NO. 16-6795 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS M. AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S *RHINES* HOLDING.

The Supreme Court just observed, in a case involving this same District Attorney's Office: "[T]his is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *See* Opinion at 13, *Buck v. Davis*, No. 15-8049 (Feb. 22, 2017). Mr. Ayestas does not, as the Director assumes, argue that there is a circuit split on the standard for a *Rhines* stay. The first Question Presented is worthy of certiorari for other reasons, not the least of which involves the "toxin[]" of blatant discrimination. *See id.* at 19.

A. The Anticipatory Default Holding Was Debatable Because it Was Wrong.

Stripped of its legalese, the Director's position is that the TCCA would find Mr. Ayestas at fault because his defense lawyers did not obtain the discriminatory memo over which the State claimed privilege. In a breathtaking concession warranting summary reversal, the BIO expressly states that "the fact that [the Siegler Memo] is privileged explains why it was not voluntarily turned over to [Mr. Ayestas's] counsel during the criminal trial." BIO at 18 n.10. To be clear: *The Director is expressly conceding that the Siegler Memo was unavailable to trial counsel.*

Otherwise, the anticipatory default position is a moving target. The Fifth Circuit initially held that the TCCA would refuse the claims because the post-conviction lawyers did not discover the Siegler Memo before December 2014. *See Ayestas v. Stephens*, 817 F.3d 888, 900-901 (5th Cir. 2016). Confronted with the

plain language of TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1)—which bars consideration of claims available on the "date the applicant filed the previous application"—the Fifth Circuit amended its opinion to predict that the TCCA would find *trial counsel* at fault for failing to obtain the Siegler Memo. *See Ayestas v. Stephens*, 826 F.3d 214, 215 (5th Cir. 2016) (mem.). Here, *having expressly conceded that the Siegler Memo was unavailable to trial counsel*, the Director attempts to revive the position abandoned by the Fifth Circuit. BIO at 18 (phrasing Mr. Ayestas' obligation as one to show why the memo was "unavailable until 2014"). To repeat the point that caused the Fifth Circuit to abandon the Director's position: the TCCA asks only whether the claim was unavailable on the "date [he] filed the previous application."

As a secondary matter, the Director misinterprets Mr. Ayestas's adequacy analysis as an argument that art. 11.071 § 5(a) is generally an inadequate procedural ground. The point is different—by anticipatorily imposing a procedural bar instead of waiting for the TCCA to apply the state statute, the lower courts deprived Mr. Ayestas of the opportunity to avoid or excuse default. If the TCCA ignored art. 11.071 § 5(a)(1)'s reference to the "date [he] filed the previous application," then the state ground would not be "firmly established and regularly followed." Pet. at 24.

B. 28 U.S.C. § 2244(b) Does Not Bar The Siegler Memo Claims.

The first vehicle problem asserted by the Director is that using Rule 59 to incorporate Siegler Memo litigation is the equivalent of a "successive petition" under 28 U.S.C. § 2244(b)(2), and that the Siegler Memo Claims therefore require circuit authorization under § 2244(b)(3). The district court did not in fact transfer the case

in accordance with the successive-petition rules, and the Fifth Circuit rejected the Director's jurisdictional position. This case does not involve certiorari review of an order denying authorization under § 2244(b)(3), so this Court's appellate jurisdiction is unimpaired. There is only a vehicle problem if this Court reversed the Fifth Circuit and imposed a jurisdictional rule no other appeals court entertains: that the district court lacks original jurisdiction to consider claims in a Rule 59 posture.

The Fifth Circuit refused to analyze the Siegler Memo litigation under § 2244(b) because, appropriately presented under Rule 59, it was not successive. In district court, Mr. Ayestas sought the *Rhines* stay in conjunction with an amendment 23 days after he discovered the Siegler Memo, while a timely Rule 59 motion was pending. He proposed three Rule 59 pathways through which the Court could grant leave to amend. He suggested that the Court: (1) grant the first Rule 59 motion and then grant leave to amend his petition to include the new claims; (2) exercise its Rule 59(d) authority to set aside the judgment on grounds other than those raised in the first Rule 59(e) motion; or (3) treat the Supplement to the first Rule 59(e) motion as a second Rule 59(e) motion, and set aside the judgment. *See* Pet'r's Mot. for Leave to Amend Original Pet. For Writ of Habeas Corpus at 2-3, *Ayestas v. Stephens*, No. 4:09-cv-2999 (S.D. Tex. Jan. 9, 2015) (No. 54). The Director argues that all three Rule 59 mechanisms should be treated as Rule 60 motions and as successive petitions under *Gonzalez v. Crosby,* 545 U.S. 524, 532 (2005).

No circuit, other than the Fifth, appears to entertain the idea that Rule 59(e) motions containing new content are successive petitions. *See, e.g.*, *Blystone v. Horn,*

664 F.3d 397, 414 (3d Cir. 2011) ("[W]e cannot logically subject a Rule 59(e) motion to the statutory limitations imposed upon second or successive collateral attacks on criminal judgments because * * * it is part and parcel of the petitioner's one full opportunity to seek collateral review."); *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) ("The purposes behind Rule 59(e), as well as the mechanics of its operation, counsel in favor of the nonapplicability of second-or-successive limitations," even if the motion advances a claim.); *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002) (holding that Rule 59(e) motions are not "affected by the statutory limitations on successive collateral attacks on criminal judgments"); *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005) ("[S]o long as appellate proceedings * * * remain pending when a subsequent petition is filed, the subsequent petition does not come within [the successive petition provisions]."); *see also* Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure § 34.3 n.21 (7th ed. 2016) ("A Civil rule 59(e) motion is categorically exempt from the successive petition rules."). The Tenth Circuit case the Director invokes actually refers to a 59(e) motion in which the inmate moved to reconsider a Rule 60(b) motion already treated as a successive petition. *See United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006) (cited in BIO at 19).

The Director's fallback position is that the Fifth Circuit erred because *this particular* Rule 59(e) motion should be treated as a successive petition under some previously unspecified exception to the general rule that a new Rule 59(e) motion made during the pendency of a timely Rule 59(e) motion is itself timely. BIO at 19.

According to the Director, that general rule is limited by a novel "relation-back" exception, which, she argues, Mr. Ayestas does not satisfy. In the Second Circuit case the BIO cites on page 19, *Feldberg v. Quechee Lakes Corp.*, 463 F.3d 195, 197 (2nd Cir. 2006) (per curiam), the court did not allow a subsequent Rule 59(e) motion to extend the period for appealing the judgment when the initial Rule 59(e) motion was simply a placeholder "provid[ing] no ground for altering or amending the district court's order dismissing the complaint." *Id.* The placeholder motion did not toll the time to appeal because it did not "state with particularity" the grounds for post-judgment relief under FRCP 7(b)(1). *See id. Feldberg* literally has nothing to do with the theory the Director suggests. If a novel relation-back rule exists, then Mr. Ayestas satisfies it because the Siegler Memo Claims arise out of the same common nucleus of operative facts as the Rule 59(e) Motion. *Cf.* FRCP 15(c)(1)(B) (defining "transactional" test for relation-back of pleading amendments).

The BIO includes two sentences suggesting that the mandate rule bars jurisdiction under 28 U.S.C. § 2244(b). BIO at 20. The Fifth Circuit indeed explained that the Siegler Memo litigation was outside the scope of its mandate, but that explanation was not a successive-petition holding. The Fifth Circuit held that the mandate rule, of its own force, precluded consideration in the district court. The mandate rule is addressed on pages 25-26 of the Certiorari Petition.

C. 28 U.S.C. § 2244(d) Does Not Bar The Siegler Memo Claims.

The Director asserts that the statute of limitations is vehicle problem. Should the Director plead the limitations defense when the time comes, Mr. Ayestas will

obviously assert that his limitation period for the Siegler Memo claims is one that commences under either 28 U.S.C. § 2244(d)(1)(B) or (d)(1)(D), which specify:

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; [or * * *] (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Mr. Ayestas has not pleaded his claims, the Director has not pleaded a limitations defense disputing the period's commencement under Subsections (1)(B) and (1)(D), and there has been no fact development on the question whatsoever. The limitations period is not a vehicle problem; it is an affirmative defense the Director hopes to win should the litigation return to district court.

Nor is the limitations provision a "jurisdictional" bar. *See Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense, the State acknowledges, is not 'jurisdictional' * * *.") It is an affirmative defense that is specified by name in the habeas rules governing state-inmate petitions. *See id.* at 208-09 (repeatedly identifying limitations rule as an affirmative defense); Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") (specifying which limits on habeas relief must be set out in the State's answer). The non-jurisdictional status of the limitations period is well established, reflected by the Director's failure to cite any authority suggesting otherwise. *See Ray v. Clements*, 700 F.3d 993, 1006 (7th Cir. 2012) ("It is well-settled that AEDPA's statute of limitations is a nonjurisdictional affirmative defense.").

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S SUBSTANTIAL-NEED RULE.

The district court determined that the evidence before it did not "demonstrate" a *Wiggins* violation, and, for that reason, it refused funding for § 3599(f) investigative services necessary to develop and plead the claim. The Fifth Circuit "interpreted" that holding as a finding that, even if Mr. Ayestas were to develop the claim, the result would be a nonmeritorious challenge.[1] *Ayestas*, 817 F.3d at 896. As a result, the Fifth Circuit held that, notwithstanding *Wiggins* deficiency, there was no "substantial need" for investigative services to explore prejudice.

A. The Circuit Split Over The Substantial-Need Standard Is Real.

The Director repeatedly insists that there is no circuit split because no appeals court authorizes § 3599(f) services for meritless claims. BIO at 24, 26-27. Courts indeed refuse services in support of meritless claims, but that observation obviously sidesteps the subject of the circuit split: at what state of factual development a federal court may declare a claim "meritless." For example, in the Seventh Circuit, the standard for authorizing § 3599(f) services would not be whether Mr. Ayestas's existing evidence showed "substantial need" by proving prejudice, but whether he had met the much lower threshold of establishing a "preliminary showing" that expert services are reasonably necessary to litigate that position. *See Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997).

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[1] The district court held that Mr. Ayestas "fail[ed] to demonstrate" a *Wiggins* violation. *Ayestas v. Stephens*, No. H-09-2999, 2014 WL 6606498, at *5 (S.D. Tex. Nov. 18, 2014). This Court just held that it will not indulge the fiction that such clarity indicates anything other than a merits disposition on the underlying question. *See* Opinion at 13-14, *Buck v. Davis*, No. 15-8049 (Feb. 22, 2017).

Indeed, the Fifth Circuit split with the Fourth and Sixth Circuits is explicit. Pet. at 34-35. The Director's primary argument is that the split is immaterial because *Ayestas* would have turned out the same way in both jurisdictions—that the Fifth Circuit "*essentially* determined that there was no substantial question" about *Wiggins* prejudice. BIO at 25 (emphasis added). To the contrary, had Mr. Ayestas made his § 3599(f) request under the Fourth and Sixth Circuit's less stringent standard—expressly distinguished by the Sixth Circuit from the Fifth Circuit's substantial-need test—the § 3599(f) services would have been authorized. The Fifth Circuit did not "essentially" find the absence of a substantial question, because it did not reach that issue. Instead, it only considered Mr. Ayestas' motion under the "heightened standard" demanded by the substantial-need test. *Matthews v. White*, 807 F.3d 756, 760 n.2 (6th Cir. 2015) (noting that the substantial need standard exceeds what is contemplated by the "reasonable" language of the statute).

The Director further argues this case implicates no difference between the reasonable-necessity standards with citation to *Foley v. White*, 835 F.3d 561, 564 (6th Cir. 2016), explaining that the Sixth Circuit used the substantial-question test to deny funding there. BIO at 25. As reflected by the fact that Mr. Ayestas actually relies on *Foley* for his position (Pet. at 35), the Director's characterization omits the key distinctions. The *Foley* petitioner was not denied funding to develop a new record; he was denied funding because his "competency and mental health have been discussed, analyzed, and adjudged numerous times[]," creating an "expansive and detailed" record. *Foley*, 835 F.3d at 564. Mr. Ayestas, by contrast, seeks § 3599(f)

services to create the mental health and substance abuse record in the first place. Quite unlike the inmate in *Foley*, Mr. Ayestas is not seeking to fund a duplicative search for information already considered on the merits. In the Fourth Circuit, a "substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without it." *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998).

The remainder of the BIO briefing on the circuit split involves stray observations about different pieces of authority in the Certiorari Petition. For example, the Director attempts to paper over the circuit split on the ground that some of the Sixth Circuit cases involved § 3599(f) services for clemency proceedings. Although § 3599(f) services that are reasonably necessary for post-conviction litigation differ from those reasonably necessary for clemency, the fact that a substantial-question standard requires less than a substantial-need standard remains the same. The substantial-need rule does not refer to one quantum of necessity for post-conviction litigation and another for clemency proceedings. If the distinction mattered to the Sixth Circuit, its aggressive criticism of the Fifth Circuit's substantial-need standard for post-conviction services makes no sense.[2] Moreover, the cases from the other jurisdictions aligning themselves with the Sixth Circuit and against the Fifth do *not* involve clemency.

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[2] Even the Director fails to operate as though this distinction matters. At least one of the cases she cites to show that this Court has declined certiorari on "this issue" is a clemency case out of the Fifth Circuit. *See* BIO at 24 (citing *Wilkins v. Davis*, No. 16-723, 2017 WL 103565 (Jan. 11, 2017)).

The Director also suggests that cases discussing the parallel provision for criminal trials, 18 U.S.C. § 3006A, are irrelevant because "a court [applying § 3006A] could not decide that a defendant was guilty and deny investigative funding." BIO at 25-26. Setting aside that a federal judge presiding over a trial obviously has discretion to deny absurd investigative requests, the distinction between the two different Criminal Justice Act ("CJA") provisions (18 U.S.C. §§ 3006A & 3599) is one without a difference. First, § 3599 and § 3006A are part of the same statutory framework, codified in different parts of the U.S. Code. Section 3599, which has rules specific to death penalty cases, was enacted as part of the CJA and as an offshoot of § 3006A. *See Martel v. Clair*, 565 U.S. 648, 658-59 (2012). To the extent that there is any difference in the application of the two provisions, § 3599 is interpreted as *more* protective of inmates seeking resources. *See id.* at 659 (recognizing that § 3599 was enacted to provide capital defendants with "enhanced" protections including more experienced counsel, higher rates of compensation, and more money for expert and investigative services). Any distinctions between the standards for authorizing § 3599(f) services in capital cases and the standards for authorizing them under § 3006A cuts *against* the Director, not for her. Second, the fact that § 3006A(e)(1) provides that services "shall" be provided and § 3599(f) provides that they "may" be provided makes not a lick of difference to the meaning of the substantive standard—necessity—used to decide whether services are awarded.

B. There Is Appellate Jurisdiction Over Orders Denying § 3599(f) Services.

The Director asserts that this Court lacks appellate jurisdiction over orders denying § 3559(f) services—i.e., that the absence of express language providing for appeal of § 3599(f) orders should be construed as a limit on the otherwise applicable grant of plenary appellate power to the federal appeals courts under 28 U.S.C. § 1291 (and to this Court under 28 U.S.C. § 1254). Such an interpretation seems quite strained in light of the portion of § 3599(f) requiring that "[a]ny [ex parte request for services] shall be transcribed and made a part of the record available for appellate review." Why would § 3599(f) require materials be prepared for appeal of a § 3599(f) order if such appeals are barred?

No court has ever endorsed the position the Director takes, which is also inconsistent with basic canons of statutory construction requiring that there be an express provision ousting superior courts of the more general jurisdiction they exercise by way of 28 U.S.C. §§ 1254 & 1291. This Court would certainly be shocked to learn that standards for considering the *amount* of compensation implicitly limited the appellate jurisdiction of federal courts to review any order made under § 3599. After all, this Court has exercised jurisdiction over § 3599 orders on a number of occasions. *See*, *e.g.*, *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (reviewing circuit disposition of appeal on order denying substitution of counsel under § 3599(e)); *Martel v. Clair*, 565 U.S. 648, 658-59 (2012) (same); *Harbison v. Bell*, 556 U.S. 180, 185-86 (2009) (determining that § 3599 mandates provision of counsel in state clemency proceedings). Federal appeals courts—including the Fifth Circuit—routinely review orders denying § 3599(f) services. *See*, *e.g.*, *Ward v. Stephens*, 777 F.3d 250,

265–66 (5th Cir. 2015) (reviewing denial of § 3599(f) services for abuse of discretion); *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012) (same); *Fautenberry v. Mitchell*, 572 F.3d 267, 268-69 (6th Cir. 2009) (same).

The cases the Director cites for the proposition that § 3599 decisions are unreviewably administrative are all about the *amount of fees or other compensation* for counsel or services already provided under the CJA—which are completely different issues from whether the underlying § 3599(f) request is denied in advance. *See* BIO at 27 (citing *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009); *Landano v. Rafferty*, 859 F.2d 301, 302 n.2 (3d Cir. 1988). The Director's emphasis on *Rojem v. Workman*, 655 F.3d 1199 (10th Cir. 2011), is particularly stunning in light of the clarity with which the opinion speaks to the distinction between appealing a denial of funds versus appealing the amount approved:

> Rather than a complete denial of counsel, * * * this appeal boils down to a dispute about the district court's decision to award an amount less than the requested amount for representation in the pending § 2254 proceeding. This court has determined that such district court CJA fee determinations are not appealable orders. * * * [B]ecause it all comes down to the fact that counsel disagrees with the *amount* of the payment, this court lacks jurisdiction to hear this appeal.

Id. at 1202 (10th Cir. 2011) (alterations, citations, and internal quotation marks omitted; emphasis in original).

Setting aside the citation to the string of that irrelevant authority about appealing the *amount* of compensation—most of which involves the parallel CJA provisions applicable for trial defendants in noncapital cases—the Director's argument consists, it seems, of the observation that "Section 3599 closely circumscribes the

review available for funding determinations and does not itself provide for appellate review of the denial of funds." BIO at 27. Subsections (f) and (g)(2)—the two provisions cited by the Director—certainly do not impose limits on appellate review of orders denying § 3599 counsel or services. Subsection (f) is the standard that a *trial court* uses to determine entitlement to such services. Subsection (g)(2) requires that the Chief Justice of the pertinent circuit (or the Chief's delegee) authorize payment in excess of $7,500.

There is nothing in the text of the statute, this Court's decisions, or case law anywhere that supports the Director's theory that § 3599 ousts superior federal courts of appellate jurisdiction that they enjoy under §§ 1254 & 1291. The Director is attempting to present cases involving the *amount* of after-the-fact payment (usually to attorneys) with cases about whether § 3599(f) requests are denied.

C. 28 U.S.C. § 2254(e)(2) Is Not a Vehicle Problem.

The Director further asserts as another downstream vehicle problem that 28 U.S.C. § 2254(e)(2) would bar introduction of any evidence that federal habeas counsel discovers. BIO at 29-30. Once again, this is not a vehicle problem, but an attempt to present as law an idiosyncratic interpretation of § 2254(e)(2) that even courts in the Fifth Circuit have found too extreme. After *Martinez* and *Treviño*, the Fifth Circuit affirmed the order denying § 3599(f) services, but did not breathe a word about the § 2254(e)(2) conditions for an evidentiary hearing. In fact, no Fifth Circuit decision adopts her preferred § 2254(e)(2) interpretation—and the Fifth Circuit expressly rejected it in *Canales* v. *Stephens*, 765 F.3d 551 (5th Cir. 2014).

See *id.* at 571 n.2 ("Texas argues that if we decide to remand any claims to the district court, we should deny Canales the opportunity to have an evidentiary hearing. We decline to take this step * * *.").[3]

Setting aside that the question is premature, the Director interprets § 28 U.S.C. § 2254(e)(2) incorrectly. It restricts an evidentiary hearing "on the claim" if a state inmate "failed to develop the factual basis of a claim in State court proceedings." In *(Michael) Williams* v. *Taylor*, 529 U.S. 420 (2000), this Court held that, under § 2254(e)(2), an inmate only "fail[s] to" develop a claim's factual basis if the inmate is "at fault." See *id.* at 433. *Williams* held that the same conditions establishing cause for a procedural default will also establish that an inmate did not "fail[] to develop" the factual basis of a claim in state court. 529 U.S. at 433. If state post-conviction performance excuses Mr. Ayestas' default, then it also disables any § 2254(e)(2) bar to federal evidentiary hearings. *See Dickens* v. *Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc) (holding that a successful showing of *Martinez*

[3] Federal district courts in Texas have already concluded that the limitation of § 2254(e)(2) should not apply to claims that fall within the *Martinez* exception. *See*, *e.g.*, *Murphy* v. *Stephens*, No. 3:09–cv–1368–L–BN, 2014 WL 4771859, at *2 (N.D. Tex. Sept. 25, 2014) (reasoning that a court invoking § 2254(e)(2) to bar introduction of IATC evidence on claims that *Martinez* excuses "would defeat * * * [Martinez's] stated purposes"); Order Cancelling Referral And Setting Hearing at 4, Dkt. 66, *Garcia* v. *Stephens*, No. 3:06-cv-02185 (N.D. Tex. Jan. 31, 2014) (granting evidentiary hearing on procedurally defaulted IATC claim).

cause disabled § 2254(e)(2) because the inmate "'was unable to develop his claim in state court despite diligent effort'") (quoting *Williams*, 529 U.S. at 437).[4]

* * *

Mr. Ayestas does not argue that *Martinez* requires courts to authorize § 3599(f) services for any claim, without respect to merit. Mr. Ayestas has shown deficiency, and the question is what the underlying deficiency kept out of the jury's reach. That information can only be known with a measure of investigation. The Director's § 3599(f) position reduces to the circular argument that a court can know that deficient performance did not prejudice the sentencing outcome without knowing what evidence the deficient investigation failed to discover.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Ayestas prays that this Court grant a writ of certiorari to resolve the Questions Presented.

February 23, 2017 Respectfully Submitted,

[4] The Director's argument about the underlying merits of the claim—specifically, *Wiggins* prejudice—are sufficiently addressed in the Certiorari Petition. Pet. for a Writ of Certiorari at 37-40, *Ayestas v. Davis*, No. 16-6795 (Nov. 7, 2016).

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CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Reply in Support of a Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on February 23, 2017 via e-mail to:

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