No. 20130259

In the Supreme Court of North Dakota

MKB Management Corp., d/b/a/ Red River Women's Clinic, Kathryn L. Eggleston, M.D.,

Plaintiffs-Appellees,

vs.

Birch Burdick, in his official capacity as State Attorney for Cass County, Terry Dwelle, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health,

Defendants-Appellants.

Appeal from Memorandum Opinion and Order for Permanent Injunction Entered by the District Court, East Central Judicial District, County of Cass, File No. 09-2011-CV-02205, Hon. Wickham Corwin, Judge Presiding.

BRIEF *AMICUS CURIAE* OF THE NORTH DAKOTA CATHOLIC CONFERENCE IN SUPPORT OF DEFENDANTS AND IN SUPPORT OF REVERSAL

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Interest of the *Amicus*

The North Dakota Catholic Conference has been organized by the Roman Catholic Bishops of the State as the entity by which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference promotes the social teaching of the Catholic Church in such diverse areas as education, marriage and family life, health care, social welfare, immigration, civil rights, criminal justice, the economy and the sanctity of human life from conception to natural death.

The Conference supported the legislation which is the subject of this appeal, HB 1297, which regulates medical abortions. The district court's judgment, recognizing a fundamental right to abortion under the state constitution, threatens a wide range of abortion regulations the State has enacted, including parental consent, informed consent, waiting periods and public funding restrictions, as well as virtually any other abortion regulation the State may enact. Nothing in the text, history or interpretation of the North Dakota Constitution requires such a radical result. To assist this Court in addressing the profound constitutional questions presented by this appeal, the Conference respectfully submits this brief.[*]

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[*] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the *amicus curiae* or its counsel, contributed money that was intended to fund preparing or submitting the brief.

I.

THIS COURT IS NOT REQUIRED TO RECOGNIZE A RIGHT TO ABORTION UNDER THE NORTH DAKOTA CONSTITUTION MERELY BECAUSE THE SUPREME COURT HAS DERIVED A RIGHT TO ABORTION FROM THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As a threshold matter, *amicus* submits that, contrary to the district court's understanding, *see* Mem. Op. 4, 22, 41 (July 15, 2013), this Court is *not* required to recognize a right to abortion under the inalienable rights (art. I, § 1) and due process (art. I, § 12) guarantees of the North Dakota Constitution merely because, in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court derived a right to abortion from the liberty language of the Due Process Clause of the Fourteenth Amendment. That a given right is protected by the federal constitution does not require a state court*, as a matter of state law*, to interpret the state constitution to extend protection to the same right, so long as the state constitution is not *applied* in a manner that would deny a federal constitutional right (plaintiffs have presented no federal constitutional claims in their challenge to HB 1297).

There are two principled approaches in considering the relationship between similar state and federal constitutional guarantees. A state court may conclude, after a careful analysis of the relevant constitutional text, the history of its adoption and its judicial interpretation, that a given state constitutional guarantee should be construed consistently with the corresponding federal guarantee. Under this approach, often referred to as "lockstep" analysis, a state constitutional right would not be recognized unless there is a corresponding federal constitutional right; and, if there is such a right, the state right would be coextensive with the federal right, neither broader nor narrower.

Alternatively, a state court may conclude that, in light of its text, history and interpretation, the state guarantee should be construed independently of the federal guarantee. Under this approach, known as independent state constitutionalism, whether a state right would be recognized (and its scope) would not depend upon whether there is a corresponding federal right. The asserted right might not exist at all under the state constitution and, if it does, it could be broader or narrower than the federal right. What is *not* principled, however, is to *combine* the two approaches and to say, on the one hand, that federal constitutional law will be controlling in determining whether a given right is protected by the state constitution (thereby establishing, as a matter of state law, a federal "floor" of protection), but, on the other hand, that federal law will not be controlling in determining the scope of that same right (allowing for a higher state "ceiling" of protection). That hybrid approach is unprincipled in theory and unsound in practice:

> The image of federal constitutional law as a "floor" in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not adopt state constitutional rules which fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher "ceiling" of rights for individuals . . . .
>
> Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court; the Supremacy Clause of the Federal Constitution clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail.
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> * * * * *

> [S]uch courts [that do not employ "lockstep" analysis] must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor," the state court is allowing a federal governmental body–the United States Supreme Court–to define, at least in part, rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federally recognized rights as a matter of state law must employ a two-stage process. The court first must determine whether the federally recognized rights themselves are incorporated into the state constitution and *only then* must determine whether those protections are more expansive under state law.

Earl M. Maltz, *False Prophet–Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429, 443-44 (1988) (emphasis in original).

State reviewing courts have recognized that, under an independent state constitutional analysis (as opposed to "lockstep" analysis), *federal* constitutional rights are not necessarily incorporated into *state* constitutions. In *Sitz v. Dep't of State Police*, 506 N.W.2d 209, 217 (Mich. 1993), the Michigan Supreme Court stated that "appropriate analysis of our constitution does not begin from the conclusive premise of a federal floor . . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same."[1] Other state courts have agreed with this conclusion. *See Serna v. Superior Court*; 707 P.2d 793, 798-

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[1] This Court has stated that "we cannot interpret our state constitution to grant narrower rights than [those] guaranteed by the federal constitution." *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.*, 527 N.W.2d 884, 890 (N.D. 1995). *See also State v. Herrick*, 1997 ND 155, ¶ 19, 567 N.W.2d 336 (same). But that statement should be understood to mean only that the state constitution may not be *applied* in such a manner as to deprive someone of a federal constitutional right. In other words, an invalid *state* constitutional claim will not defeat a valid *federal* constitutional claim. That does not mean, however, that state constitutional protections are necessarily co-extensive or broader than their federal equivalents.

800 (Cal. 1985); *Sanders v. State*, 585 A.2d 117, 147 n. 25 (Del. 1990); *Taylor v. State*, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994); *Ex parte Tucci*, 859 S.W.2d 1, 13 (Tex. 1993) (plurality); *West v. Thompson Newspapers*, 872 P.2d 999, 1004 n. 4 (Utah 1994).

In rejecting a state constitutional challenge to Ohio's abortion informed consent statute, the Ohio Court of Appeals noted that although a state court is "not free to find constitutional a statute that violates the United States Constitution, as interpreted by *Planned Parenthood* on the basis that the [state] [c]onstitution is not violated," it need not "follow the undue burden test of *Planned Parenthood* [in construing] the [state] [c]onstitution." *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 577 n. 9 (Ohio Ct. App. 1993), *rev. denied*, 624 N.E.2d 194 (Ohio 1993). "Instead, the state may use either a lesser or greater standard." *Id.* at 575 n. 5. In a similar vein, the Massachusetts Supreme Judicial Court, in interpreting the Massachusetts Constitution, refused to employ the Supreme Court's (now abandoned) "rigid formulation" of balancing the interests at stake in the abortion debate, preferring instead a "more flexible approach to the weighing of interests that must take place." *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387, 402-04 (Mass. 1981).

In sum, depending upon text, history and interpretation, a state court may reasonably either follow Supreme Court precedent construing a federal constitutional guarantee in construing a similar guarantee in the state constitution, with all the limitations that implies, or it may construe the state constitution independently of the federal constitution. But, if it chooses the latter course, then Supreme Court precedents should not dictate the interpretation of the state constitution. A right secured by the North

Dakota Declaration of Rights may be broader,[2] narrower[3] or the same[4] as the corresponding right secured by the Bill of Rights.

II.

NOTHING IN THE INALIENABLE RIGHTS GUARANTEE (ART. I, § 1) OR THE DUE PROCESS GUARANTEE (ART. I, § 12) OF THE NORTH DAKOTA CONSTITUTION CONFERS A RIGHT TO ABORTION THAT IS SEPARATE FROM, AND INDEPENDENT OF, THE RIGHT TO ABORTION THE SUPREME COURT HAS DERIVED FROM THE LIBERTY LANGUAGE OF THE FOURTEENTH AMENDMENT.

Article I, § 1, of the North Dakota Constitution provides, in pertinent part, that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; [and] pursuing and obtaining safety and happiness. . . ." N.D. CONST. art. I, § 1 (2009). And § 12 provides, in part, that "[n]o

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[2] *See Donaldson v. City of Bismarck*, 71 N.D. 592, 608, 3 N.W.2d 808, 816 (1942) (state constitutional provision that "property shall not be taken or damaged for public use without just compensation," N.D. CONST. art. I, § 16, is "broader" in scope than the "Takings Clause" of the Fifth Amendment).

[3] Article I, § 4, of the state constitution provides, in part: "In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense *when the matter is published with good motives and for justifiable ends* . . . ." N.D. CONST. art. I, § 4 (emphasis added). At least with respect to public figures, whether an alleged libel has been published "with good motives and for justifiable ends" has no bearing on whether it is protected by the Free Speech Clause of the First Amendment, as this Court has recognized. *See Riemers v. Mahar*, 2008 ND 95, §§ 14-19, 748 N.W.2d 714). *See also Dickinson Newspapers*, *Inc., v. Jorgensen*, 338 N.W.2d 72, 79 (N.D. 1983) (noting difference between Free Speech Clause and art. I, § 4, and suggesting that art. I, § 4, may be narrower in scope).

[4] *See, e.g.*, *State v. Allesi*, 216 N.W.2d 805, 817-18 (N.D. 1974) (construing double jeopardy provision of the state constitution, now art. I, § 12, consistently with the Double Jeopardy Clause of the Fifth Amendment).

person shall . . . be deprived of life, liberty or property without due process of law." N.D. CONST. art. I, § 1 (2009). "[T]he due process clause protects and insures the use and enjoyment of the rights declared by section 1 of the Constitution," and that "there cannot be a violation of section 1 unless there be also a violation of section 13 [now § 12]." *State v. Cromwell*, 72 N.D. 565, 573, 575, 9 N.W.2d 914, 918, 919 (1943).

In *Cromwell*, the court, quoting a constitutional law text, observed that the expression "the pursuit of happiness" is not susceptible of "specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guarantee of 'liberty.'" 72 N.D. at 574, 9 N.W.2d at 918 (citation and internal quotation marks omitted). Insofar as the happiness of persons "is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, . . . liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home." *Id.*, 9 N.W.2d at 918-19 (citation and internal quotation marks omitted). Citing a legal encyclopedia, the court explained that the term "liberty" includes, in addition to a number of specific rights, "in general, the opportunity to do those things which are ordinarily done by free men." *Id.* at 573, 9 N.W.2d at 918 (citation and internal quotation marks omitted). Contrary to plaintiffs' understanding (Doc. 4, pp. 10-11), and that of the district court (Mem. Op. 4-6), nothing in *Cromwell* supports a state right to abortion.

As an initial matter, it must be noted that the actual *holding* in *Cromwell*, that the State could not require the licensing of photographers, was called into question in *Johnson v. Elkin*, 263 N.W.2d 123, 128–30 (N.D. 1978). In *Johnson*, the court criticized

Cromwell and held that "there is no general constitutional prohibition against legislation limiting entry into occupations or professions. Any occupation or profession may be subject to the police power." *Id*. at 130. More significantly, neither the plaintiffs nor the district court even attempts to explain how one is to derive specific rights (*e.g*., a right to abortion) from the general language in *Cromwell* referring to "personal freedom" and "the opportunity to do those things which are ordinarily done by free men," or what criteria might be appropriate for determining what "inalienable rights" are guaranteed by art I, § 1, as secured by the due process clause of art. I, § 12.

This Court has not developed a formal methodology for determining whether an asserted interest is protected by the inalienable rights language of art. I, § 1, as secured by the due process guarantee of § 12.[5] The court has held that, taken together, art. I, § 1, and art. I, § 12, protect, among other "liberty" interests, "the right to enjoy the domestic relations and the privileges of the family and the home," as well as the "fundamental, natural right" of parents "to the custody and companionship of their children" and "[to] mak[e] decisions" regarding their upbringing. *Hoff v. Berg*, 1999 ND 115, ¶ 10, 595

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[5] In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis, the Supreme Court applies a two-prong test: First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted). Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id*. at 710. In *Abdullah v. State of North Dakota*, 2009 ND 148, ¶¶ 25-29. 771 N.W.2d 246, this Court applied *Glucksberg* in holding that a physician did not have a substantive due process right to graduate from a state university residency program. Although the physician's due process claim was brought under 42 U.S.C. § 1983, the *Glucksberg* test would be an appropriate one to use in evaluating claims brought under the state inalienable rights and due process guarantees.

N.W.2d 285 (internal quotation marks omitted).[6] These rights have long been recognized in English and American law. "'The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'" *Hoff,* 1999 ND 115, ¶ 8 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)). This Court's reliance in *Hoff* upon the "strong tradition" recognizing the rights of parents in raising their children suggests that the presence (or absence) of such a tradition is of critical importance in determining whether an asserted liberty interest (or right) will be recognized under art. I, §§ 1 and 12, of the North Dakota Constitution.[7] That suggestion is confirmed by the court's statement that "[i]n construing a constitutional provision we must undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted." *Kadrmas v. Dickinson Public Schools*, 402 N.W.2d 897, 899 (N.D. 1987) (citation omitted), *aff'd*, 487 U.S. 450 (1988). "In so doing, it is appropriate to consider contemporaneous and long-standing practical interpretations of the provision by the

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[6] Apart from the specific privacy interests secured by the search and seizure provision of the North Dakota Constitution (art. I, § 8), no "generalized right of privacy" "has as yet been recognized under the North Dakota Constitution." *City of Grand Forks v. Grand Forks Herald*, *Inc*., 307 N.W.2d 572, 578-79 (N.D. 1981) (public disclosure of contents of former police chief's personnel file did not constitute an impermissible invasion of his privacy). *See also State v. Howe*, 308 N.W.2d 743, 748 (N.D. 1981) (no constitutional right of privacy "which would entitle an exonerated arrestee to expunction of valid arrest records"). Thus, privacy theory does not support plaintiffs' position.

[7] *See*, *e.g*., *State v. Odegaard*, 165 N.W.2d 677, 678–80 (N.D. 1969) (law requiring the operator of or passenger on a motorcycle to wear a crash helmet did not violate art. I, § 1, or § 13 (now § 12); *State v. Goetz*, 312 N.W.2d 1, 7-9 (N.D. 1981) (no fundamental right under art. I, § 1, to use commercial paper in a commercial setting).

Legislature where there has been acquiescence by the people in such interpretations." *Id*. (citations omitted). *See also State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974) (provisions of state constitution "must be read in the light of history"). Unlike the right of parents to the custody and control of their children, there is no "strong tradition" of permitting abortion in North Dakota law.

North Dakota enacted its first abortion statutes in 1877, twelve years *before* the 1889 Constitution was adopted and North Dakota was admitted as a State. Act of Feb. 17, 1877, § 337, *codified at* DAKOTA (TERR.) PENAL CODE § 337 (1877). One provision prohibited abortion upon a pregnant woman at any stage of her pregnancy except when the procedure was necessary "to preserve her life. . . ." *Id*. A second provision prohibited a woman from soliciting an abortion or allowing an abortion to be performed upon her (subject to the same exception). *Id*. § 338 (no prosecutions were reported under this section). These statutes remained on the books until after *Roe v. Wade* was decided. DAKOTA (TERR.) COMPILED LAWS §§ 6538, 6539 (1887), *recodified at* N.D. REV. CODES §§ 7177, 7178 (1895), *recodified at* N.D. REV. CODES §§ 8912, 8913 (1905), *recodified at* N.D. COMPILED LAWS §§ 9604, 9605 (1913), *recodified at* N.D. REV. CODE §§ 12-2501, 12-2504 (1943), *recodified at* N.D. CENT. CODE §§ 12-25-01, 12-25-04 (1970), *repealed by* 1973 N.D. Laws 215, 300, ch. 116, § 41. And on November 7, 1972, less than three months before *Roe v Wade* was decided, the people of North Dakota, by a margin of more than three-to-one, rejected a ballot initiative that would have permitted abortions to be performed under a broader range of reasons than had theretofore been allowed. *Official Abstract of Votes Cast at the General Election Held November 7*, *1972*;

Office of the Secretary of State, Nov. 21, 1972 (Measure No. 1: Yes: 62,604; No: 204,852).

In determining the meaning and scope of guarantees secured by the North Dakota Constitution, this Court has repeatedly relied upon contemporary legal practices at the time when the Constitution was adopted. *Compare State v. Orr*, 375 N.W.2d 171, 177-78 (N.D. 1985) (recognizing state constitutional right to counsel in all criminal prosecutions based upon statutes in effect when Constitution was adopted), and *City of Bismarck v. Altevogt*, 353 N.W.2d 760, 764-66 (N.D. 1984) (same with respect to state constitutional right to jury trial), *with Martian v. Martian*, 328 N.W.2d 844, 845 (N.D. 1983) (no state constitutional right to a jury trial in divorce proceedings where, when Constitution was adopted, "jury trials were [not] available in divorce cases under common law []or by statute"). The consistent prohibition of abortion, from territorial days until *Roe v. Wade* was decided in 1973, is fatal to plaintiffs' argument (and the district court's conclusion) that the North Dakota Constitution confers a right to abortion.

A right to abortion cannot be found in the text, structure or history of the North Dakota Constitution. There is no evidence that the framers or ratifiers of the North Dakota Constitution intended to limit the Legislature's authority to prohibit or regulate abortion. *See* Proceedings & Debates of the First Constitutional Convention of North Dakota 357–71 (debate on Declaration of Rights in Committee of the Whole); 531–37 (debate on Declaration of Rights in Convention) (Bismarck, N.D. 1889). Such an intent would have been remarkable in light of the contemporaneous and longstanding

prohibition of abortion except to save the life of the mother.[8]

Nor does the well-established constitutional and common law right to refuse unwanted medical treatment support plaintiffs' assertion of a state right to abortion.[9] "A competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment," *State ex rel. Schuetlze v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995), citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990), but that liberty interest derives from the common law which regarded medical treatment to which one had not consented (outside the context of an emergency) as an actionable battery. *See*, *e.g*., *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). That "negative" right cannot be transformed by some strange legal alchemy into an "affirmative" right to obtain a particular drug or undergo a particular procedure or course of treatment. *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (cancer patient had no constitutional right "to obtain laetrile free of the lawful exercise of government police power"); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) ("the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health"); *Raich v. Ashcroft*, 248 F.Supp.2d 918, 928 (N.D. Cal. 2003) (same with respect to marijuana), *reversed and remanded*, 352 F.3d

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[8] This Court has referred to the right to abortion solely as a matter of *federal*, not *state*, constitutional law. *See State v. Sahr*, 470 N.W.2d 185, 191 (N.D. 1991); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 792 n. 5 (N.D. 1996).

[9] The district court did not separately address plaintiffs' "bodily integrity" argument. Mem. Op. 50.

1222 (9th Cir. 2003), *vacated and remanded*, 545 U.S. 1 (2005), *on remand*, 500 F.3d 850, 866 (9th Cir. 2007) ("federal law does not recognize a fundamental [constitutional] right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering").

The North Dakota Constitution "must be interpreted in light of the rights and liberties it was created to uphold, and not the philosophical viewpoints of the judiciary who hold the responsibility of interpretation." *State v. Herrick*, 1999 ND 1, ¶ 22, 588 N.W.2d 847. Nothing in the state constitution was intended to create or recognize a right to abortion, which was a crime under the laws of the Dakota Territory and under the statutes of the State of North Dakota from its admission to the Union until 1973. It necessarily follows that there is no subsidiary state constitutional right to obtain an abortion by a particular method or means.[10]

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[10] With respect to matters not covered by this brief, *amicus* generally adopts the defendants' brief.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

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Affidavit of Service

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STUTSMAN)

Christopher Dodson states under oath as follows:

1. I swear and affirm under penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 1st day of October, 2013, I served the foregoing **BRIEF *AMICUS CURIAE* OF THE NORTH DAKOTA CATHOLIC CONFERENCE IN SUPPORT OF DEFENDANTS AND IN SUPPORT OF REVERSAL** upon the following by both regular United States mail, first class postage prepaid, and by e-mailing a true and correct copy thereof:

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Christopher Dodson

Subscribed and sworn to before me
this 1st day of October 2013

(hard copy notarized)

____
Notary Public