 A. 821, 822-23 (Pa. 1908); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Doese*, 501 N.W.2d at 369-71; *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn. 1974); *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995); *Murray v. Luzenac Corp.*, 830 A.2d 1, 2-3 (Vt. 2003); *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992); *Society Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

after the state legislature permitted such claims against perpetrators of childhood sexual abuse. *See Mitchell*, 469 P.3d at 901. While the court "appreciated the moral impulse" underlying the claims-revival provision and expressed "enormous sympathy for victims of child sex abuse," it maintained that the issue was "not a matter of policy" but one of basic protection for defendants. *Id.* at 914. The court unanimously held that the principle that the legislature "vitiates a 'vested' right" in violation of due process by retroactively reviving a time-barred claim is "well-rooted," "confirmed by the extensive historical material," and has been repeatedly reaffirmed for "over a century." *Id*. at 903, 904, 913. Thus, the court followed the "majority rule." *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995).

In comparison, a minority of states, about one-third, find that legislation reviving time-barred claims is generally permissible or appear likely to reach that result. These states, unlike North Carolina, follow the approach taken under the U.S. Constitution. The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312-13 (1945). Many states do so. In fact, when the Connecticut Supreme Court ruled that its constitutional law favored the minority federal approach, it recognized North Carolina among those states that "have rejected the United States Supreme Court's approach to this issue . . . and held, as a

matter of state constitutional law, that the retroactive expansion of the statute of limitations, which revives an otherwise time-lapsed claim, is an incursion on a vested property right that amounts to a per se violation of substantive due process." *Doe v. Hartford Roman Catholic Diocesan Corp*., 119 A.3d 462, 512 (Conn. 2015) (citing *Colony Hill Condo. Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273 (1984)).

Invalidating the SAFE Child Act's claims-revival provision will ensure that North Carolina law remains consistent with the majority approach among states.[7] This Court has consistently emphasized the importance of statutes of limitations in providing the fairness, predictability, and finality "to afford security against stale demands." *King by and through Small v. Albemarle Hosp.*, 370 N.C. 467, 470, 809 S.E.2d 847, 849 (2018) (cleaned up). For such interests to have any meaning, there must be robust constitutional protections. That is not the case if this Court permits the revival of any alleged sexual abuse claims extending back any period of time.

II. REVIVING TIME-BARRED CLAIMS UNDERMINES NORTH CAROLINA'S CIVIL JUSTICE SYSTEM

The SAFE Child Act's claims-revival provision defies the fundamental purpose of statutes of limitations "to require that litigation be initiated within the

[7] *Amici* are not aware of any state high court abandoning *stare decisis* to allow revival of time-barred claims over the past thirty years. Such a ruling would have significant implications for both plaintiffs and defendants in any civil action.

prescribed time or not at all." *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957), *superseded by statute on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985). While "[s]tatutes of limitations are primarily designed to assure fairness to defendants," *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965), they are essential to a fair and well-ordered civil justice system overall. This is because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale claims. By requiring "diligent prosecution of known claims," statutes of limitations "prevent the problems inherent in litigating claims in which evidence has been lost, memories have faded, and witnesses have disappeared." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) (cleaned up).

Statutes of limitations allow judges and juries to evaluate an individual or business's liability when the best evidence is available. In that regard, statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). The possibility of an unfair trial is heightened when heart-wrenching allegations are involved, as they are here.

Statutes of limitations also allow businesses and other organizations to accurately gauge their liability exposure and make financial, insurance coverage,

and document retention decisions accordingly. They provide "security and stability to human affairs" that is "vital to the welfare of society." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

The loss of security and stability is particularly problematic with respect to insurance. By assuming and managing risk, insurers play an indispensable role in modern life. But a necessary precondition to "managing" risk is the ability to identify and quantify it to establish reserves sufficient to cover all potential exposure for all covered types of losses. Although access to historical data and sophisticated statistical models allows insurers to perform this complex task with ever-increasing accuracy and efficiency, the process still depends on a measure of predictability and stability. Insurers must be able to locate a point at which historically-distant events no longer pose a current and future risk—where "the past" is definitively and conclusively past.

Without a clear line of demarcation, risk assessments and other basic ordering by organizations, insurers, and other entities become uncertain, unreliable, and even speculative. Entities face the risk of "open-ended liability for an indefinite period of time." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999).

The fundamental due process issues that arise as a result of reviving time-barred claims are evident in the wake of the 2019 SAFE Child Act, which contains

no time constraint at all during its "window." Personal injury lawyers filed hundreds of cases by the time the window closed at the end of 2021, some involving allegations of sexual abuse eighty years ago. *See* Derek Lacey, *Eckerd Camps, Henderson County Named in Sexual Assault Case*, Asheville Citizen-Times, Jan. 7, 2022, 2022 WLNR 588624 (quoting plaintiffs' counsel Lisa Lanier as indicating that her firm filed 249 revived cases under the SAFE Child Act in just one month against Boy Scout troops, camps, and churches); Karen Chávez, *Child Sexual Abuse Lawsuits Filed as Lookback Window Closes*, Asheville Citizen-Times, Jan. 4, 2022, at A1, 2022 WLNR 199103 (quoting Chicago attorney Evan Smola, whose firm filed at least 100 cases in North Carolina courts during the SAFE Child Act's revival period and reporting that revived claims include cases alleging conduct as early as 1942).

The sudden barrage of old claims and the challenges of defending them given the passage of time, loss of records, witnesses, and institutional memory, and nature of the allegations involved, would be borne mainly by schools, nonprofit organizations, and other entities that provided services to children. These entities can expect increased insurance costs and difficulties obtaining insurance in the future, in addition to their significant new liability exposure for otherwise time-barred claims. *Cf.* Kay Dervishi, *Child Victims Act Leads to Insurance Woes*, City & State, Feb. 10, 2020 (stating that schools and nonprofits, in the wake of New

York's claims-revival law, "have faced increased insurance costs" and "have lost coverage for sexual abuse claims altogether").

Over time, there will be many other sympathetic plaintiffs, important causes, and unpopular industries and defendants. It is never easy to tell an injured person that their time to sue has ended. *See Shearin*, 246 N.C. at 371, 98 S.E.2d at 514 (recognizing that statutes of limitations "may operate to bar the maintenance of meritorious causes of action" but that courts need to be mindful that "[h]ard cases must not make bad law" and reject any "urge" to create exceptions) (cleaned up). This is why separation of powers and due process requires legislatures to act prospectively, not retrospectively; so that our society can appropriately order itself and know the law. Allowing revival of time-barred claims here would inevitably lead to future calls to permit claims alleging physical or economic injuries based on alleged conduct that occurred decades ago to proceed in North Carolina courts.

Amici have already observed several such attempts. Efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. Legislation recently enacted in New York will revive claims brought by those who allege injuries from sexual abuse as *adults*. *See* S. 66 (N.Y. 2022). California legislation has gone even further by proposing to revive claims involving anything that might be considered "inappropriate conduct, communication, or activity of a sexual nature" decades ago, which would spark

stale employment litigation and other claims. *See* A.B. 2777 (Cal. 2022) (as amended in Senate June 16, 2022).[8] Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to claims alleging *physical* abuse. *See* S. 99 (Vt. 2021).[9]

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of tort claims – and they are already doing so. For example, legislation proposed in Maine would have retroactively expanded the state's statute of limitations for product liability claims from six to fifteen years. *See* LD 250 (Maine 2019) (reported "ought not to pass"). Oregon considered a bill that would have revived time-barred asbestos claims during a two-year window. *See* S.B. 623 (Or. 2011) (died in committee). New York is on the cusp of enacting legislation that would revive certain claims by water suppliers alleging injuries related to an "emerging contaminant." S. 8763A (N.Y. 2022) (awaiting transmission to Governor).

[8] The California Legislature ultimately passed an amended bill that revives claims alleging that an entity is legally responsible for damages stemming from a sexual assault by an alleged perpetrator that occurred when the plaintiff was an adult. A.B. 2777 (Cal., presented to Gov. Sept. 6, 2022).

[9] Vermont's revival of time-barred claims appears unlikely to survive a constitutional challenge, as the Vermont Supreme Court has indicated that while the legislature may extend a statute of limitation for a viable claim, it can only do so "where the time limitation has not run and thereby barred the action." *Murray*, 830 A.2d at 3.

States have also considered proposals to retroactively permit novel theories of liability. Bills have attempted to allow claims addressing social and political causes by applying today's moral values to conduct that occurred long ago. For instance, a California bill would have revived time-barred actions under the state's unfair competition law alleging that businesses deceived, confused, or misled the public on the risks of climate change or financially supported activities that did so. *See* S.B. 1161 (Cal. 2016) (reported favorably from committee, but died without floor vote). Another California bill proposed a ten-year statute of limitations for torts involving certain human rights abuses that would have applied retroactively to revive time-barred claims for events that occurred up to 115 years earlier. *See* A.B. 15 (Cal., as amended Mar. 26, 2015) (claims-revival provision removed and legislation made prospective before enactment).

While most of these proposals have failed to gain sufficient support for enactment, should this Court change North Carolina's vested-rights analysis and allow the SAFE Child Act's claims-revival, more of these types of proposals should be expected in the state. Calls for discarding statutes of limitations and reviving time-barred claims will become more frequent and louder. As a result, individuals and businesses in North Carolina will face a risk of indefinite liability. In addition, when adopted, these proposals will undermine the ability of judges and juries to accurately evaluate liability given the loss of witnesses and records, faded

memories, and changes in societal expectations. Cases will become more susceptible to being decided based on sympathy and bias, rather than law and evidence.

CONCLUSION

For these reasons, this Court should affirm the ruling below.

Respectfully submitted,

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Dated: September 8, 2022

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief conforms to the requirements of Rule 28 of the North Carolina Rules of Appellate Procedure. I further certify that a copy of the foregoing Brief was served upon the following by first class U.S. mail, postage prepaid, addressed as follows:

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