IN THE SUPREME COURT
OF THE STATE OF DELAWARE

THE DELAWARE DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL, an agency of the State of Delaware,	)	
Defendant Below, Appellant,	)	
v.	)	No. 145, 2011
SUSSEX COUNTY, a political subdivision of the State of Delaware; WHITE FARM, LLC, a Delaware Limited Liability Company; BAR-SGR, LLC, a Delaware Limited Liability Company; WAYNE BAKER, LLC, a Delaware Limited Liability Company; BAXTER FARMS, INC., a Delaware Corporation,	)	
Plaintiffs Below, Appellees.	)	

AMICUS CURIAE BRIEF OF THE SIERRA CLUB IN SUPPORT OF APPELLANT'S POSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

IDENTITY AND INTEREST OF AMICUS CURIE

The Sierra Club is the amicus curiae filing this brief. By and through its Delaware Chapter, the Sierra Club has long had an interest in protection of Delaware's natural environment and resources through effective regulation and stewardship. The regulations at issue in this appeal—the *Regulations Governing The Pollution Control Strategy For The Indian River, Indian River Bay, Rehoboth Bay and Little Assawoman Bay Watersheds* (the "PCS Regulations")—seek to reduce nutrient pollution in the Inland Bays, water bodies that members of the Sierra Club use for recreational and aesthetic purposes and upon and around which members live and own property.

The Sierra Club has long fought for the improvement of water quality in Delaware. The Delaware Chapter successfully sued the United States Environmental Protection Agency to get Total Maximum Daily Loads ("TMDLs") set for Delaware waters, including the Inland Bays, as a way of achieving better water quality. The PCS Regulations were issued in order to implement the TMDL for the Inland Bays. In addition, during the administrative process by which the PCS Regulations were proposed, debated, and ultimately issued, the Delaware Chapter played an active role, attending public hearings and submitting comments. This participation reflected the Delaware Chapter's and its members concerns for the quality and conservation of the Inland Bay's waters and their commitment to participate in the creation, adoption, promulgation and enforcement of regulatory measures to protect the Inland Bays.

The source of the Sierra Club's authority to file this amicus curiae brief is the Club's longstanding commitment to and involvement in protection of Delaware's natural environment and its involvement in and knowledge of the regulatory process that led to the issuance of the PCS Regulations. The Sierra Club seeks to express the concerns of Delaware citizens on the

issue of the policy implications of the Superior Court's decision voiding certain sections of the PCS Regulations that would not otherwise be presented to this Court.

SUMMARY OF ARGUMENT

The analytical lynchpin of the Superior Court's decision is the claim that "[t]he PCS Regulations, in establishing buffer zones and in regulating the use and utilization of land, constitute zoning." *Sussex County v. Delaware Dept. of Nat. Res. and Environ. Control*, No. SO8C-11-032THG, slip op. at 6 (Del. Super. Ct. Feb. 25 2011). The Sierra Club respectfully suggests that the policy implications of this essential assumption behind the Superior Court's reasoning justify rejection of the decision below for two reasons. First, the notion that any regulation of the use of land constitutes zoning is not supported by, and if upheld would require the rewriting of, Delaware law. Second, upholding the Superior Court's analytical claim would seriously weaken if not completely undermine environmental regulation in the State of Delaware because, by requiring express grants of authority to zone, state environmental statutes are void and environmental regulatory power will reside in the Counties instead of the State. The Sierra Club therefore urges this Court to reject the Superior Court's flawed reasoning and reverse the decision below.

ARGUMENT

I. THE CONCEPT THAT REGULATION OF THE USE OF LAND CONSTITUTES ZONING IS NOT SUPPORTED BY, AND WOULD REQUIRE THE REWRITING OF, DELAWARE LAW.

It is very clear that the Superior Court viewed this case as one about whether or not the Department of Natural Resources and Environmental Control (DNREC) had the power to zone or issues regulations that amount to zoning: "The ultimate question is whether Delaware's General Assembly has granted DNREC the authority to implement regulations which create

zoning laws regarding the lands in the referenced watersheds." *Id*. at 1. The Superior Court found that DNREC engaged in zoning because it drew a direct analytical link between the regulation of the use of land and zoning such that regulation of land use *equals* zoning. *See id*. at 4 (". . . the only issue examined in this decision is whether Delaware's General Assembly has granted DNREC the power to issue regulations directing land use and utilization in Sussex County's inland bays watersheds" and then immediately calling the PCS Regulations "DNREC's zoning actions"); *id*. at 6 ("[t]he PCS Regulations, in establishing buffer zones and in regulating the use and utilization of land, constitute zoning"). Having described the problem as one of DNREC's power to zone, the Superior Court then looks for, but fails to find, express statutory power for DNREC to zone, and therefore invalidates the PCS Regulations..

The Sierra Club respectfully suggests that the Superior Court fundamentally erred when it assumed that any regulation of the use of land equals zoning. Not only is this assumption not supported by Delaware law, but if upheld this assumption would require a significant rewriting of numerous Delaware laws. As such, the Delaware General Assembly cannot have intended that all regulation of the use of land constitutes zoning. If in fact land use can be regulated in ways that are not considered or viewed as zoning, then the Superior Court's entire analytical edifice crumbles.

A. *Farmers for Fairness* Does Not Support The Conclusion That DNREC's Regulation of Land Use Via The PCS Regulations Is Zoning.

To support its claim that regulation of the use of land constitutes zoning, the Superior Court cites a single legal source: *Farmers for Fairness v. Kent County*, 2007 WL 1413247 (Del. Ch. May 1, 2007). In that case, Kent County exercised its zoning authority to promulgate a Coastal Zone Protection Overlay District which was challenged by residents of the County on a number of grounds, *id*. at *1, though the Court only ruled on the challenge based on the

uniformity requirements of 9 Del. C. § 4902(b). *Id*. As a result, a good portion of the decision discusses Kent County's authority to zone under Title 9 of the Delaware Code. *Id*. at *3-8. In that discussion, the Chancery Court logically concludes that, pursuant to its zoning authority, Kent County can regulate land use, but must comply (and in this case failed to comply) with the requirements of § 4902 granting the County its power to zone. Thus, at best *Farmers for Fairness* stands for the wholly unremarkable proposition that an exercise of zoning power (which Kent County inarguably possesses) is the regulation of the use of land.

What *Farmers for Fairness* does not assert, however, is what the Superior Court cites it for—that any regulation of the use of land equals zoning. That *Farmers of Fairness* does not state this is hardly surprising, given that the Chancellor Chandler had no need to even consider this concept because he was dealing with the exercise of power by a County with zoning authority to regulate use of land in that County. Nor can *Farmers for Fairness* be read as saying anything about a regulation of the use of land by a state agency like DNREC, as there was no state agency or state regulation involved in that case at all. In short, nothing in the *Farmers for Fairness* case provides any relevant legal guidance on the question of the status of a state regulation (like the PCS Regulations) that happens to regulate the use of land. The Superior Court's reliance on the case as the sole legal support for its claim that the regulation of the use of land constitutes zoning when the case neither asserts nor can be read as supporting that proposition shows that the Superior Court's claim has no legal support.

B. Delaware Law Shows That State Regulation Of The Use of Land Is Separate From Zoning.

A strong second indication of the legal error in the Superior Court's claim that regulation of the use of land constitutes zoning can be found in the way that the General Assembly treats regulatory power under state law provisions. If the Superior Court is correct that regulation of

the use of land equals zoning requiring express power to zone, one would expect to see the General Assembly granting state regulatory agencies zoning power in order to accomplish the General Assembly's regulatory objectives in passing the statute. However, no such support of the Superior Court's reasoning can be found.

In fact, Delaware law consistently shows that the General Assembly views the state regulatory power it creates in Delaware statutes to be ***different from*** and ***in addition to*** zoning by counties or municipalities. For example, in the Environmental Protection Act, 7 Del. C. § 6001 *et seq.*—one of the statutes relied upon by DNREC to justify the PCS Regulations and analyzed by the Superior Court—the General Assembly in § 6003(a)-(b) specifically prohibited a wide variety of activities without obtaining a permit,[1] and in § 6003(c) specifically empowered the Secretary of DNREC to grant permits for those activities. The prohibitions clearly regulate the use of one's land by prohibiting any person from engaging in those activities on their property without first obtaining a permit. For example, one cannot build or operate a facility that causes or contributes to the discharge of air or water pollutants without a permit. Thus, the General

[1] Those sections provide:

> (a) No person shall, without first having obtained a permit from the Secretary, undertake any activity:
> (1) In a way which may cause or contribute to the discharge of an air contaminant; or
> (2) In a way which may cause or contribute to discharge of a pollutant into any surface or ground water; or
> (3) In a way which may cause or contribute to withdrawal of ground water or surface water or both; or
> (4) In a way which may cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes, regardless of the geographic origin or source of such solid wastes; or
> (5) To construct, maintain or operate a pipeline system including any appurtenances such as a storage tank or pump station; or
> (6) To construct any water facility; or
> (7) To plan or construct any highway corridor which may cause or contribute to the discharge of an air contaminant or discharge of pollutants into any surface or ground water.
>
> (b) No person shall, without first having obtained a permit from the Secretary, construct, install, replace, modify or use any equipment or device or other article:
> (1) Which may cause or contribute to the discharge of an air contaminant; or
> (2) Which may cause or contribute to the discharge of a pollutant into any surface or ground water; or
> (3) Which is intended to prevent or control the emission of air contaminants into the atmosphere or pollutants into surface or ground waters; or
> (4) Which is intended to withdraw ground water or surface water for treatment and supply; or
> (5) For disposal of solid waste.

Assembly very clearly empowered the Secretary of DNREC to regulate these uses of land via a permit system.

In discussing the Secretary's authority to issue permits, § 6003(c) specifically distinguishes this permitting power from zoning when it states:

> (c) The Secretary shall grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations and:
>
> (1) No permit may be granted unless the county or municipality having jurisdiction has first approved the activity by zoning procedures provided by law….

7 Del. C. § 6003(c). In other words, the statute requires a permit applicant to obtain zoning approval ***plus*** comply with the "duly promulgated regulations." By requiring zoning approval as but one of the bases for granting a permit under the Environmental Protection Act, the General Assembly was clearly indicating in this "zoning plus" construct that the regulation of the uses of land in § 6003(a)-(b) were ***different from*** zoning by county or municipality because the exercise of the regulatory power was ***in addition to*** the zoning approval. Similar provisions requiring zoning approval as separate from the permitting decision by the Secretary of DNREC can be found in the Coastal Zone Act[2] and the Wetlands Act.[3] Other, non-environmental statutes reflect the General Assembly's distinction of zoning from the state regulatory program in a similar way when regulating particular uses of land.[4] In short, the General Assembly distinguishes between

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[2] *See* 7 Del. C. § 7004(a) ("no permit [for manufacturing uses or the expansion of a nonconforming use] may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law").

[3] *See* 7 Del. C. § 6604(a) ("any activity in the wetlands requires a permit from the Department . . . and no permit may be granted unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law"); § 6605 ("Any expansion or extension of a preexisting use requires a permit and no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law").

[4] *See e.g.*, 4 Del. C. § 543(g) (making zoning approval one of several conditions for grant of a liquor license); 21 Del. C. § 6303 (making zoning approval one of several conditions for grant of a Motor Vehicle Sales Dealer license); 21 Del. C. § 7503 (making zoning approval one of several conditions for license to conduct automobile recycler business).

the zoning that a county or municipality might impose and the exercise of regulatory power granted under the statute—i.e., regulation of the use of land pursuant to a state statute and regulation of the use of land via zoning are two completely different things.

This distinction between regulation for statutory purposes and regulation for zoning purposes underscores the flaw in the Superior Court's reductionist construct. For if all regulation of the use of land constitutes zoning (as the Superior Court assumes), then any state regulation of the use of land means the State is engaged in zoning, and thus zoning approval begins and ends the permitting matter. In order for the Superior Court's reasoning to be valid, this Court must read out of these statutes anything beyond zoning approval—in effect, rendering the above-cited statutory provisions of the Environmental Protection Act, Coastal Zone Act, Wetlands Act, and any other similar statute meaningless surplusage. That would violate fundamental principles of statutory construction, for "words in a statute should not be construed as surplusage if there is a reasonable construction which would give them meaning," and "must be construed as a whole, in a way that gives effect to all of their provisions and avoid absurd results." *Chase Alexa LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010), citing *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1984) and *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007). In addition, such an interpretation would fail to carry out the intent of the General Assembly (which is clearly indicated by these "zoning plus" provisions in the statutes) and ignore the golden rule of statutory interpretation favoring reasonable interpretations over unreasonable ones. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Given that none of these statutes expressly gives DNREC the power to zone (no doubt because the General Assembly views what DNREC does as different from zoning), if the Superior Court's reasoning prevails, then all these statutes would

need to be rewritten to grant the state agency zoning authority in order to create a regulatory power the General Assembly clearly intended to create and thought it had created by passage of the statute.

The Sierra Club respectfully suggests that the better—and, under the golden rule of statutory interpretation, more reasonable—interpretation of these statutes is to recognize that land use can be regulated for many reasons, only one of which is zoning, and that the state can regulate the use of land separate and apart from any zoning of the land. When the General Assembly wants to regulate the use of land under its inherent police power for environmental protection reasons, it has the full power to do so, and DNREC can be empowered to issue and enforce regulations that impact the use of land without needing a grant of zoning authority. Indeed, the General Assembly made clear in the Environmental Protection Act that DNREC could do precisely that. In 7 Del. C. § 6010(a), the General Assembly specifically provided that "[t]he Secretary may *adopt*, amend, modify, or repeal rules, *regulations*, and plans, after public hearing, *to effectuate the policy and purposes of this chapter*" (emphasis supplied). In terms of the policy of the Act, the General Assembly stated the following:

> In view of the rapid growth of population, agriculture, industry and other economic activities, the land, water and air resources of the State must be protected, conserved and controlled to assure their reasonable and beneficial use in the interest of the people of the State. Therefore, it is the policy of this State that: . . .
>
> (2) The State, in the exercise of its sovereign power, acting through the Department *should control the development and use of the land*, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State.

7 Del. C. § 6001(b) (emphasis supplied). In terms of the purposes of the Act, the General Assembly stated the following:

> (c) Purpose.--It is the purpose of this chapter to effectuate state policy by providing for:

> (1) A program for the *management of the land*, water, underwater and air resources of the State so directed as to make the maximum contribution to the interests of the people of this State;
>
> (2) A program for the *control of pollution of the land, water, underwater and air resources* of the State to protect the public health, safety and welfare;
>
> (3) A program for the *protection and conservation of the land, water, underwater and air resources of the State*, for public recreational purposes, and for the conservation of wildlife and aquatic life . . . .

7 Del. C. § 6001(b) (emphasis supplied). Buffers like those in the PCS Regulations struck down by the Superior Court are a well-recognized way to control pollution and protect water resources.[5] Given that the Act is to be liberally construed, *see* 7 Del. C. § 6020, and "the rules of statutory construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute," *Chase Alexa LLC*, 991 A.2d at 1151, the express grant of authority to issue regulations in § 6010(a) to effectuate the articulated policies and purposes of the Act gives direct power to the Secretary to regulate the use of land and thus to issue the PCS Regulations.

This is not to say that Sussex County's power to zone is meaningless. Sussex County has authority under 9 Del. C. § 6902 to regulate the use of land for the purpose of zoning. However, well recognized principles of statutory interpretation require that the provisions empowering Sussex County in Title 9 and the provisions in Title 7 empowering DNREC must be read to harmonize the two statutes as much as possible by reading them in a manner that gives effect to both. *See Olson v. Halvorsen*, 986 A.2d 1150, 1160 (Del. 2009). Harmonization of these two statutes is easily achieved by recognizing that zoning is but one of several purposes for

[5] *See e.g.*, US EPA Fact Sheet on Riparian/Forested Buffers at p. 2 of 5 ("In general, a minimum [buffer] width of at least 100 feet is recommended to provide adequate stream protection;" copy in Amicus Appendix and available at http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=factsheet_results&view=specific&bmp=82&minmeasure=5); *In the Matter of Stormwater Management Rules*, 894 A.2d 1241, 1248 (N.J. Super. 2006) (upholding 300 foot buffer in regulations issued by New Jersey Department of Environmental Protection because "The Legislature, in a variety of measures, has given the DEP a wide array of power to address water quality and pollution concerns beyond traditional floodwater control, and to promulgate rules to protect the waters of this State").

regulating the use of land, and that the State's regulation of the use of land in order to achieve environmental protection is another. This interpretation gives full credence to the General Assembly's intent in passing both titles.[6]

The Superior Court's claim that regulation of the use of land constitutes zoning within the exclusive authority of the counties is not supported by and is in fact inconsistent with Delaware law.[7] Thus, the Superior Court's decision finding the PCS Regulations void as zoning should be overturned.

II. THE IMPACT ON STATE ENVRIONMENTAL REGULATION OF FINDING THAT REGULATING THE USE OF LAND CONSTITUTES ZONING JUSTIFIES REJECTION OF THAT CONCEPT.

Separate and apart from the fact that Delaware law does not support (and in fact is inconsistent with) the notion that all regulation of use of land constitutes zoning, the consequences of adopting the Superior Court's view provide an independent basis for its rejection. For if a regulation of the use of land is the equivalent of zoning requiring express

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[6] Of course, if the Court finds that the titles really are in irreconcilable conflict, then the rules of statutory construction require that the later-enacted statute should prevail. *See State Dept. of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982), citing *Green v. County Council of Sussex County*, 415 A.2d 481, 484 (Del.Ch 1980) ("It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier."). The General Assembly enacted 9 Del. C. § 6902 giving Sussex County the power to zone in 1967, *see* 56 Del. Laws c. 97, while 7 Del. C. § 6010(a) giving the Secretary of DNREC the power to issue regulations to carry out the policies and purposes of the Environmental Protection Act was enacted in 1973, *see* 59 Del. Laws c. 212. Thus, under this rule of construction, 7 Del. C. § 6010 trumps 9 Del. C. § 6902. However, the Sierra Club does not believe that the Court need make this finding, as the two provisions can be easily harmonized once the Court rejects the Superior Court's reductionist view that all regulation of the use of land constitutes zoning.

[7] In addition to the inconsistency with Delaware law, the Superior Court's decision suffers from its own internal inconsistency. The Superior Court declared void "the provisions of Section 4 of the PCS Regulations, as well as those portions of Section 5 adopting the buffer's requirements under Section 4," but specifically declared that "[t]he remaining provisions of the PCS Regulations remain valid." *Sussex County*, slip. op at 12. In § 6.5, the PCS Regulations impose setback (i.e., buffer) requirements on existing onsite wastewater treatment and disposal systems which are repaired or replaced or new systems on parcels recorded less than 30 calendar days after the PCS Regulations are published. In § 6.6, the Regulations expressly create a 100 foot buffer for new drainfields on parcels recorded more than 30 days after publication of the Regulations. In short, the Superior Court upheld the buffers in §§ 6.5 and 6.6, but struck down the buffers in Sections 4 and 5 of the Regulations.

statutory power to zone, then environmental regulation in the State of Delaware under state statutes is void and solely the province of the Counties that possess zoning power.

Numerous Delaware environmental statutes impose restrictions on the use of land. The Coastal Zone Act prohibits the construction of new heavy industry uses and bulk product transfer facilities in the Coastal Zone. *See* 7 Del. C. § 7003. The Wetlands Act prohibits dredging, draining, filing, bulkheading, and construction of any kind in the wetlands of the State. *See* 7 Del. C. § 6604(a) (prohibiting "activity") and § 6603 (defining "activity"). The Subaqueous Lands Act prohibits depositing materials upon or extracting materials from, or constructing, modifying, or occupying any structure or facility on submerged lands or tidelands. See 7 Del. C. § 7205. Yet none of these statutes expressly give DNREC the power to "zone" as the Superior Court said was necessary for the PCS Regulations in this case. Thus, under the Superior Court's analysis, DNREC's regulations and attempts to enforce all of these statutes are void because, by regulating the use of land, they constitute zoning for which DNREC has not been expressly granted any power.

The policy implications of this are frightening:

First, by reducing all regulation of the use of land to zoning, the Superior Court's analysis—if allowed to stand—undercuts the entire structure of environmental regulation by the State of Delaware. Given the fundamental impact of environmental regulations on the use of land, the General Assembly's failure to grant DNREC an express power to "zone" means that DNREC cannot implement the very statutes the General Assembly passed to protect the environment in Delaware. In addition, DNREC's ability to carry out the responsibilities delegated to it by the United States Environmental Protection Agency under the Clean Water

Act, the Clean Air Act, and other federal statutes is seriously compromised if not completely destroyed by the lack of express "zoning" power.

Second, by reducing all regulation of the use of land to zoning, the Superior Court's analysis—if allowed to stand—completely inverts the structure of government in this state by ceding all power to regulate the use of land to the counties under the rubric of their zoning power. Given the Superior Court's analysis that the General Assembly has ceded primary responsibility for zoning to the counties, opinion at 9 (citing *Hayward v. Gatson*, 542 A.2d 760, 766 (Del. 1988)), the State is apparently unable to control or legislate for the regulation of statewide problems created by the use of land because of the ultimate county power to zone.

To articulate these policy implications is to see the potentially corrosive effect of the Superior Court's reasoning and the unreasonable result produced by the Superior Court's interpretation. Again, applying the golden rule of statutory interpretation, the Sierra Club respectfully suggests that there is a better way for this Court to resolve these legal and policy issues. The Court should reject the Superior Court's reductionist analysis that views all regulation of the use of land as zoning. Instead, the Court should recognize that the use of land can be regulated for many reasons, one of which is for zoning by counties or municipalities, but others of which include for environmental protection pursuant to state statutes regardless of local zoning. This interpretation is reasonable for three reasons:

(1) This broader interpretation is clearly supported by the fundamental distinction the General Assembly has drawn between regulation for other purposes and zoning in the Environmental Protection Act and other environmental statutes.

(2) This interpretation avoids having to require the re-writing of numerous Delaware statutes to give DNREC and other state agencies the power to "zone" so as to be able to regulate the use of land that was clearly intended by the General Assembly.

(3) This broader interpretation avoids the policy implications of the Superior Court's ruling by recognizing that the state does have a legitimate interest in environmental problems and has the power to legislate state solutions to those problems (as the General Assembly has done in the Environmental Protection Act as well as other statutes) regardless of the local zoning.

Delaware's environment needs protection. The General Assembly has enacted numerous statutes designed to do precisely that through DNREC. Reversal of the Superior Court's decision will reaffirm the vitality of Delaware's environmental laws and the power of DNREC as the State's designated regulator to protect Delaware unique natural resources and natural spaces.

CONCLUSION

For the reasons set forth above, amicus curie Sierra Club respectfully requests that this Court reverse the ruling of the Superior Court and uphold the validity of the PCS Regulations at issue in this appeal.

Respectfully submitted,

The Sierra Club

May 17, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing AMICUS CURIE BRIEF and APPENDIX TO AMICUS CURIE BRIEF has been served upon the following:

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