IN THE SUPREME COURT OF PENNSYLVANIA

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD

Respondents.

INTERVENOR'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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I. INTRODUCTION

Greenwood Gaming and Entertainment, Inc. ("GGE") files this Intervenor's Reply Brief to address certain arguments raised in the Respondents' Brief filed on behalf of the Pennsylvania Department of Revenue, C. Daniel Hassell in his official capacity as Secretary of the Pennsylvania Department of Revenue, and the Pennsylvania Gaming Control Board ("the Board") (collectively, "Respondents") in this proceeding. In their Brief, Respondents raise several arguments challenging the positions taken by Sands in its Petitioner Brief, all of which lack merit.[1] Respondents mistakenly argue, among other things, that the relief sought by Sands exceeds this Court's original jurisdiction. Respondents further argue that the challenged provisions of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101 *et seq.* ("Gaming Act")[2] satisfy the requirements of the Uniformity Clause and the Special Law restrictions in the Pennsylvania Constitution. PA. Const. art. VIII, § 1; PA. Const. art. III, § 32. However,

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[1] GGE intervened in this proceeding on March 20, 2018. GGE's intervention is still pending. As such, contemporaneous with this Intervenor Reply Brief, GGE is also filing a Motion for Leave to File Intervenor Reply Brief.

Additionally, because GGE's intervention is still pending, Respondents do not specifically address any of GGE's arguments in their Brief. Rather, they indicate that should this Court grant GGE's intervention, the arguments advanced in their Brief should apply with equal force to any parallel claims brought by GGE. Respondent Brief at 6, FN 1. As such, GGE will address the arguments advanced by Respondents, as if they applied to GGE's arguments.

[2] The provisions of the Gaming Act under challenge before this Court are Sections 1407(c.1), 1407.1 and 1408(c.1) (the "tax scheme").

Respondents' contentions fail to obviate the constitutional defects in the tax scheme challenged in this action.

The tax scheme violates the Special Law Clause of the Pennsylvania Constitution by treating Pennsylvania licensed gaming entities differently, granting special privileges in the form of automatic grants to certain casinos, at the expense of others. These classifications are based solely on levels of casino slot machine revenue, which levels were known to the General Assembly at the time of enactment, and not on geographic location or an attempt to "get the [12-year old] industry up and running."[3] Such classifications designed to grant privileges to one company over another are exactly the kind of legislation the Special Law restrictions sought to protect against.

Additionally, the challenged provisions of the Gaming Act violate the Uniformity Clause. In determining a statute's compliance with the Uniformity Clause, it is necessary to look to the net effect of the tax rate. Here, the tax scheme created under the Gaming Act has the net effect of imposing disparate tax rates on Pennsylvania casinos based on their slot machine revenues. The purported public policy reason behind the disparate treatment of licensed casinos, even if true, cannot excuse the tax scheme's violation of the Uniformity Clause.

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[3] Respondent Brief at 36.

This Court has the authority to restrain the implementation of the challenged provisions of the Gaming Act and refund the monies already paid into the CMCD Account. This Court has previously restrained the enforcement of provisions of the Gaming Act which it found to be unconstitutional. Additionally, as Respondents acknowledge, the circumstances in this case allow for the refund of monies already paid into the CMCD Account, as the money deposited into the CMCD Account can only be spent on the very distributions challenged in this case and no governmental entity would be burdened by the return of money in this proceeding. As such, return of the refunds already paid into the CMCD Account is necessary, fair and workable.

For the reasons discussed below and in the Intervenor Brief, this Court should: (1) find that the challenged provisions of the tax scheme are unconstitutional; (2) issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and (3) order the return of any funds paid into the CMCD Account.

II. REPLY ARGUMENT FOR INTERVENOR – GGE

A. The tax scheme in the Gaming Act violates the Special Law Restrictions of the Pennsylvania Constitution by granting special privileges in the form of automatic grants to certain casinos, at the expense of others.

In response to Sands' Special Law Clause challenge, Respondents cling to a number of strained theories that are illogical on their face, lack any basis in reality and find no support in the subject provisions of the Gaming Act. Respondents offer the thin claim that the automatic tax grant class is not closed to Sands and GGE. See Respondent Brief at 33-38. Specifically, Respondents assert:

> Of course, Sands will attempt to keep its gross terminal revenue as high as possible, thereby making it less likely that such a distribution will be forthcoming. Nonetheless, '[a] class is not closed merely because possible class members may choose to avoid actions that subject them to the law' in question. *Corman v. National Collegiate Athletic Association*, 93 A.3d 1, 6 (Pa. Cmwlth. 2014).

Id. at 35. Respondents further make the astounding assertion that the "challenged provisions are *truly designed to get the gaming industry up and running rather than to benefit some facilities over others*." Id. at 36 (emphasis added). Respondents also argue that the geographical restrictions placed on casino locations and the grant money limitation ensure that the benefits of the money are spread throughout the Commonwealth. Id. at 37.

Respondents' arguments related to the Special Law restrictions of the Pennsylvania Constitution all lack merit. First, Respondents' assertion that the class is not closed, because casinos whose revenue exceeds the threshold for automatic grants are choosing "to avoid actions that subject them to the law in question" defies logic and is inconsistent with the public interest and the Gaming

Act. The Gaming Act was designed to "provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives." 4 Pa. C.S. § 1102(3). Under Respondents' interpretation, all Pennsylvania casinos have the "option" of receiving automatic grants. The only way for casinos to invoke this option, however, would be to prejudice their businesses (and the Commonwealth) in hopes of lowering their gross terminal revenue. As such, contrary to Respondents' assertion, it is not a realistic "choice" for casinos to intentionally attempt to lower their revenue to become part of this privileged class. In fact, even Respondents acknowledge that it is reasonable to assume that all Category 1, 2, and 3 licensees will strive to exceed the gross terminal revenue thresholds that would allow for automatic grants. Respondent Brief at 35-36. As such, a finding that the tax scheme does not violate the Special Law Clause because casinos can "choose" to lower their revenue and receive automatic grants would be entirely inconsistent with the public interest and the purpose of the Gaming Act.

Second, Respondents claim that the challenged provisions of the Gaming Act are designed to get the industry "up and running" lack any evidentiary support and are fully contradicted by common knowledge of present reality. The Pennsylvania gaming industry has been "up and running" for twelve (12) years.

Indeed, by any measure, gaming in Pennsylvania is a mature industry. The industry got "up and running" numerous years ago, and has now undergone two major expansions, enacted over the span of nearly eight years. Setting aside Respondents' "up and running" pretext reveals that the tax scheme at issue is clearly designed to benefit select casinos, the identities of which were known to the General Assembly at the time it passed the amendments to the Gaming Act, at the expense of other casinos. See Intervenor Brief at 16.

Third, Respondents' arguments that the geographical restrictions placed on casino locations and the grant money limitation ensure that the benefits of the money are spread throughout the Commonwealth are also without merit. The geographical restrictions in the Gaming Act are not related to the tax scheme provisions at issue, and the tax scheme does not impose any restrictions on the disbursement of grant monies insofar as ensuring that the money will be spread throughout the Commonwealth. See 4 Pa.C.S. §§ 1407(c.1), 1407(1), 1408(c.1).

All of these contortions by Respondents are made in a fruitless attempt to avoid the conclusion that the challenged tax scheme plainly violates the Special Law restrictions of the Pennsylvania Constitution. As Respondents correctly note in their Brief, "The primary purpose of the Special Law Clause is to restrain the General Assembly 'from granting special privileges or treatment to select

industries, groups, or individuals which d[o] not serve to promote the general welfare of the public." Respondent Brief at 34, *quoting* Robinson Township v. Commonwealth of Pennsylvania, Public Utility Commission, 147 A.3d 536, 572 (Pa. 2016); see also Wings Field Preservation Association, L.P. v. Comm., Dept. of Transp., 776 A.2d 311, 316 (Pa. Cmwlth 2011). Respondents further acknowledge that "[t]he 'constitutional principle' embodied with the Special Law Clause is that 'like persons in like circumstances should be treated similarly by the sovereign.'" Respondent Brief at 34, *quoting* Pennsylvania Turnpike Commission v. Commonwealth of Pennsylvania, 899 A.2d 1085, 1094 (Pa. 2006). Respondents correctly concede, "A law that does not apply uniformly to all class members constitutes a 'special law' prohibited by the Pennsylvania Constitution. Respondent Brief at 36, *quoting* Heuchert v. State Harness Racing Commission, 170 A.2d 332, 336 (Pa. 1961).

The tax scheme at issue here contravenes the principles of the Special Law Clause quoted by Respondents. Specifically, the challenged provisions of the Gaming Act treat Pennsylvania licensed gaming entities differently, granting special privileges in the form of automatic tax grants to certain casinos, at the expense of others. See Intervenor Brief at 13-17. No claim can be made that the law applies uniformly to all class members. It is evident that no monies will likely

be available beyond the amounts needed for the automatic tax grants, if there is even enough to pay those monies in full. Basic mathematics demonstrates that grant money will not be available in equal proportions to every licensed Pennsylvania Category 1, 2, and 3 casino. See Intervenor Brief at 26; Sands Brief at 11-13. Even Respondents acknowledge that the CMCD Account is used to finance the marketing and capital development of "several" (*i.e.*, not all) casinos in the Commonwealth. Respondent Brief at 36. The classification that determines which casinos are among the "several" is based solely on casino slot machine revenue, and not on geographic location or an attempt to "get the industry up and running" as Respondents argue. 4 Pa.C.S. § 1407(1). Such classifications designed to grant privileges to one company over another – to pick winners and losers – are exactly the kind of legislation the Special Law restrictions sought to protect against.

B. The Gaming Act establishes a tax scheme that treats licensed gaming entities differently based upon their slot machine revenue in violation of the Uniformity Clause of the Pennsylvania Constitution.

i. The Gaming Act treats licensed gaming entities differently for tax purposes based on their slot machine revenues.

In their Brief, Respondents argue that the challenged provisions of the Gaming Act satisfy the requirements of the Uniformity Clause. Respondent Brief at 22-33. Specifically, Respondents argue that the Uniformity Clause governs only

the manner in which taxes are "levied and collected" and does not require the equal distribution of tax revenue that has already been collected. Respondent Brief at 22-27. Respondents assert that the distributions at issue in the case bear no resemblance to tax credits. Id. at 26-27. As such, Respondents conclude that the challenged provisions of the Gaming Act satisfy the requirements of the Uniformity Clause. Id. at 33.

Respondents completely mischaracterize the arguments advanced by Sands and GGE in their respective briefs. Propping up a straw-man, Respondents contend that Sands and GGE are insisting on the equal distribution of tax revenue that has already been collected. Rather, this challenge is about the General Assembly imposing disparate tax rates based on income level, which the Uniformity Clause prohibits regardless of whether it is done explicitly or whether it has the net effect of operating in a non-uniform manner. This Court has made that prohibition clear. Nextel Comm. of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue, 171 A.3d 682, 698-99 (Pa. 2017); Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue & Eileen McNulty, 154 A.3d 268, 276-77 (Pa. 2016) ("Mount Airy"). Respondents even acknowledge this prohibition in their Brief. Respondent Brief at 23.

While Respondents attempt to focus their analysis solely on the characterization of the "grants" of money awarded by the Board under Section 1407.1(e), the tax scheme at issue here cannot be analyzed in a vacuum. Rather, the Court must examine how it functions when applied to determine whether it violates the Uniformity Clause. See Nextel, 171 A.2d at 698.

Here, the Gaming Act creates a tax scheme that, in effect, imposes disparate tax rates upon casinos whose slot machine revenue exceed (or fail to exceed) particular thresholds. The taxes collected and the automatic tax grants issued are inextricably linked. Unlike general taxes, the funds from this new tax scheme go into a restricted account, rather than the Commonwealth's General Fund. See 4 Pa.C.S. § 1407.1. The money available in the restricted, CMCD Account comes solely from "supplemental daily assessments" paid by Category 1, 2, and 3 licensees and other tax monies paid by such licensees (initially designated to support grants to law enforcement). See 4 Pa.C.S. §§ 1403; 1407(c.1); 1408(c.1). The Board is then required to pay automatic tax grants from the CMCD Account back to a subset of those same casinos that funded the Account. See 4 Pa.C.S. § 1407.1. As such, there is a direct line between the tax and the automatic tax grants that alter the effective tax rate paid by their recipients. While the Gaming Act allows casinos who do not receive automatic tax grants to apply for grants if any

funds remain, it is evident that the likely scenario is that no monies will be available beyond the amounts needed for the automatic grants, if there is even enough to pay those monies in full. See Intervenor Brief at 26; Sands Brief at 11-13.

Thus, it is clear that certain casinos whose slot machine revenue falls below particular thresholds will, in effect, pay a lesser supplemental assessment than those with higher slot machine revenues. In this manner, the automatic tax grants from the Board are acting as tax credits. Much like this Court has recognized that a tax is a tax no matter what the Legislature calls it, the same is true for tax credits. See Mount Airy, 154 A.3d at 279. This tax scheme, which serves solely to redistribute money among Pennsylvania casinos, has the net effect of imposing disparate tax rates based on a casino's slot machine revenue in violation of the Uniformity Clause.

ii. Respondents' purported public purpose cannot excuse the tax scheme's violation of the Uniformity Clause.

Respondents further argue that, even if the Uniformity Clause applies, there is reasonable justification for treating the casinos differently. Respondent Brief at 27-33. In support of this position, Respondents argue that the tax scheme at issue here serves a public purpose by, among other things, ensuring that all Pennsylvania licensed casinos continue to operate, generate tax revenue, and retain their

employees. See Id. at 29-31. Respondents assert that all slot machine licensees gain advantages from the creation and maintenance of a vibrant casino industry throughout the Commonwealth. Respondent Brief at 31. Respondents further assert that any disparities caused by the tax scheme will be minimal, arguing that the maximum amount of money a competitor of Sands would receive would constitute no more than 2% of Sands' gross terminal revenue. Id. at 31-32. As such, Respondents conclude that the tax scheme does not impose substantially unequal tax burdens and, consequently, the tax scheme does not violate the Uniformity Clause. Id. at 33.

First, all of these contentions are completely speculative and lack any factual basis of record in this matter. Second, although Respondents attempt to muddle the issues by setting forth their public purpose argument within the context of the Uniformity Clause challenge, it is worth clarifying that these issues are separate. While GGE agrees that taxes must serve a public purpose to pass constitutional muster, that standard is not determinative of whether the tax violates the Uniformity Clause. In its Intervenor Brief and in Section II(B)(i), above, GGE identified the relevant considerations in determining whether a tax violates the Uniformity Clause and discussed, at length, how the tax scheme at issue here violates those constitutional requirements. Intervenor Brief at 17-23. GGE

incorporates these discussions herein. Regardless of whether the tax scheme serves a public purpose, this Court has made it clear that if a tax has the net effect of imposing disparate tax rates on casinos based on revenue, it violates the Uniformity Clause. Nextel, A.3d at 698-99; Mount Airy, 154 A.3d at 276-77.

Moreover, the tax scheme at issue here does not serve a public purpose, because the public is not the "primary and paramount beneficiary." See Philadelphia Parking Authority, 221 A.2d 138, 147 (Pa. 1965); see also Intervenor Brief at 23-27. Respondents' argument related to public purpose fails to acknowledge one key factor: the funds that would provide any "benefit" to communities surrounding the casinos that receive grants from the CMCD Account are being provided exclusively by Pennsylvania casinos. Any public benefit that results from the tax grants being provided to the subset of casinos is offset by the burden placed on the casinos who do not receive tax grants. Pennsylvania casinos that do not receive grant money (and their surrounding communities) would be harmed. Those casinos would lose funds that could assist in sustaining their operations, generating tax revenue, and retaining their employees, among other things.

Further, Respondents' claim that all casinos will benefit from a "vibrant casino industry throughout the Commonwealth" is without merit. GGE gains no

material benefit if a casino in Erie, Mt. Pocono or Farmington is doing well – and will suffer actual competitive harm to the extent those facilities in its market area receive tax grants at its tax expense.

Respondents' contention that any disparities caused by the tax scheme will be minimal is similarly specious and without any factual support. Respondents' dismissive claim that the maximum amount of money a competitor of Sands will receive is no more than 2% of its GTR reflects a lack of knowledge or appreciation for the demands on each dollar of GTR. Such claims are baseless. Ultimately, no public purpose, real or imagined, can justify or excuse a violation of the Uniformity Clause.

C. This Court has the authority to restrain the enforcement of the challenged provisions of the Gaming Act and refund the monies already paid into the CMCD Account.

In their Brief, Respondents argue that the relief sought by Petitioner exceeds this Court's original jurisdiction. Respondent Brief at 17-22. Specifically, Respondents challenge this Court's authority to order injunctive relief and to grant Sands' request for an Order requiring the return of funds paid (by Sands) into the CMCD Account. Id. Respondents argue that the only relief Sands can seek is the entry of a declaratory judgment finding the relevant provisions to be unconstitutional. Id. Nevertheless, Respondents acknowledge that, here, the money deposited in the CMCD Account can only be spent on the very tax grants

that are challenged by Sands in this case. Id. at 21-22. For this reason, Respondents state that they will "voluntarily attempt to secure a refund for Sands and all similarly situated slot machine licensees if this Court determines that the challenged provisions of the Gaming Act are unconstitutional." Id. at 22.

At the onset, it should be noted that, despite their claims, Respondents are not actually challenging the Pennsylvania Supreme Court's jurisdiction in this case. "Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case that is then presented for its consideration belongs." Delaware River Port Authority v. Pennsylvania Public Utility Com., 182 A.2d 682, 686 (Pa. 1962); see also Drafto Corp. v. Nat'l Fuel Gas Distrib. Corp., 806 A.2d 9, 11 (Pa. Super. 2002) ("Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case [...]."). There is no question of this Court's jurisdiction to hear the claims asserted by Sands in this proceeding. 4 Pa. C.S. § 1904. Rather, Respondents challenge the relief that this Court is authorized to grant.

The Court's authority to grant relief in this case is not limited to a declaratory judgment finding the relevant provisions of the Act to be unconstitutional, as Respondents assert. In support of their position, Respondents

cite Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania, 877 A.2d 383, 392-93 (Pa. 2005) ("PAGE") and Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania Gaming Control Board, 920 A.2d 173 (Pa. 2007) ("State Troopers"). Respondent Brief at 17, 19. Respondents misstate this Court's holding in both proceedings.

In both PAGE and State Troopers, this Court specifically acknowledges its authority under 4 Pa. C.S. § 1904 to "take such action as it deems appropriate [...] to expedite a final judgment in connection with such a challenge or request for declaratory relief." PAGE, 877 A.2d at 392; State Troopers, 920 A.2d at 176. In State Troopers, this Court found that it did not have original jurisdiction under 4 Pa. C.S. § 1904, because the petition did not allege that the Gaming Act was unconstitutional, not because petitioners sought relief that the Supreme Court was not authorized to grant. State Troopers, 920 A.2d at 180.

In PAGE, this Court found the challenged provisions of the Gaming Act to be unconstitutional and severed the unconstitutional provisions from the Gaming Act pursuant to 4 Pa. C.S. § 1902. PAGE, 877 A.2d at 419; see also Mount Airy, 154 A.2d at 280 (This Court severed the provisions of the Gaming Act it found to be unconstitutional). It is also worth noting that, despite Respondents' argument that this Court's authority to issue relief in this proceeding is limited to declaratory

relief, Respondents specifically acknowledge and advocate for the severance of the challenged provisions should this Court determine that they are unconstitutional. Respondent Brief at 49-51. Thus, it is clear that this Court's authority to grant relief in this proceeding is not limited to issuing a declaratory judgment.

The Court's authority to restrain the enforcement of the challenged provisions of the Gaming Act in this proceeding is also clear. See DePaul v. Commonwealth, 969 A.2d 536, 538 (Pa. 2009) (Finding that a provision of the Gaming Act violated the Pennsylvania Constitution, this Court enjoined the enforcement of the unconstitutional provision). Moreover, courts may apply equitable remedies in cases determining constitutional questions. The United States Supreme Court has held that equitable remedies in constitutional adjudications "are a special blend of what is necessary, what is fair, and what is workable." Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). Thus, injunctive relief may be obtained to restrain the enforcement of an invalid statute, ordinance or regulation. See e.g. Harris v. State Bd. of Optometrical Examiners, 135 A. 237, 238 (PA 1926); Harris-Walsh, Inc. v. Dickson City, 216 A.2d 329, 331 (PA 1966). As such, this Court has the authority to restrain the enforcement of the challenged provisions of the Gaming Act. Under Respondents' theory, a party acting under Section 1904 would apparently have to bring its challenge before this Court, secure

a declaration that a provision of the Gaming Act is unconstitutional, and then bring a separate action in Commonwealth Court to enjoin the enforcement of said provision. Such a tortured reading of Section 1904 is not compelled by its text, and would be incredibly inefficient and wasteful of judicial resources.

This Court also has the authority to refund the monies already paid into the CMCD Account. Despite Respondents' six-page argument as to why this Court lacks authority to issue the relief requested in this case, Respondents concede that the circumstances in this case are different from other cases wherein this Court found it did not have the authority to issue refunds. See Respondent Brief at 21-22. GGE agrees. See Intervenor Brief at 29-33. As the Respondents note, the money deposited into the CMCD Account can only be spent on the very tax grants challenged in this case. Consequently, no governmental entity would be burdened by the return of money in this proceeding. As such, return of the refunds already paid into the CMCD Account is necessary, fair and workable. See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973).

While GGE appreciates that Respondents have agreed to voluntarily "attempt to secure" a refund for Sands and all similarly situated slot machine licensees should this Court determine that the challenged provisions of the Gaming Act are unconstitutional, GGE was not a party to the stipulation agreement. As a

result, it is important that this Court grant GGE's intervention in this proceeding. Significantly, GGE's request for relief differs from Sands' in that GGE seeks a dollar-for-dollar return of all monies paid into the CMCD Account by any casino. Moreover, GGE submits that the qualification language, "attempt to secure," used by Respondents is unnecessary. Respondents have access to and the ability to refund the money already paid into the CMCD Account. As such, Respondents are able to issue the refunds, and this Court should order Respondents to do so.

III. CONCLUSION

For the reasons set forth herein and in the Intervenor Brief, GGE requests this Court to:

(1) Find that the challenged provisions of the Gaming Act are unconstitutional on their face and as applied;

(2) Issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and

(3) Order the return of any funds paid into the CMCD Account.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 2135

I hereby certify that the foregoing Reply Brief complies with the word count limit in Pa.R.A.P. 2135 for a reply brief, and does not exceed 7,000 words based on the word count of the Microsoft Word processing system used to prepare the brief.

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CERTIFICATE OF COMPLIANCE

I hereby 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.

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PROOF OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing Application for Leave to File Reply Brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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