Supreme Court No. 95420-8 (consolidated with 95436-4)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE,
Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, *et al.*,
Respondents.

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION AS *AMICUS CURIAE*

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The Washington State Department of Financial Institutions (the "Department"), which is also submitting an *amicus curiae* brief in this case, is a NASAA member.

NASAA's U.S. member organizations are responsible for administering state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55-251 (5th ed. 2014). NASAA supports the work of its members and the investing public by promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions, and commenting on legislative and rulemaking proposals. NASAA also offers its legal analysis and policy perspective to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws. One of NASAA's goals is to foster greater uniformity across state and federal securities laws, though the overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA and its U.S. members – especially the Department – have an interest in this case because this case directly affects investors' private rights of action under Washington securities law and because this Court's decision in this matter could impact our members' ability to pursue their own enforcement actions under the securities laws they administer.

STATEMENT OF THE CASE

The consolidated cases before this Court present the question of whether reliance is a required element in a civil claim brought by a private litigant under the Washington State Securities Act, RCW 21.20.005 *et seq*. (the "WSSA").

ARGUMENT

The WSSA is patterned off a model state securities statute, the Uniform Securities Act of 1956 (the "1956 USA"). Go2net v. Freeyellow.com, 143 P.3d 590, 595 (Wash. 2006). The 1956 USA was written in the 1950s by a committee of the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") and the American Bar Association to cohere common principles of state securities law into a comprehensive model act. Harvard law professor Louis Loss was the 1956 USA's principle draftsman. *See* Louis Loss, COMMENTARY ON THE UNIFORM SECURITIES ACT, Prefatory Note (1976). The 1956 USA has been

amended slightly since it was first penned,[1] though changes over time in the federal securities laws inspired the NCCUSL eventually to commission two updated model acts, the Revised Uniform Securities Act of 1985 (the "1985 RUSA")[2] and, later, the Uniform Securities Act of 2002 (the "2002 USA").[3] Today, by NASAA's count, 44 of our 53 U.S. member jurisdictions pattern their securities statutes off the 1956 USA, the 1985 RUSA or the 2002 USA.[4] While there are stylistic differences between these three models, they were always intended to be harmonious with one another and to comport with the federal securities laws. *See* 1956 USA § 415; 1985 RUSA § 803; 2002 USA § 608. Among their many common themes is that reliance

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[1] The 1956 USA as adopted by NCCUSL is available on Westlaw through the *Uniform Laws Annotated* portion of that site. NASAA has also recommended minor revisions to the text of 1956 USA since its adoption, though. A copy of the 1956 USA as recommended by NASAA is available at: http://www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritesAct1956withcomments.pdf.

[2] The Revised Uniform Securities Act of 1985 (as amended in 1998) can be found on the *Uniform Laws Annotated* portion of Westlaw.

[3] The Uniform Securities Act of 2002 (as amended through 2005) is available at http://www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf.

[4] According to NASAA's analysis, 20 jurisdictions have adopted, either verbatim or in substantial part, the 1956 USA (Alabama, Alaska, Arkansas, Connecticut, Delaware, Kentucky, Maryland, Massachusetts, Montana, Nebraska, New Jersey, North Carolina, Oregon, Pennsylvania, Puerto Rico, Tennessee, Utah, Virginia, Washington and West Virginia); 4 jurisdictions have adopted, either verbatim or in substantial part, the 1985 RUSA (Colorado, District of Columbia, Nevada and Rhode Island); and 20 jurisdictions have adopted, either verbatim or in substantial part, the 2002 USA (Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Vermont, Virgin Islands, Wisconsin and Wyoming). The remaining 9 NASAA U.S. member jurisdictions (Arizona, California, Florida, Illinois, Louisiana, New York, North Dakota, Ohio and Texas) have securities statutes that, while they may parallel one or another of the three model acts in certain respects, are insufficiently similar to be considered uniform act states.

was never intended to be required in public or private causes of action. Rather, these model acts were always intended to retain a through-line to the very first Blue Sky Laws, which predated the federal securities laws, by providing robust, even paternalistic, private rights of action that dispensed with requirements at common law such as reliance.

I. The Washington Department Of Financial Institutions Should Never Be Required To Show Reliance

This case raises the question whether reliance is required for *private* securities claims under the WSSA. This case does not raise the question whether reliance is required where an agent of the State of Washington (*e.g.*, the Department) brings a *public* enforcement action under the WSSA. Although public enforcement actions are not at issue, it is very important to NASAA and its members that this Court be mindful of the following truism: it is universally accepted across all federal and state jurisdictions that reliance is never required when a governmental plaintiff brings a public enforcement action under a federal or state securities law. At the state level, this principle of black letter law holds true irrespective of whether the state has patterned its securities statute on one or another of the three uniform securities acts.

There are countless examples of this principle being applied by federal and state courts. Here are a few: SEC v. Apuzzo, 689 F.3d 204, 213

(2d Cir. 2012) ("while a [private] plaintiff must prove reliance [under federal securities law] . . . , there is no such requirement in an SEC enforcement action"); Harrington v. Sec'y of State, 129 So. 3d 153, 170 (Miss. 2013) ("reliance is not an element of fraud in securities enforcement actions brought by the State"); Sec'y of State v. Tretiak, 22 P.3d 1134, 1140 (Nev. 2001) ("reliance and scienter are not required elements of securities fraud in state enforcement actions"); State Dep't of Fin. v. Tenney, 858 P.2d 782, 788 (Idaho Ct. App. 1993) ("detrimental reliance is not required when the Department is pursuing an enforcement action"); New York v. Credit Suisse Secs., 2018 N.Y. Slip Op. 04272, 2018 WL 2899299, *5 (N.Y. June 12, 2018) ("the Martin Act . . . dispenses, among other things, with any requirement that the Attorney General prove scienter or justifiable reliance").[5]

[5] One state court once held oppositely that reliance would be required in claims brought by the government, however the decision was subsequently overridden legislatively. Specifically, in Hubbard v. Hibbard Brown & Co., 633 A.2d 345, 349 (Del. 1993), the Delaware Supreme Court indicated that the Delaware Securities Division would be required to prove reliance in its enforcement actions. The Delaware legislature later amended the state's securities statute to, among other things, make clear that "in a government enforcement action brought under the anti-fraud provision, the government need not prove loss, proximate cause, or reliance." *See* Original Synopsis of H.B. 88, 164th Gen. Assembly, Reg. Sess. (Del. 2011), *available at* https://legis.delaware.gov/BillDetail?LegislationId=21077. Separately, some courts have held that the government is required to prove reliance when it brings a securities claim *sui juris*, such as in State v. Marsh & McLennan, 292 P.3d 525 (Or. 2012), where an agency of the Oregon government sought to recover damages suffered by a state pension fund.

This Court accordingly must ensure that whatever eventual decision it issues in this matter does not suggest, either expressly or even in dicta, that the Department would ever be subject to a reliance requirement. Any such pronouncement would undermine the Department's ability to enforce the WSSA and would disrupt the unanimity of federal and state law on this important point. This important point being made, we now turn to the issue before this Court.

II. Reliance Was Not Intended To Be Required In Private Claims Under Any Of The Uniform Securities Acts

Blue Sky Laws predate the federal securities laws of the 1930s and 1940s by two decades. State securities laws were first enacted in the early 1900s for the signature purpose of protecting investors. Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917). At the time, hucksters preyed on unwitting investors with "fly-by-night concerns, visionary oil wells, distant gold minds, and other ill-considered or fraudulent enterprises." Hornaday v. State, 208 P. 228, 231 (Okla. Crim. App. 1922). State legislatures drafted Blue Sky Laws to protect investors from these charlatans but also from investors' own ignorance, naivety or gullibility. Lolkus v. Vander Wilt, 141 N.W.2d 600, 603 (Iowa 1966). Blue Sky Laws thus were intended from the outset to be paternalistic. *See*, *e.g.*, Kerst v. Nelson, 213 N.W. 904, 905 (Minn. 1927).

A. Reliance Under the Blue Sky Laws Before the 1956 USA

In the 1920s, the NCCUSL made its first attempt to synthesize Blue Sky principles into a model act. The result, after seven years of study and drafting, was the Uniform Sale of Securities Act of 1929. *See* 39 HANDBOOK OF THE NATL. CONF. OF COMM. ON UNIFORM STATE LAWS 171 (1929).[6] The Uniform Sale of Securities Act was comprehensive and contained significant remedies for investors. For example, it provided an express private right of action that rendered every sale "in violation of any of the provisions of this act [] voidable at the election of the purchaser . . . ." *Id.* § 16. This private right was additive of any other statutory or common law rights that might otherwise exist, such as common law fraud. *See id.* § 18. This voidability principle in the Uniform Sale of Securities Act reflected widespread standards across state Blue Sky Laws at the time. *See, e.g.*, Wilson v. Guaranteed Secs., 272 P. 946, 948 (Utah 1928) (stating sales that violated any provision of the state Blue Sky Law were voidable at the election of the purchaser); Mau v. Montana Pac. Oil, 141 A. 828, 831 (Del. Ch. 1928) (same); Dixie Rubber v. Catoe, 110 So. 670, 671 (Miss. 1926) (same). The Uniform Sale of Securities Act also included an antifraud provision, though enforcement of this provision was vested solely in the

[6] This source is available on the research database HeinOnline.

hands of a state securities administrator. *See id.* § 15. This early model securities statute, like the Blue Sky Laws more generally, thus armed investors with strong rights of recovery. Purchasers could recover if they were defrauded but also if a security had not been properly registered. These statutory rights of recovery purposefully dispensed with the legal elements of scienter, loss, or reliance, which would be necessary at common law. *See*, *e.g.*, Kountze v. Kennedy, 41 N.E. 414 (N.Y. 1895).

B. Reliance Under the 1956 USA

The states' Uniform Sale of Securities Act was joined by federal securities legislation in the 1930s and 1940s and, as a result, the NCCUSL began work on a new model state securities statute in the 1950s. The drafters of the 1956 USA sought to retain the Blue Sky Laws' strong investor protections, though they pulled back a bit on the tradition of *per se* voidability reflected in the Uniform Sale of Securities Act of 1929. To Professor Loss and his fellow draftsmen of the 1956 USA, *per se* voidability "sometimes seem[ed] to be a remedy out of all proportion to the seriousness of the violation" committed by a defendant. Loss, COMMENTARY, *supra*, at 147.

The drafters of the 1956 USA followed the basic structure of the Uniform Sale of Securities Act, including a general antifraud provision as Section 101 and a separate civil liability provision as Section 410. These

two sections were not related and were not intended to interrelate. Rather, Section 410 was intended to be a self-enforcing, standalone civil liability provision. Section 410(a) thus was drafted with precise language outlining the conditions under which civil liability would arise, including in situations involving securities sales "by means of any untrue statement of a material fact or any omission to state a material fact." *See* 1956 USA § 410(a). Section 410 as drafted did not reference the 1956 USA's antifraud provision, Section 101, because this was unnecessary. *See* Loss, COMMENTARY, *supra*, 145 – 48 (diagramming the conditions for civil liability under Section 410 as drafted).[7] The draftsmen's commentary makes clear it was "not intended as a requirement that the buyer prove reliance" for civil liability to attach under the 1956 USA. *Id.* at 148.

Many early courts in states that adopted the 1956 USA interpreted this provision as the drafters had intended. For example, the courts in Bradley v. Hullander, 249 S.E.2d 486, 495 (S.C. 1978), Everts v. Holtmann, 667 P.2d 1028, 1033 (Or. Ct. App. 1983), and Arnold v. Dirrim, 398 N.E.2d 426, 435 (Ind. Ct. App. 1979), all correctly concluded that the private right of action under Section 410 as adopted in their states did not require a

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[7] The WSSA differs from the 1956 USA in that the WSSA's civil liability provision, RCW 21.20.430, does expressly invokes the WSSA's antifraud provision, RCW 21.20.010. As discussed *infra*, this textual difference should not be interpreted as narrowing the scope or standards of civil liability under the WSSA.

showing of reliance. However, other courts erred, reading reliance into Section 410 because they felt justice required this (*e.g.*, S&F Supply v. Hunter, 527 P.2d 217, 221 (Utah 1974)) or because reliance was required in implied private rights of action in federal cases brought under Rule 10b-5 of the Securities Exchange Act of 1934 (*e.g.*, Diversified Equities v. Warren, 567 S.W.2d 171, 174 (Tenn. Ct. App. 1976)). An unfortunate disunity thus arose relatively early-on in the development of 1956 USA jurisprudence regarding the standards for civil liability, and this disunity has persisted to the present day.

C. Reliance Under the 1985 RUSA and the 2002 USA

The two updated model acts developed by the NCCUSL in recent decades, the 1985 RUSA and the 2002 USA, retained the approach of favoring investor protection found in the 1956 USA and in the Uniform Sale of Securities Act. Reliance was not intended to be required in private causes of action under either of these model acts. The commentary to the 2002 USA explicitly notes this, stating "neither causation nor reliance has been held to be an element of a private cause of action" under the uniform securities acts. *See* 2002 USA § 509, cmt. 4 (citing Gohler v. Wood, 919 P.2d 561 (Utah 1996) and other decisions). Courts that have applied the 2002 USA have interpreted it in this way. *E.g.*, Barron v. Lampley, No. 15-cv-0038, 2015 WL 12591006, *18 n.13 (N.D. Ga. June 22, 2015). These

model acts thus continued the unifying theme dating back to the earliest Blue Sky Laws that common law elements such as reliance should not be required in private causes of action brought pursuant to these statutes.

III. This Court Should Follow the Intent of the Uniform Securities Acts and Conclude Reliance is Not Required in Private Causes of Action Under the Washington State Securities Act

A. The WSSA is Written Differently than the 1956 USA But These Differences are Immaterial and the WSSA Should be Interpreted Similarly to the 1956 USA in Not Requiring Reliance

The WSSA's civil liability provision currently reads in relevant part, "[a]ny person, who offers or sells a security in violation of any provisions of RCW 21.20.010, 21.20.140 (1) or (2), or 21.20.180 through 21.20.230, is liable to the person buying the security from him or her . . . ." RCW 21.20.430 (2018). This is of course different than Section 410 of the 1956 Act. NASAA has found no legislative history from the WSSA's enactment in 1959 to the present regarding what the Washington legislature may have intended under this provision. Nevertheless we believe the textual differences between the WSSA and the 1956 USA should not be interpreted as material distinctions.

As a brief aside, it is worth noting that the text of RCW 21.20.430 has evolved. When the WSSA was first enacted in 1959, the Washington legislature took the civil liability provision in the 1956 USA, Section 410,

and simplified it. Specifically, the legislature replaced the italicized language from Section 410 printed below,

> Any person who . . . (2) offers or sells a security *by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,* is liable . . .,

with the phrase, "*by means of fraud or misrepresentation*." *See* Garretson v. Red-Co., 516 P.2d 1039, 1040 n.1 (Wash. Ct. App. 1973). The legislature gave no explanation for this significant shortening of the 1956 USA's civil liability language. We believe this does not indicate any intent by the Washington legislature to narrow the potential scope of civil liability under the WSSA. To the contrary, if anything, the legislature's drafting of RCW 21.20.430 in 1959 suggests a broader scope of potential liability than Section 410 of the 1956 USA.

In addition, the text of RCW 21.20.430 as enacted in 1959 did not include a reference to the WSSA's antifraud provision, RCW 21.20.010. This change occurred nearly two decades later. Specifically, in 1977, the Washington legislature replaced the phrase it had adopted in 1959, "*by means of fraud or misrepresentation*," with a reference to RCW 21.20.010. RCW 21.20.430 was thus revised as follows: "Any person, who offers or

sells a security in violation of any provisions of RCW 21.20.010 or 21.20.140 through ~~21.20.220 and~~ 21.20.230, ~~or offers or sells a security by means of fraud or misrepresentation~~ is liable . . . .").[8]

Thus, in two steps, the Washington legislature adjusted the 1956 USA's civil liability provision, Section 410, into the current text of RCW 21.20.430. These two steps should not be interpreted as a material departure from the 1956 Act. The first step merely shortened Section 410's internal antifraud language while the second step replaced this now-shortened language with a cross-reference to RCW 21.20.010. (The legislature may also have intended the second step to confirm that a private right of action existed for violations of RCW 21.20.010, which theretofore had been implied by Washington courts. *See* Shermer v. Baker, 472 P.2d 589 (Wash. Ct. App. 1970).) These textual changes certainly do not suggest an intent to narrow the scope of potential civil liability under the WSSA. To the contrary, they suggest the Washington legislature intended for private parties to have broad rights of action. It would utterly defeat this apparent legislative intent for this Court to read a reliance requirement into RCW 21.20.430 (or, by extension, RCW 21.20.010). Furthermore, interpreting the WSSA as not requiring reliance in private causes of action would be

[8] *See* 1977 WASH. SESS. LAWS (45TH LEG.) at 678, *available at* http://leg.wa.gov/CodeReviser/documents/sessionlaw/1977pam1.pdf.

entirely consistent with this Court's repeated admonitions that the WSSA should be construed liberally for the benefit of investors. *E.g.*, Go2net v. Freeyellow.com, 143 P.3d 590, 592 – 93 (Wash. 2006); McClellan v. Sundholm, 574 P.2d 371, 374 (Wash. 1978).

B. Previous Decisions by Washington Courts Regarding Reliance Under the WSSA Never Properly Confronted this Question

The first decision by a Washington court interpreting the WSSA and whether reliance was required in private rights of action thereunder was Ludwig v. Mutual Fund Investors, 567 P.2d 658 (Wash. Ct. App. 1977). There a Washington appellate court, applying the 1959 version of RCW 21.20.430, interpreted its usage of the phrase "by means of fraud or misrepresentation." Ludwig gave this phrase a common law meaning because it had not been defined in the WSSA. Ludwig held as a result that scienter and reliance were required in private actions under the WSSA. *Id.* at 661.

Ludwig started Washington courts down an errant path. Ludwig did not consider that RCW 21.20.430 had not been created out of whole cloth but rather was just a revision of Section 410 of the 1956 USA. Ludwig thus never considered whether the phrase "by means of fraud or misrepresentation" in RCW 21.20.430 was merely a simplification of the much wordier language used in Section 410 of the 1956 USA.

In any event, this Court did not look favorably on Ludwig. This Court's decision in Kittilson v. Ford, 608 P.2d 264 (Wash. 1980), rejected Ludwig's conclusion that the phrase "by means of fraud or misrepresentation" should be given a common law meaning and, accordingly, this Court overruled Ludwig's holding that scienter was required under RCW 21.20.430. Kittilson was silent, though, on whether Ludwig had also erred in concluding that reliance was required; this Court's reasoning certainly implied as much, but Kittilson unfortunately did not expressly reject Ludwig's reliance holding.

Since Kittilson, this Court has addressed the reliance question under the WSSA in four cases, each time indirectly. First, in Haberman v. Wash. Pub. Power, 744 P.2d 1032 (Wash. 1987), this Court stated reliance was required for the plaintiff's negligent misrepresentation claim, but this Court was silent as to whether reliance was had also been required in the plaintiff's companion WSSA claim. *See id.* at 1045, 1048 – 50, 1067 – 70. Later, in Go2net v. Freeyellow.com, 143 P.3d 590 (Wash. 2006), this Court was silent as to whether reliance (which had been pled and proven at trial) was actually necessary for the plaintiff's WSSA claim. *See id.* at 251 – 54. This Court's two other decisions, Hines v. Data Line Sys., 787 P.2d 8 (Wash. 1990), and Kinney v. Cook, 154 P.3d 206 (Wash. 2007), did not clarify these ambiguities.

C. **This Court Should Pick Up Where it Left Off in Kittilson , Haberman and Go2net and Expressly Hold Reliance is Not Required Under RCW 21.20.430 or RCW 21.20.010**

As discussed above, state Blue Sky Laws have always focused on investor protection. This fundamental tenet extends from the earliest state securities statutes through the NCCUSL's several model acts. There is no indication the Washington legislature ever intended anything less for the citizens of this state. This Court has recognized as much, stating that "while the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors." Haberman, 744 P.2d at 1049.

Indeed, this Court has *always* interpreted the WSSA broadly to protect investors. In 1973, this Court reversed lower court judgments and ruled the WSSA applies to bilateral contracts involving a security. Claudia v. DeHart, 515 P.2d 982, 984 (Wash. 1973). In 1980, this Court ignored U.S. Supreme Court interpretations of the federal securities laws and ruled that scienter is not required under the WSSA. Kittilson, 608 P.2d at 226 – 27. In 1981, this Court reversed lower court judgments and rejected a private company's attempt to use Indian tribal immunity rules to evade the WSSA and a related Washington consumer protection statute. Aungst v. Roberts Const., 625 P.2d 167, 167 (Wash. 1981). In 1982, this Court

confirmed that partnership interests can be securities. Goldberg v. Sanglier, 639 P.2d 874, 879 (Wash. 1982), *amended* 647 P.2d 489 (Wash. 1982). In 1987, this Court held that strict privity is not required under the WSSA notwithstanding the plain language of RCW 21.20.430. Haberman, 744 P.2d at 1051. In 1990, this Court held plaintiffs need not prove proximate causation under the WSSA. Hines, 787 P.2d at 12. In 2006, this Court affirmed lower court decisions that waiver and estoppel are not valid defenses to a WSSA claim. Go2net, 143 P.3d at 249. In 2007, this Court narrowly split on whether every individual payment on a note was actionable under the WSSA. Kinney, 154 P.3d at 845 – 48. And finally in 2014, this Court affirmed the principle that Washington citizens should be entitled to the WSSA's protections when a conflict of laws exists with another state. FutureSelect Portfolio Mgmt. v. Tremont Group, 331 P.3d 29, 35 – 38 (Wash. 2014). This Court's relevant precedents as to the interpretation and application of the WSSA thus radiate with investor protection and the same principle should follow here.

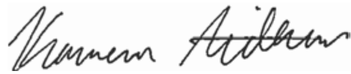
CONCLUSION

The Washington legislature's drafting of the civil liability provisions in the WSSA is a departure from the 1956 USA upon which the WSSA was based. Nonetheless, this departure should not be interpreted as a material change from the intent of the 1956 USA – indeed, if anything,

the legislature's drafting of the WSSA suggests an intent to expend the potential scope of private rights under the 1956 USA. Given this Court's longstanding tradition of interpreting the WSSA broadly, this Court should not now restrict its scope by imposing a reliance requirement on private plaintiffs. Requiring reliance would be akin to holding that the WSSA merely restates the rights and remedies that otherwise already exist at common law. The Washington legislature surely did not intend this result.

For all these reasons, this Court should conclude reliance is not required in private claims under the WSSA.

Respectfully submitted,



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Date: 08/23/2018

CERTIFICATE OF SERVICE

I certify that I have on this 23rd day of August, 2018, caused true and complete copies of the BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION AS *AMICUS CURIAE* to be electronically filed with the Clerk of the Court and served on counsel of record via the Court's web portal.

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