No. 21-CV-31

District of Columbia Court of Appeals

TAX ANALYSTS AND AARON DAVIS,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

The argument presented by the Office of Tax and Revenue ("OTR") is at best puzzling, inasmuch as appellants ("Tax Analysts") ask only that OTR disclose on a regular basis the sort of guidance to taxpayers that OTR has disclosed on an irregular basis for years, *i.e.*, rulings that present OTR's analysis of how the District's tax code applies to a specific fact pattern, while redacting any names and identifiers that could link that analysis to a specific individual.

In this brief, we first answer OTR's claim that Exemption 6 of the Freedom of Information Act ("FOIA") requires OTR to withhold private letter rulings ("PLRs") in their entirety. We then answer the claim that the trial court properly granted summary judgment to OTR without conducting *in camera* review of these PLRs, even though Tax Analysts presented evidence that OTR never challenged, which demonstrates that OTR can redact such rulings to remove identifiers and that such rulings, as redacted, offer valuable guidance to the public.

I. PRIVATE LETTER RULINGS MAY NOT BE WITHHELD UNDER FOIA EXEMPTION 6(A).

A. OTR reads "tax information" in section 47-4406 too broadly.

Exemption 6(A) of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute (other than this section), provided that such statute . . . [r]equires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." D.C. § 2-534(a)(6)(A).

D.C. Code § 47-4406(a) bars OTR from disclosing "federal, state, or local tax returns (or copies of these returns) and . . . federal, state, or local tax information either submitted by the taxpayer or otherwise obtained." OTR reads this language to say that a private letter ruling contains "tax information" that was "submitted by" a taxpayer who requested the ruling; because a private letter ruling consists of OTR's "evaluation" of that "tax information," PLRs are exempt from disclosure in their entirety, and there are no non-exempt portions that can be carved out and made public.

The dispute here thus centers on the meaning of the quoted language and, in particular, the phrase "tax information." We answer first the claim that section 4406 is clear on its face and requires OTR to withhold PLRs in their entirety. We then answer OTR's rejection of comparisons between the statutes here and their federal counterparts.

1. The centerpiece of OTR's argument is a claim that the meaning of the key statutory language is "clear" because the dictionary definition

of "information" is broad, *i.e.*, "[k]nowledge of facts learned, especially about a certain subject or event." OTR cites too the policy importance of taxpayer confidentiality, adding that even if section 4406 were deemed to be ambiguous, the Court should defer to OTR's interpretation. Brief for Appellee ("OTR Br.") at 9-10. These arguments lack merit.

First, the issue here is not the proper interpretation of the word "information," standing alone, but the concept of "tax information," as used in section 4406, which is to be construed in light of the FOIA's directive that the FOIA's exemptions from disclosure "are to be narrowly construed, with ambiguities resolved in favor of disclosure." *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 803, 813 (D.C. 2014) (internal citation and quotation omitted). See also *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989) ("Just as the provisions of the Act giving citizens the right of access are to be generously construed, so the nine statutory exemptions must be approached with a jaundiced eye").

OTR never addresses these authorities, which also foreclose any notion that ambiguities in the statutory text require the Court to defer to OTR's broad reading of section 4406. See *Federal Labor Relations Authority v. U.S. Department of the Treasury*, 884 F.2d 1446, 1451 (D.C. Cir. 1989) (no deference to a single agency's interpretation of the FOIA, a broadly applicable statute).

Second, by focusing solely on taxpayer confidentiality, OTR fails to explain how that interest can be protected consistent with the FOIA's goal of giving the public "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Code § 2-531. As we discuss below, there is ample guidance on this point from the federal counterparts to the statutes at issue here, and the proper construction of section 4406 would be to hold that OTR has no discretion to disclose "tax information" that is "submitted" by a taxpayer if the "tax information" would directly tie the fact pattern in a ruling to a specific individual.[1]

2. OTR resists Tax Analysts' argument that the Court should examine the counterpart provisions of the federal FOIA and the Internal Revenue Code ("I.R.C."), even though the comparisons are informative.

As a general proposition, OTR's argument here ignores several guiding principles that are highly relevant.

• The District's FOIA is "modeled on the corresponding federal statute" and this Court has thus " looked to decisions under the federal act in guiding our interpretation of the FOIA." *Hines v. District of Columbia Board of Parole*, 567 A.2d 909, 912 (D.C. 1989).

• If there is doubt as to the meaning of a specific tax statute, the

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[1] OTR 's brief states at several points (at 14, 18) that there have been "assurances of confidentiality" to taxpayers seeking PLRs and that there has been taxpayer "reliance"on these assurances. These are statements of fact, yet there is no affidavit or other record evidence establishing any "assurance" or "reliance." The fact that PLRs are labeled "private" surely is not enough. More generally, an agency cannot override obligations under the FOIA simply by stating that it will treat a certain category of records as confidential.

Court will "endeavor to conform its interpretation to comparable provisions of the federal Internal Revenue Code." *District of Columbia v. National Bank of Washington*, 431 A.2d 1, 4 (D.C. 1981), quoted in *School Street Associates Ltd. Partnership v. District of Columbia*, 764 A.2d 798, 813 (D.C. 2001). Accord *Stedman v. District of Columbia*, 12 A.3d 1156 n.1 (D.C. 2011).

These authorities support the approach taken by Tax Analysts. Our point, simply put, is that as an aid in construing section 4406's protection of "federal, state or local tax information," there are some striking parallels between section 4406 and its federal counterparts, I.R.C. §§ 6103, 6110 (26 U.S.C. §§ 6103, 6110), which have been interpreted to harmonize the twin goals of disclosing agency decisions while protecting taxpayer privacy.

In a nutshell, and as we explained in our opening brief (at 13-20), section 4406 protects two categories of information: "tax returns" and "tax information." In so doing, section 4406 tracks the dichotomy in I.R.C. § 6103, which expressly protects "returns" and "return information" when records are disclosed under the FOIA. Section 4406(h)(3) expressly acknowledges I.R.C. § 6103, where the definition of "return information" focuses on–

> . . . a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . .

I.R.C. § 6103(b)(2)(A). In short, "return information" under federal law is limited to certain information, but not an entire document.

OTR tries to turn this citation of I.R.C. § 6103 against Tax Analysts by arguing that I.R.C. § 6103 broadly "prohibits disclosure of any data received or prepared by the IRS with respect to determining tax liability, so it would actually prevent disclosure of private letter rulings if it applied here." OTR Br. at 10. To support this claim, OTR cites language that appears in I.R.C. § 6103(b)(2)(A) after the language just quoted, which defines "return information" as also covering–

> . . . any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] *with respect to a return or with respect to the determination, or possible existence, of liability (or the amount thereof) of any person.*

OTR Br. at 16 (emphasis added by OTR). According to OTR, the italicized phrase "squarely covers private letter rulings."

Of course, that assertion is untrue is as a factual matter, given Congress's decisions to require disclosure of redacted rulings and other "written determinations" under I.R.C. § 6110 and to clarify that I.R.C. § 6103 bars disclosure of "return information" in any other documents disclosed under the FOIA. The fact that Congress used two statutes to embody the same basic policy objective – disclosure of IRS's reasoning with identifiers redacted – does not alter the analysis.

This brings us to OTR's next attempted distinction, namely, that the 1974 federal court decision denying protection to IRS private letter rulings dealt with a version of I.R.C. § 6103 that focused on tax returns.

OTR Br. at 16-17. The point is factually correct, but irrelevant in light of the history recounted in our opening brief (at pp. 19-20), which explained how Congress amended the Internal Revenue Code in 1976 to codify the pro-disclosure result in that case and to advance the twin purposes of (1) mandating the disclosure of private letter rulings and similar guidance while (2) protecting taxpayer privacy by removing identifiers that could be used to identify the "existence" or "possible existence" of tax "liability" *of a specific person.*

Nor can OTR fare better with its next argument that section 4406 is "markedly different" from I.R.C. § 6103 because it protects "local tax information either submitted by the taxpayer or otherwise obtained," and no comparable language appears in the version of I.R.C. § 6103 construed in that 1974 case. OTR Br. at 17. Again, OTR is factually correct that I.R.C. § 6103 does not contain that language. However, OTR's point is murky at best. Is OTR conceding that section 4406 should be read narrowly when there is a request to OTR involving "federal tax information," but read broadly with respect to "local tax information"? Such a reading makes no sense.

This brings us to OTR's final point, *i.e.*, that the mandatory disclosure of "written determinations" under I.R.C. § 6110 has no relevance because the District's tax code has no counterpart provision that affirmatively requires disclosure of OTR rulings. OTR Br. at 18.

This argument does not come to grips with the legislative history of the 1976 amendments (as discussed in our opening brief at 19-20), which shows that I.R.C. §§ 6103 and 6110 are of a piece.[2] The basic policy goal is the same – disclosure of IRS guidance with identifiers redacted, regardless of the label attached to a document. Congress in 1976 was aware of litigation over disclosure of other types of IRS guidance (notably "technical advice memoranda"). The 1976 amendments thus specified that certain categories of IRS guidance must be made public (with redactions) as a matter of course, while other guidance – whatever the title – would be disclosed under the FOIA with redactions under I.R.C. § 6103. And that is how it has worked out.[3]

B. OTR has discretion to disclose redacted private letter rulings.

Without conceding the point, even if one were to conclude that certain "tax information" in a private letter ruling should be viewed as "submitted by the taxpayer or otherwise obtained," section 4406 does

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[2] A "written determination" is defined in I.R.C. § 6110(b)(1)(A) as "a ruling, determination letter, technical advice memorandum, or Chief Counsel advice." When disclosing written determinations, IRS must redact "the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person," I.R.C. § 6110(c)(1), as well as other information that would be protected under the FOIA. I.R.C. § 6110(c)(2)-(7).

[3] Thus, there has been litigation about whether a certain type of document is a "ruling" that must be disclosed with redactions under I.R.C. § 6110, *e.g.*, an IRS ruling that revokes or denies a taxpayer's tax-exempt status. *Tax Analysts v. IRS*, 350 F.3d 100 (D.C. Cir. 2003). Other guidance has been deemed disclosable under the FOIA with redactions under I.R.C. § 6103, *e.g.*, "field service advice" from IRS headquarters to field offices (with redactions limited to what the court called "true return information"), *Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997), or electronic "chief counsel advice," *Tax Analysts v. IRS*, 495 F.3d 676 (D.C. Cir. 2007).

not fit within the contours of Exemption 6(A). The reason is that OTR enjoys – and has exercised – the "discretion" to disclose private letter rulings, with section 4406 at most authorizing the redaction of names and personal identifiers. Thus, Exemption 6(A) is inapplicable on its own terms and cannot support a grant of summary judgment to OTR as to PLRs in their entirety.

The record is clear – and uncontested – on this point. Tax Analysts submitted an affidavit from appellant Aaron Davis, the reporter who filed the FOIA request here on Tax Analysts' behalf (J.A. 13-20). Mr. Davis's affidavit described OTR's practices and included as exhibits several examples of written guidance that OTR has exercised its "discretion" to publish, albeit with names and identifiers redacted – precisely what Tax Analysts seeks here. There are multiple examples of such discretionary disclosure.

• Perhaps the clearest example is an OTR "General Counsel Memorandum," entitled *Sales Tax on Hotel Attrition Fees and Cancellation Fees* (J.A. 102-105). That memorandum states that it was "Originally Issued as a Private Letter Ruling" (J.A. 102). The four-page document follows the format of private letter rulings by other tax agencies (*e.g.*, J.A. 94-101) and indeed uses a standard memorandum format of the sort used by lawyers in a variety of settings:

• "Issues" (whether certain fees that a hotel charges a client who cancels a block of rooms and meeting facilities are subject to the District's sales tax);

• "Conclusion" (one fee is subject to District sales tax in

certain circumstances, while the other fee is not);
- "Facts" (outlining the circumstances involving the cancellation);
- "Taxpayer Argument";
- "Law" (setting forth the pertinent statutes);
- "Analysis" (OTR's explanation of its view as to how the cited statutes apply to the facts).

This memorandum redacts the name of the hotel and the client, along with possible identifying details.

At one level, this General Counsel Memorandum illustrates the clear public interest in learning how OTR interprets specific tax provisions. There are numerous hotels in the District of Columbia, and there is obvious value if businesses in that industry have access to this guidance, which can foster compliance with the District's tax laws and avoid issues over tax liability. (OTR claims that the disclosure here was "mistaken," a point we answer in more detail at 12-13, *infra.*)

• OTR states on the agency's web page the agency's view as to how public disclosure of redacted rulings can benefit the public:

> While a ruling is applicable solely to the taxpayer to which it is directed and may not be used by any other taxpayer, *rulings provide guidance to other District taxpayers as to the interpretation and development of the DC Tax Code.*

J.A. 106 (emphasis added by Tax Analysts). Tax Analysts and OTR both submitted this web page as an exhibit (J.A. 92; Pl. Ex. 7/Def. Ex. 7), but at no point in this case has OTR tried to explain "other District taxpayers" can benefit from the "guidance" in a private letter ruling if OTR has no "discretion" to disclose any portion of a such a ruling even in redacted form.

• Responding to an e-mail question from Tax Analysts about OTR decisions to publish PLRs on the agency's web site, OTR stated:

> We sometimes convert PLR to notices which are then published on our website under 'Law and Guidance'" (J.A. 106).

• OTR allows taxpayers to request and obtain "declaratory orders" that opine on the tax treatment of certain events or transactions in much the same way as private letter rulings. As with PLRs, these orders omit or redact the name of the petitioner/taxpayer, and they are deemed binding on OTR as to the requesting taxpayer. As with PLRs, the format includes the issues presented, the pertinent facts and the legal analysis of the issue. Unlike PLRs, however, these declaratory orders are posted on the OTR web page entitled *Declaratory Orders*, which is a microsite of OTR's *Tax Law and Guidance* web page (J.A.18, ¶ 19; 108-117).

• OTR's *Tax Law and Guidance* web page (J.A. 90) contains a microsite entitled *Tax Rulings,* and as Mr. Davis explained, that page (https://otr.cfo.dc.gov/node/401862) has five "revenue rulings." They date back to 2006 and state OTR's official position on certain tax situations (J.A. 19, ¶ 20), for example, a ruling that responded to a Presidential appointee who asked if his or her circumstances required the payment of District income tax. The ruling provided OTR's answer and analysis with names and identifiers redacted (J.A. 118-120)).

• In July 2002 OTR issues a notice entitled *Recall and Review of OTR Rulings*, which stated that OTR would "conduct a review of all rulings relating to taxes administered by OTR" and would "determine whether a ruling is of general applicability and should be made available to all taxpayers, or released (in sanitized form) pursuant to the Freedom of Information Act" (J.A. 19-20, ¶ 23; 121). Thus, nearly 20 years ago, OTR apparently believed that it had discretion to release "sanitized" private letter rulings and similar guidance.

These examples – none of which OTR challenged below – indicate that OTR periodically discloses the sort of guidance that Tax Analysts is seeking here and does so in a way that lets the public understand OTR's view of the law without invading anyone's privacy.

OTR tries to explain away two of these disclosures, but without success.

OTR characterizes the General Counsel Memorandum (J.A. 102-105) as a "single" episode and a "prior mistaken disclosure." OTR Br. at 15, 19. The record does not support this claim. There is no affidavit from an OTR official with relevant knowledge that this disclosure was, in fact, an error. If anything, any notion that the disclosure was "mistaken" is contradicted by OTR's statement in the record that OTR will "sometimes convert" PLRs, which are "then published on our web site under 'Law and Guidance'" (J.A. 106).

As for "declaratory orders," OTR argues that "the District's tax code specifically authorizes the issuance of a declaratory order '[o]n petition of any interested person' and directs that the 'Chief Financial

Officer will publish declaratory orders of general interest.'" OTR Br. at 19 n.1, citing D.C. Code § 2-508 and 9 DCMR § 4200.6.

This is not accurate. D.C. Code § 2-508 is not a part of the District's tax code, but rather a part of the Administrative Procedure Act, which applies to District agencies generally. Moreover, D.C. Code § 2-508 was enacted prior to the FOIA and thus has no bearing on an agency's obligation to disclose records under the FOIA.[4]

The regulation cited by OTR does allow the Chief Financial Officer to "publish declaratory orders of general interest, subject to the protection of the identity of the petitioner and confidential information contained in the declaratory order." 9 DCMR § 4200.6. But if anything, this regulation – and declaratory orders of the sort that OTR posts on its web site (J.A. 108-117) – support Tax Analysts' position that OTR can and does exercise its "discretion" to disclose guidance that is useful to taxpayers, even with redactions to protect "confidential information."

Finally, we note OTR's point that section 4406 makes it a criminal misdemeanor if anyone who "willfully violates this section." OTR Br. at 19. "Willful" sets a very high bar. In defining this standard in the tax arena, the Court has looked to the Internal Revenue Code, which

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[4] D.C. Code § 2-508 was adopted as part of the Administrative Procedure Act prior to home rule. Pub. L. 90-604, 82 Stat. 1207 (21 October 1968). Technical conforming changes were made after home rule in D.C. Law 1-19, title I, § 102(ff), 22 DCR 2054 (8 October 1975), and the APA sections were renumbered when the FOIA was adopted. D.C. Law 1-96, § 3(a), (c), 23 DCR 3744 (29 March 1977) See https://code.dccouncil.us/dc/council/code/sections/2-508.html.

defines "willful" as a "voluntary, intentional violation of a known legal duty." *Stedman v. District of Columbia, supra,* 12 A.3d at 1156 n.1, citing *Cheek v. United States,* 498 U.S. 192, 201 (1991). The good faith publication of redacted PLRs consistent with OTR's obligations under the FOIA would hardly seem to rise to the level of a "willful" violation.

* * *

A final comment is warranted here. If the Court should agree with Tax Analysts on this latter interpretation of Exemption 6(A), that would not mean – and Tax Analysts is not urging – that PLRs should be disclosed in their entirety. Exemption 2 of the FOIA protects "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(2). As our opening brief noted (at 27-29), OTR incorrectly argues that Exemption 2 permits withholding of PLRs in their entirety. That said, however, names and identifiers as to specific taxpayers would certainly seem to qualify for redaction and withholding under Exemption 2 – as OTR has routinely done in the redacted rulings cited in Mr. Davis's affidavit. In other words, a ruling for Tax Analysts under either of the two theories presented above would result in the same level of disclosure of the requested documents.

II. THE TRIAL COURT'S FAILURE TO CONDUCT AN *IN CAMERA* REVIEW WAS REVERSIBLE ERROR.

A. The record warranted an *in camera* review.

OTR argues that the trial court did not abuse its discretion on this score, an argument that rests on the flawed factual assumption that "the entirety" of a private letter ruling contains "tax information." OTR Br. at 20. Based on that assumption – which Tax Analysts' evidence rebuts – OTR contends that even if one were to conduct an *in camera* review, the redactions would leave a document with "little to no information value." OTR Br. at 21. Indeed, OTR goes so far as to claim that the lack of informational value is "self-evident." OTR Br. at 22.

The record belies these claims. Both OTR and the trial court built a house of cards that rests on an unproven factual assumption, namely, that "tax information" about an individual *must* inevitably permeate every corner of a private letter ruling to such a degree that nothing can be disclosed, at least nothing useful to anyone. But how could the trial court reach that conclusion – must less grant summary judgment to OTR – when evidence that OTR never contested proves otherwise?[5]

OTR cites no case in which a record was withheld in its entirety based on a bald assertion that exempt and non-exempt portions are "inextricably intertwined." Instead, and without citing any cases, OTR

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[5] OTR's brief does note (at 22) that OTR submitted one of the 24 requested PLRs to the Mayor's Office for consideration during Tax Analysts' appeal, and the Mayor's Office agreed with OTR. This proves nothing. Random sampling occurs in federal FOIA cases only if the record is voluminous and the records to be sampled are representative of the whole. *Bonner v. United States Dep't of State,* 928 F.2d 1148, 1151 (D.C. Cir. 1991); *FlightSafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 612-13 (5th Cir. 2003). Neither condition was present here. The PLRs are not voluminous, and there is no affidavit by a knowledgeable OTR official detailing why the one PLR submitted to the Mayor's Office was "representative" of the whole.

asserts that such a conclusion is proper here because the "entire focus" of a private letter ruling is a request for guidance, and section 4406 "prohibits the disclosure of such tax information." OTR Br. at 22-23.

However, Tax Analysts' unchallenged evidence rebuts any notion that section 4406 somehow "prohibits" the disclosure of tax guidance with redactions. But even had there been no such showing, the case law cited in our opening brief (at 23-26) shows that a question of fact inevitably arises when an agency makes an "inextricably intertwined" argument. That case law also indicates a judicial finding on this issue will depend on the quality and factual detail of an agency affidavit that explains the agency's position on this point, and that even with such an affidavit, an *in camera* review can assist in evaluating such claims.

But none of that was present here. Faced with the record presented by Tax Analysts, the trial court should not have assumed that OTR's characterization of the records was accurate, but should have addressed the issue by reviewing the rulings *in camera.*

B. *In camera* review by this Court is warranted.

OTR resists Tax Analysts' citation of *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 124 A.3d 69, 77 n.12 (D.C. 2015), which noted that in cases where trial courts "have reviewed records *in camera* to evaluate the government's claimed exemptions, appellate courts generally find it necessary to review the documents *in camera* as well."

The record in this case demonstrates the value of such a review here too. The number of documents is small, and OTR presented no evidence to counter Tax Analysts' showing that OTR can and does publish redacted rulings. Moreover, the trial court here – after first concluding the severability was a question of fact (J.A. 27) – changed course and uncritically accepted OTR's view that private letter rulings are exempt in their entirety.

OTR also resists *in camera* review on the theory that there is no public interest in disclosure of private letter rulings with redactions. OTR Br. at 24. This argument cannot be taken seriously.

As appellant Davis's affidavit noted, the complexity of tax laws make private letter rulings and other forms of guidance helpful to taxpayers trying to assess how a statute may affect their own situation (J.A. 16, ¶ 11). This is not a matter of conjecture. As Mr. Davis noted, the IRS publishes PLRs and a myriad of other guidance with redactions. *FOIA Library*, https://www.irs.gov/privacy-disclosure/foia-library. Examples of these rulings appear in this record at J.A. 94-101. In addition, of the 47 state revenue departments that offer rulings upon request, 36 of those state departments make their rulings public (with redactions) (J.A. 16-17, ¶ 13). It is difficult to believe that so many state revenue departments would undertake this effort if the rulings are as worthless as OTR claims.

Finally, OTR claims that there is no need to disclose private letter rulings because OTR posts a "substantial" amount of information on its web site. OTR Br. at 25. But that is beside the point. There is no question that a government agency is capable of telling citizens what the agency wants them to know. The basic reason for having a Freedom of Information Act is to give citizens an opportunity to learn what they want to know, not simply what the government wants to tell them.

CONCLUSION

For these reasons and those stated in our opening brief, appellants respectfully ask the Court to conduct an *in camera* review of the documents at issue here and to reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this reply brief was served electronically this 2nd day of July, 2021 upon Loren AliKhan, Solicitor General, and Richard S. Love, Senior Assistant Attorney General, 400 Sixth Street, NW, Suite 8100, Washington, DC 20001.

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