FILED August 30, 2021 11:16 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

Richard Taylor WHITEHEAD; Timothy Grant; and
Citizens in Charge Foundation, a Virginia not-for-profit corporation,
Plaintiffs-Appellants, Respondents on Review

v.

Shemia FAGAN, Secretary of State of the State of Oregon,
Defendant-Respondent, Petitioner on Review

Marion County Circuit Court 16CV28212

Court of Appeals A167087

Supreme Court S068382

AMICUS BRIEF on the MERITS

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[1] *Woodward v. Barbur*, 59 Or 70, 75, 116 P 101 (1911).

I. Ignored Constitutional Clause

1902 – Art. IV, § 1 – State voters given a 90-day referendum;

1906 – Art. IV, § 1a – Local voters given ***exact same*** power;

1907 – State statute reduces local referendum to 30 days; and,

1908 – Constitutional amendment invalidates the 1907 statute.

Still, the 1907 law and its progeny continue to litter state statutes, local codes and administrative rules.

II. "General" Elections

* The Secretary of State ("Sec'y") currently restricts elections on most citizen petitions to every-other-year.

* This means the Sec'y is either adding the word "***biennial***" to Art. IV, § 1(4)(c), or subtracting it from Art. V, § 8a.[2]

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[2] The Sec'y also ignores the fact that Art. IV, § 1(4)(c), uses the ***plural*** "elections," while Art. V, § 8a uses the ***singular*** "election."

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III. The AG Cripples the Initiative

In 1961 – almost sixty (60) years after creation of the I & R – the AG "discovered" that state initiatives are only guaranteed ballot-access at the *biennial* general elections held every-other November.

In 1966 – speaking through William T. Linkletter – AG Thorton constructed, out of whole clothe, a "drop-dead" due date for state initiatives and a two-year limit on the life of state initiatives book-ended by consecutive even-numbered Julys.

IV. Bogus District Statutes

The ***Constitution*** sets the signature requirements for initiative and referendum petitions at 6 and 4 percent. Cities – ***only*** – are given permission to increase the requirements to 15 and 10 percent for local petitions.

Despite having no constitutional permission, the elected legislature has freely raised and lowered the signature requirements while requiring different levels in different districts.

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Americans are understandably proud of cementing constitutional government into world political thought.

But, writing a ***Constitution*** really isn't that big a deal.

Following a ***Constitution*** is the act to be admired.

Exhibit A – "Direct Election of U.S. Senators"

Exhibit B – "Oregon's Constitutional Constellation"

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TABLE OF AUTHORITIES

Oregon Cases

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Amicus on the Merits - Whitehead v. Fagan.

A. Timeliness & Jurisdiction

* On 04/28/2021 the Court allowed this author – Greg Wasson – to appear *Amicus Curiae* supporting Review. Wasson's *amicus* brief urged that the decision be affirmed, but for other reasons.[1]

* On 05/20/2021 the Court granted the State's Petition for Review and has since modified the briefing schedule twice. The State's opening brief has been submitted.

* The Court aligned *Amicus* with Respondent, whose brief is now due 08/23/2021. This *Amicus* Brief on the Merits is filed on that date per ORAP 8.15(5)(b)(iii).

B. Summary of Argument

Oregon Initiative Law is a confusing contradictory mess.

The case at bar – *Whitehead v. Fagan* – offers a chance to begin what would be this Court's third return to the ***Constitution***.

Here, the lodestar is a 1911 case: *Woodward v. Barbur.*

Woodward teaches that the only valid restrictions on the right to sign petitions are those found in Oregon's Organic Charter.[2]

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[1] *Whitehead v. Fagan, Amicus Brief supporting review,* at 1-2.

[2] *Woodward v. Barbur*, 59 Or 70, 75, 116 P 101 (1911).

The two (2) attached exhibits provide crucial background.

* The Fathers built two (2) notions of Separation-of-Powers into the 1787 ***Constitution***. But – as the nation grew – this combination of federalism and tripartite governments proved woefully inadequate.

Post-Civil War – as more and more money gathered in fewer and fewer pockets – the "Free Marketplace of Ideas" devolved into the "Convenience Store of Accumulation."

* The second exhibit shows that – after 1902 – Oregon's legislative branch is split into two (2) separate departments,[3] deserving of ***equal*** constitutional respect.

Four (4) notions demonstrate the urgent need to resurrect a constitutional reading of the Initiative and Referendum ("I & R"):

1. Art. II, § 18(8) – Ignored Constitutional Clause;

2. Unclear Definition of "General" Election;

3. The AG Cripples the Initiative; and,

4. Statutes Restrict Districts.

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[3] *Meyer v. Bradbury*, 341 Or 288, 300, 142 P3d 1031 (2006), *quoting*, *State ex. rel. Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928).

I. Ignored Constitutional Clause

C. Art. II, § 18(8) – Voters Cancel the 30-day Statute

* In 1902, a referred amendment "***reserved***" to ***state*** voters the I & R, including a 90-day referendum.

* In 1906, a citizen initiative "further reserved" ***the exact same*** powers to ***local*** voters "neither greater nor less."[4]

* In 1907 – under the guise of implementation – the legislature shortened the local 90-day referendum to 30 days.[5]

* In 1908 – as part of the initiative creating the recall – the people voided the 1907 statute by declaring:

> "* * * the words, 'the legislative assembly shall provide,' * * * ***in this constitution or any amendment thereto,*** shall not be construed * * * to limit the initiative and referendum powers reserved by the people." (emphasis mine).[6]

The emphasized phrase both canceled the egregious statute and prohibited future over-reaching.

At least that's the theory.

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[4] *Roy v. Beveridge*, 125 Or 92, 96, 266 P 230 (1928). *Accord, Multnomah Co. v. Mittleman*, 275 Or 545, 552-53, 552 P2d 242 (1976).

[5] 1907 Oregon Law, c. 226, s. 11.

[6] This language remains the last sentence of Art. II, § 18(8).

Actually, the 1907 law and its progeny continue to litter state statutes, local codes and administrative rules.

II. "General" Elections

D. "General Election" – Current Constitution

* 1968's Art. IV, § 1(4)(c) mandates submission of citizen petitions "at the *regular general elections* * * *."

* 1972's Art. V, § 8a directs that stand-in governors be replaced at the next "*general **biennial** election.*"

The Secretary of State ("Sec'y") – on the advice of the Attorney General ("AG") – confines petition elections to every-other-November.

Which means the Sec'y is either adding the word "***biennial***" to Art. IV, § 1(4)(c), or subtracting it from Art. V, § 8a.[7]

Either is equally unconstitutional.[8]

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[7] The Secretary is also ignoring the fact that Art. IV, § 1, talks of "elections" (plural), while Art. V, § 8a, says "election" (singular).

[8] *Armatta v. Kitzhaber,* 327 Or 250, 262, 959 P2d 49 (1998).

E. "General Election" – 1906 Constitution

* 1902's Art. IV, § 1 directed that most referendums be submitted at the "***biennial** regular general elections*."

* 1906's Art. XVII, § 1 directed that amendments proposed by the Assembly appear "at the next *regular general election.*"

Since the early 1900s – then – "***biennial** regular general elections*" and "*regular general elections*," have been two (2) different things.

F. All Jurisdiction-Wide Elections are "General"

In *Bethune v. Funk* – which is still good law – it is written:

> "* * * a 'general election' is one that regularly recurs in each election precinct of the state on a day designated by law * * * or is held in such entire territory pursuant to an enactment (calling) a (special election) * * *."[9] (parentheses mine).

"General" refers to the type – not the timing – of the election.

> "* * * the election * * * was ***general*** and ***not special***, which latter term, though not involved herein, would appear to mean an election held in only * * * part of the state."[10]

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[9] *Bethune v. Funk*, 85 Or 246, 250, 166 P 931 (1917).

[10] *Id*, at 251.

G. Evolution of Art. II, § 14 Offers Further Support

Each clause of the ***Constitution*** – and all amendments – are to be read as a seamless document,[11] and, "if possible, effect should be given to every part and every word * * *."[12]

Originally, Oregon ***Constitution,*** Art. II, § 14, read:

> "***General Elections*** shall be held on the first Monday of June, biennially." (emphasis mine).

In 1908, voters approved this rewrite of Art. II, § 14:

> "The *regular general* ***biennial*** *election* in Oregon for the year A.D. 1910 and thereafter shall be held on the first Tuesday after the first Monday in November. * * *." (emphasis mine).

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[11] *State v. Cochran*, 55 Or 157, 179, 105 P 884 (1909) (rehearing).

[12] *Armatta,* 327 Or at 262, *quoting*, *State ex rel. Gladden v. Lonergan,* 201 Or 163, 177, 269 P2d 491 (1954).

If the "*regular general **biennial** election*" is the one held every-other November, then, "*regular general elections*" are all other state-wide elections called in the regular[13] course and open to all, generally.[14]

H. Statutory Definitions are Irrelevant

The ***Constitution*** controls, here. And the term "primary" does not appear in any relevant constitutional clause.

III. The AG Cripples the Initiative

I. Robert Y. Thorton Severely Restricts Ballot Access

In 1961 – almost sixty (60) years after creation of the I & R – the AG's office made the outlandish claim that this Court had never directly addressed when initiatives should appear on the ballot.[15]

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[13] Definition of ***regular***:

1 -- "constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules, or discipline

2 -- "recurring, attending, or functioning at fixed, uniform, or normal intervals" https://www.merriam-webster.com/dictionary/regular.

[14] Definition of ***general***:

1 – "involving, applicable to, or affecting the whole"

2 – "involving * * * or applicable to every member of a class, kind, or group" https://www.merriam-webster.com/dictionary/general.

[15] 30 Or Atty Gen 252 (1961).

Actually, by 1961 this Court had addressed the issue of ballot access at least four (4) times. More about that in a minute.

The summary of this 1961 AG opinion – written by Deputy E. G. Foxley and published over the name Robert Y. Thorton – shows that the AG's office either didn't understand, or had it in for, the Initiative.

> "Election on measure ***referred to the people through exercise of the initiative*** is to be held concurrently with the ***biennial*** regular general election * * * unless otherwise authorized by the Legislative Assembly." (emphasis mine).

Come, now. The people don't refer initiatives to themselves.

The people initiate law and refer legislative mistakes.[16]

The four (4) ballot access cases mentioned at the top of this page each answered this simple question:

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[16] *See, Palmer v. Benson*, 50 Or 277, 280, 91 P 579 (1907).

Cf, Columbia River v. Appling, 232 Or 230, 233, 375 P2d 71 (1962):

"* * * the differences between the initiative and referendum are so substantial as to afford adequate reasons to distinguish between them should [the need] arise. (cite omitted)." (brackets mine).

Can petitioners demand submission of their initiatives at special elections called for other reasons?

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1. 1913 - *Equi v. Olcott,* 66 Or 213, 216 ..... No

2. 1927 - *State ex rel. Van Winkle v. Gilmore*, 122 Or 19, 22-23 ..... Yes

3. 1933 - *State ex rel. Bylander v. Hoss,* 143 Or 383, 388 ..... No

4. 1946 - *Seufret v. Stadleman*, 178 Or 646, 656 ..... Yes

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* These cases concern a mixture of state and local initiatives. However, this is a distinction without a difference.

* The extent of the local petition power can only be measured by reference to the powers available on the state level, and *vice versa*.[17]

* Since all petition rights – state and local – flow from the ***exact*** same constitutional clause, they are ***exactly*** the same.

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[17] *Multnomah Co. v. Mittleman*, 275 Or 545, 557 ftn 11, 552 P2d 242 (1976); *Kosydar v. Collins,* 201 Or 271, 270 P2d 132 (1954); *Loe v. Britting*, 132 Or 572, 577, 287 P 74 (1930); *Cameron v. Stevens,* 121 Or 538, 543, 256 P 395 (1927).

J. Thorton's Office Compounds the "Error"

In 1966 – speaking through William T. Linkletter – AG Thorton constructed, out of whole clothe, a two-year limit on the life of state initiatives book-ended by consecutive even-numbered Julys.[18]

Linkletter also opined that – by the necessary implication – once the petition is certified, state initiatives "drop dead" if enough signatures aren't filed by the next even-numbered July.

This, even if petitioners only had a week to collect the needed signatures. Despite the obvious "Equal Privileges" problems, Sec'y McCall responded: "Sounds good to me."

As an aside, think about the logistics, here.

One government official advises another government official that the people's power should be limited in ways not found in the ***Constitution***.

"Poof," that's the law.

No judge; no day in court; no nothing.

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[18] 33 Or Atty Gen 48 (1966).

In *Unger v. Rosenblum,* this Court seemed to endorse the drop-dead deadline by quoting the rule itself:

> "To ensure ***uniformity*** within a petition cycle and to avoid voter confusion only one petition cycle will be approved for circulation during a two year period."[19] (emphasis mine).

What uniformity?

1. Professional petition peddlers with multi-year agendas can file their sponsorship signatures in June of even-numbered years and have nearly twenty-four (24) months to gather signatures;[20]

2. State citizens responding to a specific government misstep in November of an odd-numbered year could well be left with a matter of weeks to do the job; and,

3. Local governments can adopt their own I & R procedures, but they don't have to. In local elections controlled by the Secretary's ("Sec'y's") rules, all petitioners have the full two (2) years.[21]

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[19] *Unger v. Rosenblum*, 362 Or 210, 224, 407 P3d 817 (2017).

[20] OAR 165-014-0005 – "*State I & R Manual*," at, 15 (2020).

[21] OAR 165-014-0005 – "(*Local*) *I & R Manual*," at 5 (2020).

Again, if Oregon is to be a government of laws – and not people – there is an urgent need to return to a constitutional reading of the I & R.

And, as said by this Court long ago:

> "The judiciary, as the guardians of the people's constitutional liberties, must, in duty, observe that vigilance against constitutional encroachment which is said to be the price of liberty."[22]

The guiding principle this Court should adopt:

Statutes can only control the "***procedure***" of the petition power, not "the ***substance*** of the power itself."[23]

IV. Bogus District Statutes

K. Signature Requirements for District Petitions

* Art. IV § 1 says that statewide initiative petitions need a number of signatures equal to 6 percent of those who voted for governor in the last election. Referendums need 4 percent.

* Cities – ***only*** – are given permission to increase the requirements to 15 and 10 percent for local petitions.

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[22] *White v. Commisioners*, 13 Or 317, 321, 10 P 484 (1886).

[23] *Kosydar v. Collins*, 201 Or 271, 282, 270 P2d 132 (1954).

In *Kosydar v. Collins*, this Court reached "the inevitable conclusion" that since the ***Constitution*** expressly mentions cities – but is silent as to districts – the later are governed by the 6 and 4 percent levels.[24]

Moreover, wrote the *Kosydar* Court – a number of times – the Assembly could ***not*** increase the signature requirements set out in the ***Constitution***.[25]

Despite this emphatic declaration, and, basic constitutional law:

* The 1979 Legislature increased the requirements for districts to 15 percent and 10 percent. (*1979 Oregon Laws c. 190, s. 295*).

* The 1983 Legislature increased the requirements for both types of petitions to 25 percent. (*1983 Oregon Laws c. 350, s. 75*).

* The 1987 Legislature returned to the unconstitutional 15 percent, 10 percent levels. (*1987 Oregon Law c. 211, s. 1*).

* The 1989 Legislature returned to the constitutional level for metro districts, ***only***. (*ORS 255.165*).

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[24] *Kosydar*, 201 Or at 284.

[25] *Id*, at 282.

L. Conclusion

Amicus reminds this Court of the ever-tightening leash the ***Constitution*** has imposed on legislative discretion over the years.

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* The original 1902 Initiative Amendment declared that petitions be submitted to state voters according to existing law "until legislation shall be especially provided therefor."[26]

* As stated above, a 1908 initiative clarified that this did ***not*** give the Legislative Assembly authority to reduce the constitutional powers.

* A 1912 initiative prohibited – and still prohibits – attachment of an emergency clause to tax legislation.[27]

* Since 1968, Art. IV, § 1(4)(b) has declared:

> "(I & R) measures shall be submitted to the people as provided in this section ***and by law not inconsistent therewith***." (emphasis mine).

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[26] Oregon ***Constitution***, Art. IV, § 1 (1902).

[27] Art. IX, § 1a.

Cf, Wittemeyer v. City of Portland, 361 Or 854, 878-80, 402 P3d 702 (2017) (briefly discussing the history of Art. IX, § 1a).

Also, Woodward, *U'Ren and the Single Tax in Oregon*," *in,* 61 *Or. Hist. Quart.*, p. 46 (1960).

Amicus neither spouts Jeffersonian phrases like "wisdom of the people," nor supports the populist excesses found in Oregon's ***Constitution***.

But, those excesses are part of Oregon's fundamental law.

While there are ways to amend those excesses away, over-reaching statutes and bogus administrative rules are not among them.

Americans are understandably proud of cementing constitutional government into world political thought.

But, writing a ***Constitution*** really isn't that big a deal.

Following a ***Constitution*** is the act to be admired.

Respectfully submitted this 23rd day of August, 2021.

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Exhibit A

When America's Architects gathered in Philadelphia, government by the people, or even for the people, was a largely untried experiment.

Under the "Bundle of Compromises:"

* The state legislatures selected the federal senate.

* The Electoral College decided who would be President.

* These two insulated institutions picked the federal judiciary.

This arraignment – especially a U.S. Senate often derisively dismissed as"The Millionaire's Club"[28] – did not age well.

> "* * *. It was soon discovered that the election of (federal) Senators was largely controlled by the great financial interests.
>
> "Exceedingly few (Senators) were ever * * * in accord with the 'under-dog,' to whom they were not beholden for their seats * * *."[29]

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[28] "Progressive Reform: The Direct Election of Senators:"

> "It is harder for a poor man to enter the United States Senate than for a rich man to enter Heaven."

https://www.archives.gov/exhibits/treasures_of_congress/text/page17_text.html, (*last checked,* 08/08/2021.)

[29] Clark, C.J., "*Government by Judges*," 11 Ohio Law Reptr. 485 (1914).

The "Millionaire's Club" drew special ire in the West.

* In 1892, California approved direct election 14 to 1;

* A year later, Nevada voters said "Yes" nearly 8 to 1; and,

* In 1902, Illinois added a further endorsement by a vote of 6 to 1.[30]

Added to this were numerous lessor calls "including 220 state party platforms and 19 national party platforms."[31]

According to then-Gov. T.T. Geer, the ***elected*** U.S. House voted for Direct Election four (4) times, but the ***appointed*** federal Senate never concurred, and, warned Geer, "probably never will."[32]

The 1901 Oregon Legislature approved the "Mays Act," where a straw ballot would allow voters to express their choice for U.S. Senator, with the "election" to be canvassed immediately before the 1903 Legislature appointed Oregon's next senator.

A rousing show of support for popular government.

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[30] These facts come from: Haynes, "*The Senate of the United States: It's History and Practice,*" at 96-117 (1938).

[31] Rossum, *Federalism * * * and the 17th Amendment*, at 192 (2001).

[32] Gov. T.T. Geer, *1901 Legislative Message,* final chapter of the Senate Journal, at 30 (1901).

But – alas – a show is all it was.

The 1903 Legislature – after being told which candidate the people favored – proceeded to appoint a man who had received only a handful of votes at the much-vaunted "election."

The People's Power League responded by initiating an imaginative end-run on the federal constitution – and, the back room politics of Salem – that allowed Oregonians to "elect" their federal senators in 1907.

With one state choosing its senators at the ballot box, the old appointment system had no chance elsewhere.

In 1913, the 17th Amendment spread direct election nation-wide.

> "Few states – even those dating back to Colonial times – have made as great an original contribution to government in the United States as has the state of Oregon."[33] (dashes mine).

The fact that it took the I & R to make direct election of federal senators a reality suggests that Direct Legislation is the natural – and necessary – extension of the Separation of Powers.

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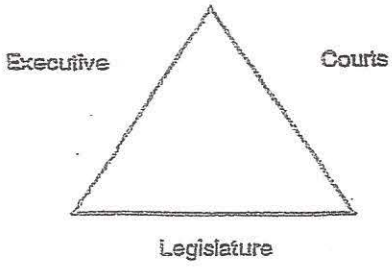
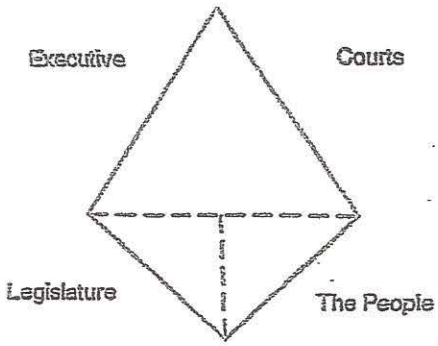
[33] Neuberger, *U'Ren and the "Oregon System,"* in, *They Never Go Back to Pocatello: The Selected Writings of (Sen) Richard Neuberger*, at 99 (1988).

Oregon's Constitutional Constellation

> "'By the adoption of the (I & R) into our constitution, the legislative department of the State is divided into two separate and distinct law-making bodies * * *.[34]





As shown by this graphic, the 1902 adoption of the Initiative Amendment did not change the basic structure of Oregon's government.

It is still the job of the judiciary to announce what the law is – *e.g.* when petitions can be used – and the job of administrators to translate those announcements into neutral, consistently-applied rules.

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[34] *Meyer v. Bradbury*, 341 Or 288, 299-300, 142 P3d 1031 (2006), *quoting*, *Straw v. Harris*, 54 Or 424, 430, 103 P 177 (1909).

Combined Certificate of Compliance with Petition Length and Type Size Requirements,

I certify that the body of this petition complies with the word-count limitation set out in the Oregon Rules of Appellate Procedure, which word count is 2,334.

I certify that the size of the type in this Petition is not smaller than 14 point for both the text of the petition and footnotes.

Done & Dated: August 23, 2021.

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on August 30, 2021, I electronically filed with the Appellate Court Administrator, Appellate Records Section, this Amicus Brief on the Merits (Greg Wasson), and on this same date electronically served copies of said document upon Christopher A. Purdue, attorney for petitioner on review, and upon Gregory A. Chaimov, Chris Swift, and Eric C. Winters, attorneys for respondents on review, by using the court's electronic filing system.

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