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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONNA PATRICK, JAMES K. BARNETT, and JOHN P. LAMBERT, Appellants, *v.* THE ALASKA PUBLIC OFFICES COMMISSION, Appellee.	Case No. 3AN-18-05726CI

On appeal from a Final Order of the Alaska Public Offices Commission

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REPLY BRIEF OF APPELLANTS

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Dated the 26th day of February, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. The Dispositive Issue in This Case is Whether the 2012 Advisory Opinion is Correct. 3

II. The 2012 Advisory Opinion Should Be Reconsidered Because a Viable Theory Permits APOC to Enforce the Law. 6

a. Applying the original understanding of corruption reveals a governmental interest that supports the contribution limits at issue. 6

b. Appellants have shown that § 15.13.070(b) is "closely drawn" to further the government's anti-corruption interest. 10

c. APOC has an obligation to enforce state election law if it can. 11

d. This Court should require APOC to adopt the reasonable construction offered here that permits it to enforce the law as written. 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Bigley v. Alaska Psychiatric Inst.,
208 P.3d 168 (Alaska 2009) 14

Dep't of Fish & Game, Sport Fish Div. v. Meyer,
906 P.2d 1365 (Alaska 1995) 12, 13

FEC v. Beaumont,
539 U.S. 146 (2003) 7

Heckler v. Chaney,
470 U.S. 821 (1985) 13

Libertarian Party of Alaska, Inc. v. State,
101 P.3d 616 (Alaska 2004) 11

May v. State,
168 P.3d 873 (Alaska 2007) 4

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 5

Radebaugh v. State,
397 P.3d 285 (Alaska 2017) 5

Regents of the University of California v. United States Department of Homeland Security,
908 F.3d 476 (9th Cir. 2018) 15, 16

Seybert v. Alsworth,
367 P.3d 32 (Alaska 2016) 11

Ship Creek Hydraulic Syndicate v. Dep't of Transp. & Pub. Facilities,
685 P.2d 715 (Alaska 1984) 5

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 8

State v. ACLU,
978 P.2d at 624–25 10

State v. Alaska Civil Liberties Union,
978 P.2d 597 (Alaska 1999) 6, 14

Thompson v. Hebdon,
909 F.3d 1027 (9th Cir. 2018) 9, 10

Yankee v. City & Borough of Juneau,
407 P.3d 460 (Alaska 2017) 12

Statutes

Alaska Statutes § 15.13.030(7) 11

Alaska Statutes § 15.13.070(b) ..... *passim*

Alaska Statutes §§ 15.13.380(b)–(e) 11

Alaska Statutes § 15.13.380(e) 11

Alaska Statutes § 15.13.390 4

Other Authorities

2002 Op. Att'y Gen. No. 14 14

State Br. in *Thompson v. Hebdon* at 23, 9th Cir. No. 17-35019,
Dkt. Entry 23-3 (July 19, 2017) 9

PRELIMINARY STATEMENT

The sole issue in this case is whether Alaska law governs in Alaska, notwithstanding erroneous interpretations of federal law by lower federal courts.

This case began when Appellants challenged APOC's refusal to enforce long-standing laws limiting contributions to political action committees that operate independently of campaigns. The Commission defended its refusal to enforce Alaska law by citing decisions of lower federal courts that it claimed rendered Alaska law unconstitutional and by ignoring binding law from the Alaska Supreme Court that reached the opposite conclusion. ER 101-103.

Appellants now argue, as they did before the Commission, that APOC's interpretation of federal law is incorrect, and APOC's attempt to read the tea leaves at the U.S. Supreme Court based purely on decisions from lower courts fails. Applying the methods for interpreting the Constitution that the Supreme Court has repeatedly adopted—namely, originalism—Appellants have shown that that the Court likely would uphold Alaska's law limiting contributions to independent political action committees. It is thus incumbent on APOC to enforce the law as written.

This Court should also reject APOC's invitation to shield its actions from judicial review. APOC asks this Court to dismiss this appeal without even resolving whether Alaska law is constitutional by raising a dubious procedural

bar and also claiming that its resources are better spent enforcing other laws that present a lesser "litigation risk." But there is no bar to review here, and APOC has no enforcement discretion at all—instead, the Legislature *requires* APOC to investigate complaints and enforce violations. Thus, this Court must either rule that the law at issue is constitutional, and remand the case for further proceedings consistent with that ruling, or that the law is unconstitutional, in light of hints from non-binding federal authority that suggest that legislatures have no power to limit contributions to independent political action committees.

Declining to reach the constitutional merits will permit APOC to unilaterally abandon enforcement of provisions of law with no route to judicial review. More broadly, any other resolution will allow this question of national importance to linger, unresolved. Alaska is unique in giving citizens the ability to challenge a refusal to apply election law regulating independent political action committees. Unless Alaska courts address that question, there are few other clear paths that would give the United States Supreme Court the chance to clarify the confusion that lower courts have created within this critical area of election law regulation.

ARGUMENT

I. The Dispositive Issue in This Case is Whether the 2012 Advisory Opinion is Correct.

In issuing its Final Order, APOC determined that its 2012 Advisory Opinion "remained valid" as a matter of federal law. ER 103. That was the sole question presented in the hearing by Appellants. *See* ER 101–103. APOC staff members affirmatively engaged that question, and argued explicitly that the 2012 Advisory Opinion was indeed correct as a matter of federal law. ER 101–103. The Commissioners asked questions of both sides to probe that conclusion. ER 101–103.[1] The Commission then concluded both that the otherwise-illegal contributions identified by Appellants were authorized by the 2012 opinion and then held "that the conclusion in Advisory Opinion 12-09-CD remains valid, and there is thus no good cause to reconsider that opinion." ER 103. The vote was 3-2. ER 103 n.2.

That key sentence in the Order, along with the divided vote of the Commissioners, show conclusively that adherence to the 2012 Advisory Opinion was the dispositive factor in the agency's determination. There is no dispute that the 2012 Advisory Opinion permitted the respondent independent

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[1] As mentioned in Appellants' Opening Brief, the transcript of the administrative hearing is unfortunately unavailable as a result of a recording malfunction. The Final Order thus summarizes what occurred.

groups to accept donations of more than $500, despite the clear limit in Alaska Statutes § 15.13.070(b). Nor is there any dispute about whether Appellants asked APOC to reconsider that opinion—they did. ER 101–102. And the Commission was entitled to reconsider that opinion: as APOC itself recognizes, its regulations provide that it may reconsider an advisory opinion "for good cause." State Br. 8 (citing 2 AAC 50.840); *see also May v. State*, 168 P.3d 873, 884 (Alaska 2007) ("[A]gencies may overrule a prior decision if convinced it was wrongly decided").

Had the Commission agreed with Appellants, then the 2012 Advisory Opinion could have been withdrawn, and the complaints investigated. To be sure, the respondent groups' reliance on the 2012 Advisory Opinion in accepting donations above the statutory limit may well have provided them a strong argument against their being penalized for violating Alaska law, and APOC would have discretion to consider that fact at the penalty phase. *See* Alaska Statutes §§ 15.13.380(e), 15.13.390. But nothing in the APOC hearing addressed the equities of enforcement, and therefore, that question is plainly not before this Court. *See* ER 101–103.

APOC's argument to this Court that it was without power to reconsider the 2012 Advisory Opinion glosses over the agency's actual decision making. State Br. 8–9. Yet Alaska law is clear that courts review the stated reasoning of the agency and "will not accept post-hoc rationalization in lieu of adequate

explanation at the time the decision was made." *Radebaugh v. State*, 397 P.3d 285, 294 (Alaska 2017) (quotation marks omitted); *see also Ship Creek Hydraulic Syndicate v. Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 720 (Alaska 1984) (stating "a decisional document is most useful as a document which separates an agency's actual reasons for making a decision from the legal arguments it later advances to justify it"). Federal courts apply the same principle. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (a court "may not supply a reasoned basis for the agency's action that the agency itself has not given").

Here, that principle forecloses APOC's argument in this Court. The record shows that it was dispositive *for the agency* that the 2012 Advisory Opinion was correct and should not be reconsidered. Thus, APOC's argument that reconsideration of the opinion is unavailable because it would have been "unfair" or would have "undermine[d] the utility of the Commission's advisory opinion," State Br. 9, is simply a post hoc gloss on the agency's actual decision making. But this Court is barred from considering arguments that were not made before the Commission. Thus, this Court must decide the same question the Commission addressed below: whether the 2012 Advisory Opinion "remains valid" because it is a correct application of federal law to the Alaska contribution limit or whether Appellants' argument that would permit regulation is superior.

II. The 2012 Advisory Opinion Should Be Reconsidered Because a Viable Theory Permits APOC to Enforce the Law.

With no procedural bar to reaching the merits, this Court must therefore address the question that motivated Appellants' complaints: whether the limits on contributions within § 15.13.070(b) are constitutional and, therefore, enforceable.

Nowhere does APOC state that any binding authority prohibits it from enforcing a law that was last amended with overwhelming public support. Instead, APOC admits that Appellants' "constitutional theory," could have merit, State Br. 2. Moreover, APOC fails to note that in its last direct encounter with the law at issue, the Alaska Supreme Court *upheld* the very limits at issue. *State v. ACLU*, 978 P.2d 597, 600 (Alaska 1999). That holding is binding until reversed by a higher court, and the United States Supreme Court is the only higher court with that authority. Thus, the contribution limits at issue in this case must be deemed to be constitutional, rendering APOC's 2012 Advisory Opinion incorrect.

a. Applying the original understanding of corruption reveals a governmental interest that supports the contribution limits at issue.

As Appellants explained in their opening brief, the prevention of corruption is a governmental interest that may support limits on the amount

of contributions from individuals to groups engaged in political activities. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) ("The importance of the governmental interest in preventing [corruption] has never been doubted." (quotation marks omitted)).

The only issue in this case is the meaning of "corruption." That question, as applied to *contributions* to independent political action committees, has never been resolved by the United States Supreme Court. Nor have any of the federal circuit courts that have considered laws similar to those at issue here examined the issue by considering the conception of corruption as understood by the Framers. That allows this Court to return to first principles and adopt the best view of the law—which is that § 15.13.070(b) is constitutional.

In addressing the merits, APOC does not challenge the conclusion of Appellants' experts that the Framers would have viewed the pattern of contributions to independent political action committees as "corruption." It does not question the claim of Professor Jack Rakove that the concept of "institutional corruption"—and not merely *quid pro quo* corruption—was central to the Framers' conception of "corruption." *See* Opening Br. 31–38 (describing Rakove's testimony in detail). Thus, applying an originalist methodology in this case would permit a court to uphold the limitations of § 15.13.070(b). And, while the justices of the Supreme Court are not exclusively originalist, four justices have plainly signaled their view that laws

such as § 15.13.070(b) are constitutional, and several others have indicated that originalism is to be preferred if available. *See* Opening Br. 24–26 (describing jurisprudence of the Supreme Court). This Court should thus count a majority of the Supreme Court likely to uphold § 15.13.070(b). *See generally* Opening Br. 17–49.

APOC responds not by disputing Appellants' evidence or taking on its theory directly, but instead by casting the issue as one of settled law. State Br. 13–15. But, while APOC points to a string of circuit court cases that have struck down limits similar to those here, the opinions of those courts are not binding on APOC or this Court. Nor should they be persuasive, as those courts did not have the opportunity to consider the evidence from the Framers that is central to Appellants' argument here. APOC ignores the fact that the first such case, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), was decided by the D.C. Circuit without any briefing at all on the impact of *Citizens United*—much less any briefing on the original understanding of the concept of "corruption." *See* Opening Br. 42–44. It, like the later federal Circuit Court opinions, merely presumes that by "corruption" the framers meant *quid pro quo* corruption alone.

APOC and this Court now have the evidence and argument to show that Alaska's law, already upheld by the Alaska Supreme Court, is likely not to be

overturned by the United States Supreme Court. That law should therefore prevail, and APOC's 2012 Advisory Opinion should be reversed.

APOC's position in this case is also inconsistent with its position before the United States Court of Appeals for the Ninth Circuit. Summarizing Supreme Court law on this issue, the State told the Ninth Circuit that "corruption exists whenever an elected official makes a decision he or she would not otherwise make because of financial dependency, and *not all such arrangements involve criminal conduct.*" State Br. in *Thompson v. Hebdon* at 23, 9th Cir. No. 17-35019, Dkt. Entry 23-3 (July 19, 2017) (emphasis added). The Ninth Circuit ultimately agreed with the State's careful argument and upheld the relevant contribution limits. *See Thompson v. Hebdon*, 909 F.3d 1027, 1031 (9th Cir. 2018). Thus, by even APOC's own logic, the narrow conception of "corruption" presented in a few sentences in *Citizens United* and *McCutcheon* is not the only legally viable one. That is especially true because the Supreme Court has never been expressly asked to adopt the original conception of institutional corruption espoused here. The Supreme Court cannot have already rejected what it has never considered, and this Court should not short-circuit the inquiry.

b. Appellants have shown that § 15.13.070(b) is "closely drawn" to further the government's anti-corruption interest.

Even granting a substantial and valid anti-corruption interest, APOC contends that Appellants "fail[] to complete the analysis" by showing that the contribution limits at issue are "closely drawn" to further the government's valid anti-corruption interest. State Br. 15. That argument is not correct.

First, Appellants proffered extensive and uncontradicted expert testimony about how campaign finance restrictions just like the one at issue here can and do further the governmental interest in preventing corruption; that evidence directly supports the connection between prevention of institutional corruption and the restriction at issue. *See* Opening Br. 41–48.

Second, the Alaska Supreme Court, in its prior encounter with the law, upheld the precise restrictions at issue here. *State v. ACLU*, 978 P.2d at 624–25. But, even if APOC thinks that the Alaska Supreme Court's conception of corruption is no longer valid, that does not change the conclusion that if there were a valid governmental interest in preventing corruption, then this exact provision was held to be closely drawn to further it. That conclusion was confirmed recently by the Ninth Circuit's decision to uphold Alaska law's $500 contribution limit to campaigns and other non-independent groups. *See Thompson*, 909 F.3d at 1035–40. The $500 limits at issue here—which are

identical to those upheld only months ago by the Ninth Circuit in *Hebdon*—are likewise closely drawn to meet the anti-corruption interest.

c. APOC has an obligation to enforce state election law if it can.

"The legislature conceives of APOC as a 'watchdog agency.'" *Seybert v. Alsworth*, 367 P.3d 32, 41 (Alaska 2016). Its "expressed legislative purpose" is "to restore the public's trust in the electoral process and to foster good government." *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616, 621 (Alaska 2004) (quotation marks omitted). The Legislature has therefore given APOC minimal discretion in its enforcement authority. Those limits make sense of the agency's express statutory purpose.

For instance, Alaska law requires that APOC "*shall* ... examine, investigate, and compare all reports, statements, and actions required by" the state election law. Alaska Statutes § 15.13.030(7) (emphasis added). To make this obligation concrete, the Legislature comprehensively specified a series of mandatory steps that must occur when the agency receives a complaint: the agency must accept the complaint on either a regular or expedited basis; it must hold a hearing within a certain specified time; and it must issue an order ten days later. Alaska Statutes §§ 15.13.380(b)–(e). And if the Commission finds a violation, it "shall" enter an order remedying it in some way. Alaska Statutes § 15.13.380(e). The Commission has no prosecutorial discretion,

though it may consider mitigating factors in assessing any monetary penalty. *See id.*, § 15.13.390(a).

Despite this mandatory language, APOC claims it may consider not only the merits of an important constitutional question, but also may take into account its "limited resources" and then, instead of enforcing statutes for which there is a strong constitutional foundation, may abandon certain provisions and turn its attention to the "many other statutes" it has to enforce. State Br. 16. The cases it cites in support of this wide discretion say no such thing.

APOC primarily relies on *Yankee v. City & Borough of Juneau*, 407 P.3d 460 (Alaska 2017), in which the State Supreme Court held that a decision of a local Community Development Department official not to act on a complaint about a neighbor's fence was an unreviewable exercise of discretion. *Id.* at 464–67. But the court's conclusion turned on the fact that the official was exercising traditional enforcement discretion that was not overridden by mandatory statutory language. *Id.* at 466. Thus, the Alaska Supreme Court contrasted the situation there with one in which the "legislature has statutorily narrowed or eliminated the agency's enforcement discretion." *Id.*

Here, the legislature has not vested APOC with the enforcement discretion it claims or that the official had in *Yankee*. Instead, this case is governed by the rule laid out in *Dep't of Fish & Game, Sport Fish Div. v. Meyer*, 906 P.2d 1365 (Alaska 1995). In that case, the Alaska Supreme Court held

that the Alaska State Human Rights Commission had no ability to "exercise prosecutorial discretion" and could not refuse to investigate complaints supported by substantial evidence. *Id.* at 1374. Rather, as here, the Legislature used mandatory language that stripped the agency of discretion and required it to investigate complaints and, if supported by evidence, sanction the respondents. *Id.* at 1368; *see also Heckler v. Chaney*, 470 U.S. 821, 834 (1985) (noting that some agency statutes "quite clearly withdr[a]w discretion from the agency and provide[] guidelines for exercise of its enforcement power").

Indeed, the human rights agency made similar arguments in *Department of Fish & Game* about resource constraints as those APOC pushes here, but the Supreme Court dismissed them as already having been rejected by the Legislature. Thus, while the agency there invoked its "limited resources" to support its supposed discretion, the court concluded that, "if the Commission wants its staff to have this discretionary authority, it must be obtained from the legislature, not the judiciary." *Dep't of Fish & Game* at 1374; *compare* State Br. at 16 ("[T]he Commission has limited resources, and many other statutes to enforce"). Ultimately, the court declined to "import these social, political, and economic concerns into the clear scheme of the existing statute." *Dep't of Fish & Game* at 1374.

So too here. APOC's role is to enforce the law if at all possible, not to adopt certain legal arguments because they would result in savings in cost, time, and aggravation for the Commission. Thus, APOC's attempt to use resource constraints as a rationale for adhering to its 2012 Advisory Opinion must fail.

d. This Court should require APOC to adopt the reasonable construction offered here that permits it to enforce the law as written.

APOC admits that it "would enforce limits on contributions to independent expenditure groups if it could reasonably do so." State Br. 15. This case gives APOC just that opportunity. Thus, by APOC's own standards, it was arbitrary and contrary to law not to seize it.

APOC's stated desire to enforce the law respects its role as a vital enforcement agency, *see supra* 11–13, and it also conforms with the well-worn principle of constitutional avoidance. That principle applies both to courts, *see, e.g.*, *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 184 (Alaska 2009), and the executive branch, *see* 2002 Op. Att'y Gen. No. 14 at 4 (Apr. 25) ("[T]he Department of Law has adopted legal interpretations that avoid the constitutional questions, when it is reasonable to do so, as courts would be

obligated to do").[2] Indeed, APOC itself has made the argument in the context of campaign finance restrictions. *State v. ACLU*, 978 P.2d at 608. APOC thus should be doing everything it can to find a way to enforce the law, not abandon it and then attempt to insulate its decision from judicial review.

Moreover, the fact that federal appellate decisions are not favorable does not absolve APOC from its duty to take the best view of the law. In an analogous situation, the Ninth Circuit recently affirmed that courts may require agencies to adhere to the best view of the law, even where an agency, in good faith, believes it is bound by federal appellate decisions that lead to a different conclusion. In *Regents of the University of California v. United States Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018), the federal Department of Homeland Security in 2017 determined it was forced to end the DACA deferred action immigration program because the program was very similar to another program that the Fifth Circuit had determined was unconstitutional. *Id.* at 489–92. The agency claimed it was bound by the Fifth Circuit's decision (which had been affirmed by an equally divided Supreme Court) and did not want to face the "litigation risk" of trying to convince different courts of a different outcome. *Id.*; *see also id.* at 500.

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[2] *Available in Lexis at* 2002 Alas. AG LEXIS 14.

The Ninth Circuit rejected the agency's reasoning. First, it held that such a legal determination was reviewable *de novo* by the courts, because, if the agency decision relied not on a permissible policy choice but was instead "based solely on an erroneous legal premise, it must be set aside." *Id.* at 505. Second, because the Ninth Circuit disagreed with the Fifth Circuit's reasoning on *de novo* review, it held that the program at issue in fact had a legal basis, which meant the agency's contrary conclusion must be set aside. *Id.* at 510.

Although *Regents* dealt with the decision of an agency to eliminate a program, and not the decision to stop enforcing a validly enacted law, the governing legal principles are identical. As in *Regents*, the agency here relies not on its policy expertise but instead claims its hands are tied by adverse precedent from the federal appellate courts. But here, as in *Regents*, the agency is incorrect: in fact APOC's hands are *not* tied, because Appellants presented the Commission with a legal theory that permits it to continue enforcing the law as written.

Moreover, in *Regents*, as here, the agency tried to fall back on the "litigation risk" created by its continued maintenance of the DACA program. The Ninth Circuit noted that it was "less than clear how 'litigation risk' differs from a substantive belief that [the program] is illegal." *Id.* at 500, n.14. And because the agency's "litigation risk" concern was ultimately dependent on the "on-the-merits assessment of DACA's legality," the court determined the

analysis was the same and the agency was not entitled to deference on that basis. *Id.* So too here: APOC claims that adopting Appellants' view presents a "litigation risk" only because it thinks a court would have enjoined the enforcement of the law if the Commission had continued to enforce it. State Br. 1, 16. But that conclusion is indistinguishable from the prediction that the reviewing court would agree with the Commission on the merits. Because a court presented with Appellants' theory would not agree with the Commission, "litigation risk" cannot save the Commission's erroneous legal interpretation.

* * *

If reasoned agency decision making means anything, it means that agencies may not unilaterally decline to enforce a validly-enacted statute when the best view of the law permits enforcement. It is not the agency's fault that it was not previously presented with the argument and evidence advanced here. But now it has before it a means to enforce the law as written. It should—indeed, must—follow the law on the books.

This Court should hold that § 15.13.070(b) remains the law of Alaska, and has not been rendered unenforceable by any decision of the Alaska Supreme Court or the United States Supreme Court. It should likewise reverse the Final Order and require APOC to revise its incorrect 2012 Advisory Opinion. If there are equitable reasons not to enforce that law against the respondent independent groups because of their reliance on the 2012 Advisory

Opinion, those reasons may be considered when properly presented. They were not presented before the Commission. They are not properly before this Court.

CONCLUSION

The Final Order of the Commission should be reversed and the matter remanded to APOC for investigation.

Dated: February 26, 2019

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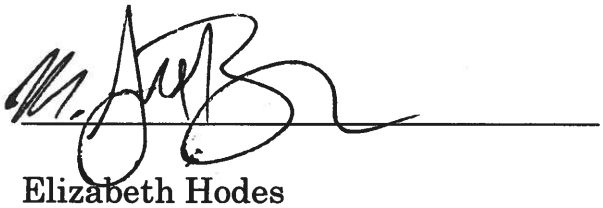

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CERTIFICATE OF SERVICE

I hereby certify that the Reply Brief of Appellants has been served by U.S. Mail, postage paid, on the 26th day of February, 2019, to the following:

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