No. 06-334

In the Supreme Court of the United States

DONALD F. APPOLONI, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
KENNETH L. GREENE
ELLEN PAGE DELSOLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether early retirement payments made to tenured public school teachers, who gave up tenure and other rights upon resigning from their positions, were "wages" subject to Federal Insurance Contributions Act taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 450 F.3d 185. The opinions of the district courts (Pet. App. 35a-60a, 61a-75a) are reported at 328 F. Supp.2d 754 and 333 F. Supp. 2d 624, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. The petition for a writ of certiorari was filed on September 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Insurance Contributions Act (FICA) tax (see 26 U.S.C. 3101-3128) funds Social Security and Medicare benefits. FICA taxes are imposed on both employees and employers, and both elements of the tax

are imposed on all "wages" received by an employee "with respect to employment." 26 U.S.C. 3101(a) and (b). For purposes of the FICA tax, the term "wages" is defined, with exceptions not relevant here, to mean "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. 3121(a) (2000 & Supp. III 2003). The term "employment" is defined, again with exceptions not relevant here, as "any service, of whatever nature, performed * * * by an employee for the person employing him." 26 U.S.C. 3121(b).

2. The instant case presents the question whether early retirement payments made to tenured teachers, who voluntarily relinquished their employment rights upon receipt of the payments, were "wages" within the meaning of 26 U.S.C. 3121(a) (2000 & Supp. III 2003). The court of appeals' decision resolved two separate lawsuits, one brought in the Western District of Michigan and the other in the Eastern District of Michigan, in which the district courts had issued conflicting rulings on that question.

Each of the named petitioners is a former tenured public school teacher in Michigan who had accepted the benefits of a voluntary early retirement program offered by his or her school district. See Pet. App. 2a. Each named petitioner had attained a certain level of seniority with satisfactory performance and, accordingly, had been awarded tenure under the Michigan Teachers' Tenure Act, which provides that public school teachers are automatically awarded tenure after successfully completing a probationary employment period. See *id.* at 3a-5a; Mich. Comp. Laws Ann. §§ 38.71 *et seq.* (West 2005). "As tenured teachers, [petitioners] were entitled to continued employment with their respective school

districts absent 'reasonable and just cause' and subject to the procedural protections set forth in the Tenure Act." Pet. App. 3a; see Mich. Comp. Laws Ann. §§ 38.91, 38.101 (West 2005).

Because more experienced teachers command larger salaries than do new employees, petitioners' school districts offered severance plans to induce senior teachers to separate from employment in exchange for a fixed sum payable in regular installments. Pet. App. 36a. Although differing in their details, each of the programs imposed certain participation requirements, including minimum years of service, and each required the employee to agree to relinquish tenure rights and waive all employment-related claims. *Id.* at 3a-5a, 38a-43a, 62a-63a. In accordance with the requirements of those programs, petitioners voluntarily severed their employment, relinquished their tenure rights, and began to receive payments under their respective plans. See *id.* at 3a-5a. When their respective school districts withheld FICA taxes from the payments, petitioners filed unsuccessful administrative refund claims with the Internal Revenue Service (IRS), followed by the instant refund suits. See *id.* at 4a, 5a.

3. On cross-motions for summary judgment in each case, the two district courts reached inconsistent conclusions.

a. The United States District Court for the Eastern District of Michigan held that the payments in question were not FICA "wages." Pet. App. 35a-60a. In the district court's view, the payments "were not for services, past, present or future. Rather, they were made in exchange for the employees' relinquishment of the right to exchange services for wages in the future." *Id.* at 54a. In reaching that conclusion, the court relied substan-

tially (see *id.* at 45a-49a, 55a) on the Eighth Circuit's decision in *North Dakota State University* v. *United States*, 255 F.3d 599 (2001) (*North Dakota*), which had held that payments made to tenured university professors under an early retirement program that required the professors to relinquish tenure rights were not "wages" subject to FICA tax.

b. By contrast, the United States District Court for the Western District of Michigan held that the payments at issue were "wages" subject to FICA tax. Pet. App. 61a-75a. That court stated that it would "determin[e] the issue of whether the [Employee Severance Plan] payments were wages by answering the following questions: (1) Did [petitioners] receive the payments because of the employment relationship with the [School] District?; and (2) Were [petitioners'] tenure rights a benefit [petitioners] earned through prior service to the District?" *Id.* at 72a. The district court answered both those questions in the affirmative and accordingly ruled in favor of the government. See *id.* at 72a-75a.

4. The court of appeals consolidated the two cases and held that the payments received by petitioners were FICA "wages." Pet. App. 1a-34a. The court recognized that, under the precedents of this Court and of the Sixth Circuit, the term "wages" in 26 U.S.C. 3121(a) (2000 & Supp. III 2003) is to be given a broad construction. Pet. App. 7a-9a. The court further held that "the eligibility requirements for qualifying for a payment—that a teacher served a minimum number of years—indicate the payments were for services performed" and therefore "constitute[d] FICA wages." *Id.* at 10a; see *id.* at 10a-12a.

The court of appeals rejected petitioners' contention that the payments at issue in this case were not FICA

"wages" because they had been made in exchange for petitioners' relinquishment of tenure rights. Pet. App. 12a-14a. The court observed that "just because a teacher relinquishes a right when accepting early retirement does not convert what would be FICA wages into something else." *Id.* at 12a. The court found this case to be materially indistinguishable from prior decisions holding that "severance payments for the relinquishment of rights in the course of an employment relationship are FICA wages." *Id.* at 13a. The court explained that, "[i]n this case, the school district's motivation was not to buy tenure rights—the motivation was to induce those teachers at the highest pay scales to retire early. Relinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout." *Id.* at 14a.

The court of appeals also "agree[d] with the government's position that the most applicable [IRS] revenue ruling indicates the severance payments [at issue in this case] are FICA 'wages.'" Pet. App. 14a; see *id.* at 14a-16a. The court recognized that the Eighth Circuit in *North Dakota* had relied on Revenue Ruling 58-301, 1958-1 C.B. 23. See Pet. App. 15a. The court concluded, however, that Revenue Ruling 75-44, 1975-1 C.B. 15, was the Revenue Ruling most analogous to the situation presented here. The court explained that Revenue Ruling 75-44 had involved an employee's relinquishment of employment rights that the employee had previously acquired through length of service to the employer, whereas the employee in Revenue Ruling 58-301 had surrendered contract rights conferred at the outset of the employment relationship. Pet. App. 15a-16a.[1]

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[1] During the pendency of this litigation, the IRS issued Revenue Ruling 2004-110, 2004-2 C.B. 960. That Ruling addressed, inter alia, the

The court of appeals further acknowledged that its "holding, and [its] reliance on Revenue Ruling 75-44, differs from what the Eighth Circuit held in *North Dakota*." Pet. App. 16a. The court stated, however, that it found the reasoning of the Court of Federal Claims (CFC) in *CSX Corp.* v. *United States*, 52 Fed. Cl. 208 (2002), supplemented, 71 Fed. Cl. 630 (2006), appeal pending, No. 07-5003 (Fed. Cir. filed Oct. 4, 2006), No. 07-5007 (Fed. Cir. filed Oct. 18, 2006), to be more persuasive than that of the Eighth Circuit in *North Dakota*. Pet. App. 16a-17a. The court also noted that the tenure rights at issue in *North Dakota* were "factually distinguishable" from those involved here. *Id.* at 16a n.5. The court explained:

> In *North Dakota*, even though the monetary amount of any individual[']s rights was determined, at least partially, by length of service, the tenure rights in

question "[w]hether an amount paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights is * * * wages for purposes of [FICA]." *Ibid.* The IRS concluded that such a "payment provided by the employer to the employee is wages for purposes of FICA." *Id.* at 961. The IRS further stated that Revenue Ruling 58-301's contrary conclusion was erroneous, *ibid.*, and that Revenue Ruling 58-301 was "modified and superseded" with respect to its analysis of FICA taxation, *id.* at 962.

In Revenue Ruling 2004-110, the IRS stated that it "will not apply the position adopted in this ruling to any payment that an employer made to an employee or former employee before January 12, 2005, provided that the payment is made under facts and circumstances that are substantially the same as in * * * Rev. Rul. 58-301." 2004-2 C.B. at 962. In the instant case, the court of appeals stated that, "[b]ecause a large portion of the payments to which [petitioners] were entitled under the buyout agreements were made prior to this date, and because * * * Revenue Ruling 75-44 is analogous to the facts of this case, [the court would] decline to rely on Revenue Ruling 2004-110 in making [its] decision." Pet. App. 15a n.4.

> *North Dakota* were created by a single contract made at the onset of the tenure relationship. *North Dakota*, 255 F.3d at 601. Tenure, moreover, was not automatic; the North Dakota Board of Higher Education considered several factors in making tenure determinations, "including scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society." *Id.*

Ibid.

Judge Griffin dissented in part. Pet. App. 19a-34a. Except with respect to the claim of one plaintiff who is not a petitioner in this Court, Judge Griffin would have held that the payments at issue were not FICA "wages." See *id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Although there is significant tension between the decision below and the ruling of the Eighth Circuit in *North Dakota*, the two cases are factually distinguishable. In addition, the IRS has recently issued a Revenue Ruling that clarifies the agency's position concerning the application of 26 U.S.C. 3121(a) (2000 & Supp. III 2003) to severance payments by confirming that an amount paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights is FICA "wages." That Revenue Ruling modifies and supersedes, and thus essentially revokes, the 1958 Revenue Ruling on which the Eighth Circuit substantially relied, and it may ultimately eliminate the current tension between the Sixth and Eighth Circuit ap-

proaches. This Court's review therefore is not warranted at the present time.

1. The decision of the court of appeals is correct.

a. In order to accomplish the important remedial purposes of the Social Security Act, Congress imposed FICA taxes on a broad range of employer-furnished remuneration. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937); *Temple Univ.* v. *United States*, 769 F.2d 126, 130 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). As the Court explained in *United States* v. *Silk*, 331 U.S. 704, 712 (1947), a restrictive interpretation of the terms "employment" and "employee," as those terms are used in the definition of FICA "wages," "would only make for a continuance, to a considerable degree, of the difficulties for which [Social Security] was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation."

Consistent with the expansive statutory language and the remedial purpose of the Social Security Act, this Court has construed the term "wages" broadly. In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), the Court addressed the question whether back pay, paid to an employee who had been wrongfully discharged and then reinstated, represented "wages" for Social Security purposes, even though the worker had not earned the back pay through the performance of actual services. The Court explained:

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. They admonish us against holding that "service" can be only productive activity. *We think that "service" as*

> *used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee.*

327 U.S. at 365-366 (emphasis added).[2]

b. Applying that approach, the court of appeals correctly concluded that the payments at issue in this case were FICA "wages." The court recognized that "where a payment arises out of the employment relationship, and is conditioned on a minimum number of years of service, such a payment constitutes FICA wages." Pet. App. 10a. The court explained that the payments at issue here were FICA "wages" because those payments "arose out of the employment relationship, and were conditioned on a minimum number of years of service." *Id.* at 11a-12a.

The court of appeals correctly rejected petitioners' contention that the severance payments here were not FICA "wages" because they represented compensation for the relinquishment of tenure rights. Pet. App. 11a-14a. The court acknowledged that, because the length of service required to establish eligibility for the buyout program exceeded the number of years required for tenure under Michigan law, petitioners "necessarily had to have tenure to be eligible for the buyout." *Id.* at 11a.

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[2] Although the Court in *Nierotko* held that the case was governed by the Social Security Act of 1935 rather than the Social Security Act amendments of 1939, see 327 U.S. at 360, the Court specifically disavowed any suggestion that the differences between the two enactments were significant with respect to the issues the Court considered, see *id.* at 360 n.5. And because the relevant statutory definitions have remained essentially unchanged, the *Nierotko* Court's interpretation of the definitions of FICA "wages" and other pertinent terms is directly applicable here.

The court recognized, however, that "longevity—not tenure—was the key factor for determining eligibility because these early retirement payments were offered to encourage teachers at a high pay rate to retire." *Ibid.* "Relinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout." *Id.* at 14a. Under those circumstances, the court of appeals correctly declined "to differentiate the relinquishment of tenure rights from the relinquishment of other benefits earned during the course of employment, like the right to bring suit, or rights associated with seniority." *Ibid.*

Indeed, the payments at issue here would properly be treated as FICA "wages" even if they were regarded as payments made to induce the relinquishment of tenure rights. Tenure under Michigan law is simply a right, earned through service to the employer over a specified amount of time, to protection against being fired without cause. For purposes of 26 U.S.C. 3121(a)'s definition of "wages," the prerogatives associated with petitioners' tenure were no different from seniority rights or other security in employment. Severance payments made to induce the relinquishment of such employment-related rights are properly treated as FICA "wages." See, *e.g.*, *Abrahamsen* v. *United States*, 228 F.3d 1360, 1364-1365 (Fed. Cir. 2000), cert. denied, 532 U.S. 957 (2001); *Associated Elec. Coop., Inc.* v. *United States*, 226 F.3d 1322, 1327 (Fed. Cir. 2000) (payments under "early out" plan to employees who gave up rights to security in employment that had been earned through service "were intimately related to and arose from the employer-employee relationship, and thus were [FICA] 'wages'").

2. Petitioners contend (Pet. 10) that the Sixth Circuit's decision in this case squarely conflicts with the

Eighth Circuit's ruling in *North Dakota*, and that this Court should grant review to resolve the conflict. The Sixth Circuit recognized that its "holding, and [its] reliance on Revenue Ruling 75-44, differs from what the Eighth Circuit held in *North Dakota*." Pet. App. 16a. For two reasons, however, the tension between the decisions does not warrant resolution by this Court at the present time.

a. The plaintiffs who prevailed in *North Dakota* were tenured university professors. See 255 F.3d at 605-607. In concluding that the buyout payments at issue in that case were not FICA "wages," the Eighth Circuit attached significance to the criteria used to grant tenure at that institution and the factors considered in determining the amount of an individual professor's buyout payment. The court observed that, "[a]lthough past service plays a part in the decision to grant tenure, tenure is much more than a recognition for past services. Importantly, tenure is not automatic upon completing service for a specified time period, which is a hallmark of ordinary seniority rights." *Id.* at 605. The court explained that the criteria used to award tenure also included "scholarship, research, and service to the university and society." *Id.* at 606.

Based on those considerations, the court in *North Dakota* found that the university's decision to grant tenure had the practical effect of creating a new contractual relationship between the professor and the school. See 255 F.3d at 606. The court reasoned that, "contrary to the government's argument that tenure rights are earned by past service to the university, tenure rights are established at the outset of the tenured relationship." *Ibid.* The court relied on that analysis in concluding that Revenue Ruling 58-301, rather than Revenue

Ruling 75-44, was the most analogous agency precedent. See *id.* at 605-607.

In the instant case, by contrast, the Sixth Circuit attached significance to the fact that eligibility for the relevant buyout programs was based solely on length of service to the school district. The court stated that "the eligibility requirements for qualifying for a payment—that a teacher served a minimum number of years—indicate the payments were for services performed rather than for the relinquishment of tenure rights." Pet. App. 10a. The court accordingly relied on prior decisions holding "that where a payment arises out of the employment relationship, and is conditioned on a minimum number of years of service, such a payment constitutes FICA wages." *Ibid.* And in concluding (unlike the court in *North Dakota*) that Revenue Ruling 75-44 involved a more analogous set of facts than Revenue Ruling 58-301, the Sixth Circuit emphasized that the employee rights surrendered under the buyout programs had been earned automatically through completion of a probationary period and thus were acquired through length of service to the relevant school districts. See *id.* at 12a, 15a-17a.

While expressing disagreement with the reasoning of the Eighth Circuit in *North Dakota*, Pet. App. 16a, the Sixth Circuit also noted that "*North Dakota* is factually distinguishable," *id.* at 16a n.5. The court explained that "the tenure rights in *North Dakota* were created by a single contract made at the onset of the tenure relationship," and that tenure for North Dakota professors was not automatic after a specified period of service but depended on a variety of factors. *Ibid.* Although the government does not believe that the correct application of 26 U.S.C. 3121(a) turns on those factual distinctions (see

p. 13, *infra*), the Sixth and Eighth Circuits each attached significant weight to facts that were not present in the other case. For that reason, no square conflict between the two decisions exists.

b. In Revenue Ruling 2004-110, 2004-2 C.B. 960 (see note 1, *supra*), the IRS recently addressed the question "[w]hether an amount paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights is * * * wages for purposes of [FICA]." The IRS concluded that such a "payment provided by the employer to the employee is wages for purposes of FICA." *Id.* at 961. The IRS further stated that Revenue Ruling 58-301's contrary conclusion was erroneous, *ibid.*, and that Revenue Ruling 58-301 was "modified and superseded" with respect to its analysis of FICA taxation, *id.* at 962. Under the analysis set forth in Revenue Ruling 2004-110, the severance payments at issue in both the instant case and *North Dakota* would be treated as FICA wages, notwithstanding the factual differences between the two cases.

If given the opportunity to reexamine the holding in *North Dakota* in light of Revenue Ruling 2004-110, the Eighth Circuit may hold that severance payments of the sort at issue in that case are properly treated as FICA "wages." That is particularly so in light of the fact that the Eighth Circuit relied substantially on Revenue Ruling 58-301, see 255 F.3d at 603-604, 607, whose analysis with respect to FICA was expressly disavowed in Revenue Ruling 2004-110. Thus, even if the Sixth Circuit's decision in this case were squarely in conflict with the ruling in *North Dakota*, review by this Court would be premature until the Eighth Circuit has been given an

opportunity to apply the IRS's current guidance on the question presented here.

In Revenue Ruling 2004-110, the IRS stated that it "will not apply the position adopted in this ruling to any payment that an employer made to an employee or former employee before January 12, 2005, provided that the payment is made under facts and circumstances that are *substantially the same* as in * * * Rev. Rule 58-301." 2004-2 C.B. at 962 (emphasis added). The italicized language reflects the IRS's recognition that employees whose circumstances are materially indistinguishable from the facts considered in Revenue Ruling 58-301 may have organized their affairs in reasonable reliance on the analysis set forth in that Ruling. Because the employee in Revenue Ruling 58-301 relinquished contractual rights that had been acquired at the outset of the employment relationship under a contract employing him for a limited term, see Pet. App. 16a; 1958-1 C.B. at 23, the circumstances presented here (and, we submit, in *North Dakota* as well) are not "substantially the same" as those in Revenue Ruling 58-301. Revenue Ruling 2004-110 therefore applies to the instant case, even though many of the buyout payments at issue here were made before that Ruling was issued.[3]

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[3] Petitioner errs in contending (Pet. 20-21 & n.7) that Revenue Ruling 2004-110 is not entitled to deference. Although revenue rulings are not issued pursuant to notice and comment procedures, the absence of such formalities in the rulemaking process does not preclude *Chevron* deference when, as here, Congress granted the agency the power to make rules with the "force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227, 230-231 (2001); see *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002).

Revenue rulings satisfy that test. Contrary to petitioners' assertion (Pet. 20 n.7), the IRS promulgates revenue rulings pursuant to its

The Sixth Circuit, however, "decline[d] to rely on Revenue Ruling 2004-110 in making [its] decision," partly on the ground that "a large portion of the payments to which [petitioners] were entitled under the buyout agreements were made prior to" January 12, 2005. Pet. App. 15a n.4. If this Court's resolution of the question presented here ultimately becomes necessary, it would be preferable for the Court to address that issue in a case in which no possible uncertainty exists as to the applicability of Revenue Ruling 2004-110.

3. We agree with petitioners (see Pet. 21-23) that this case and *North Dakota* raise questions of substantial and recurring importance. When confronted with uncertain revenue or declining employment needs, educational institutions frequently institute voluntary early

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statutory authority to "prescribe all needful rules and regulations for the enforcement of" the Code. 26 U.S.C. 7805(a); see Treas. Order 111-2, 1981-1 C.B. 698, 699. Revenue rulings are formal interpretive rulings involving "substantive tax law," 26 C.F.R. 601.601(d)(2)(v)(a). They are "issued only by the [IRS] National Office" and are published in the Internal Revenue Bulletin as the agency's "official interpretation" to guide taxpayers and IRS employees alike. 26 C.F.R. 601.601(d)(2)(i)(a). Revenue rulings have legal force and effect in that they constitute "precedents to be used in the disposition of other cases" that "may be cited and relied upon for that purpose." 26 C.F.R. 601.601(d)(2)(v)(d). And a taxpayer's disregard of applicable revenue rulings can result in the imposition of penalties. 26 U.S.C. 6662; 26 C.F.R. 1.6662-3(b)(2). Thus, revenue rulings have the "force of law" within the meaning of *Mead*, 533 U.S. at 227, and *Chevron* deference is appropriate.

In any event, Revenue Ruling 2004-110 is not based solely on a construction of the statutory text, but also reflects the agency's considered interpretation of its own regulations and prior rulings. See 2004-2 C.B. at 961-962. Accordingly, the ruling is also entitled to deference under the principles of *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001).

retirement programs like the ones at issue here, under which tenured employees receive lump-sum payments in exchange for relinquishing their rights in continued employment. Litigation concerning the applicability of 26 U.S.C. 3121(a) (2000 & Supp. III 2003) to such payments is currently pending before the Third Circuit, see *University of Pittsburgh* v. *United States* (No. 06-1276), and in the District of Utah, see *University of Utah* v. *United States* (Civ. No. 2:06-cv-00595 DAK). A similar dispute involving railroad employees was decided by the CFC in *CSX Corp.*, 52 Fed. Cl. at 219-221. See Pet. App. 16a-17a (agreeing with the CFC's analysis). The question presented in this case therefore may ultimately warrant resolution by this Court. For the reasons stated above, however, the Court's review would be premature at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

KENNETH L. GREENE
ELLEN PAGE DELSOLE
Attorneys

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