IN THE SUPREME COURT OF RHODE ISLAND

Case No. 2004-63-M.P.

STATE OF RHODE ISLAND,

Plaintiff/Respondent,

v.

LEAD INDUSTRIES ASSOCIATION, INC., et al.,

Defendants/Petitioners.

MOTION TO FILE BRIEF OF *AMICI CURIAE*, AND TO FILE OUT OF TIME

The Chamber of Commerce of the United States ("the Chamber") and the American Tort Reform Association ("ATRA") (collectively, "Amici") respectfully move this Court, pursuant to Rule 16(h) of the Rhode Island Supreme Court Rules, for an Order granting leave to file a brief as *amici curiae* in support of Petitioners in the above-captioned case, and to file said brief out of time. The proposed *amicus curiae* brief accompanies this motion.

The Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the several hundred Chamber members that are located in Rhode Island, countless others do business within the state and are directly affected by its litigation climate. ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Amici seek leave to file the accompanying *amicus curiae* brief to address the important issue before this Court:

> May the State's law enforcement power be exercised by lawyers who have a personal financial interest in using the State's police power to seize a defendant's money, because they will personally receive a share of the amount seized?

Amici have closely examined this issue, sponsoring studies of the relationship between contingency fee lawyers and state attorneys general in 2000 and 2004. See John Fund, Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar (U.S. Chamber Inst. for Legal Reform, 2004), available at <http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf>; John Fund & Martin Morse Wooster, The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments (American Tort Reform Found. 2000), available at <http://www.heartland.org/Article.cfm?artId=8162>. Use of contingency fee agreements by the State pose a danger to the business and legal environment in Rhode Island. They encourage lawsuits against entire industries on the basis of profit, not public interest. They are often brought against out-of-state industries or those that are viewed as unpopular by the public, making it difficult for defendants to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval.

The proposed *amicus curiae* brief does not repeat the Petitioners' arguments. Rather, the amicus curiae brief discusses the practical public policy implications of permitting government officials to delegate the State's police powers to private contingency fee lawyers. In doing so, this brief briefly examines the political patronage and exorbitant fees that consistently result from such agreements. The brief maintains that the State's enforcement of its laws should not be motivated by profit, and examines alternatives to the State's contracting with private attorneys on

a contingency fee basis – options that safeguard the government's police power. As the Amici bring a specialized perspective to the possibly far-reaching impact of this Court's decision, they have an important, independent contribution to make to the analysis of the issues presented to this Court.

Amici only recently became aware that the instant appeal had attracted the attention of many attorneys general throughout the country, who were considering filing amicus briefs. In addition, members of the Chamber and ATRA have become increasingly concerned with the use of contingency fee agreements by state attorneys general. This issue continues to rise in importance in Rhode Island and throughout the nation. Escalating concern has led the U.S. Chamber Institute for Legal Reform and the National Chamber Foundation to plan a conference examining the practice of attorneys general delegating their enforcement powers to private attorneys operating under contingency fee agreements on May 26, 2005.

Given this national attention, and the importance to the American business community of the just resolution of the issues presented by this appeal, Amici concluded that it would be helpful to the Court to be made aware of their views. No party will be prejudiced as a result of the Court granting leave to file this brief of *amici curiae* out of time.

Wherefore, this Court should grant the Chamber of Commerce of the United States and the American Tort Reform Association leave to file a brief as *amici curiae*, and to file said brief out of time.

Dated: May 13, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of this motion were sent by United States Mail, first class, postage prepaid, this 13th day of May 2005, to counsel listed on the attached service list.

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IN THE SUPREME COURT OF RHODE ISLAND

Case No. 2004-63-M.P.

STATE OF RHODE ISLAND,

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v.

LEAD INDUSTRIES ASSOCIATION, INC., et al.,

Defendants/Petitioners.

On Writ of Certiorari to the Superior Court, Providence County

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the several hundred Chamber members which are located in Rhode Island, countless others do business within the state and are directly affected by its litigation climate. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

This case is of significant interest to Amici because permitting the state to "contract out" its police powers to private attorneys can lead to prosecution of government lawsuits on the basis of profitability, not public interest. Agreements that provide private attorneys with the right to a percentage of the recovery in an action brought on behalf of the state can warp the development of law, are prone to political patronage and exorbitant fees, and create, at minimum, the appearance of impropriety. The Chamber and ATRA have closely examined this issue, sponsoring studies of the relationship between contingency fee lawyers and state attorneys general in 2000 and 2004. See John Fund, Cash In, Contracts Out: The Relationship Between

State Attorneys General and the Plaintiffs' Bar (U.S. Chamber Inst. for Legal Reform, 2004), available at <http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf>; John Fund & Martin Morse Wooster, The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments (American Tort Reform Found. 2000), available at <http://www.heartland.org/Article.cfm?artId=8162>. Amici have a strong interest in ensuring that this practice not be permitted to continue, lest other members find that their own industries have been targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained by the traditional obligations and constitutional checks on the exercise of that authority. As the Amici bring a specialized perspective to the possibly far-reaching impact of this Court's decision, they have an important, independent contribution to make to the analysis of the issues presented to this Court.

STATEMENT OF ISSUE PRESENTED

The Supreme Court of Rhode Island certified the following question:

> May the State's law enforcement power be exercised by lawyers who have a personal financial interest in using the State's police power to seize a defendant's money, because they will personally receive a share of the amount seized?

STATEMENT OF THE CASE

Amici adopt Defendant's summary of the dispute in question.

INTRODUCTION AND SUMMARY OF ARGUMENT

Delegation of the state's police power to private attorneys can lead to prosecution of government lawsuits on the basis of profitability, not public interest. These government-endorsed, privately-motivated lawsuits have led to attacks on entire lawful industries and ill-conceived attempts to expand tort law under the cloak of state authority. Contingency fee agreements were meant to increase access to courts for individuals without the resources to pay

an hourly attorney fee; they were not meant for state governments. The experience of other states that have engaged in the practice of entering contingency-fee contracts demonstrates that government-hired private attorneys are often political donors, friends, or colleagues of the hiring government official – creating the appearance of impropriety, and sometimes worse. Such practices damage the public's confidence in government. This experience repeatedly and persuasively demonstrates that Rhode Island should not set down this path. Moreover, the Attorney General does not need to hire lawyers on a contingency-fee basis and has other alternatives available – options that safeguard the government's police power.

This case is a paradigm of all that is wrong with government agencies hiring private lawyers on a contingency fee basis. It appears that this lawsuit would never have been brought were it not for the proposal of the private attorneys who hope to profit from any recovery. Its inception occurred when then-Attorney General Sheldon Whitehouse was approached by private contingency fee counsel and asked to authorize a lawsuit on behalf of the state against companies that once manufactured lead pigments for paint used in residential applications. This was a lawful endeavor at the time of manufacture, but one in which the companies have not engaged in decades. The private attorneys further proposed that they would take a share of any recovery obtained on behalf of the state. See Whitehouse Tr. at 150 (App. 1204). The suit was to be based on the unprecedented theory that the mere presence of lead paint in Rhode Island buildings constituted a public nuisance that must be abated by the total removal of the paint. According to press accounts, the intention of these private attorneys in initiating this suit was to "bring the entire lead paint industry to its knees," and by doing so to make a tidy profit for themselves. (App. 1198).

Behind closed doors, then-Attorney General Whitehouse and the private attorneys entered into a contingent-fee agreement. The private attorneys in this case would be entitled to a substantial share of any recovery, 16 2/3%, and therefore are motivated to maximize the potential recovery whether or not the suit is in the public interest. The agreement cedes to these attorneys the right to decide whom the government would sue and on what grounds, and makes it virtually impossible for the attorneys to be fired. After entering the contract, the private attorney who approached the former Attorney General later contributed money to his political campaign. Whitehouse Tr. at 198 (App. 1206).

ARGUMENT

I. STATE USE OF CONTINGENCY FEE LAWYERS LEADS TO PROSECUTION OF LAWSUITS BASED ON PROFIT, NOT PUBLIC INTEREST

A. The Purpose of Contingency Fees is to Provide Access to Justice to Individuals Who Cannot Otherwise Afford to Bring a Lawsuit, Not the Government

Contingency fees, once viewed as illegal in the United States,[1] gained grudging acceptance in the late nineteenth century. See, e.g., 33 A.B.A. Rep. 80, at 579 (Canon 13 of the Canons of Ethics) (approving of contingency fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges"). Contingency fees have a worthy purpose: providing access to the legal system, regardless of means. See Lester Brickman, Contingency Fees Without Contingencies: Hamlet without the Prince of Denmark, 37 UCLA L. Rev. 29, 43-44 (1989). Contingency fees can allow an individual to assert an otherwise unaffordable claim. As one commentator observed of the

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[1] See, e.g., Butler v. Legro, 62 N.H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

American system, "contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel." Alfred D. Youngwood, The Contingency Fee – A Reasonable Alternative?, 28 Mod. L. Rev. 330, 334 (1965).

When contingency fees do not further access to the courts for those with limited means or create incentives that violate public policy, they should be viewed with skepticism and scrutiny.[2] The traditional justifications for contingency fees do not apply to the State of Rhode Island as the "client" in this case. As former Alabama Attorney General Bill Pryor, a critic of the government hiring of contingency fee lawyers, has observed:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

Bill Pryor, Curbing the Abuses of Government Lawsuits Against Industries, Speech Before the American Legislative Exchange Council, Aug. 11, 1999, at 8.

Of course, the state of Rhode Island could pay for such a suit without engaging private attorneys on a contingent fee basis: the state takes in several billion dollars of revenue each year,

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[2] Despite the widespread acceptance of contingency fee agreements today, there remain lingering prohibitions based on sound public policy. For example, contingency fees remain prohibited in criminal defense cases. See Brickman, supra, at 40-41. The bar in criminal cases is due to the creation of mis-incentives that threaten to corrupt justice. For instance, if a lawyer's recovery is based on his or her client's acquittal, the incentive is to win at any cost, possibly by suborning perjury. See id. Likewise, contingency fee agreements create improper incentives when they encourage use of the state's police power to obtain the highest monetary award at any broader cost to society.

and has the power to raise even more money were this to prove insufficient. But the Attorney General did not use the resources of his office or request an additional appropriation from the people of the state of Rhode Island, through their duly-elected legislators. Instead, by entering into a contingent-fee arrangement that required no immediate out-of-pocket expenditure, the Attorney General was able to circumvent the legislative appropriations process. See, e.g., City and County of San Francisco v. Philip Morris, 957 F. Supp. 1130, at 1136, n.3 (N.D. Cal. 1997) (finding unconvincing "plaintiff's argument that, as a matter of public policy, a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources with the wealthy [corporate] defendants"). This is not the type of "access to justice" that contingency fees were meant to promote.

B. Delegation of the Government's Police Power to Profit-Motivated Attorneys Facilitates "Regulation Through Litigation"

Contracting out of the state's police power to private contingency fee attorneys facilitates what has been called "regulation through litigation." See Robert B. Reich, Regulation is out, Litigation is in, USA Today, Feb. 11, 1999, at A15; Fund & Wooster, supra. The strategy of the private contingency fee attorneys to select an industry and go after it through tort litigation – as opposed to through legislation – may result in an end-run around representative government. Victor E. Schwartz et al., Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation, 27 Wm. Mitchell L. Rev. 237, 258-59 (2000). For example, the private attorney/state attorney general alliance in the tobacco litigation "legislated" by achieving enormous settlements – and did so with private personal injury lawyers working hand in hand with state attorneys general. If the process of hiring personal injury lawyers is left unchecked, results may not be in the public interest. This alliance will no doubt continue, because these "new style" cases give the state executive branch a new revenue source without

having to raise taxes. See id. at 259. These lawsuits also give executives the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. See id.

In this case, the state AG is seeking to "legislate" behavior contrary to the Legislature's stated public policy decision on lead-based paint in residential properties. In 1991, the State of Rhode Island adopted the Lead Poisoning Prevention Act, which is designed to keep properties "lead safe" by requiring property owners to maintain painted surfaces so that old lead-based paint remains covered and intact. Under Rhode Island law, lead-based paint that is covered by intact non-lead paint is not considered a hazard and need not be removed. See Rules & Regulations for Lead Poisoning Prevention, R23-24.6-PB, §§ 6.1, 11.1, 12.1 (Nov. 2001). Intact lead-based paint has not been deemed by the State of Rhode Island or the Environmental Protection Agency to be a hazardous material.[3]

Rhode Island has considered and rejected the approach promoted by the state attorney general: the complete removal of all existing layers of lead-based paint, even if located under layers of intact non-lead paint. This alternative was rejected because it would be enormously expensive, would provide no greater public health benefits on balance than the "lead safe" approach that was actually adopted, and would create additional hazards resulting from the dust and debris generated by the lead paint removal efforts. See Explaining Childhood Lead

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[3] Indeed, the United States Environmental Protection Agency recognizes that "not all lead-based paint is a hazard," only that paint which is damaged or deteriorated such that it "would result in adverse health effects." 66 Fed. Reg. 1206, 1213 & 1229. Even the national Alliance to End Childhood Lead Poisoning has stated that "properties that are well maintained with lead-based paints intact rarely poison a child." AECLP, Action Plan to Make High-Risk Housing Lead Safe 1 (2000).

Poisoning in Rhode Island FY 1995 Applications Project Year Five, submitted by RIDOH Division of Family Health, Apr. 22, 1994.[4]

When attorneys general and state agencies work with private attorneys – individuals with interests different from the State – the overall benefit to the public becomes suspect at best. As Robert B. Reich, Secretary of Labor in the Clinton Administration, has sagely observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, Don't Democrats Believe in Democracy?, Wall St. J., Jan. 12, 2000, at A22.

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[4] The lead paint removal regime that this lawsuit seeks to impose upon the people of Rhode Island is not only potentially counter-productive from a public health standpoint, but could also have a devastating economic impact on the state. If Rhode Island courts accept the position set forth in the complaint, the mere presence of lead-based paint on any structure in the state would constitute a public nuisance. Any owner of such property could be held liable for the enormous cost of removing all layers of lead-based paint hidden beneath intact layers of non-lead paint, as well as potential fines, criminal sanctions, and forfeiture of the property to the State. see also City of Manchester v. National Gypsum Co., 637 F. Supp. 646 (D. R.I. 1986) (the costs of abating a nuisance can be imposed upon any individual "in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise"). Thus, if the instant suit were successful, the value of buildings built prior to 1978 in Rhode Island could plummet, as few potential buyers would be eager to assume the risk of purchasing a property that might constitute a "public nuisance," and thereby risk being saddled with the costs of "abating" the "nuisance" through the removal of all old lead-based paint that may exist under intact layers of non-lead paint. Mortgage lenders, deemed to hold legal title to the property until the borrower has completed the repayment of the mortgage, see In re D'Ellena, 640 A.2d 530, 533 (R.I. 1994), might also be held directly liable for removing the paint from those properties. For this reason, banks may cease writing loans secured by properties built before 1978, and Rhode Island's real estate market and finance industry could be brought to a grinding halt.

II. STATE USE OF CONTINGENCY FEE LAWYERS OFTEN LEADS TO CONFLICTS OF INTEREST, EXORBITANT FEES, AND A "REVOLVING DOOR," AND REDUCES THE PUBLIC'S FAITH IN GOVERNMENT

In determining the constitutionality of the state's contracting out of its police powers to private attorneys on a contingency fee basis, this Court should consider the practical implications of such an approach. In case after case, experience in other states in entering such behind-closed-door contracts, and the resulting exorbitant legal fees, has more than just raised eyebrows. It has created the appearance of impropriety, and, in one case, led to a criminal conviction. As the multi-state tobacco litigation demonstrated, state hiring of contingency fee lawyers provides equal opportunity for political patronage – both Democratic and Republican Attorney Generals awarded lucrative contracts to their friends, colleagues, and supporters. State contracting with private attorneys on a contingency fee basis has damaged the public's faith in government. Rhode Island should avoid this unholy alliance between contingency fee lawyers and the Office of the Attorney General.

A. Political Patronage and the Hiring of Friends and Colleagues

When state attorneys general or other government agencies hire contingency fee counsel, they often do so without the open and competitive process used with other contracts to assure the state receives the best value as when awarding other state contracts. Even where state attorneys general have issued some type of request for proposals, there are often no selection standards. Thus, state attorneys general have routinely hired and awarded potentially lucrative contracts to friends and political supporters. This creates a system whereby the state may not receive the most qualified counsel, taxpayers may not have received the best value, and private attorneys benefit at the expense of the public. There are many such examples.

For instance, in 1996, then-Attorney General Carla Stovall of Kansas hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco lawsuit. See Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 14, 2000, at 16 (testimony of Carla Stovall, Attorney General of Kansas), at <http://www.kslegislature.org/committeeminutes/ 2000/house/HsTax2-14-00b.pdf>. Attorney General Stovall testified that she asked her former law firm to take the case "as a favor" in part due to their "personal loyalty." Id. at 17. In addition to accepting the case that resulted in a "jackpot" fee award, Entz & Chanay performed other "favors" for General Stovall during her campaign. First, Entz & Chanay's basement housed Ms. Stovall's Attorney General campaign. Id. at 16. In addition, Entz & Chanay also contributed money to her campaign effort. See John L. Peterson, Payment for Law Firm Draws Fire; Hearing Continues In Case Involving Tobacco Litigation, Kansas City Star, Feb. 17, 2000, at B3. Attorney General Stovall selected her former firm at the expense of another Kansas firm, Hutton & Hutton, which specializes in large product liability cases, and had experience in tobacco litigation. See Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 17, 2000, at 27-88 (testimony of Andrew W. Hutton & Mark B. Hutton, Hutton & Hutton), at <http://www.kslegislature.org/ committeeminutes/2000/house/HsTax2-17-00b.pdf>.

Then-Texas Attorney General Dan Morales also hired contingency fee lawyers to file his state's tobacco litigation in 1996. Four of the five hired firms together had contributed nearly $150,000 in campaign contributions to Morales from 1990 to 1995. See Robert A. Levy, The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza, Legal Times, Feb. 1, 1999, at 27. After hiring the firms, Morales reportedly asked them to make an additional political

contribution of $250,000. See Miriam Rozen & Brenda Sapino Jeffreys, Why Did Dan Morales Exchange Good Judgment for the Good Life?, Tex. Law., Oct. 27, 2003, at 1.

Connecticut Attorney General Richard Blumenthal requested letters from individual firms or consortia of firms to represent the state in the tobacco litigation.[5] The Attorney General selected four of sixteen firms that expressed interest. As reported in the local media, the three Connecticut-based firms included:

(1) General Blumenthal's own former law firm, Silver, Golub & Teitell in Stamford, where he served for six years prior to becoming Attorney General. Partner David S. Golub is a long-time friend and law school classmate of the Attorney General;

(2) Emmet & Glander in Stamford, whose name partner, Kathryn Emmet, is married to partner David Golub of Silver, Golub & Teitell; and

(3) Carmody & Torrance of Waterbury, whose managing partner, James K. Robertson, served as personal counsel and counselor to Governor John Rowland.

See Thomas Scheffey, Winning the $65 Million Gamble, Conn. L. Trib., Dec. 6, 1999, at 1. Other firms that wanted to be considered for the litigation publicly stated they did not have a fair chance at the contract. For example, Robert Reardon of New London, a former president of the Connecticut Trial Lawyers Association, reportedly could not even get in the door for a meeting. See id.

South Carolina Attorney General Charles Condon came under fire for cronyism after he handpicked seven law firms to represent the state in the tobacco litigation. See Assoc. Press, Lawyer Fees Weren't S.C.'s, Official Says, Charlotte Observer, May 2, 2000, at 1Y. Six of the

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[5] *See* Connecticut Gen. Assem., Office of Legal Research, Research Report, Attorney General Hiring Practices and the Tobacco Settlement, No. 2000-R-0879, Sept. 15, 2000, available at <http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0879.htm>.

seven firms included the attorney general's friends or political supporters. See id.[6] Attorney General Condon's practice of hiring contingency fee attorneys was not limited to the tobacco suit. He faced heavy criticism after two attorneys with close ties to his party received lucrative fees based on a contingency fee contract by which the lawyers pursued an environmental case on behalf of the state. See John Monk, Lawyers May Get $1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake of Reedy River Oil Spill in 1996, The State (Columbia, S.C.), Nov. 17, 2000, at A1.

Missouri Attorney General Jay Nixon selected five law firms that had made over $500,000 in political contributions over the preceding eight years, most to him and his party, to handle the state's participation in the multi-state litigation against tobacco companies. Editorial, All Aboard the Gravy Train, St. Louis Post-Dispatch, Sept. 17, 2000, at B2. Those firms eventually received $111 million in fees, an amount decried as "out of proportion to the work performed and the risk involved," given that Missouri was the 27th state to join the litigation, coming in only after the hard work had been done by other states and settlement was inevitable. Id. Nixon refused to provide state officials with the criteria used to select the firms and claimed it was "privileged information." See Fund, supra, at 8. And when Nixon ran unsuccessfully for the United States Senate in 1998, numerous attorneys in those firms made $1,000 contributions to his campaign, the maximum individual donation permitted by law. See id. at 7.

Likewise, the two firms selected by then Pennsylvania Attorney General Mike Fisher to handle the tobacco lawsuits also happened to be among his largest campaign donors, placing in

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[6] Condon, accused of cronyism in his hiring of the firms, later proposed legislative oversight and competitive bidding for the government's hiring of private attorneys. See John P. McDermott, Ness Motley Tobacco Suit Fee $82.5M, Charleston Post & Courier, June 30, 2000, *at* <http://archives.postandcourier.com/archive/arch00/0600/ arc0630261513.shtml>.

the top ten on a list of more than two hundred contributors. See Glen Justice, In Tobacco Suit, Grumblings Over Lawyer Fees, Philadelphia Inquirer, Oct. 4, 1999, at A1. Both firms also gave to General Fisher's inaugural committee. See id. When asked how he selected the two firms, General Fisher said "there was a familiarity factor" and "that was how the decision was made." Id. (quoting Attorney General Fisher).

In 1994, Louisiana Attorney General Richard Ieyoub proposed to hire fourteen law firms – including many past contributors to his campaigns – to pursue environmental claims on behalf of his office. Editorial, Ieyoub's Expedition, New Orleans Times Picayune, Nov. 28, 1994 at B6. The private firms, which did not specialize in environmental law, were to receive 25% of the amounts recovered. Id.; Judge Stops Louisiana's Environmental Bounty Hunt, Gas Daily, Dec. 19, 1994. When the propriety of these contracts was challenged in court, the Louisiana Supreme Court invalidated the contingency fee agreements. See Meredith v. Ieyoub, 700 So. 2d 478 (La. 1997). Nevertheless, Ieyoub received more than $84,500 for his successful 1991 and 1995 attorney general races and his failed 1996 bid for the U.S. Senate from twelve of the seventeen law firms he hired to pursue the state's tobacco case. See Manuel Roig-Franzia, Attorneys Hired for Suit Gave to Ieyoub Campaigns, New Orleans Times Picayune, Nov. 21, 1998, at A8.

B. A Well-Documented History of Exorbitant Fees at the Public's Expense

Delegation of state authority to profit-motivated attorneys has predictably resulted in exorbitant fee awards at the public's expense. Contingency fee agreements have siphoned recovery that would otherwise go to the state treasury that could be used to support public programs or reduce taxes. Instead, such agreements have transferred millions of dollars to

private lawyers with little relation to the number of hours actually spent working on the state's behalf.

For example, Kansas Attorney General Stovall's former firm, Entz & Chanay, reportedly received $27 million in legal fees for its "favor" of serving as local counsel in the State's tobacco lawsuit See John L. Peterson, Attorneys for Kansas Collect $55 Million In Tobacco Case, Stovall's Ex-Firm Expects $27 Million, Kansas City Star, Feb. 1, 2000, at B1. Because Entz & Chanay was not required to keep detailed billing records, the arbitration panel that set the firm's fees estimated that 10,000 hours of work was performed. See Jim McLean, A.G.'s Firm to Share $54 Million Fee Award, Topeka Cap. J., Feb. 1, 2000, at 1. Others have argued that the firm did much less work on the case. See, e.g., Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 17, 2000, at 10-12 (testimony of Jerry Levy, of Jerry K. Levy Law Offices); id. at 44-45 (Testimony of Andrew W. Hutton), at <http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-17-00b.pdf>. Regardless, accepting the arbitration panel's estimate, Entz & Chanay was paid the equivalent of $2,700 per hour for simply acting as local counsel in the State's case.

The tobacco settlement awarded the lawyers hired by then-Texas Attorney General Dan Morales fifteen percent of the State's $15.3 billion recovery – about $2.3 billion, which ultimately was increased by an arbitration panel adjudicating the fee dispute to $3.3 billion. See Bruce Hight, Lawyers Give up Tobacco Fight, Austin American-Statesman, Nov. 20, 1999, at A1. That amounted to $105,022 per hour, assuming the lawyers worked eight hours per day, seven days per week, for eighteen months. See Sheila R. Cherry, Litigation Lotto, Insight on the News, Apr. 3, 2000, available at <http://www.insightmag.com/news/2000/04/03/CoverStory/Litigation.Lotto-208397.shtml>. The eight-year Attorney General and former state

representative and prosecutor was ultimately sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a long-time friend who did little work on the case. See John Moritz, Morales Gets 4 Years in Prison, Ft. Worth Star Telegram, Nov. 1, 2003, at 1A.

In Maryland, Attorney General J. Joseph Curran, Jr. entered into a contingency fee agreement with personal injury attorney (and Baltimore Orioles owner) Peter Angelos. Angelos demanded the full 25 percent share of the state's $4.4 billion of the national settlement, as provided in his 1996 contract, and refused to submit his claim to arbitration. See David Nitkin & Scott Shane, Angelos to Get $150 Million for Tobacco Lawsuit, Baltimore Sun, Mar. 23, 2002, at 1A. This would have entitled Angelos to more than $1 billion, the equivalent of $30,000 per hour. See Scott Shane, Angelos Says Panel Can't be Impartial, Baltimore Sun, Nov. 30, 2001, at 1B. After a three-year legal battle, Angelos settled with the state for $150 million. See David Nitkin & Scott Shane, supra.

In Pennsylvania, the twenty-fourth state to join the tobacco litigation, the two private firms handpicked by Pennsylvania Attorney General Mike Fisher in that case split $50 million in fees, the equivalent of about $1,323 per hour. See Justice, supra. "It's hard to see $50 million worth of value there," said Yale Law School Professor Peter Schuck. "I don't know what they did to advance the ball. Most of the work was done." Id.

The list goes on. The seventeen firms hired by Louisiana Attorney General Ieyoub divvied up $575,000, the equivalent of about $6,700 per hour, for their services. See Pamela Coyle, Tobacco Lawyers Reveal How They'll Divvy Up Fee, New Orleans Times Picayune, May 12, 2000, at A1. The three firms hired in Connecticut, each having a close personal, political, familial, or financial relationship to Attorney General Blumenthal or the Governor,

divided $65 million in legal fees. "I know how it [looks]," conceded the lead attorney, David Golob. See Thomas Scheffey, Winning the $65 Million Gamble, Conn. L. Trib., Dec. 6, 1999, at 1.

Finally, the deals between state attorneys general and private personal injury lawyers have spawned bitter fee disputes. These disputes have occurred in Florida, Kansas, Massachusetts, Maryland, Texas, and other states. See, e.g., Alex Beam, Greed on Trial, Atlantic Monthly, June 1, 2004, at 96, Scott Shane, Judge to Rule on Dispute Over Legal Fees, Baltimore Sun, Dec. 10, 1999, at 2B; Levy, Tobacco Robbery, supra; Hight, supra. In Massachusetts, for example, the firms representing the state challenged the $7,700 an hour awarded by the arbitration panel in fees, arguing they were entitled to the full 25 percent provided in the contingency fee contract – $1.3 billion more. See Beam, supra. These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, and engage in unnecessary litigation.

Such fee awards can hurt the state and its citizens. For example, South Carolina Attorney General Charlie Condon was criticized by environmental groups after a contingency fee contract he entered resulted in a $1.48 million fee to two private lawyers. See Monk, supra. The suit, a result of a 1996 oil spill, was initially handled by the South Carolina Department of Natural Resources, which usually handles suits against polluters, but then handed over to the private lawyers. See id. The contingency fee lawyers did not file the lawsuit, make any motions or engage in pretrial discovery. See id. The company quickly settled for $6.5 million, with the amount of the settlement placed in a trust fund while the private attorneys haggled with the state about their cut of the recovery. See id. Even accepting the attorneys' unsubstantiated claim that they worked 1,500 hours on the suit, the $1.48 million fee would result in the equivalent of

nearly $1,000 per hour in a case in which there appeared to be little contingency. Dell Isham, the Executive Director of the South Carolina Sierra Club, said that the state should have used government lawyers. See id. "This fee is offensive because it goes outside the system to benefit individuals, and it harms the environment by taking money away from it." Id. (quoting Mr. Isham). Common Cause blamed the Attorney General for "giving away the house." Id. (quoting John Crangle, Director of Common Cause in South Carolina).

C. The Revolving Door Between Government Agencies and Private Law Firms

When states award lucrative contingency fees to outside lawyers, talented government attorneys can be left feeling they received the raw end of the deal. For example, in Washington State, the State's antitrust chief, Jon Ferguson, announced that he was leaving his post to join the private Seattle law firm of Chandler, Franklin & O'Bryan to work on a class action lawsuit against the tobacco industry. The announcement came after Ferguson and the Chandler firm's Steve Berman led Washington State's lucrative lawsuit against the tobacco companies. When asked why he was leaving his post to go work for the firm that handled the State's case, Mr. Ferguson succinctly explained: "Steve Berman got $50 million and I got a plaque." For the Record, Wash. Post., Feb. 14, 2000, at F35.

III. BETTER CHOICES FOR STATE ATTORNEYS GENERAL EXIST THAN USING CONTINGENCY FEE LAWYERS

Restricting the ability of the Attorney General to hire private counsel on a contingency fee basis when matters involve the police power of the state will not impede his or her ability to represent the state and protect the public interest. The Attorney General can make better choices when pursuing litigation on behalf of the State.

A. Actions Involving the State's Police Power Should be Pursued by State Attorneys

When an action involves use of the state's police power, the Attorney General must use the resources of his or her own office to pursue the litigation. The government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery, in a particular case; rather, "the Government wins its point when justice is done in its courts." Brady v. Maryland, 373 U.S. 83, 88 n.2 (1963). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign to promote justice for all citizens. Berger v. United States, 295 U.S. 78, 88 (1935); see also State v. Powers, 526 A.2d 489, 494 (R.I. 1987) ("the primary duty of a prosecutor is to achieve justice, not to convict").[7]

Assistant Attorneys General, under the direction of the Attorney General, are best suited to carry out the State's responsibility, particularly when an action involves assertion of the state's police powers. The Attorney General and Assistant Attorneys General take an oath to "faithfully and impartially discharge the duties of the office of the Attorney General" and to "support the Constitution and laws of this state, and the Constitution of the United States, so help me God." R.I. Gen. Laws §§ 36-1-2, 42-9-9. They are paid in full through the annual appropriation adopted by the general assembly to ensure that their loyalty is to the people of the State. R.I.

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[7] It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.). Thus, it has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in civil proceeding "government lawyers have 'the responsibility to seek justice, and 'should refrain from instituting or continuing litigation that is obviously unfair.'" (citation omitted).

Gen. Laws §§ 42-9-1, 42-9-10; see also State of Rhode Island, Dep't of the Atty. Gen., Mission, at <http://www.riag.state.ri.us/mission.php> (recognizing that each employee of the Office of the Attorney General is charged with (1) upholding the Constitution and laws of the United States and of Rhode Island; (2) treating all persons with dignity, respect and fairness; (3) serving the people of this State with excellence and integrity; and (4) protecting the public interest and safety).

Furthermore, Rhode Island law requires that the Attorney General and his or her employees may not "use their position for private gain or advantage." R.I. Gen. Laws § 36-14-1. They are forbidden to "have any interest, financial or otherwise, direct or indirect . . . which is in substantial conflict with the proper discharge of his or her duties or employment in the public interest." R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists when the Attorney General "has reason to believe or expect that he or she . . . will derive a direct monetary gain . . . by reason of his or her official activity." R.I. Gen. Laws § 36-14-7(a). Private attorneys are not bound by these principles of ethics in government, and the very nature of a contingency fee is directly contrary to the conflict-of-interest prohibitions applicable to Attorney General actions under Rhode Island law.

B. Outside Counsel Should be Available Only in a Supportive Role, On an *Hourly* Basis With Well-Defined Responsibilities and Close State Supervision

There may be some tasks that are either routine or require special expertise for which the use of outside counsel on an *hourly* basis by the Attorney General may be appropriate. For example, under Kansas Attorney General Phill Kline most legal work is undertaken by attorneys on his staff, but outside counsel are hired to assist state attorneys when expertise in certain areas is needed, such as in water rights disputes between states and to defend the state in a school

finance suit. See Jim Sullinger, Kansas Paid $2 Million for Legal Aid; Unusual Report Fulfills a Promise by Attorney General, Kansas City Star, Dec. 29, 2004, at B1.

When undertaking litigation requiring extensive resources, the Attorney General may feel the need to hire private attorneys to supplement the resources of his or her office. In such cases, the fee should be *hourly*, the contracting process open and competitive, the lines of authority clear, and the responsibilities of the private attorneys well-defined in the contract. The private attorneys should work under the close supervision of the Attorney General. Such a procedure maintains the power of the government within the Office of the Attorney General, removes the incentive to make policy based on profitability, and reduces the potential for political patronage. Delaware Attorney General Jane Brady agrees. After taking office, she eliminated the "cozy relationships" with outside lawyers and implemented a bidding process. Manhattan Inst., Center for Legal Pol'y, Regulation Through Litigation: The New Wave of Government-Sponsored Litigation, Conference Proceedings, at 38 (Wash., D.C., June 22, 1999) (transcript of remarks). "The contracts are definite, for either a durational or transactional term, and we negotiate hourly rates, number of hours, and other terms of the relationship. Our new approach is inconsistent with contingency fee arrangements." Id.

C. Attorney Generals Have Better Options Than Hiring Contingency Fee Lawyers

Experience has proven that state attorneys general do, indeed, have a choice as to whether to contract with lawyers on a contingency fee basis, even when taking on the largest of adversaries. For example, New York Attorney General Eliot Spitzer is considered to be one of the most aggressive and activist state attorney generals. See, e.g., Sara Fritz, Another N.Y. Official Making National Name for Himself, St. Petersburg Times, Nov. 29, 2002, at A1 (reporting on Spitzer's aggressive approach); see also Jeff Shields, Taking Law into Their Own

Hands, Philadelphia Inquirer, Oct. 4, 2004, at <http://www.philly.com/mld/philly/9828724.htm> (same). Yet, General Spitzer does not enter into contingency fee agreements with private lawyers as a matter of principle and practice. See, e.g., Regulation Through Litigation, supra, at 7 ("I would never enter into an agreement with the plaintiffs' bar on a contingency fee basis to give away billions of dollars."), 23 ("I never would have entered into [the tobacco contingency fee] agreements and I criticized my predecessor for the terms, bidding process, and determination method his office used for choosing attorneys.").

In the multi-state tobacco suits, it is notable that the attorneys general of some states, such as Virginia, opted not to hire contingency fee attorneys and instead pursued the litigation with available resources. See Editorial, Angel of the O's?, Richmond Times Dispatch, June 20, 2001, at A8 (comparing the additional benefits gained by Virginia citizens whose Attorney General did not hire outside counsel the money lost by its neighbor, Maryland, to legal fees). Other attorneys general who were not motivated by contingency fee attorneys, such as Delaware Attorney General Jane Brady, decided that joining the tobacco suits did not have the support of her constituents, despite the potential for a financial windfall. See Regulation Through Litigation, supra, at 38.

IV. THE GROWING USE OF CONTINGENCY FEE LAWYERS BY STATE ATTORNEYS GENERAL IS CONTRARY TO PUBLIC POLICY

A. Origin of Practice - and Its Explosion

The examples of political patronage and outrageous fees in the state Medicaid recoupment lawsuits against tobacco companies show that the partnership between governments and private personal injury lawyers was unprecedented, powerful – and lucrative. Ultimately, the litigation resulted in an historic global settlement which included $246 billion in damages, with at least $13.6 billion awarded so far to the private attorneys – most of whom worked on a

contingent fee basis. See Susan Beck, The Lobbying Blitz Over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement and the Arbitrators Went Along, Legal Times, Jan. 6, 2003, at 1; see also Manhattan Inst., Center for Legal Pol'y, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003 6 (2003) (estimating that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion total over the next 25 years from the 1998 tobacco settlement).

B. The Future, If Left Unchecked

Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, and that no lawsuits would be brought against other industries, states and localities have hired contingency fee lawyers to attack a wide range of manufacturers and service providers.

Part of the 1998 tobacco settlement included a payment of $50 million into an enforcement fund to be used by the National Association of Attorneys General. See Samuel Goldreich, Small Farmers Stand Against Big Tobacco's Settlement; $246 Billion Deal Burns Independent Growers, Wash. Times, Apr. 26, 1999, at D11. While this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June 1999, fifty state attorneys general held a strategy session to discuss future targets. See Mark Curriden, Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive, Dallas Morning News, July 10, 1999, at 1A. Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries. See Michael Y. Park, Lawyers See Fat Payoffs in Junk Food Lawsuits, Fox News Channel, Jan. 23,

2002; see also John J. Zefutie, Jr., Comment, From Butts to Big Macs--Can the Big Tobacco Litigation And Nation-Wide Settlement With States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?, 34 Seton Hall L. Rev. 1383, 1411-13 (2004) (finding that the involvement of state attorneys general could help overcome similar obstacles in lawsuits against fast food companies, as it did in suits against the tobacco industry).

Soon after the tobacco settlement, local governments hired private attorneys to sue handgun manufacturers in a large number of cities.[8] Professor David Kairys of the Beasley School of Law at Temple University was one of the facilitators of these lawsuits. See David Kairys, The Origin and Development of the Governmental Handgun Cases, 32 Conn. L. Rev. 1163, 1163-64 (2000). While Professor Kairys recognized that the tobacco suits initially "were not treated as overly serious," had "legal problems," and "never did win in court," they were a "vehicle for settlement" and, therefore, a model for the handgun suits. Id. at 1172; see also Jeff Reh, Social Issue Litigation and the Route Around Democracy, 37 Harv. J. on Legis. 515 (2000) (arguing cities' lawsuits against gun manufacturers are an undemocratic substitute for legislation). This was only the tip of the iceberg. The list of targeted industries has quickly expanded.

In Connecticut, Attorney General Blumenthal has solicited private attorneys for their services in pursuing litigation against any company connected with the manufacture, distribution,

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[8] Most of these early cases were unsuccessful. See, e.g., City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004); Spitzer v. Sturm, 309 A.D.2d 91 (N.Y. App. Div. 2003); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3rd Cir. 2002); Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3rd Cir. 2001) (applying New Jersey law); Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001); Penelas v. Arms Tech., Inc., 778 So. 2d 1042 (Fla. App. Ct. 2001).

or sale of gasoline with Methyl tertiary butyl ether ("MTBE").[9] The Attorney General also has hired private attorneys to sue pharmaceutical companies over prescription drug pricing practices.[10] And, the Attorney General is involved in litigation against power companies to try to force reductions in carbon dioxide emissions that allegedly contribute to global warming. See Michael I. Krauss & S. Fred Singer, Pseudo-Tort Alert!, WALL ST. J., Aug. 3, 2004, at A10.

Contingency fee agreements by the state pose a danger to the business and legal environment in Rhode Island. They encourage lawsuits against "deep pocket" industries on the grounds of profit, not public interest. The lawsuits are often brought against out-of-state industries or those that are viewed as unpopular by the public, making it difficult for defendants to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval. As Michael Greve of the American Enterprise Institute has asked, "Do you want your state attorney general to be an ambulance chaser?" Shields, supra. Should this Court accept use of contingency fee agreements by the State, the political patronage and unwarranted payouts seen in other states can be expected in Rhode

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[9] See State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Compensatory and Punitive Damages and Injunctive Relief Against Manufacturers, Designers, Refiners, Distributors, and Sellers of Methyl Tertiary Butyl Ether ("MTBE") for Pollution and Contamination of the Waters of the State of Connecticut, RFP No. 04-01 (MTBE), Feb. 25, 2004.

[10] See State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Claims for Restitution and Other Relief Authorized by Law With Respect to Unfair and Deceptive Sales and Marketing Practices by Pharmaceutical Companies With Respect to the Sale, Marketing and Reporting of the Average Wholesale Price of Their Drugs and Which Conduct Has Caused harm to the State of Connecticut and to Consumers, RFP No. 04-02, Dec. 20, 2004; William Hathaway, State Sues Drug Companies, Claiming Price Gouging, Hartford Courant, Mar. 14, 2003, at B7.

Island, and exercise of the State's police power based on profit, not public interest, will result. Tort law scholar Victor E. Schwartz has recognized,

> If no rational brakes are applied to the attorney general-personal injury attorney alliance, public health and safety questions may no longer be debated and settled by elected officials beholden to the will of the people. Instead, personal injury lawyers, motivated by profit, joined by selective attorneys general and judges who want to make, not interpret, the law, will fill that role.

Victor E. Schwartz, Trial Lawyers Unleashed, Wash. Post, May 10, 2000, at A29.

CONCLUSION

For the reasons stated herein and in the Brief of the Respondent, Amici respectfully request that the orders of the court below should be REVERSED, and that the contingent-fee agreement between the Attorney General and the private lawyers should be declared unlawful and void.

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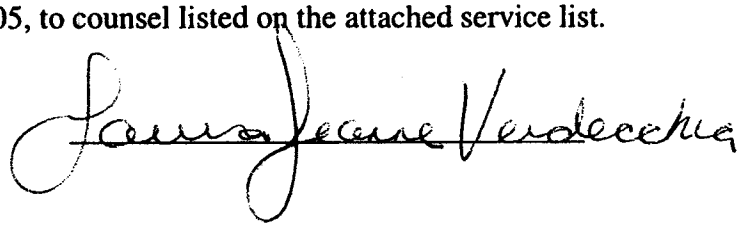
CERTIFICATE OF SERVICE

The undersigned certifies that copies of this brief were sent by United States Mail, first class, postage prepaid, this 13th day of May 2005, to counsel listed on the attached service list.



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