07-3677
07-3900

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES L. ALEXANDER; ALEXANDER & CATALANO LLC; and PUBLIC CITIZEN, INC.,
Plaintiffs-Appellees-Cross-Appellants,

v.

THOMAS J. CAHILL, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department; DIANA MAXFIELD KEARSE, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts; GARY L. CASELLA, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District; RITA E. ADLER, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District; MARK S. OCHS, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third Department; ANTHONY J. GIGLIOTTI, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District; DANIEL A. DRAKE, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial District; and VINCENT L. SCARSELLA, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eighth Judicial District,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of New York

APPELLEE'S REPLY BRIEF

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INTRODUCTION

This case involves sweeping restrictions in the Disciplinary Rules of New York's Code of Professional Responsibility that prohibit a wide range of lawyer speech in the state. The district court declared all but one of the rules at issue in the parties' cross-appeals to be unconstitutional. This brief addresses plaintiffs' cross-appeal of the district court's decision to uphold the constitutionality of the moratorium on communications "directed to, or targeted at" potential plaintiffs in personal injury and wrongful death cases. 22 N.Y.C.R.R. §§ 1200.8(b), 1200.41-a . New York's moratorium rule goes far beyond the rules of other states, prohibiting not just in-person and direct-mail solicitations but also advertisements in mass media like newspapers, television, and websites. The state's rule prohibits a law firm from, for example, stating on its website that it is willing to take cases resulting from a particular disaster or defective product, even though such a website in no way intrudes on the privacy of consumers and even though consumers may be actively looking for such information.

Although the state does not dispute that *Central Hudson* is the appropriate test under which to review the constitutionality of its moratorium, it makes no effort to satisfy its evidentiary burden under that test. Instead, the state relies for support of its rule on the Supreme Court's decision in *Florida Bar v. Went For It*, 515 U.S. 618 (1995), a conclusory report by a state bar task force, and the

existence of similar rules in other jurisdictions. All the sources from which the state seeks to derive authority, however, pertain to different, much narrower rules. Therefore, they provide no evidentiary support for the rule here.

The state's appeal to "common sense" also fails, both because the state's rule makes little sense and because the Supreme Court has repeatedly held that a state's unsubstantiated assertions cannot satisfy its burden under *Central Hudson*. The state here has produced no actual evidence that its moratorium rule addresses anything other than non-existent problems or that, even assuming such problems exist, its rule will materially alleviate those problems in a way that restricts as little speech as possible. Under well-established Supreme Court and Second Circuit precedent, the state's failure to submit such evidence "doom[s] . . . the regulation." *N.Y. State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994).

ARGUMENT

I. *Went For It* Does Not Hold That All Temporally Limited Solicitation Bans Are Constitutional.

The state's primary argument in support of its moratorium rule is that "the constitutionality of limited bans on attorney solicitations" has "largely been settled" by the Supreme Court's decision in *Went For It*. Appellants' Reply & Resp. Br. at 10-11. In the state's view, *Went For It* stands for the proposition that *any* restriction on attorney solicitations is permissible as long as the restriction is limited, like the rule in *Went For It*, to a thirty-day period. *Id.* at 11-12, 19.

Because its own rule includes such a temporal limitation, the state argues that the rule necessarily survives constitutional scrutiny. *Id.*

Went For It, however, did not adopt a per se rule that temporally limited restrictions on attorney advertising are always constitutional. The Court held only that Florida had presented adequate evidence in support of the particular rule at issue in that case. 515 U.S. at 626-28. Where, in contrast, states have adopted moratorium rules that are not supported by evidence, courts have not hesitated to declare them unconstitutional. *See Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403 (5th Cir. 2007) (declaring unconstitutional a twenty-four hour ban on solicitations by bail bondsmen); *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997) (holding unconstitutional a thirty-day restriction on direct-mail solicitation of criminal and traffic defendants); *see also Revo v. Disciplinary Bd.*, 106 F.3d 929 (10th Cir. 1997) (striking down a ban on direct-mail solicitations where the state could have achieved its desired result by screening solicitations or disciplining individual lawyers for making misleading claims).

In upholding Florida's thirty-day moratorium, the Supreme Court emphasized that the rule was "narrow *both in scope and duration*." *Went For It*, 515 U.S. at 635 (emphasis added). Under Florida's rules, a generally distributed advertisement, even if targeted at a particular class of potential plaintiffs, would not be considered a solicitation and would thus fall outside the ambit of the

moratorium rule. Fla. Rules of Prof'l Conduct 4-7.6, cmt. Thus, a Florida law firm could state on its website that it is willing to represent people who have been injured by a particular event or product without violating Florida's thirty-day moratorium. The state acknowledges here, however, that its own prohibition on solicitations is "more broadly applicable to all attorney solicitations, regardless of the medium used," Appellants' Reply & Resp. Br. at 11, and affects not only targeted direct-mail solicitations but also generalized mailings, television, radio, newspapers, billboards, websites, and other forms of mass-media advertisements whenever the content of the ad is "directed to, or targeted at, a specific . . . group of recipients." 22 N.Y.C.R.R. § 1200.8(b). A New York law firm would thus be prohibited from creating the same website that would be allowed in Florida because the website would be directed at those injured by the event or product.[1]

The state is wrong to assert that the forms of media restricted by its rule are irrelevant to the constitutional analysis. To the contrary, the Supreme Court held in *Shapero v. Kentucky Bar Association*, when assessing restrictions on attorney advertisements, "the mode of communication makes all the difference." 486 U.S.

[1] Other states considering the issue have, like Florida, concluded that generally accessible websites are "advertisements," but not "solicitations," under their rules. *See* State Bar of Cal. Op. 96-0014 (1998); Ky. Bar Ass'n Op. E-403 (1998); Va. State Bar Op. A-0110 (1998); W.V. Bar Ass'n L.E.I. 98-03 (1998); State Bar of Az. Op. 97-04 (1997); Conn. Bar Ass'n Op. 97-29 (1997); Vt. Bar Ass'n Op. 97-5 (1997); Ill. State Bar. Ass'n Op. 96-10 (1996); Mich. Bar Ass'n Op. RI-276 (1996); N.C. Bar. Ass'n Op. RPC 239 (1996).

466, 475 (1988). The state's only argument for extending *Went For It* to the broader context of this case is its unsubstantiated assertion that "potential clients are equally, if not more susceptible, to privacy invasions from advertising on these more widespread outlets." Appellants' Reply & Resp. Br. at 14. Not only is this argument unsupported by evidence, it flies in the face of the Court's rationale in *Went For It*, on which the state purports to rely. As plaintiffs explained in their opening brief (at 43-44), and as defendants have not disputed, the state interest in *Went For It* was the infringement of privacy caused by the mailing of targeted, direct-mail solicitations to potential clients' homes. 515 U.S. at 625. The Court was careful to note, however, that the same privacy concerns would not be implicated by advertisements generally distributed to the public instead of targeted at individual consumers. *Id.* at 630. The Court explained that generally distributed advertisements like untargeted mailings and newspaper ads "involve[] no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals." *Id.* Thus, *Went For It* itself forecloses the state's reliance on the case in support of restriction on general-media advertisements.[2]

[2] The lower-court cases on which the state relies also involved rules that are much narrower than New York's. *See Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995) (upholding a thirty-day moratorium "nearly identical" to the one at issue in *Went For It*); *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1344 (11th Cir. 1998) (upholding a ban on in-person solicitation and stressing that "many other modes of advertising are available to lawyers"). No court has examined or upheld a statute or rule comparable to New York's broad moratorium.

The Supreme Court's approval of Florida's rule in *Went For It* depended on its conclusion that the rule left "ample alternative channels" available to advertising lawyers, including television, radio, billboards, newspapers, general mailings, and yellow pages. *Id.* at 634; *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (noting that *Went For It* held Florida's rule constitutional "largely because it left so many channels of communication open to Florida lawyers"). New York's rule, in contrast, forecloses the very "alternative channels" on which *Went For It* relied, leaving lawyers in the state without *any* way to advertise their willingness to take on a specific claim.

The state's only response to this problem is to assert that lawyers can still advertise their general services as long as their ads are not directed at a particular class of consumers in need of legal assistance. Appellants' Resp. & Reply Br. at 11-12. The Supreme Court, however, has never held that bans on solicitation are constitutional merely because attorneys remain free to engage in generalized advertising. On the contrary, the Court has struck down state restrictions on solicitation even when general advertising remained available. *See Edenfield v. Fane*, 507 U.S. 761 (1993); *Shapero*, 486 U.S. 466; *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (holding that "a restriction on speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience"). If, as the state suggests,

lawyers could be prohibited from expressing their willingness and availability to take on a particular claim, consumers could be forced to sift through hundreds or thousands of generalized lawyer advertisements, many of which would be for lawyers unwilling or unqualified to take the case. Under the state's argument, a state could thus restrict lawyer speech to the point where its message is so diluted as to be utterly ineffective. The Supreme Court has never countenanced such an argument.

II. The Task Force Report Provides No Support for the Moratorium Rule.

In addition to *Went For It*, the state relies on the state bar's task force report, which recommended a fifteen-day moratorium on direct-mail solicitations. Appellants' Resp. & Reply Br. at 15. The state, however, does not dispute that the rule proposed by the task force was much narrower than the rule adopted by the state. The task force's proposed rule, like the rule in *Went For It*, prohibited *only* direct-mail solicitations and, except for its recommendation of a shorter fifteen-day ban, was substantially identical to the rule upheld in *Went For It*. A. 116-17. Thus, for the same reason that *Went For It* cannot support the state's rule, the task force report cannot support it either.

Even if the proposed rule were comparable to the rule adopted by the state, the task force report could not satisfy the state's burden under *Central Hudson* because the task force *itself* did not rely on any evidence. As explained in

plaintiffs' opening brief (at 61-62), the task force report, rather than collecting relevant evidence, did little more than survey the rules of other jurisdictions in an effort to determine whether the rule was likely to face a constitutional challenge. The state cannot satisfy its evidentiary burden by relying on a report that is based on nothing more than its members' legal arguments and unsubstantiated opinions. *Cf. Sable Commc'ns v. FCC*, 492 U.S. 115, 129-30 (1989) (holding that courts owe no deference to a legislature when the record "contains no evidence as to how effective or ineffective the . . . regulations were or might prove to be"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (holding that no deference is warranted where a statute contained only "legislative declaration[s]" instead of "actual facts"). The state bar's conclusory report stands in stark contrast to the two-year study held sufficient to satisfy Florida's burden in *Went For It*, which included statistical evidence and extensive reports of the impact of direct-mail solicitation on consumers. *Went For It*, 515 U.S. at 626-28.

III. New York Cannot Justify Its Rule Based on the Unchallenged Rules of Other Jurisdictions.

Like the district court, the state relies on a purported "emerging consensus" among the states that "some form of moratorium" on attorney solicitations following accidents is desirable. Appellants' Resp. Br. at 15. Once again, however, the state seeks support from inapposite rules. The state rules on which the task force relied were rules from jurisdictions that, like Florida, prohibited "targeted

mail solicitation of accident victims." A. 116. None of the rules examined by the task force extended as broadly as New York's ban on "communications" that are "directed to, or targeted at" personal injury or wrongful death victims. Indeed, New York is the *only* state to impose such a restriction.[3]

Like the state rules, the federal moratorium on solicitation of airline disaster victims is limited to communications made "to an individual injured in the accident," and thus requires *direct* communication with potential clients. 49 U.S.C. § 1136(g)(2). The statute's legislative history confirms that the law was designed to protect consumers from intrusive *targeted* solicitations, not advertisements

[3] Seven of the states relied on by the task force restrict only targeted solicitations of the sort at issue in *Went For It*. *See* Ariz. R. Prof'l Conduct E.R. 7.3(b)(3) (solicitation of "a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact"); Conn. R. Prof'l Conduct 7.3(b)(5) ("written or electronic communication to a prospective client, for the purpose of obtaining professional employment" concerning an accident "involving the person to whom the communication is addressed"); Fla. R. Prof'l Conduct 4-7.4(b)(1)(A) ("unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment" concerning an accident "involving the person to whom the communication is addressed); Ga. R. Prof'l Conduct 7.3(a)(3) ("written communication to a prospective client for the purpose of obtaining professional employment" concerning an accident "involving the person to whom the communication is addressed"); La. R. Prof'l Conduct 7.3(b)(iii)(C) ("written communication . . . involving the person to whom the communication is addressed); Mo. R. Prof'l Conduct 4-7.3(c)(4) ("written solicitation to any prospective client" concerning an accident "involving the person solicited"); Tenn. R. Prof'l Conduct 7.3(b)(3) ("communication directed to a specifically identified recipient"). The eighth state relied on by the task force, Maryland, does not have any moratorium rule. Although several other states have rules similar in scope to those examined by the task force, none of them is comparable to New York's rule.

disseminated in the general media. H.R. Rep. No. 104-793, at 10 (1996) ("This provision is designed to protect the privacy and tranquility of aircraft accident victims and their families from intrusive, unsolicited contact by lawyers, law firm employees, or others related to potential litigation during the period of immediate grieving."). As an example of conduct prohibited by the statute, the House committee report relates an instance when a law firm employee allegedly handed out business cards in the lobby of a hotel where victims' families were staying. *Id.* at 6-7. That sort of intrusive personal contact bears no similarity to a newspaper advertisement or website stating a lawyer's willingness to take on a particular claim. Indeed, even without the moratorium rule, such conduct would be prohibited by New York's independent prohibition on in-person solicitation. 22 N.Y.C.R.R. § 1200.8(a)(1).

IV. The State Cannot Justify Its Rule with "Common Sense."

In the absence of evidence supporting its moratorium, the state attempts to rely on "common sense" to justify its rule. Appellants' Resp. & Reply Br. at 16. The state does not explain, however, how common sense dictates that consumers would be harmed by law firms stating in the public media their willingness to represent victims of a particular accident, disaster, or defective product. Contrary to the state's argument, the Supreme Court has acknowledged the value of solicitation to consumers and recognized that legal needs of those of moderate

means often go unmet because consumers do not know how to locate a competent attorney. *See Edenfield*, 507 U.S. at 766; *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977). Prohibiting lawyers from advertising their willingness and availability to take a particular claim, far from benefitting consumers, could therefore deprive them of important information about their rights.

In any case, the Supreme Court in the commercial speech context "has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm." *Mason v. Fla. Bar*, 208 F.3d 952, 957-58 (11th Cir. 2000). The Court has repeatedly held that the state's "burden is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770-71; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (rejecting the state's submission of "anecdotal evidence and educated guesses"). Thus, a state's failure to "provide direct and concrete evidence . . . will doom the . . . regulation." *Shaffer*, 27 F.3d at 842.[4]

[4] *See also Ibanez v. Fla. Dep't Bus. & Prof'l Regs.*, 512 U.S. 136, 147 (1994) (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform"); *Peel*, 496 U.S. at 106 (noting the "complete absence of any evidence of deception"); *Zauderer*, 471 U.S. at 648-49 (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions"); *In re RMJ*, 455 U.S. 191, 205-06 (1982) (noting that there was no evidence in the record indicating that the targeted speech was misleading); *Revo*, 106 F.3d at 933 ("The Board offers no evidence that anyone was actually deceived."); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1240 (E.D. Ca. 2000) ("The only evidence that the [state] offers that the advertising . . . would be

The state relies on a portion of *Went For It* where the Supreme Court noted that it had, "in other contexts," accepted restrictions on speech based on "history, consensus, and 'simple common sense.'" 515 U.S. at 628. Those other contexts, however, are not relevant to this case. As already explained, New York's broad restriction on solicitations is unique in the nation and is therefore supported by neither history nor consensus. The Court's recognition in *Went For It* that restrictions on speech may, in certain limited cases, gain support through many years of experience by the fifty states does not indicate that the Court was casting aside *Central Hudson*'s evidentiary burden. Indeed, *Went For It* stressed the extensive evidence submitted by Florida in support of its rule, pointedly contrasting *Edenfield*, in which the state, like the state here, submitted "no evidence." *Id.* Moreover, since *Went For It*, the Court has repeatedly applied the *Central Hudson* test to strike down laws that states had failed to support with adequate evidence. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart*, 517 U.S. 484.

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misleading is conclusory, anecdotal, and speculative. The [state] has not offered any empirical evidence—in the form of studies or surveys."); *Capoccia v. Comm. on Prof'l Standards*, No. 89-866, 1990 WL 211189, at *6 (N.D.N.Y. Dec. 20, 1990) (striking down restriction on attorney advertising where the defendants had failed to sustain their burden of demonstrating a valid state interest and instead "maintain[ed], in conclusory manner, that the statements in question [were], indeed, false, deceptive and misleading").

Went For It therefore signals no retreat from the evidentiary requirements of the *Central Hudson* test.

Finally, the state suggests that advertising by attorneys may be subject to less constitutional protection than other advertising. Appellants' Resp. Br. at 25. This contention, however, runs headlong into *Zauderer v. Office of Disciplinary Counsel*, where the Supreme Court held that attorney advertisements are subject to the same standard as advertisements in other industries. 471 U.S. 626, 646-47 (1985). A state's interest in regulating attorneys, while significant, is no more important than the governmental interest at stake in other areas where the Court has applied the *Central Hudson* test, such as advertisements for alcohol, *44 Liquormart*, 517 U.S. 484, gambling, *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, tobacco, *Lorillard Tobacco*, 533 U.S. 525, and prescription drugs, *Thompson*, 535 U.S. 357. Indeed, because consumers are less likely to rely on advertising alone in selecting an attorney than in selecting ordinary consumer goods, lawyer advertisements are, if anything, less likely to deceive consumers than other sorts of ads. *See Zauderer*, 471 U.S. at 649 ("[B]ecause it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in

lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.").[5]

The state quotes language derived from *Ohralik v. Ohio State Bar Association*, where the Court noted that lawyers are "professionals trained in the art of persuasion." 436 U.S. 447, 464-65 (1978). *Ohralik* upheld discipline against a lawyer for the in-person solicitation of an accident victim while she was laying in traction in a hospital bed. *Id.* at 450. Because *Ohralik* was decided before the Court had articulated the *Central Hudson* standard, it contains little discussion of the state's evidentiary burden. In any case, *Ohralik* is inapposite here because the state does not even attempt to argue that advertisements in the general media of the sort prohibited by its moratorium rule create a risk of overreaching comparable to face-to-face solicitation of a hospital patient. *See Edenfield*, 507 U.S. at 774 (noting that "*Ohralik*'s holding was narrow and depended upon certain 'unique features of in person solicitation by lawyers' that were present in the circumstances of that case."); *see also Shapero*, 486 U.S. at 475 (holding that written communication lacks "the coercive force of the personal presence of a trained advocate") (internal quotation omitted); *Falanga*, 150 F.3d at 1340 (upholding a ban on in-person

[5] The Supreme Court has also recognized that "members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients." *Peel*, 496 U.S. at 109; *see also Bates*, 433 U.S. at 379 ("[I]t is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point and at another to assert that its members will seize the opportunity to mislead and distort.").

solicitation by personal injury attorneys and noting that the "essential circumstances of *Ohralik* were that a lawyer engaged in 'uninvited' in-person solicitation of 'unsophisticated, injured, or distressed lay person[s]'").[6]

To be sure, the Supreme Court has indicated that "misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates*, 433 U.S. at 383. Thus, the state in some cases may be able to prove that particular attorney advertisements are likely to deceive consumers, such as, for example, an advertisement using confusing legal terminology or jargon to mislead consumers. *See, e.g.*, *Zauderer*, 471 U.S. at 646-47 (upholding a restriction on advertising contingent-fee legal services without disclosing that the client is responsible for paying costs); *RMJ*, 455 U.S. at 205-06 (noting that a lawyer's claim to be a member of the Supreme Court Bar "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court," but nevertheless finding "nothing in the record to indicate that the inclusion of this information was misleading"). That attorney

[6] The state also relies on dicta from *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), in support of its argument that lawyers are entitled to fewer First Amendment protections than other speakers. *Gentile*, however, involved an attorney speaking in his capacity as an officer of the court. As the Court noted in *Zauderer*, the fact that the state "has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom" does not mean that the state also has an interest in enforcing the dignity of public advertising. 471 U.S. at 644.

advertisements may be misleading in particular cases, however, does not justify broad restrictions on attorney ads for which there is no evidence of harm. *See Zauderer*, 471 U.S. at 645, 646-47 (holding that a state may not prophylactically ban potentially misleading lawyer advertisements and noting that targeting only particular misleading ads is no more difficult in the context of attorney ads than in "virtually any field of commerce").

* * *

The state has provided no evidence that consumers have been harmed by the sorts of advertisements prohibited by its moratorium or that, assuming that such a harm exists, the state's chosen rule would materially alleviate that harm. Indeed, there is no evidence that even a single consumer has ever complained about untargeted solicitations on the Internet or in other forms of mass media. Nor has the state made any effort to explain why a narrower moratorium, such as the one upheld in *Went For It*, would not satisfy its asserted goals. Because the state has failed to carry its burden under *Central Hudson*, the moratorium rule is unconstitutional.

CONCLUSION

The district court's grant of partial summary judgment to defendants on the issue of the thirty-day moratorium should be reversed and remanded with instructions to enter judgment for plaintiffs on that issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(C). The brief is composed in a fourteen-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002), the brief contains 4,218 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Gregory A. Beck
Gregory A. Beck

CERTIFICATE OF SERVICE

I certify that on April 16, 2008, I caused the original and ten copies of this brief to be sent by first-class U.S. Mail to the Clerk of the Court, and two copies to be sent by first-class mail to the following:

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