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QUESTION PRESENTED

1. Did the Appellate Tax Board (the "Board") err in determining that appellant Global Companies, LLC ("Global"), did not demonstrate that purchases of fuel made by Hyannis Harbor Tours, Inc. ("Hy-Line") were exempt from sales tax under *G.L. c. 64H, § 6(o)*, where Hy-Line's vessels did not engage in "foreign and interstate commerce" as required by the statute, but provided domestic passenger ferry service exclusively between points in Massachusetts?

Statement of the Case.

In May 2006, Global, as the relevant vendor, filed a petition with the Board pursuant to G.L. c. 58A, § 7, and G.L. c. 62C, § 39, challenging the Commissioner of Revenue's refusal to abate sales tax assessed under G.L. c. 64H, § 2,¹ stemming from sales of fuel to Hy-Line in 2002, 2003, 2004 and 2005. Joint Appendix ("JA") at 3, 239. The Board held a hearing in November 2007, and issued a decision in May 2009, affirming the Commissioner's determination that Global was not entitled to an exemption from the sales tax under G.L. c. 64H, § 6(o).² JA 17, 1215-1238. Global filed a timely appeal. JA 1239.

¹ That statute provides, in pertinent part: "An excise is hereby imposed upon sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of five percent of the gross receipts of the vendor from all such sales of such property or services, except as otherwise provided in this chapter." G.L. c. 64H, § 2. Because the sales tax is imposed on vendors, only vendors may apply for abatements on behalf of their customers.

² That statute provides, in pertinent part: The following sales and gross receipts shall be exempt from the tax imposed by this chapter . . . (o) . . . sales of fuel or substitute therefor, supplies and repairs to vessels engaged in foreign and interstate commerce." G.L. c. 64H, § 6(o).

Statement of Factual Background.

Global is a Massachusetts limited liability company, maintaining its principal place of business in Waltham. JA-243, 1217. It sells fuel to a broad range of commercial and industrial interests in this country and elsewhere. JA 243, 1217. One of its customers is Hy-Line. JA 243, 244, 1219. JA 244, 1219.

Hy-Line is a Massachusetts corporation, maintaining its principal place of business in Hyannis. JA 243, 1217-1218. It is a private carrier licensed by the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority ("Steamship Authority") to provide passenger ferry service to and between Nantucket, Martha's Vineyard and Hyannis. JA 244, 1218.

During the periods at issue,³ Hy-Line had a fleet of seven vessels, all engaged in the business of providing passenger ferry service between the Cape and

³ The specific months at issue are: July 1, 2002 through December 31, 2002; January 1, 2003 through December 31, 2003; January 1, 2004 through December 31, 2004; and January 1, 2005 through July 31, 2005. JA 240, 1216. The total amount of tax in dispute is \$156,258.81. JA 5, 240.

the Islands. JA 244, 1218. Hy-Line's vessel were regulated by the Coast Guard and offered daily passenger service to and from Nantucket year-round, as well as daily passenger service to and from Martha's Vineyard and between the Islands on a seasonal basis. JA 244-248, 1218. Certain Hy-Line vessels made numerous trips daily, while others made a single round trip per day. JA 244-248, 1219. While Hy-Line served Massachusetts residents, its passengers regularly included out-of-state and foreign tourists as well. JA 1221, 1223.⁴

To avoid the shoal waters off the Massachusetts coast, Hy-Line's vessels routinely crossed the three-mile territorial line between Massachusetts and federal waters. JA 227, 1223-1225. That is, the vessels started in Massachusetts waters, crossed briefly into federal waters three miles from land, and

⁴ The precise percentage of out-of-state and foreign tourists who used Hy-Line's vessels during the relevant period was disputed. JA 1222 n.3. The Board did not resolve the dispute. JA 1222 n. 3. Rather, it simply inferred the presence of non-Massachusetts passengers on Hy-Line's vessels based on evidence in the record that "many out-of-state and foreign tourists visit the islands each year, and . . . Hy-Line was one of the few providers of ferry service to the islands." JA 1221, 1222 n.3.

then re-entered Massachusetts waters. JA 227, 1223-1225. Thus, the vessels commenced their voyages in Massachusetts and concluded them in Massachusetts, only entering federal waters as a safety precaution to avoid shallow water. JA 227, 1225.

ARGUMENT.

The issue on appeal is straightforward: did Hy-Line's vessels engage in "foreign and interstate commerce" within the meaning of G.L. c. 64H, § 6(o), thus making Global's fuel sales to Hy-Line exempt from the sales tax. Based on the plain language of the statute, they did not. Simply put, Hy-Line's business was conducted exclusively within the Commonwealth. Neither the presence of non-Massachusetts residents on the vessels, nor the fact that the vessels briefly entered federal waters, changes that necessary conclusion.

I. THE STANDARD OF REVIEW IS "HIGHLY DEFERENTIAL."

The Board's factual findings and legal conclusions are entitled to deference. This court may "not modify or reverse a decision of the board if the decision is based on both substantial evidence and a correct application of the law." Boston Professional Hockey

Ass'n, Inc. v. Comm'r of Revenue, 443 Mass. 276, 285 (2005) ("BPHA"). "The taxpayer has the burden of proving as a matter of law its right to an abatement of the tax." BPHA, 443 Mass. at 285, quoting M & T Charters, Inc. v. Comm'r of Revenue, 404 Mass. 137, 140 (1989). "This obligation is not a light one." BPHA, 443 Mass. at 285.

"The board's decision is final as to findings of fact." Syms Corp. v. Comm'r of Revenue, 436 Mass. 505, 511 (2002), citing G.L. c. 58A, § 13 ("The decision of the board shall be final as to findings of fact."). "[T]he board's 'findings have the same force and effect as the verdict of a jury or the finding of a judge sitting without a jury . . .'" Id., quoting Comm'r of Corps. & Taxation v. J.C. McCrory Co., 280 Mass. 273, 278 (1932). "Resolution of conflicts in evidence and the credibility of the witnesses is in the province of the board." Bayer Corp. v. Comm'r of Revenue, 436 Mass. 302, 307 (2002). Thus, the Board's factual findings must be upheld so long as they are supported by "substantial evidence." G.L. c. 30A, § 14(7).

The substantial evidence test is "highly deferential to the agency." Friends and Fishers of

Edgartown Great Pond, Inc. v. Dept. of Env'tl. Protection, 446 Mass. 830, 836 (2006). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" RCN-BecoCom, LLC v. Comm'r of Revenue, 443 Mass. 198, 204 (2005), quoting G.L. c. 30A, § 1(6). Appellate "review of the sufficiency of the evidence is limited to whether a contrary conclusion is not merely a possible but a necessary inference from the findings.'" BPHA, 443 Mass. at 285, quoting Comm'r of Revenue v. Houghton Mifflin Co., 423 Mass. 42, 43 (1996). The Court "may not displace an administrative board's choice between two fairly conflicting views," even if the Court would "have made a different choice had the matter been before it de novo." Southern Worcester County Regional Vocational School Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420 (1982).

The Board's "interpretation of tax statutes" is entitled to particular deference, because the Board has "expertise in tax matters" and is "charged with the administration of tax law." RHI Holdings, Inc. v. Comm'r of Revenue, 51 Mass. App. Ct. 681, 685 (2001), quoting A.W. Chesterton Co. v. Comm'r of Revenue, 45

Mass. App. Ct. 702, 710 (1998); accord, e.g., Comm'r of Revenue v. McGraw-Hill, Inc., 383 Mass. 397, 401 (1981). As "[t]he party appealing [the agency's statutory] interpretation," Global "has the burden of proving it invalid." LeBeau v. Comm'r of Dept. of Employment and Training, 422 Mass. 533, 537 (1996). Thus, the Board's legal conclusions should be affirmed so long as they are "based on reasonable interpretations of the tax laws." BPHA, 443 Mass. at 286. "[I]f the board's interpretation of a tax statute is reasonable, then [the Court] 'should not supplant [its] judgment,' and the board's interpretation will be adopted. AA Transp. Co., Inc. v. Commissioner of Revenue, 454 Mass. 114, 119 (2009), quoting Dowling v. Registrar of Motor Vehicles, 425 Mass. 523, 525 (1997).

II. THE BOARD REASONABLY CONCLUDED THAT HY-LINE'S VESSELS DID NOT ENGAGE IN "FOREIGN AND INTERSTATE COMMERCE" WITHIN THE MEANING OF G.L.C. 64h, §6(O)

To be entitled to the sales tax exemption set forth in G.L. c. 64H, § 6(o), Global must establish that Hy-Line's vessels "engaged in foreign and interstate commerce." Id. See, e.g., New England Legal Foundation v. City of Boston, 423 Mass. 602, 613

(1996) (taxpayer bears "heavy burden" of establishing its entitlement to exemption). It has failed to do so. As the Board found, "Hy-Line's vessels did not ferry passengers between states or countries or in any way involve or connect two or more states or countries." JA 1226. Thus, they did not engage in "foreign or interstate commerce" within the plain language of the statute. JA 1226 & n. 6 (citing dictionary definition of the term "interstate," as "[i]nvolving, existing between, or connecting two or more states").

A. Tax Exemptions are Strictly Construed.

It is well-established that tax exemptions are strictly construed. As the Supreme Judicial Court has repeatedly recognized, "an exemption from taxation is a matter of special favor or grace." Macy's East, Inc. v. Comm'r of Revenue, 441 Mass. 797, 804, cert. denied, 543 U.S. 957 (2004), quoting South Boston Savings Bank v. Comm'r of Revenue, 418 Mass. 695, 698 (1994); accord AA Transp., 454 Mass. at 121 (applying same principle to exemptions from sales tax under G.L. c. 64H). Thus, an exemption is "to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command."

Macy's East, 441 Mass. at 804, citing South Boston Savings Bank, 418 Mass. at 698. Moreover, the burden "is on the taxpayer to demonstrate entitlement to an exemption claimed." Macy's East, 441 Mass. at 804, quoting South Boston Savings Bank, 418 Mass. at 698. This is a "heavy burden." AA Transp., 454 Mass. at 121.

Here, the express terms of the exemption require that the relevant vessels "engaged in foreign and interstate commerce." G.L. c. 64H, § 6(o). On its face, this language requires that the vessels themselves must have engaged in business outside the borders of Massachusetts. See JA 1226 n. 6 (applying dictionary definition of "interstate"); see also Massachusetts Broken Stone Co. v. Weston, 430 Mass. 637, 640 (2000) ("Where the language of a statute is clear, courts must give effect to its plain and ordinary meaning and the courts need not look beyond the words of the statute itself"); G.L. c. 4, § 6, cl. 3 ("Words and phrases shall be construed according to the common and approved usage of the language").

The facts before the Board demonstrated that Hy-Line's vessels were engaged in a strictly local activity, conducted entirely within the confines of

the Commonwealth. That is, Hy-Line was a Massachusetts company, licensed by the Massachusetts Steamship Authority, engaged in the business of ferrying passengers between points in Massachusetts. JA 243, 244-248, 1217-1219. Thus, the Board reasonably concluded that Global's fuel sales to Hy-Line did not come within the plain meaning of G.L. c. 64H, § 6(o), because "Hy-Line did not Transport passengers between different states or foreign countries." JA 1233. See, e.g., Labrecque, 64 Mass. App. Ct. 100, 102 (2005) (court will defer to agency's reasonable statutory interpretation); RHI Holdings, Inc., 51 Mass. App. Ct. at 685 (court will defer to Board's special expertise in interpreting tax law).

B. The Broad Definition of "Interstate Commerce" Used in Dormant Commerce Clause Analysis is Inapplicable Here.

Global contends that the Board's interpretation of what it means to be "engaged in foreign and interstate commerce" was overly narrow, and that it should stretch to include Hy-Line's business, which allegedly has provided "essential transportation services to out-of-state and foreign travelers." Brief of Appellant Global Companies, LLC ("Global

Br.") at 11-30. But Global's argument is premised on the assumption that the reference in G.L. c. 64H, § 6(o), to "foreign and interstate commerce" is co-extensive with the broad definition of "interstate commerce" used in analyzing the dormant Commerce Clause of the United States Constitution. Global Br. at 23-25; see also U.S. Const. Art. I, § 8, cl. 3. It is not.

To begin with, Global has not asserted a Commerce Clause challenge in this case. JA 1219 n.2; Global Br. at 23 ("[t]he Appellant does not argue that the imposition of sales tax on its sale of fuel to Hy-Line burdened interstate commerce"). Rather, it relies on the Commerce Clause by analogy because it "provides a rich jurisprudence that defines what activities constitute interstate and foreign commerce." Global Br. at 24-25. But, as the United States Supreme Court has held, context matters when interpreting the phrase "interstate commerce." See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-119 (2001).

In Circuit City, the Court was asked to interpret the phrase "engaged in foreign or interstate commerce" as used in the Federal Arbitration Act. 532 U.S. at 105; 9 U.S.C. § 1. As here, one of the

parties suggested that Congress intended the phrase to be interpreted broadly, sweeping in the full extent of Congress's powers to regulate commerce under the Commerce Clause. 532 U.S. at 114. The Court rejected that interpretation based on the plain language of the statute. Id. at 115. As the Court noted, different interpretations result from the relevant legislature's use of different modifiers for the word "commerce." Id. Words such as "involving" or "affecting" signal "an intent to exercise Congress's commerce power to the full." Id. Whereas "the general words 'in commerce' and the specific phrase 'engaged in commerce' are understood to have a more limited reach." Id. Those words mean "engaged in the flow of interstate commerce, and [are] not intended to reach all corporations engaged in activities subject to the federal commerce power." Id. at 117, quoting United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 283 (1975). See also Brent Leasing Co. v. State Tax Assessor, 773 A.2d 457, (Me. 2001) (in strikingly similar case, Supreme Judicial Court of Maine determined that whale watching vessel was not "an instrumentality of interstate or foreign commerce" for purposes of use tax exemption .

Here, the Legislature did not use sweeping language. It did not, for example, exempt from tax sales of fuel to vessels "involved" in foreign or interstate commerce. Rather, it used the more limited term "engaged" in foreign or interstate commerce.⁵ G.L. c. 64H, § 6(o). By the deliberate choice of this more limited language - with its history of being construed narrowly, see Circuit City, 532 U.S. at 117-118 (tracing history) - the Legislature signaled its intent to apply the exemption only to those vessels that actually cross the borders of Massachusetts to deliver passengers or goods to other states or

⁵ The Legislature made a much more explicit reference to the Commerce Clause in an entirely different section of the statute, exempting from the tax "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the commonwealth." G.L. c. 64H, § 6(a). By this language, the Legislature indicated its intent to tax sales up to the limit imposed by federal law. This intent contrasts sharply with Global's assertion that the "structure of the statute makes it clear that the legislature meant to offer an exemption beyond that which is constitutionally mandated." Global Br. at 23. Rather, the structure of the statute shows that the Legislature chose to exempt only those sales that obviously and directly involve foreign and interstate commerce, thus implicating the prohibitions of the Commerce Clause. See G.L. c. 64H, § 6 (j) (exempting sales of fuel used "in the operation of aircraft or used in the operation of railroads").

countries. Such circumstances do not exist here, therefore, the exemption is inapplicable.

Contrary to Global's assertion, the Supreme Judicial Court's decision in Opinion of the Justices, 428 Mass. 1201 (1998), does not demand a different conclusion. Global Br. at 19-21. Indeed, that opinion demonstrates the importance of context in construing the phrase "interstate commerce."

In the opinion, the Court commented on proposed legislation that would impose a surcharge on vehicle rentals in Boston. Id. at 1201-1202. The surcharge distinguished between Boston residents and all others who rented vehicles in the city, requiring non-Boston residents to pay an additional \$7.00. Id. The Court was specifically asked to consider whether the surcharge would "violate the Commerce Clause of the Constitution, Art. I, Sec. 8." Id. at 1202. Thus, the Court began its analysis by determining whether the Commerce Clause even applied to the proposed legislation. Id. at 1204.

In determining the clause's applicability, the Court considered its full sweep, assessing whether the legislation had "*a sufficient effect on interstate commerce to evoke commerce clause scrutiny.*" Id.

(emphasis added), quoting Perini Corp. v. Comm'r of Revenue, 419 Mass. 763, 766 (1995). The Court determined that the "rental of vehicles in Boston is plainly an aspect of interstate transportation," adding that "[m]any, if not the majority of those who rent motor vehicles in the city are interstate travelers, and their vehicle rentals may represent the final step of an interstate journey." Id. at 1205. Thus, the Court concluded, "the surcharge in question here has a 'sufficient effect on interstate commerce' to require further commerce clause inquiry." Id. at 1206 (emphasis added).

From this language, Global constructs a hard and fast rule of Massachusetts law: "when essential transportation service represents a leg of a tourist's interstate or foreign journey it is transformed into an aspect of interstate trade and falls squarely within the exemption provided in G.L. c. 64H, § 6(o)." Global Br. at 19. But that is not what the Supreme Judicial Court said in its opinion.⁶ All the Court did

⁶ Even if the Opinion were not distinguishable, it would not be controlling. As the Supreme Judicial Court has reiterated, advisory opinions, "although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the
(footnote continued)

was determine - as an initial matter and in the broadest possible sense - whether a surcharge that likely discriminated against tourists "affected" interstate commerce for purposes of Commerce Clause analysis. It did not determine that any business that in some way served tourists "engaged" in interstate commerce for purposes of a limited tax exemption.⁷ In short, the context of the Court's decision was completely different. And because the Supreme Court has made clear that the term "interstate commerce" means different things in different contexts, the

(footnote continued)

justices as individuals in their capacity as constitutional advisers of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis." Opinion of the Justices, 341 Mass. 738, 747-748 (1960), quoting Commonwealth v. Welosky, 276 Mass. 398, 400 (1931). If the same question arises later, "it is the duty of the court to consider it anew, unaffected by the advisory opinion." Id.

⁷ Indeed, such a rule would be unworkable, potentially exempting from sales tax under G.L. c 64H, § 6(a), everything that might pass through a tourist's hands, from salt water taffy to t-shirts. See JA 1228 (expressing concern that Global's characterization of Hy-line's activities would leave "no sound principle to prevent the same immunity from attaching to every domestic retail detailer in respect of goods which in any stage . . . have been transported in interstate commerce"), quoting H.P. Hood & Sons v. Commonwealth, 235 Mass. 572, 577 (1920).

Supreme Judicial Court's 1998 opinion does not require a broad construction of G.L. c 64H, § 6(o). Circuit City, 532 U.S. at 115.

C. The Brief Entry of Hy-Line's Vessels into Federal Waters does not Transform Their Routes into Interstate Commerce.

The routes followed by Hy-Line's vessels connect various points in the Cape and Islands. JA 223, 244-248, 1218, 1219. They do not connect those points with any other state or country. JA 223, 244-248, 1218, 1219. The routes do, however, briefly and routinely cross into federal waters in order to avoid the shallow shoal waters off the Massachusetts coast.⁸ JA 227, 1223-1225. Global asserts that these brief forays into federal waters between Massachusetts

⁸ In its brief, Global attempts to equate federal waters with international waters. Global Br. at 30-37. Global's own witness did not equate the two, testifying only that Hy-Line's vessels travelled in federal waters and denying that they ventured into "foreign" waters. JA 214-217, 219, 224 ("I don't believe it is foreign"). And the Board found that "the evidence of record did not support a finding that Hy-Line's vessels entered into international waters." JA 1233 n.7. But regardless whether the vessels were in federal or international waters, the fact remains that they entered those waters on a route between two points in Massachusetts. As discussed above, the brief excursion outside the Commonwealth's borders does not change the essentially local nature of Hy-Line's business.

destinations transform Hy-Line's routes into foreign or interstate commerce. Global Br. at 36. Hy-Line's position contradicts established law, and common sense.

For more than a century, the Supreme Court has rejected the argument that "the mere passage over the soil of another State" in the transportation of freight or passengers between two points in one state "renders that business foreign," even for Commerce Clause purposes. Lehigh Valley R.R. Co. v. Pennsylvania, 145 U.S. 192, 202 (1892) ("We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached" from another point in Pennsylvania); see People v. Sohmer, 235 U.S. 549, 559-561 (1915) (no dormant Commerce Clause violation where towing business was conducted entirely "between New York ports" and forays into New Jersey waters was for "convenience in conducting domestic transportation"); see also United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 326 (1918) ("a tax that only indirectly affects the profits or returns from [interstate] commerce is not within the rule").

Massachusetts courts have been just as consistent. For example, in H.P. Hood & Sons v. Commonwealth, 235 Mass. 572, 574 (1920), a Massachusetts milk producer argued that it should be exempt from Massachusetts corporate excise tax because 90% of its milk originated in New York and the other New England states. Thus, it was engaged in "interstate or foreign commerce." Id. at 575-576.

The Supreme Judicial Court disagreed, finding that interstate commerce had been "utilized as a preliminary" to Hood's sale of milk within the Commonwealth, and that "the part it played ended when the milk reached its terminus at Boston." Id. at 577. "[T]hereafter," the Court reasoned, "every step in the transaction was an intrastate affair." Id. Indeed, the Court cautioned, "[i]f such transportation in interstate commerce affords immunity from taxation, there appears to be no sound principle to prevent the same immunity from attaching to every domestic retail detailer in respect of goods which in any stage . . . have been transported in interstate commerce." Id.; cf. Massachusetts Bay Lines, Inc. v. Commissioner of Revenue, 72 Mass. App. Ct. 321 (2008) (company that conducted whale watch cruises was subject to

Massachusetts surcharge on water-based sightseeing tours "conducted partly or entirely within the city of Boston," despite the fact that the tours took place primarily outside Massachusetts waters).

The consistent theme of these cases is that courts will look to the essential nature of the transaction to determine if it is local or "foreign." If the critical elements of the transaction occur within the Commonwealth - that is, passengers or freight are taken from one point in the state to another point in the same state, or milk is sold in Massachusetts to Massachusetts customers - then it is a local or "intrastate" activity. And the essential nature of that activity is not transformed by incidental or indirect contact outside the state. Otherwise, virtually everything sold in the Commonwealth would arguably be exempt from taxation under the dormant Commerce Clause. See Hood, 235 Mass. at 577 (finding that "this business of the petitioner is indistinguishable from the sales by any other retail or wholesale sealer who sells from a stock of goods bought in a foreign market, and brought to his store here by interstate commerce").

Here, Hy-Line's business is transporting passengers between Massachusetts destinations on the Cape and the Islands. Its vessels cross into federal waters only as a safety precaution to avoid shallow Massachusetts shoal waters. They do not cross federal waters to reach other states or countries. Thus, their contact with federal waters is only incidental and does not change the essentially intrastate nature of Hy-Line's business. A contrary conclusion, moreover, would upset decades of established law and would have a destabilizing effect on the Commonwealth's efforts to assess sales tax on items bought and sold in Massachusetts that have travelled, even briefly, outside Massachusetts.

CONCLUSION.

For the reasons above, the Board's order should
be affirmed.

Respectfully submitted,

COMMISSIONER OF REVENUE

By his attorney,

MARTHA COAKLEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'JGM', is written over a horizontal line.

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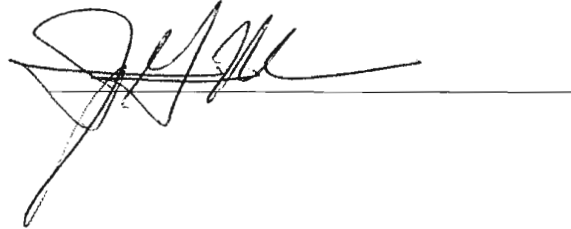
Certification of Compliance with Rules

Pursuant to Mass. R. Civ. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filing of briefs.

A handwritten signature in black ink, appearing to be 'J. A. M.', written over a horizontal line.

Certificate of Service

I certify, under the pains and penalties of perjury, that true copies of this document were served by regular mail on December 2, 2009, upon William E. Halmkin, Esq. and Judith G. Edington, Esq., attorneys for appellant.

A handwritten signature in black ink, appearing to be 'J. A. M.', written over a horizontal line.