IN THE SUPREME COURT OF FLORIDA

FREDERIC GUTTENBERG, ETC., ET AL.,

Appellants,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Appellee. /

Case No. SC19-487
Lower Case Nos. 4D19-229; 062018CA009397XXXCE

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPELLANTS' REPLY BRIEF

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The School Board's brief presents something of a misdirection play. It gives the distinct—but wholly inaccurate—impression that the Parkland Parents' position risks evisceration of the statutory caps on government tort liability. But this case only presents the far less radical question of *which of the two* liability caps in subsection 768.28(5), Florida Statutes (2018), might apply to the circumstances presented in the Parents' separate damages suits. The rule of decision the Parents urge is not only wholly consistent with the text and purposes of the Tort Claim Act, but it will only affect a corner of the field of government tort liability: that involving derivative-liability torts. The vast majority of cases—alleging theories of direct negligence by a government employee—will be unaffected. The School Board and its amici's appeals to what they evidently suspect to be this Court's policy preferences are not just inappropriate, they are unfaithful to a traditional, textualist analysis of the statutory provision in question. That analysis, as underscored below, strongly favors the holding the Parents urge.

I. This Appeal Asks Which, Not Whether Any, Cap Applies

The School Board spends pages tilting at points not even remotely in controversy: that subsection 768.28(5), Florida Statutes effected only a "limited" waiver of sovereign immunity and that the statute creates a "ceiling" on governmental exposure. Answer Br. ("AB") at 5, 15-18. Those considerations have nothing to do with this appeal, unless the School Board's "concept of an aggregate

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limit" (AB at 32) is meant to suggest that the $300,000 cap is the maximum the government could pay *in any circumstance*. That is plainly *not* what the statute says; the $300,000 cap applies, by its terms, only to multiple claims or judgments that "aris[e] out of the same incident or occurrence." § 768.28(5), Fla. Stat.

So, where different tort victims' claims arise out of *different* incidents or occurrences, the government's exposure is not capped at $300,000. The maximum is the sum of each individual $200,000 cap.[1] Stated differently, the statute affirmatively entitles *each* tort victim whose claim arises out of a different incident or occurrence to recover up to $200,000 from the government. To the extent the School Board equates this unambiguous statutory reality with there being "no cap" at all on governmental exposure as it seems to, *see, e.g.*, AB at 34, then it has misjudged its *existing* liability, irrespective of the resolution of the distinct issue this case presents. The Parents are not urging this Court to take any action that "supplant[s]" the statutory caps (AB at 39); this appeal seeks no more than a proper interpretation of which of the two *existing* caps may apply in their suits.

II. Treating Each Shot That Causes Injury As a Separate "Incident or Occurrence" Effectuates the Plain Language of the Statute

[1] To illustrate, suppose Justice Frankfurter's hypothetical government lighthouse keeper in *Indian Towing Co. v. United States*, 350 U.S. 61, 66 (1955), were a Florida employee. Each of his separate injury-producing acts of negligence would give rise to a separate instance of $200,000 liability.

A. The Parents' initial brief undertook a careful explication of the text, structure, and history of the statute, as well as contemporaneous judicial commentary about it and related statutes, to show why a faithful application of principles of statutory interpretation yields the conclusion that *Barnett* was wrongly decided. The School Board largely skips this analysis and reaches directly, instead, for the strict-construction canon applicable to statutes waiving sovereign immunity to achieve its self-serving reading of the statute. That approach is mistaken for two reasons.

First, it is improper to "mechanistically rely on a single tool" of statutory interpretation instead of "us[ing] all available tools of interpretation." *Bautista v. State*, 863 So. 2d 1180, 1187 n.8 (Fla. 2003). And as the Supreme Court of the United States has cautioned, "[t]he sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

Second, there is no need to resort to the strict-construction canon because the statute's text illuminates the Legislature's intent. As noted in the initial brief, the references to the negligent act or omission of an employee in other places in section 768.28, Florida Statutes are strong evidence that the Legislature did not intend that to be "the *sole* determinant of whether claims or judgments should be aggregated for damage-cap purposes." IB at 15-16 (emphasis added; discussing § 768.28(1), Fla.

Stat. (2018)); *see also* § 768.28(9)(a), Fla. Stat. (2018) (also using same terminology). The School Board offers no rejoinder to this textual analysis.

Another provision of the statute resolves any lingering uncertainty as to where to look to determine what the proper point of reference should be: the law applicable to private parties in similar circumstances. The opening sentence of subsection 768.28(5), Florida Statutes proclaims: "The state and its agencies and subdivisions shall be liable for tort claims *in the same manner and to the same extent as a private individual under like circumstances* . . ." (emphasis added).[2] So, where Florida law shapes the scope of the liability of private parties (insurance companies and their insureds) in a particular circumstance (derivative liability claims) in accordance with a particular legal doctrine (the *Koikos* last-injury-producing-act rule), the "same manner"/"same extent" provision of subsection 768.28(5), Florida Statutes requires application of the same rule to government defendants facing similar claims "under similar circumstances," *Henderson v. Bowden*, 737 So. 2d 532, 535 (Fla. 1999).[3]

[2] This language derives verbatim from the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1946). *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1016 (Fla. 1979).

[3] The government's liability tracks the law at any given time. *See* Fla. Const. art. X, § 13 (allowing waiver of sovereign immunity "as to all liabilities now existing or hereafter originating"); § 768.28(1), Fla. Stat. (waiving such immunity "[i]n accordance with s. 13, Art. X of the State Constitution"); *cf. Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768 (2019) (FTCA holds government liable "in the same way as a private individual *at any given time*") (emphasis added).

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Not only does this conclusion flow directly from the plain language of the statute, but it is backed by longstanding precedent of this Court that synchronizing the principles governing the liability of governmental defendants with that of similarly situated private parties (subject to the applicable cap) effectuates the express command of the statute. In *Berek v. Metropolitan Dade County*, 422 So. 2d 838, 840 (Fla. 1982), the Court invoked the "same manner"/"same extent" provision as the basis to require an award of costs, under the general prevailing-party costs statute, to a tort claimant who prevails against the government. The Third District had held costs unavailable on the theory that "[w]hatever rights of recovery against the state are given to a claimant must . . . affirmatively appear in the waiver of immunity statute and cannot be read into it." *Berek v. Metro. Dade Cty.*, 396 So. 2d 756, 758 (Fla. 3d DCA 1981). This Court rejected that view as inconsistent with the "same manner"/"same extent" provision of subsection 768.28(5) and held that a "general provision[] of law" like the prevailing party costs statute is equally "applicable when a tort claimant prevails against the state," provided it remains within the applicable liability cap. *Berek*, 422 So. 2d at 840. The Supreme Court of the United States has reached similar conclusions regarding the FTCA.[4] The "same

[4] *See, e.g.*, *United States v. Olson*, 546 U.S. 43, 46 (2005) (emphasizing that the FTCA speaks of "like circumstances" not "the *same circumstances*" as a private party) (discussing *Indian Towing Co.*, 350 U.S. at 64).

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manner"/"same extent" provision also reveals the error in the School Board's assertion that there is something inherently different about tort liability in "the sovereign immunity context" (AB at 24). This Court long ago dispatched that misconception. *See Commercial Carrier*, 371 So. 2d at 1016 (rejecting purely "governmental functions" exception from "the scope of the waiver contemplated by section 768.28").

In summary, interpreting the "incident or occurrence" language of subsection 768.28(5), Florida Statutes to refer to each shot fired by the gunman that results in a distinct injury to a victim is perfectly consistent with the Legislature's expressed intent. Given the School Board and its amici's sky-will-fall mantra, it bears repeating that adopting this holding will have a limited effect. It affects only the small portion of the landscape of governmental tort liability involving derivative-liability torts. In the mine run of *direct* liability cases, the government's act of negligence will generally coincide with the injury-producing act, so that looking to the act of negligence will still suffice to disaggregate different from "same" "incidents or occurrences" for cap purposes. *See* IB at 13; *see also infra* at 13 (discussing separate-complete-tort principle). Such a holding would not, therefore, undermine the existing body of precedent in correctly decided direct-liability cases. *See infra* nn. 9 (single-victim cases) & 12 (multiple-victim cases).

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B. The School Board contends that the reasoning of *Koikos v. Travelers Insurance Company*, 849 So. 2d 263 (Fla. 2003), "cannot be applied in the sovereign immunity context" because "it is the sovereign entity's purported negligence that is in question, not the injury-producing event." AB at 31; *see id.* at 24 (asserting that the School Board "*cannot*, however, be held liable for the independent, and clearly intentional, actions of the shooter himself"). This proposition misunderstands the nature of derivative-liability torts. A private party in Florida under like circumstances—whose negligence exposes invitees to its property to the risk of harm from an intentional tortfeasor, like a deranged gunman—becomes liable to multiple victims based upon the last injury-causing act as to each victim, and not upon the private party's own negligence. This common law doctrine consists of two components: a theory of derivative liability plus the disaggregation principle articulated in *Koikos*.

Florida's common law recognizes that liability for certain claims of negligence are "derivative because [they] depend[] upon a subsequent wrongful act or omission by another." *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003).[5] Thus, in the context of a derivative-liability tort, the acts of the third-party

[5] *Accord Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde*, 199 So. 3d 333, 341 (Fla. 4th DCA 2016); *Peltz v. Trust Hosp. Int'l, LLC*, 242 So. 3d 518, 520 n.6 (Fla. 3d DCA 2018); *cf. Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562-63 (Fla. 1997).

tortfeasor (or criminal actor) that cause harm to the victims loom *particularly* significant in defining the scope of the negligent defendant's liability.

Because the Legislature mandated that public entities shall be liable in tort in the "same manner and to the same extent" as private parties in "like circumstances," § 768.28(5), Fla. Stat., the School Board may be liable for the shooter's intentional acts in the same way private insureds and insurance companies are for the gunman's acts in the "like circumstances" presented in *Koikos*. Depending on the facts, the School Board may be similarly situated to a private property owner whose negligent maintenance or operation of property facilitates an intentional tortfeasor's foreseeable injury-producing conduct. *Compare City of Belle Glade v. Woodson*, 731 So. 2d 797, 798 (Fla. 4th DCA 1999) *with Sanchez v. Miami-Dade Cty.*, 245 So. 3d 933, 943 (Fla. 3d DCA 2018).

C. The Florida cases the School Board relies upon (AB at 19-24) do not offer a persuasive ground to depart from this approach. (Space constraints here force a heavy reliance on footnotes for the necessary detail; apologies.) *Rumbough v. City of Tampa*, 403 So. 2d 1139 (Fla. 2d DCA 1981), a case which rightly recognized that subsection 768.28(5) evoked insurance parlance (IB at 23-25), offers meager support for the argument that "occurrence" must always be tethered to the government's negligent act (AB at 20). *Barnett*, 262 So. 3d at 753, tried to squeeze the same juice from *Rumbough*, but it yields nary a drop. *Rumbough* simply did not

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address that question.[6] *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), offers even less succor. The applicability of the aggregate statutory cap to multiple claimants was not at issue.[7] Nor did the split decision in *Windham v. Florida Department of Transportation*, 476 So. 2d 735 (Fla. 1st DCA 1985), construe the "same incident or occurrence" language of subsection 768.28(5), Florida Statutes. It presented the somewhat different question of how to

[6] The *Rumbough* court confronted a homeowner couple's nuisance claim about noxious fumes emanating from the city's operation of a landfill. Because the city had already settled with other complainants for the stench up to the aggregate damages cap (then $100,000), 403 So. 2d at 1142, the question was whether those claims arose from the same "occurrence." But the plaintiffs "concede[d] that the effects of the landfill upon each surrounding landowner must be aggregated for purposes of the $100,000 maximum." *Id*. Instead, they argued that a continuing course of conduct, maintaining a landfill, cannot be considered an "incident or occurrence." *Id*. *That* is the main point the court addressed. *Id*. at 1143 ("having concluded the statute waives sovereign immunity with respect to torts which constitute a nuisance, we cannot see how such torts could be divided into time segments so as to permit multiple recoveries simply because nuisances are usually continuing in nature"). The case did not present a derivative-liability tort, which requires consideration of the distinction between the government's underlying negligence and the intentional tortfeasor's more proximate acts. The *Barnett* court's assertion that in *Rumbough* "[t]he 'occurrence' was tied to the negligence of the state actor, not to the damages resulting from the negligent acts," 262 So. 3d at 753, relies on alchemy; the *Rumbough* decision does not even consider whether an "occurrence" would turn on separate resulting damages.

[7] This Court in *Trianon* made only passing mention in its recitation of the procedural history of the case to the fact that the *trial court* limited the multiple condominium owners' jury verdict "to the maximum amount provided under section 768.28(5)." 468 So. 2d at 915. This ruling appears not to have been challenged on appeal, so the case furnishes no precedent on the question presented here.

interpret the word "incidents" that appeared in a different context: the effectiveness provision, section 768.30, Florida Statutes (1973), which provided that "Section 768.28 shall take effect in July 1, 1974 . . . and shall apply only to incidents occurring on or after those dates." *See Windham*, 476 So. 2d at 737 n.3.[8]

The Third District's decision in *Department of Health and Rehabilitative Services v. T.R. ex rel. Shapiro*, 847 So. 2d 981 (Fla. 3d DCA 2002), was wrongly

[8] *Windham* involved a family's claim against a state agency for negligently allowing a contractor's unsafe disposal of toxic chemicals that seeped into their water supply and caused injury to their child. *Id.* at 736, 739. Although the injuries manifested after the effective date of the statute waiving sovereign immunity, the alleged breach of duty happened years before. The case raised the question of whether the word "incidents," "in the context in which it is used," *id.* at 739—*i.e.*, "incidents occurring on or after" a certain date—referred to the occurrence of the injury or the negligent conduct of the government. The majority reasoned that if one considered the date of the injury, which would be "synonymous with 'accrual of the cause of action,'" it would be "inconsistent with other provisions of the same statute" which use the term when "'such claim accrues,'" such that the omission of that "accrual" language in the effectiveness provision implied a different intent. *Id*. (quoting §§ 768.28(6)(a), (11), Fla. Stat. (1981)). Consequently, the court held that the point of reference for effectiveness purposes was the date of the negligence. *Id*. at 740. Despite the case's superficial similarity, it confronted a different question and the lone term "incidents" in a different context, where construing it with reference to the injury presented potential conflict with another provision governing accrual of claims. Those circumstances differ from the question presented in this case, and no court has ever pointed to *Windham* as support for how to interpret "the same incidents or occurrences" in subsection 768.28(5), Florida Statutes. Judge Ervin's strong dissent—objecting that the majority's "interpretation bifurcates the traditional definition of negligence," departs from "common principles of tort law," and thus conflicts with subsection 768.28(5)'s "same manner"/"same extent" requirement, 476 So. 2d at 742 (Ervin, J., dissenting)—underscores the Parents' position.

decided. It framed the doctrinal question as presenting a (false) choice between an individual "incident" of negligence versus a "claim" of underlying negligence. *Id.* at 984-85. In adopting a claim-based principle, it held that two girls in foster care, who apparently suffered multiple and different injuries at the hands of abusive doctors, foster parents, and others as the result of various actions by numerous state employees over a period of many years, could each recover no more than the per-person statutory cap for all of their separate injuries because they each had only a single claim for the Department's negligence. *Id*. at 981, 985. That result chafes against basic conceptions of tort law, in which a victim has a separate right to recover from a tortfeasor for each distinct injury he or she suffers. The court failed to recognize the existence of another available principle: that a claim or judgment is distinct from another if it gives rise to a separate *complete* tort—that is, a distinct claim for damages that could stand on its own, separate from others. *See Zamora v. Fla. Atl. Univ. Bd. of Trs.*, 969 So. 2d 1108, 1113 (Fla. 4th DCA 2007) (referring to a "separate tort").

The Third District's own hypothetical illustrates the distinction. It noted that if the applicability of the (per-person) cap turned simply on an incident of negligence, "such a reading would allow a plaintiff, after having been operated on, to accuse a state hospital surgeon of using the wrong medicine, performing some procedure too slowly, and closing in an improper manner, and as such performing

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three separate incidents of negligence, thereby subjecting the state hospital to three separate [then] $100,000 caps." *T.R.*, 847 So. 2d at 985. The Parents agree. The common law would *not* treat that scenario as three separate torts because they give rise to but one single, non-segregable set of damages.[9]

By contrast, if state employees negligently allowed different third parties to commit distinct intentional torts against a minor child in the state's custody at different times, *cf. T.R.*, 847 So. 2d at 981, and those acts each caused discrete, segregable injuries, then the victim would have multiple, independent tort claims. As several courts have appreciated, such complete torts give rise to a distinct "incident or occurrence" for purposes of subsection 768.28(5), Florida Statutes. *See* IB at 32-33 & n.10 (citing cases).[10] Indeed, the School Board appears to concede

[9] Cases the School Board cites falling into that category are: *School Bd. of Broward Cty. v. Greene*, 739 So. 2d 668, 670 (Fla. 4th DCA 1999) (teacher's claims of negligent public release of derogatory comments in his file and invasion of privacy based on same conduct implicate "a single incident or occurrence"); *Comer v. City of Palm Bay*, 147 F. Supp. 2d 1292, 1299 (M.D. Fla. 2001) (African-American employee "proved his single claim of negligent supervision through various incidents [of discrimination], resulting in one judgment").

[10] *Berek v. Metropolitan Dade County*, 396 So. 2d 756 (Fla. 3d DCA 1981), *approved in result*, 422 So. 2d 838 (Fla. 1982), is not to the contrary. The School Board stresses the Third District's statement that "'the Legislature has said $50,000, whatever the components may be, is the *most* the Legislature will permit a court to award a claimant,'" AB at 17 n.2 (quoting *Berek*, 396 So. 2d at 759 (emphasis added)), to suggest that *under no circumstances* can one claimant recover more than the per-person cap (then $50,000). But, the per-person cap is tethered to liability arising from a single incident or occurrence, a subtle but important distinction which this Court's recapitulation was careful to note: "The maximum amount of the state's

that where a plaintiff "claim[s] to have suffered *different damages* because of different acts that were taken at different times" (AB at 36 (emphasis in original)), that *would* give rise to a different "incident or occurrence." That is precisely the Parents' position, albeit in the multiple-victim context that this case presents.

The separate-complete-tort principle works equally well in a multiple-victim scenario. This, of course, jives with the common law from the insurance context, whereby "the act that causes the damage" identifies the "occurrence." *Koikos*, 849 So. 2d at 271; *see also* IB at 28 (collecting cases). This test "looks not to the number of injuries or victims," but, in the case of a mass shooting (because it involves separate injury-producing conduct) "to each separate shot that resulted in a separate injury to a separate victim." 849 So. 2d at 273. However, where a single injury-producing act inseparably causes multiple casualties—say, a city bus crash injuring

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liability to any one claimant *arising out of any one incident or occurrence*, therefore, is $50,000." *Berek*, 422 So. 2d at 840 (emphasis added). So, an individual aggrieved on multiple occasions by the government could recover multiple judgments against it, each one up to the per-person per-incident cap. That issue is not presented in this case, of course.

multiple passengers[11]—there remains only one "incident or occurrence," and the aggregate ($300,000) cap will apply, significantly cabining government exposure.[12]

III. It Would Be Premature to Decide How This Court's Holding Will Affect the Parents' Separate Lawsuits

The School Board elected not to respond to the Parents' alternative position, predicated on the sound logic of *Zamora*, save to invite improper resort to extra-record materials: complaints filed *after* the trial court's ruling. *See* AB at 3 n.1, 36, 40; *see also id.* at 41 (report). *See Bryant v. Kuhn*, 73 So. 2d 675, 676 (Fla. 1954);

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[11] Or the explosion of a hot-water heater in a school cafeteria, *Wilson v. Gipson*, 753 P.2d 1349, 1350 (Okla. 1988). The other out-of-state cases the School Board cites (AB 25-29) are equally unenlightening as to the narrow issue presented in this case.

[12] *See also City of Miami v. Valdes*, 847 So. 2d 1005, 1009 (Fla. 3d DCA 2003) (aggregate cap applied to two people injured in police car accident); *Orange County v. Gipson*, 539 So. 2d 526, 527 (Fla. 5th DCA 1989) (each child's drowning attributable to the defendants' creation of an "attractive nuisance"); *State Bd. of Regents v. Yant*, 360 So. 2d 99, 100-01 (Fla. 1st DCA 1978) (child's claim for unspecified injuries and mother's derivative claims for resulting medical bills arose from the same incident of the state's negligence); *Dep't of Health & Rehab. Srvs. v. McDougall*, 359 So. 2d 528, 533 (Fla. 1st DCA 1978) (claims of decedent's widow and surviving children all stemming from decedent's murder by escaped mental patient subject to aggregate cap).

For this reason, the amicus Panhandle Area Educational Consortium is wrong that the Parents' interpretation of the statute would create "devastat[ing]" exposure to small school districts from hypothesized mold-related injuries to students in hurricane-ravaged schools. PAEC Br. at 8 n.18. Such mass exposure would result from a single injury-causing act: the negligent remediation of mold in a building. The aggregate cap of $300,000 would apply to such claims, perhaps on a per-facility basis. *Cf. Home Indem. Co. v. City of Mobile*, 749 F.2d 659, 663 (11th Cir. 1984).

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Tyson v. Aikman, 31 So. 2d 272, 273 (Fla. 1947). It matters not that they are public records. *See Gidwani v. Roberts*, 248 So. 3d 203, 207 (Fla. 3d DCA 2018).

IV. Overtures to Public Policy Concerns Are Inappropriate

The School Board and PAEC's invocations of conceptions of good public policy ignore this Court's unanimous admonition that "this Court is not the proper forum for a policy decision." *Halifax Hosp. Med. Ctr. v. State*, 44 Fla. L. Weekly S149, No. SC18-683, 2019 WL 1716374, at *5 (Fla. Apr. 18, 2019). Where a statute waiving sovereign immunity permits exposure to liability, a court should not play "self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it." *Indian Towing Co.*, 350 U.S. at 68; *see also Everton v. Willard*, 468 So. 2d 936, 946 (Fla. 1985) (Shaw, J., dissenting). Moreover, alarmism about supposedly greater exposure is exaggerated. Counties already shoulder the cost of claims bills, *e.g.*, *Hess v. Metro. Dade Cty.*, 467 So. 2d 297, 298 (Fla. 1985), a risk against which they already may insure, § 768.28(16)(a), Fla. Stat. (2018). *See Everton*, 468 So. 2d at 949 n.13, 952-53 (Shaw, J., dissenting).

* * *

The Parkland Parents therefore respectfully urge the Court to quash the decision below and the Fourth District's erroneous decision in *Barnett* upon which it turned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on this 15th day of July, 2019.

/s/ Stephen F. Rosenthal
Stephen F. Rosenthal

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

/s/ Stephen F. Rosenthal
Stephen F. Rosenthal

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