

09-2878-CV

**In the United States Court of Appeals
for the Second Circuit**

J.D. SALINGER, individually and as trustee
of the J.D. Salinger Literary Trust,

Plaintiff-Appellee,

v.

FREDRIK COLTING, writing under the name John David California,
WINDUPBIRD PUBLISHING LTD., NICOTEXT A.B. and ABP, INC.,
doing business as SCB Distributors, Inc.,

Defendants-Appellants.

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

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN, INC.

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc. certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Nobody disputes J.D. Salinger’s claim that he holds a valid copyright in his novel *The Catcher in the Rye* or that, as a consequence of that copyright, he controls the exclusive right to make copies of his book. Salinger, however, has asserted that Fredrik Colting’s book, *60 Years Later*, “infringes [his] copyright rights in . . . the character Holden Caulfield.” Cmplt. ¶ 1. The district court accepted this contention, concluding that the character of Holden Caulfield was “quite delineated,” amounting in effect to a “portrait in words,” and thus subject to copyright protection independent of the work in which he appears. Tr. at 24.

The district court’s decision expanded Salinger’s copyright far beyond its legal limit—the fixed, creative expression embodied in *The Catcher in the Rye*—and into the realm of concepts and ideas. The court’s infringement analysis is not only contrary to the Copyright Act, but runs afoul of established limitations of copyright law, particularly its fundamental idea-expression distinction. While the fair use defense provides important First Amendment protections, the vagueness and uncertain application of the defense can itself chill speech by discouraging authors from creating new works in borderline cases. Strict adherence, at the outset, to the idea-

expression distinction avoids this problem by insulating imaginative and potentially valuable speech from government-sanctioned suppression.

Public Citizen is a nonprofit advocacy organization that opposes the misuse of intellectual property law by private interests to squelch public commentary and debate. Public Citizen has recently litigated cases involving copyright, trademark, and patent law and the intersection of these doctrines with the First Amendment and the rights of consumers. Public Citizen is concerned that the reasoning of the decision below, if upheld by this Court, would broadly chill the creation of art and commentary at a significant cost to the public discourse.

ARGUMENT

I. THE COPYRIGHT ACT FORECLOSES THE DISTRICT COURT'S FINDING OF A COPYRIGHT IN HOLDEN CAULFIELD.

The district court's conclusion that Salinger holds a copyright in Holden Caulfield wholly apart from the fixed expression of the novel itself—a general right to prevent others from conjuring up readers' memories of his iconic character—not only runs afoul of the purposes and constitutional limits on copyright but is foreclosed by the Copyright Act itself.

1. Under the 1909 Copyright Act, which was in force until 1979, a fictional character might arguably have achieved copyright protection as a “component part” of a work. 17 U.S.C. § 3 (1976) (“The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright.”). But in the 1976 Copyright Act, Congress did away with separate copyright protection for components of works. Accordingly, under current law, copyright protection extends only to “original *works* of authorship” that are “fixed” in a “tangible medium of expression.” 17 U.S.C. § 102 (emphasis added). Graphically depicted characters, unlike literary characters, might qualify separately under the Act’s inclusion of “pictorial, graphic, and sculptural works” in the list of protectable works of authorship. *Id.* Purely literary characters, however, like other non-tangible concepts found within a literary work, are not independently copyrightable.

Congress has consistently rejected proposals to extend copyright protection to fictional characters, following the recommendation of the Register of Copyrights:

Proposals have been advanced for identifying fictional characters as copyrightable works in themselves under the bill. . . . As is

equally true in the case of detailed presentations of plot setting, or dramatic action, we believe it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works.

Supplemental Report of the Register of Copyrights on the General Revision of U.S. Copyright Law: 1965 Revision Bill, 89 Cong., 1st Sess. (1965) (quoted in Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.12 (1999)). The district court's holding that the character of Holden Caulfield is independently protected by copyright is incompatible with Congress's legislative judgment.

The error of the district court's approach is also underscored by the longstanding practice of the Copyright Office, which refuses to register characters. See *Compendium II of Copyright Office Practices* § 202.02(1) ("The copyright law does not provide for the copyright registration of characters as such. However, original works of authorship describing, depicting, or embodying a character are registrable if otherwise in order."). The Office's practice is to deny registration of characters when the nature of authorship is described as a "cartoon" or "pictorial" character, but to accept an application describing the nature of authorship as a "cartoon drawing." *Id.* The Copyright Office's position on the question of copyright registration is

entitled to deference. *See Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (Alito, J.).

2. Because Salinger did not—and could not—register a copyright in Holden Caulfield, *see* Cmplt. ¶¶ 42-43 (alleging only that the *book* was registered in 1951 and its copyright renewed in 1979), he may not sue Colting for infringement of the character. *See* 17 U.S.C. § 411(a) (“[N]o action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”). This requirement is jurisdictional and the copyright in the novel cannot be bootstrapped to create jurisdiction, over a claim of infringement in the character, that would not otherwise exist. *See In re Literary Works in Elect. Databases Copyright Litig.*, 509 F.3d 116, 121-23 (2d Cir. 2007) (“[T]he existence of a claim based on a registered copyright does not bring within a district court’s jurisdiction all related claims stemming from unregistered copyrights.”). For this reason alone, the district court’s decision must be reversed.

3. Neither the Supreme Court nor this Court has ever accorded copyright protection to a literary character. And although their holdings are not always clear, federal courts have long recognized that literary characters

are not a separate class of copyrightable works. See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954). Most discussions of the question begin with *dicta* from Judge Learned Hand’s opinion in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), which is often misread as suggesting independent copyrightability for characters. Judge Hand’s comments, however, are properly read as an observation about the appropriate limits of a test for infringement of the literary work *Twelfth Night*—not a statement about the independent copyrightability of the characters in a play:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.

Id. at 121.

In 1954, the Ninth Circuit rejected a claim of a copyright in Dashiell Hammett’s iconic detective, Sam Spade of the *Maltese Falcon*, reasoning that “[i]f Congress had intended” the copyright protection of a literary work to preclude “use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefore.” *Columbia Broad Sys.*, 216 F.2d at 950. Such a restriction, the

court concluded, would be “unreasonable, and would effect the very opposite of the statute’s purpose, which is to encourage the production of the arts.”
Id.

In 1982, in an appeal by Edgar Rice Burroughs’ heirs over the movie version of *Tarzan*, this Court deliberately left unresolved what it called the “interesting,” “difficult,” and “venerable” question of “whether and in what circumstances an author’s creation of a fictional character can be protected by copyright.” *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 621 (2d Cir. 1982) (citing *Nichols*, 45 F.2d at 121); *see also Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 240 (2d Cir. 1983) (issue was “expressly left open” in *Burroughs*).¹ As discussed above (at 3-5), the statute itself answers the question this Court left open in *Burroughs* and *Nichols*.

¹ The following colloquy—in response to a question from Judge Newman as to whether any case had held a literary character infringed based on the character’s attributes alone— demonstrates the importance of clearly defining the nature of the copyrighted work:

COUNSEL: That is not the issue. The issue isn’t whether the character has been infringed, your Honor, but whether the literary work has been infringed.

JUDGE NEWMAN: I thought your argument was what has been conveyed is a copyright interest in the characters.

COUNSEL: No, what has been conveyed is a right under copyright in the literary work, *Tarzan of the Apes*.

.....

That fictional characters are not copyrightable does not mean that the Copyright Act permits the wholesale piracy of characters in copyrighted works—particularly where the expression of those characters is fixed in graphical form or in film. *See Columbia Broad. Sys.*, 216 F.2d at 950. Properly conceived, the protection of characters within copyright should be analyzed, as Learned Hand suggested, as part of the test for infringement of the work as a whole. *See 1-2 Nimmer on Copyright* § 2.12 (explaining that the question of copyright in a character is “more properly framed as relating to the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se”) (footnotes omitted).

We acknowledge that courts (including this one) have spoken loosely of characters as if they are independently copyrightable under the 1909 Act and even under the current Act. *See, e.g., Am. Broad. Cos.*, 720 F.2d at 240. Most of this discussion, however, either arises out of a misreading of the *Nichols* dicta or concerns graphical characters. And “many of these cases have

JUDGE NEWMAN: Wait a minute. What I am trying to get at is what is it a copyright grant in. I thought we were talking about a copyright grant in the characters?

COUNSEL: No, we are not.

JUDGE NEWMAN: We can put that aside.

Burroughs, 683 F.2d 620 n.10.

nothing to do with protecting cartoon ‘characters’ as such but merely hold that particular directly perceptible images, covered by the plaintiff’s copyright, were infringed by identical or substantially similar images marketed by the defendant.” Francis M. Nevins, *Copyright + Character = Catastrophe*, 39 J. Copyright Soc’y USA 303, 321-22 (1992).

In any event, extending copyright to characters would prove unworkable. Characterization is a mental impression formed from a character’s appearance, thoughts, words, or actions, and is thus inherently subjective; the same roomful of people could have very different impressions of Huck Finn or Hamlet. *Id.* at 304. Indeed, Salinger was initially turned down by a publishing executive who “couldn’t figure out whether Holden Caulfield was supposed to be crazy.” Louis Menand, *Holden at Fifty: ‘The Catcher in the Rye’ and what it spawned*, *The New Yorker*, Oct. 1, 2001. And many people identify the central “moral of the book” as being that “Holden will outgrow his attitude”—a view that is fundamentally at odds with Colting’s portrayal. *Id.*

It is, moreover, “impossible to articulate a criterion for separating copyrightable from uncopyrightable characterizations that does not compel courts to operate *ultra vires* and hand down aesthetic decisions.” Nevins,

Copyright + Character, at 343. Given the First Amendment’s prohibition on content-based speech restrictions, that difficulty is reason enough to refrain from going down the road pursued by the district court. As Justice Holmes warned, it is a “dangerous undertaking” for judges in copyright cases to sit as art critics. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

II. THE DISTRICT COURT’S INFRINGEMENT ANALYSIS IS INCOMPATIBLE WITH COPYRIGHT’S IDEA-EXPRESSION DICHOTOMY.

The district court’s infringement analysis was contaminated by its failure to identify the copyrighted work at issue. Its erroneous conclusion that characters could be independently copyrighted led it to perform a simplistic comparison of the similarities between the *idea* of Holden Caulfield in the two books, rather than the similarities and differences between the *expression* in the works as a whole. The district court asked the wrong question and it got the wrong answer.

As explained above, the only copyright at issue in this case is Salinger’s copyright in his fixed work of creative expression, *The Catcher in the Rye*. As a consequence of Salinger’s copyright, a publisher ordinarily could not reproduce literal copies or substantial portions of the novel without

Salinger's permission. Nor could a publisher bypass Salinger's copyright by issuing the same book using slightly different language. To prevent such obvious circumvention, the copyright is infringed if the "total concept and feel, theme, characters, plot, sequence, pace, and setting" of the works *as a whole* are substantially similar and there is no finding of fair use or another defense. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 140 (2d Cir. 1998). This substantial similarity test has two important aspects: It "requires that the copying [be] quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement has occurred." *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) (emphasis added). While the quantitative component of the infringement test looks only to the amount of copying, the qualitative component ensures that the alleged infringement concerns the copying of expression, rather than ideas. *Id.* at 75.

Salinger's copyright, properly understood as limited to *The Catcher in the Rye*, was not infringed here. There are neither global similarities in structure and sequence nor localized similarity in language between the two works. Other than a few common English words and phrases, Colting copied little or no actual language from novel. Nor did he copy the larger structure of the work. Although Salinger points to a few scenes that share common

settings—the Museum of Natural History, Grand Central Station, and Central Park, for example—both those scenes and the larger work in which they are contained are completely transformed.

Instead of properly examining the whole work, the court primarily relied on the “frequent and extensive use of Caulfield’s character traits,” noting that Mr. C. had “similar or identical thoughts, memories, and personality traits to Caulfield.” Mem. & Order of July 1, 2009, at 25. Given that Colting admitted that Mr. C represents an older version of Holden Caulfield, some similarities between the two characters are not surprising. Where there is no actual copying of an author’s character descriptions, however, “[s]tirring one’s memory of a copyrighted character” is not sufficient to give rise to infringement. *Am. Broad. Cos.*, 720 F.2d at 242. In holding otherwise, the district court impermissibly extended copyright protection not just to the fixed expression set forth in *The Catcher in the Rye*, but to the very *idea* of Holden Caulfield. That result is expressly forbidden by the Copyright Act. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or

discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).²

This idea-expression dichotomy originates from the Constitution’s Copyright Clause, which empowers Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, cl. 8. As codified in 17 U.S.C. §102(b), the dichotomy is the central balance in the copyright system, granting copyright protection to the expression of a work, but not to its underlying idea. *See Am. Broad. Cos.*, 720 F.2d at 240. Providing protection for original works fosters creativity by “assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys.” *Id.* But “if authors are fearful

² Courts should be careful not to conclude that appropriating a character from a well-known novel is a copyright infringement because the defendant has “reaped where he has not sown.” Although this might once have been an appropriate reading of copyright’s purpose, recent Supreme Court precedent makes clear that it is no longer is. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994). It is also impermissible to conclude that there has been a copyright infringement based on concerns that consumers could be confused about the identity of the author or that the value of the original might be “diluted.” Consumer confusion and dilution are claims in trademark or unfair competition law, not copyright. Confusion as to attribution, affiliation or source has never been a concern of copyright, nor has copyright ever been troubled by worries about dilution of the “brand strength” of the original work.

that their creations will too readily be found to be substantially similar to preexisting work,” they will be less likely to create new works. *Id.* Granting too wide a monopoly to the author would thus reduce the number of works produced for the benefit of society and frustrate the constitutional purpose of copyright. The idea-expression dichotomy “enable[s] courts to adjust the tension between these competing effects of copyright protection.” *Id.* By affording protection to character concepts and traits, as opposed to the fixed expression in which the character is embodied, the district court undermined this balance.

The district court’s expansive infringement analysis would also undermine core First Amendment protections. “In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations” in the form of the fair use defense and the idea-expression dichotomy. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). To be sure, the fair use defense keeps copyright clear of violating the First Amendment by immunizing commentary and criticism. But it is an affirmative defense (thus placing the burden on the defendant), and its vagueness and unpredictability inevitably chill protected expression. *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112

Yale L. J. 1, 17 n.75 (2002). Professor Rubinfeld has forcefully made the case that fair use alone is not enough to protect exercises in literary imagination like Colting's:

No court in the United States should need to wrestle through a set of complicated statutory factors (the factors of the fair use defense) before deciding whether to suppress a book like *The Wind Done Gone*. We don't suppress books in this country. Courts have no authority to suppress a book on the ground that its exercise of imagination is harmful and unauthorized. To do so violates the First Amendment—period.

Id. at 54.

Unlike the fair use defense, the idea-expression distinction prevents copyright from extending to the suppression of literary imagination in the first place. Its rule is straightforward: “No author may copyright his ideas.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). As a result, “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Eldred*, 537 U.S. at 219. Copyright thus “assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

That ability to “build freely upon the ideas” in others’ work is essential to First Amendment protection because even the most creative or artistic activity depends on the ability to borrow from what has gone before. *Id.* “Poetry can only be made out of other poems; novels out of other novels.” Northrop Frye, *Anatomy of Criticism* 97 (1957). As Frye put it, we have inherited “a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others; Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible.” *Id.* at 96. In a provocative 2007 essay that has already become a contemporary classic, the novelist Jonathan Lethem went further, suggesting through an array of colorful examples plundered from other sources that appropriation and originality are one and the same. Jonathan Lethem, *The ecstasy of influence: A plagiarism*, Harper’s Mag., Feb. 2007, at 59.³

Perhaps surprisingly, this contemporary understanding of art is not foreign to our tradition of copyright law. As early as 1845, Justice Story, while riding as a Circuit Justice in a copyright infringement case, observed:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new

³ Available at <http://www.harpers.org/archive/2007/02/0081387>.

and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Emerson v. Davies, 3 Story 768, 8 F. Cas. 615, 619 (C.C. Mass. 1845).

Salinger's complaint against *60 Years Later* implicates First Amendment protection for a new and innovative category of artistic borrowing that arises out of developments in postmodern and postcolonial literary theory—a genre known as “literary rewriting.” The works in this genre include novels, poems, plays, and films that “self-consciously repeat and refashion material from our common literary heritage. These works draw, to various degrees, on preexisting plots, characters, scenes, and text.” Jeannie Suk, *Originality*, 115 Harv. L. Rev. 1988, 1989 (2002). Noted examples includes Jean Rhys's *Wide Saragasso Sea*, an acclaimed novel that rewrites *Jane Eyre* from the perspective of Bertha, the mad woman in the attic; Tom Stoppard's *Rosencrantz and Guildenstern are Dead*, a comedic and philosophical play that appropriates two characters from Shakespeare's *Hamlet*; and *Lo's Diary*, a feminist rewriting of Vladimir Nabokov's *Lolita* from the nymphet's point of view.⁴

⁴ Because *Lolita* remains in copyright, the latter book resulted in an infringement suit by the author's son, Dmitri. Probably in light of the unpredictability of fair use, the case was settled on the condition that the

The example mentioned in Professor Rubinfeld’s article, Alice Randall’s *The Wind Done Gone*, presents a slave’s view of the fictional world of Margaret Mitchell’s *Gone with the Wind*. The book is celebrated not only for its subversive critique of the antebellum South, but also for its significance in copyright law. A federal district court initially enjoined its publication, and the Eleventh Circuit reversed the injunction by awkwardly cramming Randall’s work into the category of “parody,” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)—even though the book wasn’t parodic and the target of its criticism was less Mitchell’s work than the nature of American slavery, literary voice, and cultural construction. *See* Suk, 115 Harv. L. Rev. at 1995-2002.

As already noted, the law of this circuit holds that merely “[s]tirring one’s memory” of a character in a copyrighted work is not infringement. *Am. Broad. Cos.*, 720 F.2d at 242. The district court’s error was to confuse Colting’s act of literary rewriting—which involves conjuring the memory of Holden in the reader’s memory to achieve a literary effect—with the lifting of actual expression, as in the case of plagiarism or piracy. Under copyright’s

publisher include a critical preface written by Dmitri. *See* Peter Applebome, *Pact Reached on U.S. Edition of ‘Lolita’ Retelling*, N.Y. Times, June 17, 1999, at E1.

idea-expression distinction, only the expression receives protection, not the shared cultural memory. See Jacqueline Chung, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 Wm. & Mary L. Rev. 903, 924, 939 (2007) (arguing that copyright law should create a legal space for derivative works that appropriate culturally iconic literary characters); Nevins, *Copyright + Character*, 39 J. Copyright Soc’y USA at 304.

Permitting literary rewritings like Colting’s, moreover, does no damage to the goals of copyright law because the rewritings “almost invariably rewrite canonical works, which, by virtue of their canonicity, have almost certainly yielded rewards far greater than necessary to motivate their creation.” Suk, *Originality*, 115 Harv. L. Rev. at 1997-98. As Salinger’s complaint acknowledges, “*Catcher in the Rye* has taken on a specific place in American culture and is the benchmark against which any coming-of-age story is measured.” Cmplt. ¶ 34. Indeed, the critic Louis Menand has specifically identified “‘Catcher in the Rye’ rewrites” as a “literary genre all its own.” Menand, *Holden at Fifty*.

If, as the complaint alleges, Salinger’s is a “crucial American novel,” Cmplt. ¶ 2, then it is crucial too that the law not stand as a barrier to artistic

dialogue with the shared memory of that novel. And in Salinger’s case, there is special reason to allow commentary because his life and work raise questions of “authorial control” and whether there is any “distinction between Salinger and his characters,” Menand, *Holden at Fifty*—precisely the issues explored by Colting. As Mendand observes, the “end product of the ideal Salinger rewrite isn’t a Salinger story. It’s Salinger.” *Id.*

On the other side of the scale, broad protection for literary characters independent of the works in which they appear provides no countervailing benefit that would justify a serious imposition on First Amendment rights. It is implausible that any author would forego writing a work of literature out of fear that, if the work were to become influential, it might become a point of departure for other books. Salinger’s incentive to publish *The Catcher in the Rye* in 1951 would not have been diminished in any way had he known that *60 Years Later* would one day be written. Indeed, Salinger has been amply rewarded for publishing his novel, which has sold more than thirty-five million copies since it was published in 1951. Cmplt. ¶ 33.

CONCLUSION

The Court should reverse the preliminary injunction.

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a fourteen-point proportional typeface, Century Expanded. As calculated by my word processing software (Microsoft Word 2003), the brief contains 4,270 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that on August 3, 2009, I caused the original and ten copies of this brief to be sent by first-class mail to the Clerk of the Court. I also served by email and caused two copies to be sent by first-class mail to the following:

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