

In the  
**Appellate Court of Illinois**  
**First Judicial District**

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THE PEOPLE OF THE STATE OF ILLINOIS,

*Plaintiffs,*

v.

STEVEN J. ABBATE,

*Defendant-Appellee,*

NORTHWEST CENTER AGAINST SEXUAL ASSAULT,

*Contemnor-Appellant.*

---

Appeal from the Circuit Court of Cook County, Illinois,  
No. 10-3-005831-01.  
The Honorable **Edward N. Pietrucha**, Judge Presiding.

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**BRIEF OF THE ILLINOIS COALITION AGAINST SEXUAL ASSAULT,  
THE CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION, THE  
NATIONAL CRIME VICTIM LAW INSTITUTE AND THE VICTIM  
RIGHTS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF  
CONTEMNOR-APPELLANT NORTHWEST CENTER AGAINST  
SEXUAL ASSAULT AND SUPPORTING REVERSAL**

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## **INTRODUCTION**

The facts before this Court are exceedingly clear. The trial court ordered the victim's privileged rape crisis counseling records for *in camera* inspection without receiving the victim's written consent. This is a facial violation of Illinois statutory and case law regarding privilege. It is also a violation of the victim's privacy and autonomy protections – protections that are also afforded to the victim by the General Assembly, have a solid basis in social and legal literature, and are directed at promoting the recovery of the victim and the best interests of society.

Because the trial court's decision runs afoul of the law, the interests of this victim, and the interests of other victims of sexual assault and the society as a whole, it must be reversed.

### **I. The Illinois General Assembly Exercised Legitimate Authority in Creating Strong Statutory Protections for Rape Victims' Privacy and Autonomy and Courts are Bound by its Determinations.**

The Illinois General Assembly has authority to define the scope of privileges and can dictate how much protection is to be afforded to the holder of the privilege. *D.C. v. S.A.*, 670 N.E.2d 1136, 1141 (3rd Dist. 1996) (“[N]o one can dispute that the legislature has the power, through the enactment of evidentiary privileges, to inhibit the truth-seeking process to protect certain relationships. It is for the legislature, and not the courts, to determine [if the correct balance is achieved].”) (overruled on other grounds, 687 N.E.2d 1032 (1997)).

The General Assembly adopted an absolute privilege against disclosure for counseling provided by rape crisis centers. The statute provides: “[N]o rape crisis counselor shall disclose any confidential communication or be examined as a witness in

any civil or criminal proceeding as to any confidential communication without the written consent of the victim . . . .” 735 ILCS 5/8-802.1(d).

In enacting the privilege, the General Assembly embraced principles of victim privacy and autonomy and placed the decision to disclose counseling records and communications within the victim’s control – and only the victim’s control. The General Assembly articulated the policy rationales underlying the creation of the privilege:

Because of the fear and stigma that often results from [rape], many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.

735 ILC 5/8-802.1(a).

The General Assembly’s intent to achieve absolute protection is underscored by its decision to (1) remove the provision that previously allowed for *in camera* review of these records; and (2) add a provision making it a misdemeanor to disclose the victim’s records in violation of the statute. *See* 735 ILCS 5/8-802.1(f); Pub. Act No. 83-678 (effective Jan. 1, 1984); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 N.E. J. on Crim. & Civ. Con. 331, 338 n.36 (2005) (discussing the removal of the provision relating to *in camera* review).

Illinois’ Constitution also specifically affords crime victims the right to privacy by granting victims “[t]he right to be treated with fairness and respect for their dignity

and privacy throughout the criminal justice process.”<sup>1</sup> Ill. Const. art. I, § 8.1(a)(1). The General Assembly is charged with implementing this right. Ill. Const. art. I, § 8.1(b).

Regardless of the trial court’s opinion of the merits of the absolute privilege, the policies underlying it, or the right to privacy, it was bound by the legislature’s determination unless the statute is unconstitutional. *People v. Felella*, 546 N.E.2d 492, 498 (Ill. 1989) (“Declaring public policy is the domain of the legislature.”); Ill. Const. art. II, §1 (“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”).

The Illinois Supreme Court, in reviewing the privilege statute, determined that the statute is constitutional. *People v. Foggy*, 521 N.E.2d 86, 91-92 (Ill. 1988) (affirming the

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<sup>1</sup> The Supreme Court has also recognized a Constitutional right to privacy. *Roe v. Wade*, 410 U.S. 113, 152 (1973). (“[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”). The right to privacy is based on two fundamental rights – those of “confidentiality” and “autonomy.” *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting the right of privacy encompasses an “individual interest in avoiding disclosure of personal matters” as well as “the interest in independence in making certain kinds of important decisions”). While the Supreme Court has not squarely addressed whether communications with a counselor fall within the constitutionally protected zone of privacy, it has stressed the fundamental importance of privacy in connection with the similarly-situated therapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (noting that the psychotherapist and patient ““must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all””) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). Federal and state courts, extending the *Whalen* and *Jaffee* logic, have determined that the therapist-patient privilege does have roots in the Constitution. *Hawaii Psych. Soc. Dist. Branch of Am. Psych. Assoc. v. Ariyoshi*, 481 F. Supp. 1028, 1038 (D. Haw. 1979) (finding a constitutionally protected privacy right in the psychiatrist-patient relationship, and stating: “Constitutionally protected privacy must, at a minimum, include the freedom of an individual to choose the circumstances under which, and to whom certain of his thoughts and feelings will be disclosed”); *In re B*, 394 A.2d 419, 425 (Pa. 1978) (finding the patient’s right to prevent disclosure of information revealed in the context of a psychotherapist-patient relationship to be constitutionally based).

absolute privilege between victims and rape crisis counselors, citing to the legislature's intent). *See also People v. Harlacher*, 634 N.E.2d 366, 372 (2d Dist. 1994) (reaffirming the absolute privilege contemplated by § 8-802.1). This Court is bound by that decision on principles of *stare decisis*. *See Maki v. Frelk*, 239 N.E.2d 445, 447 (Ill. 1968) (“The rule of *stare decisis* is founded upon sound principles in the administration of justice, and rules long recognized as the law should not be departed from merely because the court is of the opinion that it might decide otherwise were the question a new one.”).

Notably, the Illinois Supreme Court also embraced the policy rationales behind § 8-802.1(a), confirming the “strong public policy in favor of the confidentiality of communications between sexual assault victims and counselors” in finding the privilege to be absolute. *Foggy*, 521 N.E.2d at 92.. *See also Harlacher*, 634 N.E.2d at 372 (“Section 8-802.1 provides absolute privilege for information provided to rape crisis personnel by victims of sexual offenses. The absolute privilege barred the court from conducting an *in camera* examination which was requested by the defendant because of the strong policy involved.”).

Because Illinois' law is absolutely clear that there is an absolute privilege that is controlled by the victim, that this privilege is constitutional, and that victims have privacy rights, it is also absolutely clear that the trial court erred by ordering the *in camera* production of the victim's records without her written consent. The trial court's order for the production of records of a rape crisis center for an *in camera* inspection must be reversed.

**II. The Absolute Privilege, Including Lack of an *In Camera* Inspection, Acknowledges Rape Victims' Fundamental Rights to Privacy and Autonomy and Promotes Legitimate Societal Interests.**

As discussed above, public policy is the domain of the legislature. However, because the trial court's decision is so problematic for this victim in particular, and for rape victims' rights to privacy and autonomy in general, a discussion of the importance of deferring to the Illinois General Assembly's decision to enact an absolute privilege follows.

**A. Complete confidentiality is necessary to preserve victim autonomy and is essential to victim recovery.**

“Short of homicide, [rape] is the ultimate violation of self.” *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (citation omitted). The rapist asserts his authority over the victim by objectifying her: “The rapist’s total disregard of the victim’s desires reduces her to the status of a tool or instrument.” Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a ‘Fair Trial’?*, 54 Cath. U. L. Rev. 297, 302 n. 26 (2004) (citing Nancy E. Snow, *Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims, in A Most Detestable Crime: New Philosophical Essays on Rape* 255 (Keith Burgess-Jackson ed., 1999)).

Counseling is often a key component of the victim’s reassertion of autonomy and initial steps toward recovery. See, e.g., Laura M. Monroe *et al.*, *The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment*, 20 *Journal of Interpersonal Violence* 767, 772-73 (2005) (noting that counseling, particularly early treatment, can reduce “the chronicity and negative impact of emotional and behavioral problems”); Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 *Harv. J. on Legis.* 255, 264 (1995) (“A sexual assault survivor takes the first step to recovery by talking about the rape

experience in a nonjudgmental atmosphere. . . .”). Indeed, “[s]exual assault survivors indicate that rape crisis workers are crucial to their recovery process, ranking them as more important than significant others, family members, and clergy.” Robinson, 31 N.E. J. on Crim. & Civ. Con. at 345.

In order for counseling to be effective, the victim must be assured of complete confidentiality. As the Supreme Court recognized in the cornerstone case *Jaffee v. Redmond*, “Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . .” 518 U.S. at 10. Releasing a victim’s confidential records without consent undermines the recovery process and is a direct violation of the victim’s reassertion of autonomy, which can halt or even reverse the victim’s recovery. *See, e.g., id.* (“[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”).

Complete confidentiality encompasses not just prevention of disclosure to the defendant, but also to the court for *in camera* inspection. This policy can be seen in the General Assembly’s removal of the provision that previously allowed for *in camera* review of records. Pub. Act. No. 83-678 (effective Jan. 1, 1984). The Illinois Supreme Court also recognized the harm that may come from *in camera* inspection in *Foggy*, stating that warning victims that their confidential records could be viewed by a judge *in camera* “would seriously undermine the valuable, beneficial services of those programs that are within the protection of the statute.” *Foggy*, 521 N.E.2d at 92. *See generally State v. Pinder*, 678 So.2d 410, 415 (Fla. Dist. Ct. App. 1996) (“Even in camera

disclosure to the trial judge (and to court reports, appellate courts and their staff) intrudes on the rights of the victim and dilutes the statutory privilege.”).

While confidentiality is important to any counseling relationship, it is especially crucial for rape victims because they have experienced an assault on their privacy and autonomy.<sup>2</sup> See, e.g., Reidy, 54 Cath. U. L. Rev. at 302 n.26 (“Rape, of course, is a physical, as well as a mental and emotional, violation of the victim’s autonomy. Rape denies the victim’s autonomy and implies a negative judgment of her value. It is a morally objectionable objectification of the victim. . . .”) (citing Snow, *supra*, at 255).

The harm that results from disclosure is particularly acute with rape victims. Jennifer Bruno, *Pitfalls for the Unwary: How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. Ill. L. Rev. 1373, 1377 (2002) (citing Mary P. Koss & Mary P. Harvey, *The Rape Victim: Clinical and Community Interventions*, 133 (2d ed. 1991) (“When practitioners “march on” with their work, implementing standard procedure without concern for the rape victim’s right to know and choose among alternative procedures, they reinforce her status as victim, ignore her capacity for survival, and undermine her recovery.”); see generally Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims’ Identities*, 64 S. Cal. L. Rev. 1020, 1049 (1991) (“To expose a person’s identity without her consent strips these private and personal decisions away from her and places them in the hands of a remote stranger.

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<sup>2</sup> It is perhaps for this reason that the Supreme Court has commented that “rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.” *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (stating that Michigan’s rape shield statute represented a valid determination that rape victims deserved these protections).

Such an action can only slow the victim's healing process, a process the state has a significant interest in protecting.”).

Confidentiality is so important to most rape victims that they are more likely than the general population to fail to seek necessary services if they cannot be assured of confidentiality. Joo, 32 Harv. J. on Legis. at 265 (“Without an absolute assurance of confidentiality, however, a sexual assault survivor is more apt than the general population to be deterred from seeking counseling.”); Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 New Eng. L. Rev. 983, 999 (1998) (“[T]he availability of confidential services often determines whether the [domestic violence or rape victim] will even take the first step, report violence, and ask for outside help.”).

Further, victims who do seek counseling may be less than forthcoming if they cannot be assured of confidentiality, which undermines the recovery process. Michael Laurence, *Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C. Davis L. Rev. 1213, 1225 (1984) (“Rape victims may forego counseling rather than risk disclosure of highly personal information. Many victims will avoid any contact with a center or will terminate counseling prematurely if they fear their confidences will be breached. Even if the relationship continues, the rape victim's trust and confidence in her counselor will lessen.”); Joo, 32 Harv. J. on Legis. at 272 (“Once survivors fully realize that their communications enjoy only limited protection, they may either forego treatment altogether or be less frank in their communications.”).

Additionally, undermining the victim's autonomy and confidentiality rights can lead to what many commentators have termed "secondary rape" by the judicial system.

As one commentator summarized:

After the personal violation of a sexual assault, society must respect victims' rights of personal autonomy and privacy to divulge their own feelings and emotions in a protected environment. To grant alleged rapists any degree of access to their victims' most intimate feelings appears to force victims seeking justice in the legal system to be raped a second time.

Robinson 31 N.E. J. on Crim. & Civ. Con. 331, 347 (internal citation omitted). *See also* U.S. Dep't of Justice, Report to Congress, *The Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation*, 20 (December 1995) (noting that allowing disclosure under certain circumstances "adds to a distrust of the system and sets up a situation where the victim doesn't know what to expect. This dynamic mirrors what she faces in an abusive relationship – never knowing what to expect.") (quoting a domestic violence counselor) (available at <http://www.ncjrs.gov/pdffiles1/nij/grants/169588.pdf>).

**B. The harm to victims from chipping away at confidentiality in communications between victims and rape crisis personnel can be seen by looking to other jurisdictions.**

Other courts, in upholding an absolute privilege from disclosure, have stressed how important the fundamental underpinning of confidentiality is to the victim's ability to disclose and begin the healing process. *See, e.g., Commonwealth v. Wilson*, 602 A.2d 1290, 1295 (Pa. 1992) ("At the onset of counseling the victim is informed [by the rape crisis center] that her communications will be confidential, and her willingness to disclose information quite obviously is based upon that expectation."); *People v. District Court*, 719 P.2d 722, 727 (Colo. 1986) ("The knowledge that the alleged assailant would

be entitled to discover these otherwise privileged documents could hamper a victim's treatment progress because of her unwillingness to be completely frank and open with the psychotherapist.").

In fact, in jurisdictions which have gone from an absolute to a diluted privilege, quantifiable data shows an unmistakable drop in the number of victims seeking help. When the Pennsylvania Supreme Court allowed for qualified inspection of rape crisis counseling records (before reversing course just over a decade later in *Wilson, supra*), anonymous calls to a rape crisis center increased from 37 to 61 percent, with these anonymous callers refusing to come in for counseling. Beth Stauder, *Criminal Law and Procedure (Evidence) – Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor*, 55 Temp. L.Q. 1124, 1146 n.120 (1982); *Wilson*, 602 A.2d at 1294 n.6 (noting the detrimental effect that the Pennsylvania supreme court's decision diluting the absolute privilege had on rape crisis centers, including by victims requesting the return of their records or terminating counseling for fear that their private information would become public). Additionally, rape crisis centers began destroying their records so as to avoid the potential for disclosure – often at the bequest of the victim – “with obvious destructive implications for the relationship.” *In re Matter of Pittsburgh Action against Rape*, 428 A.2d 126, 147 n.2 (Pa. 1981) (Larsen, J., dissenting).

Pennsylvania is not an outlier. A similar chain of events unfolded in Massachusetts after its supreme court allowed defense counsel direct access to records. “[R]ape crisis centers reported that many victims refused to talk freely and openly about their experiences out of fear of future disclosures. Furthermore, the number of rapes

reported to the police declined and many victims refused to talk to rape counselors.” Christine Burke, *Just How Many Times Does She Have to Say No? The Evolution of a Defendant’s Right to Access His Victim’s Rape Counseling Records in Massachusetts*, 25 New Eng. J. on Crim. & Civ. Confinement 147, 162 n.122 (1999) (noting that 30% of victims raised concerns about counseling and avoided full disclosure, while 10% refused counseling outright) (citing Ellen M. Crowley, *In Camera Inspections of Privileged Records in Sexual Assault Trials: Balancing Defendants’ Rights and State Interests under Massachusetts’ Bishop Test*, 21 Am. J.L. & Med. 131, 144 n.133 (1995)).

As this case law and scholarship reflects, a shift away from Illinois’ absolute privilege would have a devastating and immediate impact on rape victims. Fewer victims would seek counseling, which would severely impede the victim’s healing process and the health of the community as a whole.

**C. An absolute privilege promotes societal interests in encouraging reporting of crime.**

Allowing disclosure and *in camera* review would have another effect: reduced reporting rates. Rape remains one of the most underreported of all crimes. Underreporting of rape exists for both child and adult victims. In a compilation of several retrospective studies of adults who suffered childhood sexual abuse, research indicates that only one third of the victims revealed the abuse to anyone during their childhoods. Kamala London *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psych. Pub. Pol’y and L. 194, 199-200 (2005). As for adult victims, the United States Department of Justice acknowledges that rape is “seriously underreported,” with their findings suggesting that only 19.1% of women who were raped since their 18th birthday report the crime. Patricia

Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*. (NCJ publication No. 210346), Washington DC: U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice. (Available at <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>).

Removing the absolute privilege of communications between victims and rape crisis counselors contributes to the underreporting of rape. Based on evidence from other jurisdictions that have chipped away at the victim-rape crisis counselor privilege, the chilling effect is likely to be significant and immediate. *See* Burke, 25 New Eng. J. on Crim. & Civ. Confinement at 162 n.122 (describing a 20% drop in clients reporting to police after Massachusetts changed its privilege law) (citing Crowley, 21 Am. J.L. & Med. at 144 n.133).

This chilling effect occurs for at least two reasons. First, victims are less likely to report when they believe their private information will be disclosed. *See, e.g.,* Marcus & McMahon, *Limiti* 64 S. Cal. L. Rev. at 1050 (“One reason frequently mentioned by victims who do not report their rapes to the police is their uncertainty about whether they will be able to maintain their privacy if they do report the rape. They want control over when and to whom they will reveal the details of their tragedy.”); Robinson, 31 N.E. J. on Crim. & Civ. Con. at 333 (“Subpoenaing records from every one of a victim’s medical and counseling appointments constitutes a subtle form of intimidation. . . . Evidence has shown that a victim is less likely to pursue legal action once she realizes that her counseling records may be revealed in court.”) (internal quotation omitted). *See also* *People v. District Court*, 719 P.2d at 727 (“The defendant’s constitutional right to confrontation is not so pervasive as to place sexual assault victims in the untenable

position of requiring them to choose whether to testify against an assailant or retain the statutory right of confidentiality in post-assault psychotherapy records.”).

Second, victims are less likely to report without a stable support network. As one commentator notes:

Society benefits from the privilege because, when victims decide to report their assaults to the police and to cooperate in the ensuing prosecutions, counselors can support them without fear they will be called to testify about the private conversations. One study suggests that “the victim’s/survivor’s perceived social support for reporting the rape is an important determinant of whether or not the police will be notified of the rape.” So, victims who have the support of counselors may be more inclined to use the legal system.

Bruno, 2002 U. Ill. L. Rev. at 1382-83 (citing James E. Hendricks & Bryan Byers, *Crisis Intervention in Criminal Justice/Social Service* 226 (1996)). This implicates two important state interests: both the increased reporting of crime, and the health of Illinois’ citizenry. As the Pennsylvania Supreme Court stated in reinstating an absolute privilege against disclosure of rape crisis counseling records: “The inability of the crisis center to achieve its goals is detrimental not only to the victim but also to society, whose interest in the report and prosecution of sexual assault crimes is furthered by the emotional and physical well-being of the victim.”). *Wilson*, 602 A.2d at 1295. *See generally Jaffee*, 518 U.S. at 11 (“The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”); *People v. Ellison*, 463 N.E.2d 175, 183-84 (1984) (discussing, in the context of Illinois’s rape shield statute, the important state interest in promoting effective law enforcement by excluding certain evidence relating to the victim).

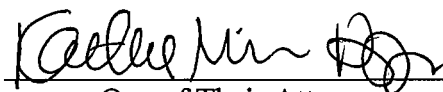
The absolute privilege adopted by the General Assembly is critical to preserving victim autonomy, aiding in recovery, and promoting societal interests, and must stand.

**CONCLUSION**

The law in this case is exceedingly clear. The victim's records and communications with the rape crisis center are protected by an absolute privilege. The trial court's order for production of confidential records, without the victim's written consent, was in contravention of Illinois law, which was carefully crafted to protect victim privacy and autonomy. This Court cannot allow such an order to stand. Accordingly, *amici curiae* urge that the trial court's order be reversed, and the underlying subpoena be quashed.

Respectfully submitted,

AMICI CURIAE

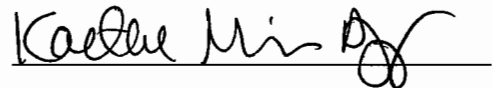
  
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### Supreme Court Rule 341(c) Certificate of Compliance

Pursuant to Supreme Court Rule 341(c), I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kaethe Morris Hoffer", is written over a horizontal line.

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