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83 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 83 MAP 2021

JACOB DOYLE CORMAN, III, *et al*.,
Appellees

v.

ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,
Appellant

REPLY BRIEF FOR APPELLANT

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON NOVEMBER 10, 2021 AT NO. 294 MD 2021

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SUMMARY OF ARGUMENT

The Department's regulations authorize it to prohibit individuals without face coverings from entering school buildings. And those regulations are authorized by the longstanding statutory mandate that the Department protect the public health by determining and employing the most efficient and practical means for the prevention and suppression of disease. Masking in school buildings undisputedly suppresses the transmission of COVID-19 among children and keeps schools from becoming super-spreader locations.

In response, Appellees (collectively the Schools) make no real attempt to grapple with these statutes or the text of the regulations. Instead, they discuss unremarkable legal principles that are both undisputed and wholly irrelevant to the issue before the Court. The Schools' unwillingness to engage is telling.

The Schools assert that the Acting Secretary has not articulated a limiting principle to the Department's authority. This is untrue. The Department is limited by its authority under the Department of Health Act, the Administrative Code of 1929, the Disease Prevention and Control Law of 1955, and the relevant regulations. Pursuant to these provisions, medical science constrains the Department's actions, and the Schools make no attempt to argue that the Masking Order is not grounded in well-established science. Thus, the Department cannot issue orders pursuant to these statutes that wander outside its medical and public health expertise. The

Masking Order falls well within the Department's expertise, as it has a direct connection to preventing and suppressing the spread of COVID-19.

Finally, the Schools argue, in the alternative, that if the Department has the authority to issue the Masking Order—which it does—such delegation of authority by the General Assembly would violate the Non-Delegation Doctrine. The Schools base this argument on the supposed "unfettered power" granted by the regulations. This is again untrue. The Department's authority is cabined by the relevant statutes and regulations, which collectively "outline the parameters within which the [Acting] Secretary may operate with respect to the containment of communicable diseases within public and private schools." R. 54a (Wojcik, J. dissenting). Further, the Department can only issue disease control measures based on medical science and its expertise in the public health area. The Department's authority, though necessarily broad, is far from limitless.

ARGUMENT

I. The Department of Health Had Authority to Issue the Masking Order Under Three Interconnected Statutes and 28 Pa. Code § 27.60.

In her opening brief, Appellant, the Acting Secretary of Health, explained in detail the basis for the Department of Health's authority to issue the Masking Order. Op. br. at 22-38.[1] The Department's regulations authorize it to prohibit individuals without face coverings from entering school buildings. 28 Pa. Code §§ 27.1, 27.60. And these regulations, in turn, are authorized by the longstanding statutory mandate that the Department "protect the health of the people of the State, and [ ] determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. § 1403(a); *see also*, 71 P.S. § 532(a). Masking in school buildings undisputedly suppresses the transmission of COVID-19 among children and keeps schools from becoming super-spreader locations. R. 58a-59a (findings supporting Masking Order).

In response, Appellees (collectively the Schools) make no real attempt to grapple with these statutes or the text of the regulations, discussing instead unremarkable legal principles that are both undisputed and wholly irrelevant to the issue before the Court. Unwilling to do battle with the arguments actually presented,

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[1] Appellant's opening brief will be cited as "Op. br." followed by the page number. Appellees' responsive brief will be cited as "Resp. br." followed by the page number.

the Schools retreat to an alternative universe where 28 Pa. Code § 27.60 does not exist. But, of course, the regulation does exist. And the Masking Order was authorized by that regulation.

A. Under Section 27.60 of its regulations, the Department may prohibit individuals without a mask from entering a school building.

The Masking Order flows from a series of interconnected statutes: Section 8(a) of the Department of Health Act, 71 P.S. § 1403(a); Section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and Section 521.5 of The Disease Prevention and Control Law of 1955 (Disease Control Law), 35 P.S. § 521.5. R. 60a (Masking Order); Op. br. at 22-38. Pursuant to the authority granted the Department of Health by the General Assembly under these statutes, in 2000, the Department promulgated 28 Pa. Code § 27.60. Op. br. at 28-29. Under this regulation, the Department of Health shall direct the "modified quarantine of contacts of a person . . . with a communicable disease or infection; and any other disease control measure the Department . . . considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents." 28 Pa. Code § 27.60(a).

As explained in detail in our opening brief, the Masking Order constitutes a modified quarantine because it "prohibit[s], or . . . restrict[s], those exposed to a communicable disease from engaging in particular activities"—*i.e.*, entering a

school building without a mask. 28 Pa. Code § 27.1 (definition of modified quarantine). Op. br. at 30-35. As this Court recognized early in the pandemic, COVID-19's pernicious nature arises from its ability to spread through asymptomatic and pre-symptomatic carriers unaware they are infected. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889-90 (Pa. 2020). In fact, infected individuals may be unaware that they are spreading the disease for days until symptoms appear, or longer if they remain asymptomatic. *Ibid.* Given the prolific nature of this virus, the manner in which it is transmitted, and the large number of infected individuals in the Commonwealth, exposure is ubiquitous. *Ibid.* (explaining that because the virus spreads through asymptomatic and pre-symptomatic carriers, "any location . . . where two or more people can congregate" is a potential source of infection). To be effective, therefore, the prohibition from entering school buildings without a mask must apply to everyone, even the vaccinated. Breakthrough cases exist.[2] For precisely this reason, both this Court and the Commonwealth Court require masks

[2] From January 1, 2021 to November 2, 2021, 104,379 post-vaccination cases were reported, which represents 12% of all COVID-19 cases during that time period. Ten percent of hospitalizations for COVID-19 (5,707) were breakthrough cases. *See* "Post-Vaccination Data," Department of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Post-Vaccination-Data.aspx (last visited 12/2/2021).

for everyone attending oral argument, regardless of vaccination status, with the exception of counsel when arguing.[3]

Additionally, the Masking Order falls within the "other disease control measure" provision of this regulation. Op. br. at 35-38. The Masking Order is clearly a "disease control measure," using the ordinary meaning of the words, because it suppresses the transmission of COVID-19. *See Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. 2011) (using dictionary to ascertain the common usage of a term the legislature did not define). The Commonwealth Court erred in suggesting disease control measures consist of only the study of disease. Op. br. at 36-38. The Department cannot "control" a disease merely by studying it. Nor can the Department "protect the public from the spread of infectious agents" without active control measures. The two must go hand-in-hand.

The Schools present no argument in response to this textual analysis, implicitly conceding the correctness of the Department, Judge Wojcik, and the Joint Committee on Document's interpretation of the regulation. Instead, the Schools incorrectly assert that "Section 27.60 only permits the Department of Health to direct isolation, surveillance, segregation, quarantine, or modified quarantine of persons or

[3] Notice, Supreme Court of Pennsylvania's December 2021 Oral Argument Session; Notice, Commonwealth Court October 18-22, 2021 oral argument session to be conducted in person in Harrisburg, Sept. 17, 2021.

animals with a communicable disease or infection." Resp. br. at 17. This is untrue. While the first part of Section 27.60(a) limits the use of "isolation" to people with a communicable disease, the second part—covering surveillance, segregation, quarantine or modified quarantine—does not contain that restriction. 28 Pa. Code § 27.60(a). Rather, a modified quarantine may be applied to anyone "exposed to a communicable disease," such as COVID-19. 28 Pa. Code § 27.1 (definition of modified quarantine). As discussed above and in our opening brief, given the unique manner in which COVID-19 spreads, anyone interreacting with another person is potentially exposed to this disease. *See Friends of Danny DeVito*, 227 A.3d at 889–90. To prevent asymptomatic individuals from unknowingly infecting a classroom of unvaccinated students, the order restricts anyone not wearing a mask from entering a school building. Such a restriction is authorized by the Department's regulations. 28 Pa. Code § 27.60.

As we also discussed in our opening brief, the regulation must be read *in pari materia* with its authorizing statutes. Op. br. at 19-22. The Commonwealth Court, instead of placing the statutory language in context and interpreting it to serve the objective of protecting public health, sought to narrow and isolate statutory language in direct contradiction of that objective. The Schools ask this Court to make the same mistake.

Both the Department of Health Act and Administrative Code of 1929 require the Department "[t]o protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease[.]" 71 P.S. § 532(a); *see also*, 71 P.S. § 1403(a). And the Disease Control Law provides that, upon "a report of a disease which is subject to isolation, quarantine, or any other control measure, the . . . department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation." 35 P.S. § 521.5. As explained in our opening brief, the measures under the Masking Order are authorized by regulation and are undisputedly an appropriate control measure for this disease. Op. br. 28-35. Masking is also the most efficient and practical means for the prevention and suppression of COVID-19 among unvaccinated school children. The Schools make no attempt to argue otherwise.

The Schools do not squarely respond to the textual analysis or principles of statutory interpretation discussed in our opening brief. Instead, they baldly state that the Administrative Code "only provides a general policy statement regarding the general duties of the Department of Health" and does not "provide any authority to issue specific disease control measures . . . ." Resp. br. at 16. The Schools cite only to the majority opinion we challenge here as the authority for this assertion, inviting this Court to make the same errors as that majority.

In our opening brief, we discussed in detail why this interpretation of the Department of Health Act and Administrative Code of 1929 is incorrect and leads to an absurd result. Op. br. at 24-28. In sum, the General Assembly has neither the expertise nor prophetic powers to legislate what specific disease control measures might be necessary to combat an unknowable future disease. Instead, the General Assembly wisely gave broad discretion to the Department of Health's numerous medical experts to employ the most efficient and practical means to combat whatever specific disease might arise. 71 P.S. § 532(a); 71 P.S. § 1403(a). The present uncertainties surrounding the recent Omicron variant of COVID-19 proves the necessity of this approach.

It was on the basis of that necessity, and pursuant to this approach, that Section 27.60 was promulgated to give the Department "the discretion to implement the most appropriate disease control measures for the situation." 30 Pa. B. 2723.[4] Universal masking in schools is the most appropriate disease control measure for this situation. R. 59a (Masking Order). And again, the Schools make no attempt to argue otherwise.

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[4] Pennsylvania Bulletin, Vol. 30, Issue 22, page 2723 (May 27, 2000), found at http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol30/30-22/930.html (last visited 12/02/2021).

B. The Masking Order is limited by the authorizing statutes and regulations, and by medical science.

The Schools assert that the Acting Secretary has not articulated a limiting principle to the Department's authority. Resp. br. at 8. This is also untrue. We articulate limiting principles on pages 27-28, 38, and 45-47 of our opening brief.

As Judge Wojcik correctly observed, "the Disease Control Law and the associated regulations outline the parameters within which the [Acting] Secretary may operate with respect to the containment of communicable diseases within public and private schools." R. 54a (dissent). Additionally, the Department must employ "efficient and practical means for the prevention and suppression of disease[.]" 71 P.S. § 532(a). And the "disease control measures" it employs under Section 27.60 of its regulations must be "necessary to protect the public from the spread of infectious agents." 28 Pa. Code § 27.60. Thus, medical science and the limitations relating to the spread of infectious agents constrain the Department's actions. And the Schools make no attempt to argue that the Masking Order is not grounded in well-established medical science.

The Department also cannot issue orders pursuant to these statutes that wander outside its medical and public health expertise. For example, in *Alabama Assoc. of Realtors v. Dept. of Health and Human Services*, __ U.S.__, 141 S.Ct. 2485 (2021), cited by the Schools, the United States Supreme Court examined an eviction moratorium issued by the Centers for Disease Control and Prevention (CDC) in

response to the COVID-19 outbreak. The High Court determined that the moratorium was likely beyond the authority granted to the CDC under Section 361(a) of the Public Health Service Act, 42 U.S.C. § 264(a). *Alabama Assoc. of Realtors*, 141 S.Ct. at 2488.[5] As that court explained, Section 361 authorized the CDC to use "measures directly relate[d] to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Ibid.* The eviction moratorium, conversely, attempted to arrest the interstate spread of an infection only indirectly: "This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute." *Ibid*. As the High Court hypothesized, it was unlikely that the CDC could "mandate free grocery delivery to the homes of the sick" or require "manufacturers to provide free computers to enable people to work from home[.]" *Id.* at 2489.

That same limitation applies to the Department under the regulation at issue here. But unlike the *Alabama* case, we are not dealing here with indirect downstream connections to the disease. The Masking Order has a direct connection to preventing and suppressing the spread of COVID-19: Universal masking is a proven disease

[5] The question arose in the context of an application to vacate a stay of the district court's order by the court of appeals. *Alabama Assoc. of Realtors*, 141 S.Ct. at 2486.

control measure that directly attacks the virus's ability to spread. Op. br. 8-9.[6] Prohibiting people without masks from entering a school building is precisely the type of disease control measure authorized by Section 27.60 and the Disease Control Law.

By restricting access to school buildings to individuals wearing a protective face covering, the Masking Order suppresses the transmission of COVID-19 among students, reducing the number of children who get sick and may be hospitalized. The Schools do not dispute the medical science supporting the need and effectiveness of the Masking Order, implicitly conceding that masking is the most efficient and practical means for the prevention and suppression of COVID-19 among vulnerable students. That is what the law requires.

C. The Schools do not meaningfully address these arguments.

The Schools spill much ink on undisputed and irrelevant areas of the law. The Schools pronounce, for example, that where "there is a conflict between a statute

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[6] The Schools complain about the Acting Secretary citing, as background, to reports from the CDC, United States Food and Drug Administration (FDA), and the American Academy of Pediatrics (AAP). Resp. br. at 2. The Schools describe these scientific and medical reports as "anonymous, unsupported, and unattributed[.]" *Ibid.* These reports are the exact opposite of those descriptors: The reports are clearly attributed, their authors are clearly listed, and the scientific studies and research underpinning each report are detailed at length in each.

and regulation . . . the regulation must give way." Resp. br. at 6. They provide no explanation, however, as to how that principle of law is relevant to this case.

The Schools proffer no argument that Section 27.60 conflicts with any of its authorizing statutes because they cannot. The General Assembly's grant of authority under the Department of Health Act and Administrative Code of 1929 is broad: "to determine and employ the most efficient and practical means for the prevention and suppression of disease" and to promulgate rules and regulations to assist in the Department's duty to "protect the health of the people of this Commonwealth[.]" 71 P.S. § 532(a), (g); *see also*, 71 P.S. § 1403(a). Neither Section 27.60 of the regulations, nor the Masking Order issued pursuant to that regulation, conflict with that broad statutory grant of authority and discretion.

Similarly, the Schools discuss at length that regulations need to be properly promulgated. Resp. br. at 9-13. But there is no question that Section 27.60 of the Department's regulations *was* properly promulgated.[7] The regulation was approved

[7] Given that the regulation was formally promulgated, the Schools' claim that acting pursuant to that regulation somehow deprived the public of an opportunity to be heard is baseless. Resp. br. 22. The public had an opportunity to be heard about this regulation when it was proposed in 2000. To the extent the Schools are arguing that the Department of Health must conduct public hearings before it responds to any public health crisis, the Schools cite no authority in support of such an extraordinary proposition. Having to conduct public hearings any time the Department needs to quickly act to prevent the spread of a virulent disease would render the Department lethargic and ineffective. During a pandemic, time is

by the Independent Regulatory Review Commission (IRRC) on December 20, 2001, which found the regulation "consistent with the statutory authority of the Department of Health . . . and the intention of the General Assembly," and that its promulgation was "in the public interest." Approval Order, IRRC, Regulation No. 10-156 (IRRC No. 2119) (Dec. 20, 2001).[8] The Schools do not argue to the contrary.

The Schools do argue that courts owe no deference to an agency's interpretation of its own regulation if the text is clear. Resp. br. at 18. We agree with this general principle. And as stated in our opening brief, because the Department's authority to issue the Masking Order falls within the clear text of Section 27.60, the Court need not address deference. Op. br. 39.

If this Court were to find that parts of Section 27.60 are ambiguous, however, then the Department would be entitled to deference in the meaning of its own regulation. *See Kisor v. Wilkie,* __ U.S.__, 139 S.Ct. 2400, 2419 (2019) (upholding *Auer* deference to agencies' reasonable readings of genuinely ambiguous regulations);[9] *accord. Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d

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precious. The Department must have the ability to quickly employ effective disease control measures.

[8] Found at http://www.irrc.state.pa.us/docs/2119/IRRC/2119%2012-20-01%20APPROVAL.pdf (last visited 12/02/2021).

[9] The United States Supreme Court explains *Auer* deference as follows: "There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and

665, 678 (Pa. 2020) ("deference is appropriate when a statute is ambiguous or when the statutory scheme is complex and falls within the agency's area of expertise").

"Statutory text is ambiguous if it is susceptible to two or more reasonable interpretations." *See Grimes v. Enter. Leasing Co. of Phila.*, 105 A.3d 1188, 1193 (Pa. 2014). The Department of Health, Judge Wojcik, and the Joint Committee on Documents each read Section 27.60 as authorizing the Masking Order. R. 52a (dissent); 292a-293a (committee). And four judges of the Commonwealth Court came to the opposite conclusion. R. 28a (Opinion). As we explained in our opening brief, "[w]hile we believe the regulation clearly provides authority for the Masking Order, at worst, the regulation is ambiguous, as reasonable minds arrived at multiple interpretations of the same regulatory language." Op. br. at 39. Although certainly not dispositive to this Court's interpretation of Section 27.60, the Department's interpretation of its own regulation should be given weight. The Commonwealth Court erred in not even countenancing a degree of deference.

The Schools generally discuss the emergency-certified regulation process. Resp. br. at 20-22. But in doing so, the Schools again fail to respond to any of the

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the agency's interpretation lines up with one of them. And even if that is the case, courts must on their own determine whether the nature or context of the agency's construction reverses the usual presumption of deference. Most notably, a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties." *Kisor*, 139 S.Ct. at 2419.

arguments raised in our opening brief as to how the Commonwealth Court misunderstood this process and why this regulatory process cannot move quickly enough to protect vulnerable individuals during a public health crisis. Op. br. at 40-42. Regardless, even if the emergency-certified regulation process could effectively address public health crises, its availability does not invalidate the Department's authority under an already existing regulation. Requiring the Department to promulgate a new regulation every time a novel disease appears is absurd and nullifies the broad discretion granted to it by the General Assembly.

Finally, the Schools' comparison of the Masking Order to *Buck v. Bell*, 274 U.S. 200 (1927), is not only inapt, it is offensive. Resp. br. at 8. The Department's reasonable measure to protect unvaccinated children from sickness and death bears no resemblance to forced sterilization. Masking is a proven and well-accepted disease control measure to prevent the spread of COVID-19 and masking continues to be mandated in airports, public transportation, medical offices, and when entering governmental buildings, such as courthouses. The Schools' evoking of this controversial and repudiated case cannot overcome, and should not distract from, their failure to analyze the relevant statutory and regulatory text actually at issue, or their failure to squarely respond to the Acting Secretary's opening brief.

II. The Masking Order Does Not Violate the Non-Delegation Doctrine Because the General Assembly Empowered the Department of Health to Employ the Most Efficient and Practical Means for the Prevention and Suppression of Disease.

The Schools argue, in the alternative, that "assuming that the provisions cited by the [Acting Secretary] in her Masking Order do grant her the authority to issue the same, such delegation of authority by Pennsylvania's General Assembly would violate the non-delegation doctrine." Resp. br. at 28. The Schools base this argument on the theory that the regulations "would allow the Secretary of Health to unilaterally create, define, and promulgate limitless control measure to prevent and control disease . . ." resulting in "unfettered power[.]" Resp. br. at 29. None of this, of course, is true.

As explained above at pages 12-15, the Department's authority is cabined by the Department of Health Act, the Administrative Code of 1929, the Disease Control Law, and the associated regulations, which collectively "outline the parameters within which the [Acting] Secretary may operate with respect to the containment of communicable diseases within public and private schools." R. 54a (Wojcik, J. dissenting). Further, the Department can only issue disease control measures based on medical science and its expertise in the public health arena. The Department's authority, though necessarily broad, is far from limitless.

The Schools complain that the Masking Order has no specific duration. Resp. br. at 29. But how long this order might be necessary was unknowable when it was

issued. And the Schools point to no requirement that disease control measures have a set termination date. Likewise, the Schools' statement that the Masking Order has "no limitation on its implementation," Resp. br. at 29, ignores the parts of the order that provide eight exceptions to its mandate and explain how the order should be implemented by schools. R. 61a-62a (Masking Order). Finally, the Schools' assertion that there exist no safeguards to protect individuals from "Constitutional violations" is patently untrue. The courts exist as precisely that safeguard.

In our opening brief, we examined the General Assembly's grant of authority and discretion to the Department of Health under the familiar analysis articulated in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (Pa. 2017). Op. br. at 43-47. In *Protz*, this Court determined that the General Assembly unconstitutionally delegated authority to establish criteria for evaluating permanent impairment to a private entity, the American Medical Association. *Id.* at 661, 668. Here, in stark contrast, the General Assembly made the basic policy choice that disease should be suppressed and that the health of the public should be protected, and created an executive agency—the Department of Health—staffed by medical and health experts to accomplish those policy goals. Op. br. at 43-45.

The Schools, once again, make no attempt to directly respond to this analysis or dispute our conclusions. This is unsurprising: As Judge Wojcik correctly observed, "[t]he authority conferred upon [the Acting Secretary] in this regard in no

way encroaches upon the legislative power provided in article II, section 1 of the Pennsylvania Constitution." R. 55a (dissent). It would be impossible for the General Assembly to legislate the most effective and practical means to prevent and suppress diseases that have not yet occurred. Rather, the General Assembly wisely created a dynamic Department of Health and broadly empowered *it* to determine what means best addresses a future emergency, in order to "protect the health of the people of this Commonwealth[.]" 71 P.S. § 532(a).

The Masking Order is well within the Department's legislatively-conferred discretion and does not violate the Non-Delegation Doctrine.

CONCLUSION

The Court should reverse the judgment of the Commonwealth Court.

Respectfully submitted,

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Date: December 2, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 4,296 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

*/s/ Sean A. Kirkpatrick*___
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CERTIFICATE OF SERVICE

I, Sean A. Kirkpatrick, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Reply Brief For Appellant by electronic service to the following:

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