IN THE

Supreme Court of Indiana

No.

Court of Appeals Cause No. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS OF INDIANA, INC. and LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC.,	)	Appeal from the Marion Superior Court Civil Division, 13
Appellants (Plaintiffs below),	)	Trial Court Cause No. 49D13-0806-PL-027627
v.	)	
TODD ROKITA, in his official capacity as Indiana Secretary of State,	)	The Honorable S.K. Reid, Judge
Appellee (Defendant below).	)	

PETITION TO TRANSFER

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STATEMENT OF THE ISSUES

1. Whether an action seeking a declaratory judgment that a statute is invalid is justiciable against a state official who does not enforce the statute.

2. Whether, under Article 1, Section 23 of the Indiana Constitution, the General Assembly may require in-person voters to show photo identification to poll workers they meet face-to-face, but not require absentee voters to mail photo identification to officials who will not see the voter's face.

3. Whether Article 1, Section 23 permits the General Assembly to exempt residents of state-licensed care facilities who vote where they live from having to show government-issued photo identification at the polls.

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Defendant-Appellee Secretary of State Todd Rokita respectfully petitions the Court to transfer jurisdiction over this case from the Court of Appeals and affirm dismissal of the case.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

1. In 2005, the Indiana General Assembly enacted the Voter ID Law to prevent voter fraud and to protect public confidence in the legitimacy of elections. Pub. L. No. 109-2005. Any voter casting a ballot in person at a precinct polling place or the county clerk's office must show election officials photo identification issued by either the United States or the State of Indiana. Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1. The identification must bear the voter's name, and this name must conform with the voter's name in the poll book. Ind. Code § 3-5-2-40.5. It must also have an expiration date that has either not passed or passed after the most recent general election. *Id*. Voters casting mail-in absentee ballots or voting "at a precinct polling place that is located at a state licensed care facility where the voter resides" are exempt. Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(e), 3-11-10-1.2.

If a voter does not produce sufficient identification at the polling place, a member of the precinct election board must challenge the voter, who may then, in response to the challenge, cast a provisional ballot after attesting in writing to the voter's right to vote in that precinct. Ind. Code § 3-11-8-25.1. The voter may validate the provisional ballot by appearing before the clerk or county election board by noon ten days following the election and, after swearing in writing that the voter

is the same person who cast the provisional ballot, either (a) produce compliant identification, or (b) establish the voter's eligibility for a hardship or religious exemption. Ind. Code §§ 3-11.7-5-1, -2.5.

If a voter takes these steps to validate a provisional ballot, the board will open, process and count the ballot. *Id.* If the board concludes that the voter did not produce compliant identification or qualify for an exemption, the voter has a right to judicial review of that decision. Ind. Code § 3-6-5-34.

2. Shortly after the General Assembly enacted the Voter ID law, several political groups and politicians filed two separate lawsuits, later consolidated in federal court, challenging the validity of the Law under the U.S. and Indiana Constitutions. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782-83 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion County Election Bd*, 472 F.3d 949 (7th Cir. 2007), *aff'd.*, --U.S.--, 128 S.Ct. 1610 (2008).

Before reaching the merits of those challenges, Judge Sarah Evans Barker ruled that Secretary of State Todd Rokita was not a proper defendant because the Secretary does not enforce the Voter ID law. *Ind. Democratic Party*, 458 F. Supp. 2d at 785-86, 838. Because the Marion County Election Board, which does enforce the Voter ID Law, was also a defendant, the district court did not dismiss the case, but instead excused Rokita's further participation. Entry on Def's Mot. to Dismiss at 3, *Ind. Democratic Party v. Rokita*, No. 1:05-cv-0634-SEB-VSS (S.D. Ind. July 1, 2005) (Addendum, Tab 1 at 3).

On the merits, the district court ruled, among other things, that the Voter ID Law permissibly exempted mail-in absentee voters and nursing home residents who vote where they live. *Ind. Democratic Party*, 458 F. Supp. 2d at 831-34. In addition, the district court held that the Voter ID Law did not impose a new, substantive qualification on the right to vote, and therefore did not violate Article 2, Section 2 of the Indiana Constitution. *Id.* at 843.

The Seventh Circuit, in an opinion by Judge Posner, affirmed on all grounds. C*rawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007). In particular, the court upheld the Voter ID Law's exemption for mail-in voters because extending the Law to absentee ballots, where the voter "wouldn't be presenting his face at the polling place for comparison with the photo[,]" would not achieve the objectives of the Law. *Id.* The court upheld the nursing-home-resident-voter exemption without discussion. *Id.* Judge Evans's dissent did not mention either exception. *Crawford*, 472 F.3d at 954-57 (Evans, J. dissenting).

The Supreme Court also affirmed. *Crawford v. Marion County Election Bd.*, --U.S.--, 128 S.Ct. 1610 (2008). The controlling opinion, written by Justice Stevens, did not specifically address the exceptions challenged here, but Justice Scalia, concurring, dismissed objections to the absentee ballot exception (and others), observing that the fact "[t]hat the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Id.* at 1627 (Scalia, J., concurring). Though the parties addressed the absentee and nursing-home-voter

exceptions in their Supreme Court briefs, Brief for Crawford et al. at 47, 56, 2006 WL 1786073; Brief for Ind. Democratic Party et al. at 38, 51, 2006 WL 1786074, neither Justice Souter nor Justice Breyer discussed either in their dissenting opinions. *Id.* at 1627 (Souter, J., dissenting); *id.* at 1643 (Breyer, J., dissenting).

3. Following the Supreme Court's decision, the League of Women Voters filed a lawsuit challenging the Voter ID Law anew under Article 1, Section 23 and Article 2, Section 2 of the Indiana Constitution. *League of Women Voters v. Rokita*, No. 49D13-0806-PL-27627, 2009 WL 2973120, *2 (Ind. Ct. App. Sept. 17, 2009) (hereinafter *LWV*).

The trial court granted the State's motion to dismiss, finding that, as a matter of law, the Voter ID Law is a procedural regulation of the voting process rather than a substantive qualification prohibited by Article 2, Section 2 of the Indiana Constitution. Order Granting Def's Mot. to Dismiss, *League of Women Voters v. Rokita*, Cause No. 49D13-0806-PL-027627 (Marion Co. Sup. Ct. Dec. 17, 2008). It also ruled that any "classes" of voters created by the statute were "not arbitrary or unreasonable but instead reasonably related to self-evident inherent characteristics that distinguish the different classes[,]" and that "[a]ll individuals within the different classes are treated similarly." *Id.* The trial court did not address the State's argument that the Secretary of State is not a proper defendant.

The Indiana Court of Appeals, in an opinion by Judge Riley (joined by Judges Kirsch and Mathias), reversed. *LWV*, 2009 WL 2973120 at *1. First, as to whether the case was justiciable against the Secretary of State, the court held that even

though no alleged injury owing to the Law was traceable to the Secretary of State, and the Secretary could provide no relief to the plaintiffs, these facts were immaterial to justiciability because the Indiana Attorney General had been served under Indiana Code § 34-14-1-11. *Id.* at *3-*4.

On the merits, the court agreed with the trial court that the Voter ID Law did not impose a substantive voting qualification prohibited by Article 2, Section 2 of the Indiana Constitution. *Id.* at *8. It also ruled, however, that exempting absentee voters and voters living in a state-licensed care facility where they can vote in person was unlawful under Article 1, Section 23. *Id.* at *9-*12. The court "reverse[d] and remand[ed], with instructions to the trial court that it enter an order declaring the Voter I.D. Law void." *Id.* at *15.

REASONS FOR GRANTING THE PETITION

I. Pursuant to Indiana Rule of Appellate Procedure 4(A)(1)(b), the Court has Mandatory and Exclusive Jurisdiction Over this Case

Indiana Rule of Appellate Procedure 4(A)(1) provides that "[t]he Supreme Court shall have mandatory and exclusive jurisdiction over . . . . (b) Appeals of final judgments declaring a state or federal statute unconstitutional in whole or part." Ind. R. App. P. 4(A)(1)(b). The decision of the Court of Appeals declaring the Voter ID Law "void" and "unconstitutional" surely qualifies. *See* Ind. R. App. P. 2(H)(1) (defining "final judgment" as a judgment that "disposes of all claims as to all parties"). This Court therefore has exclusive and mandatory jurisdiction over this appeal under Rule 4(A)(1)(b) and should transfer jurisdiction.

II. Even if Discretionary, Transfer is Plainly Warranted

A. The decision below voided a statute based on important undecided questions of law

Under Indiana Appellate Rule 57(H)(4), the Court of Appeals has decided important questions of law in a case with great public importance that have not been, but should be, decided by this Court. *See* Ind. R. App. P. 57(H)(4). Without so much as a dispositive motion from the plaintiffs (much less a trial), the court voided a presumptively valid statute that (1) protects the legitimacy of elections; (2) enjoyed 75% public support at the time of enactment, *see* Mary Beth Schneider, *Voter ID Law Looming for Hoosiers*, Indianapolis Star, Apr. 13, 2005 (Addendum, Tab 2); and (3) has been upheld by the Marion Superior Court, the Southern District of Indiana, the Seventh Circuit, and the Supreme Court of the United States. As Rule 4(A)(1)(b) implies, the Voter ID Law deserves review by the Court.

B. The redressability decision conflicts with prior decisions of this Court and the Court of Appeals

Furthermore, transfer is warranted because the decision below conflicts with prior holdings of the Court of Appeals and this Court concerning justiciability doctrine. Ind. R. App. P. 57(H)(1),(2). The Court should review whether, as a threshold matter, this case should be dismissed because the League sued a defendant who, even if enjoined, could not himself provide any relief to the League or its members.

Everybody agrees—the League and the Indiana Court of Appeals included—that the Secretary of State does not enforce the Voter ID Law. *Ind. Democratic*

Party v. Rokita, 458 F. Supp.2d at 785-86; *LWV*, 2009 WL 2973120 at *4; Appellant's Reply Br. at 4. It follows that the Secretary is not a proper defendant in a judicial proceeding challenging the validity of the Voter ID Law.

The Court of Appeals, however, dismissed as "merely instructive" the basic justiciability requirement that the plaintiff must allege an injury "fairly traceable to the defendant" that is "likely to be redressed by the requested relief." *LWV*, 2009 WL 2973120 at *3 (quoting *Alexander v. PSB Lending Corp.,* 800 N.E.2d 984, 989 (Ind. Ct. App. 2003)). The court ruled that, because the case was a declaratory judgment action, the Secretary was a satisfactory defendant not because of *his* role, but because the Attorney General had been served and given "ample opportunity to defend the Voter I.D. Law." *Id.* at *3. The Court of Appeals would therefore apparently permit a declaratory judgment action against any State official or agency, no matter how unconnected to the plaintiff's alleged injury, as long as the Attorney General has been served. This cannot be correct.

The Indiana Court of Appeals has previously held that redressability, or the court's ability to effectuate a remedy for unlawful conduct through the defendants, is a critical limitation on judicial power. In *Alexander*, 800 N.E.2d at 989-90, the court held that the plaintiff must demonstrate that the "defendant is the proper party from whom to seek redress." The decision below conflicts with that holding and therefore warrants review.

This Court itself has long refused to decide abstract issues that do not resolve genuine disputes over the legal rights and duties of the parties. *See Brewington v.*

Lowe, 1 Ind. 21, 1848 WL 2798, at *2 (Ind. 1848) (refusing to decide "fictitious" suits); *see also Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) ("mandat[ing] that courts act in real cases, and eschew action when called upon to engage only in abstract speculation."); *City of Indianapolis v. Ind. State Bd. of Tax Comm'rs*, 308 N.E.2d 868, 869 (Ind. 1974) ("It is axiomatic to declare that this Court has no power to determine question[s] of law without the proper complainants before us.").

This Court has always understood that its proper role is to resolve genuine legal disputes between affected parties, with the power to review the constitutionality of legislation merely incidental to that function. *See Brewington*, 1848 WL 2798, at *2. Where, as here, the judicial power itself cannot effectuate any meaningful remedy to Plaintiffs, it follows that adjudication would exceed the judicial power.

The Declaratory Judgment Act does not *substitute* for bedrock justiciability requirements, it *codifies* them. That Act specifically provides that a declaratory judgment is *not* proper where "the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Ind. Code § 34-14-1-6. That is the case here, where the officials who enforce the law—county election boards—will not be subject to any judicial declaration or injunction. The Declaratory Judgment Act no more authorizes courts to adjudicate abstract disputes naming defendants unconnected to the plaintiffs' grievances than it authorizes plaintiffs to seek declarations *ex parte*. *See, e.g., Little Beverage Co. v. DePrez,* 777 N.E.2d 74, 83 (Ind. Ct. App. 2002) (holding that the Act requires an

"actual controversy"); *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001) (holding that there must be a "justiciable controversy or question, which is clearly defined and affects the legal right, the legal status, or the legal relationship of parties having adverse interests").

In short, suing the right defendant matters, both because the traceability and redressability requirements prevent judicial overreaching and because it would be unfair to impose an injunction or declaration on a state official who cannot effectuate the relief sought by the plaintiff. The Court should grant transfer to consider these important separation-of-powers implications.

III. The Voter ID Law is Constitutional

On the merits, the Court of Appeals erred in its highly abbreviated analysis of whether the legislature may exempt mail-in absentee voters from enclosing copies of photo identification with their secret ballots, and in its misconception that residents of state-licensed care facilities who vote in-person where they live are similarly situated with all other elderly and disabled voters.

Under *Collins v. Day*, 644 N.E.2d 72, 79-80 (Ind. 1994), Indiana courts undertaking Equal Privileges and Immunities review consider whether a statute's classifications are (among many other descriptors) "artificial," "capricious," or "arbitrary." This is a highly deferential standard—indeed, it is hard to imagine a standard any *more* deferential—because, among other things, it not only presumes a classification to be valid but also requires the challenger to "negate 'every reasonable basis for the classification.'" *Ledbetter v. Hunter*, 842 N.E.2d 810, 814

(Ind. 2006) (quoting *Collins*, 644 N.E.2d at 81); *see also Collins*, 644 N.E.2d at 79-80 ("courts must accord considerable deference to the manner in which the legislature has balanced the competing interests involved.").

Indeed, even when a classification is not supported by "hard data," this Court upholds the classification if the Court "cannot say that it is *irrational* for the General Assembly to make th[e] assumption" justifying the classification. *Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473, 483 (Ind. 2006) (emphasis added) (equating analysis of local and special laws under Article 4, Section 23 with the *Collins* test). Thus, "[t]he practical effect of *Collins* and cases following it is that statutes will survive Article 1, § 23 scrutiny if they pass the most basic rational relationship test." *Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005) (lead opinion); *see also Horn v. Hendrickson*, 824 N.E.2d 690, 702 (Ind. Ct. App. 2005) (interpreting the *Collins* test as "relaxed scrutiny").

A. In-person and absentee voting are inherently different in ways that matter for the usefulness of the Voter ID requirement

When invalidating the Voter ID Law based on its exception for mail-in absentee voters, the Court of Appeals relied principally on this Court's decision in *Horseman v. Keller*, 841 N.E.2d 164, 173-74 (Ind. 2006), which *upheld* a statute that provided stricter recount standards for absentee ballots "because inherent differences make mailed-in ballots more susceptible to improper influences or fraud[.]" The Court of Appeals rested its holding on the non-sequitur that "[i]f it is reasonable to 'more stringently govern absentee balloting,' then it follows that a statute that imposes a less stringent requirement for absentee voters than for those

voting in person would not be reasonable." *Id.* at *9 (quoting *Horseman*, 841 N.E.2d at 173).

First, the second proposition does not follow from the first. Just because it is reasonable to take a particular course of action does not make it unreasonable not to take that action. In *Horseman*, it was reasonable for the legislature to mandate, during a recount, the counting of Election Day ballots originally excluded from the election tally because of clerical errors, while forbidding the counting of absentee ballots originally excluded from the election tally because of clerical errors. Yet, surely it also would have been reasonable for the legislature to have mandated or forbidden the counting of *both* types of ballots during a recount. The quintessence of legislative judgment is to choose among multiple reasonable alternative (and mutually exclusive) courses of action.

Second, the inherent and obvious differences between mail-in absentee ballots and in-person ballots carry different implications in different contexts. Those inherent differences justify taking extra precautions where they might help the situation, but also justify foregoing them when they would not. In *Horseman* that meant excluding from recounts absentee ballots already excluded for clerical errors in order to safeguard the election tally from improper outside influences—improper influences that do not exist for Election Day ballots. *See Horseman*, 841 N.E.2d at 172. Here it means requiring photo identification for in-person voting, where election workers may effectively compare the photograph on the identification with the voter's face, but not mail-in voting, where voters have no

face-to-face contact with election officials when marking or mailing their ballots. *See* C*rawford*, 472 F.3d at 954. Requiring mail-in voters to enclose photo identification would impose regulation solely for the sake of formalistic equality, which (as *Horseman* itself illustrates) Article 1, Section 23 does not require. If necessary (and it should not be), the State could provide evidence demonstrating the lack of utility in requiring mail-in voters to submit photo identification—as well as proof that such a requirement would risk spoiling the anonymity of the mail-in ballot.

Third, it is not as if the General Assembly altogether ignored absentee ballot fraud at the time it enacted the Voter ID Law. In addition to the safeguards already in place, at the same time the legislature passed the Voter ID law, it tightened absentee ballot restrictions in ways that address how absentee ballot fraud is typically perpetrated. *See e.g.*, Pub. L. No. 103-2005 (amending Ind. Code § 3-11-10-24(a),(c)-(d) to limit absentee voting to those prevented from voting for the entirety of election day unless the voter meets certain criteria, as well as restricting how absentee ballots are handled); *see also Pabey v. Pastrick*, 816 N.E.2d 1138, 1144-47 (Ind. 2004) (describing how absentee ballot fraud can occur when ballots are handled by political bosses). Thus, the General Assembly carefully calibrated proper safeguards for the precise vulnerabilities of each method of voting. Courts owe deference to those calibrations.

* * * *

As Judge Barker observed, "it is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters." *Ind. Democratic Party*, 458 F. Supp. 2d at 831. The legislature's decision to treat them differently under the Voter ID Law is therefore not "irrational," "artificial," "arbitrary" or "capricious," and is entirely "reasonable." It is therefore permissible under Article 1, Section 23.

B. The nursing home precinct exception reasonably relates to inherent characteristics of residents who vote where they live

Residents of state-licensed care facilities who vote in person in precincts located where they reside are inherently different from both other individuals who vote in person and other elderly and disabled voters. This reasonable statutory exception accommodates a very small subset of voters who may not be able to travel to obtain photo identification, but who also do not *need* to travel to vote at the polls (and who are categorically not likely to commit fraud given their circumstances).

As Judge Barker explained in the federal proceeding, the beneficiaries of this exception form an isolated group of voters "whose ability to obtain photo identification is particularly disadvantaged." *Ind. Democratic Party,* 458 F. Supp. 2d at 833. The decision below rejected that reasoning and stated that "the difficulty of obtaining an identification is shared by all elderly and disabled, [and so] similarly situated persons are not being treated uniformly[.]" *LWV*, 2009 WL 2973120 at *11. It is simply not true that all elderly and disabled people find it difficult (much less *equally* difficult) to obtain government-issued photo identification. And, even though the plaintiffs bear the burden of proof, the State could, if necessary (and

again it should not be), prove that many elderly and disabled people who care for themselves at home easily obtain licenses, non-license ID cards and passports.

In contrast, it is self-evident—and again the State is confident it can so prove if necessary—that many people who live in state-licensed care facilities that host voting precincts cannot care for themselves, let alone travel to the BMV or even leave the facility, but can still vote *in person*. *This* is the inherent difference between residents of such facilities and other elderly and disabled persons (not to mention in-person voters generally). The statutory accommodation allows members of this singular group to vote in person within their care facilities without the need to leave their residences to obtain identification if they do not already have it. Voters who live in care facilities that are not polling places do not fall into this distinct group of voters because they cannot vote *in person* without traveling. Instead they may cast mail-in ballots without identification.

The Court of Appeals failed to respect the legislature's decision on how to balance competing policy interests when it questioned whether it was "required, necessary, or expedient" to accommodate voters who could already vote absentee. *LWV*, 2009 WL 2973120 at *10 (citing *Heckler v. Conter,* 187 N.E. 878, 879-80 (1933)). The General Assembly, having provided for in-person voting generally, has decided to encourage in-person over absentee voting as much as possible consistent with providing secure elections. Therefore, with respect to nursing-home-resident-voters, it balanced the policy benefits of encouraging in-person voting against the policy benefits of requiring photo identification and sided with encouraging in-

person voting because this small subset of voters is categorically far less likely than the general voting population to commit voter impersonation fraud. This exception is, therefore, an "expedient" and "necessary" way to meet the legislature's competing policy goals.

As explained in more detail in the State's appellate brief at 32-34, the licensed-care-facility exemption represents a reasonable accommodation and in no way undercuts the state's compelling interests in deterring and detecting in-person voter fraud and preserving public confidence in elections.

IV. The Declaration of Invalidity Without Further Proceedings Independently Justifies Review

The Voter ID law is self-evidently constitutional, so there has never been any point in proceeding with discovery or evidentiary submissions. The trial court agreed and dismissed the case. The Court of Appeals, however, responded to the motion to dismiss not simply by reinstating the case, but by ordering judgment against the State. The State has not even been permitted to answer the complaint, much less put the League to its burden (as *Collins* requires) or come forward with evidence. In this regard the decision below departs so significantly from law and practice that it independently justifies granting transfer. *See* Ind. R. App. P. 57(H)(6).

The State, not the League, is entitled to final judgment in response to a Rule 12(b) motion, which tests the sufficiency of the *complaint*, not the sufficiency of the answer or defenses. If a complaint remains viable following a motion to dismiss, the trial court cannot simply enter judgment. *See, e.g.*, *Clinic for Women, Inc. v. Brizzi*,

814 N.E.2d 1042 (Ind. Ct. App. 2004) ("direct[ing] the trial court to reinstate the complaint and conduct an evidentiary hearing on this issue."); *trans. granted*, 837 N.E.2d 973 (Ind. 2005) (Boehm, J., dissenting) ("This case comes to us on appeal from the grant of a motion to dismiss. . . . [I]f the allegations are sufficient to state a claim, whether the plaintiffs will be able to prove them or not is not before us today and remains a matter for trial.").

A plaintiff is not even permitted to file a motion for judgment on the pleadings under Trial Rule 12(c) until the pleadings are closed. Furthermore, even a premature dispositive motion by the League would have put the State on notice that it was time to come forward with evidence—and the State would have obliged. That did not happen, so the State has not had an adequate opportunity to be heard for purposes of due process, the Trial Rules, or the Declaratory Judgment Act. *See* Ind. Code § 34-14-1-11. At most the case could be remanded for further proceedings, though again the Voter ID Law should be upheld without remand.

CONCLUSION

This Court should transfer jurisdiction from the Court of Appeals and affirm the decision of the trial court dismissing the case.

Respectfully submitted,

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Petition to Transfer contains no more than 4,200 words, not including the Statement of the Issue.

_____

Thomas M. Fisher
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2009, a copy of the foregoing was served via First Class United States mail, postage pre-paid to the following:

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