Supreme Court No. 94592-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

CA No. 33556-9-III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered RNs employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners/Plaintiffs,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his official capacity as an agent and officer of Lourdes Medical Center,

Respondents/Defendants.

ANSWER TO PETITION FOR SUPREME COURT REVIEW

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I. IDENTITY OF RESPONDENTS

Our Lady of Lourdes at Pasco and John Serle, the respondents-defendants in this appeal, respectfully request this Court deny review of the February 9, 2017 unpublished opinion of Division III of the Washington Court of Appeals. That decision held the trial court did not abuse its discretion in denying class certification to petitioners-plaintiffs.[1]

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

Plaintiffs ask the Court to accept discretionary review of the unpublished opinion of the Court of Appeals, contending the trial court and appellate court made several errors. Defendants do not agree review is warranted: the decision by the Court of Appeals is not in conflict with a decision of this Court or with another Court of Appeals decision; the decision by the Court of Appeals does not involve questions of law under the Constitution of the State of Washington or of the United States; and the decision does not involve an issue of substantial public interest that the Supreme Court should determine. Plaintiffs briefly mention the factors in RAP 13.4, instead focusing on the errors they think the trial court and Court of Appeals made in weighing the evidence. To the best of their ability, defendants answer the specified issues as follows:

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[1] In this brief, petitioners are referred to as plaintiffs and respondents are referred to as defendants, as they were before the Court of Appeals and in trial court briefings.

1. The trial court did not abuse its discretion in determining plaintiffs failed to meet the requirements of CR 23(b).

2. The trial court provided a rigorous analysis and addressed each requirement under CR 23.

3. The Court of Appeals properly deferred to the express and implied findings of the trial court.

4. The trial court adequately articulated its ruling on manageability and superiority under CR 23(b)(3).

5. The Court of Appeals' reference to small claims court does not constitute reversible error.

6. Plaintiffs failed to raise and preserve an objection to presenting summary judgment motions; the trial court properly exercised its discretion under CR 23(d) in hearing summary judgment motions prior to the class certification motion.

7. The trial court did not abuse its discretion in denying class certification under CR 23(b)(1) or (b)(2).

III. ANSWER TO STATEMENT OF THE CASE

Defendants disagree with plaintiffs' "statement of the case"; it does not present an accurate or fair statement of relevant facts. Defendants incorporate their Statement of the Case from their brief to the Court of Appeals and provide this brief summary.

At all times relevant, Lourdes was a Catholic, faith-based, non-profit hospital serving the Tri-Cities area. (CP 1947-50). During the relevant period, Lourdes employed hourly RNs in nine departments in addition to Pre-Admit (where RNs such as plaintiff Jones take vitals and

information before patients are admitted): (1) Emergency Department; (2) Surgery; (3) Post-Anesthesia Care Unit; (4) Medical/Surgical Unit; (5) Intensive Care Unit; (6) Inpatient Rehabilitation Unit; (7) Same Day Surgery/Ambulatory/GI Lab Department; (8) Observation; and (9) Obstetrics/Birthplace. (CP 319, 357, 384). Some departments operate 24-7, others are only open during the day or when procedures are scheduled. Some departments have minimum staffing that require RNs to be present even when there are no patients; other departments send RNs home if no patients or procedures. RNs are employed full-time, part-time, or on a per diem basis. (CP 1825-36). They typically work 8-hour, 10-hour, or 12-hour shifts.

Lourdes strives to provide its employees, including its RNs, with the rest breaks and meal periods required by law; when rest breaks and meal periods cannot be taken due to the circumstances of an individual shift, Lourdes appropriately compensates employees for hours worked at the proper rate.[2] (CP 1917-20, 1970-74). Lourdes has a meal and rest break policy (Policy No. 5100.7) applicable to all hourly RNs. (CP 310, 358, 568, 1843-48, 1862-67, 1873-81, 1922-27). When RNs report missed

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[2] Defendants disagree that no employees were paid for missed rest breaks before a specific date. (RP 160-63). Judge Spanner challenged plaintiffs on that argument and claimed universal policy. (RP 51-53, 357, 370). To the extent the Court of Appeals made such statement, it is based on plaintiffs' contentions, not any admission by defendants.

meal periods or rest breaks, the missed breaks are entered as time worked, and paid at the appropriate regular or overtime rate. (CP 391, 514, 557, 562-64, 1905-07). The four named plaintiffs testified they were never disciplined for reporting missed breaks or meal periods. (CP 391, 452, 507, 556).

The supervisors and managers of various departments implement how rest breaks and meal periods are planned, taken and reported in their departments. (CP 484, 498, 1820-23, 1873-81). Most departments also have department-specific orientations that include procedures for rest breaks and meal periods in that department. (CP 345, 361, 1813-14). Jones, Chavez, Christianson and Garcia – along with other witnesses – agreed that several individual factors influenced if they received breaks or meal periods, including: differences between patient flow in departments (CP 548, 1825-36, 1873-81, 1936-45); differences between day, night or weekend shifts (CP 481, 489-92, 1922-27, 1936-45, 1962-68); different managers or implementation of policies (CP 405, 484, 492, 1813-18, 1850-55, 1857-60, 1873-81, 1936-45); census or number of patients and minimum staffing levels (CP 492-93, 1825-36, 1976-80); patient acuity (CP 443-47, 1922-27, 1936-45); certifications or skills of RNs (CP 1869-71, 1857-60, 1873-81); roles assigned to an RN during a shift (i.e. triage

or charge nurse) (CP 481-84, 1843-48, 1850-55, 1873-81, 1895-96); and amount of downtime during shifts (CP 1813-18, 1922-27).

In June 2012, plaintiffs filed a lawsuit for unpaid wages under state law against defendants, asserting all hourly RNs missed rest breaks and meal periods without being compensated. After a year of pleadings and discovery, plaintiffs filed a motion for class certification. (CP 938-72). They also filed a motion for summary judgment. (RP 126). The trial court was unconvinced by their many broad theories of commonality and did not grant that motion; instead, he suggested the theories be further explored through summary judgment motions. (RP 122-25). Plaintiffs filed two more summary judgment motions and defendants filed one cross-motion. (CP 53-66, 68-84, 118-33, 1709-19). Following those motions, plaintiffs renewed their class certification motion. After written and oral arguments, the trial court denied the motion. (RP 345; CP 995-97). Division III of the Washington Court of Appeals affirmed. Plaintiffs now seek discretionary review of the denial of class certification.

IV. ANSWER TO ARGUMENT

A. Plaintiffs Fail To Explain Why This Appeal Meets Review Standards.

Plaintiffs focus their argument on several errors they think the courts made below; they spend little time explaining why this Court

should grant review. Pursuant to RAP 13.4, the Washington Supreme Court considers four factors in deciding whether to grant review: 1) if the Court of Appeals decision conflicts with a Supreme Court decision; 2) if it conflicts with a published decision of the Court of Appeals; 3) if it presents a significant constitutional law question; or 4) if it involves an issue of substantial public interest that the Supreme Court should decide. Considering those factors, the Court should not grant review.

The first three factors are not implicated here. The Court of Appeals' decision does not conflict with prior published decisions from any appellate court and does not present constitutional law questions.[3] To the extent plaintiffs address the basis for granting review, they contend defendants believe the decision involves an issue of substantial public interest. They grossly misconstrue defendants' motion to publish to make this argument.

The reasons for publishing an opinion under RAP 12.3(d) are distinct from the factors outlined in RAP 13.4. Defendants requested publishing primarily because the decision clarified existing decisions, and

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[3]Plaintiffs occasionally argue the trial court's decision conflicts with cases that granted class certification, as if to assert that shows a conflict with other appellate decisions. That a different court on a different factual record exercised its discretion and certified a class does not create a conflict warranting review. As the Court of Appeals noted, the fact that different judges might reach different decisions about manageability on different records is a hallmark of trial court discretion.

provided a state decision within the context of the healthcare industry consistent with the federal law decisions cited and relied upon by the parties and the court. Defendants further argued the decision was of significant importance, particularly to the healthcare industry. That is qualitatively distinct from presenting an issue of substantial public interest that the Supreme Court needs to decide.

Further, the Court of Appeals denied the motion to publish, apparently finding it was not of general public importance. As an unpublished opinion, under abuse of discretion review, the decision lacks precedential – or significant persuasive – value. Plaintiffs did not set forth a persuasive argument for why the Court should grant review.

B. Brief Response on the Merits of Plaintiffs' Many Arguments[4]

The crux of class certification in this lawsuit is whether class issues or individual factors predominate. The ability to answer a question once and have that answer apply to the whole class, a model for both liability determinations and damage calculations, and other options to class treatment all play a role in this determination. Contrary to plaintiffs' contention, the trial court correctly found no evidence that defendants employed an "illegal" policy. Plaintiffs theorize that nursing as a

[4] If the Court grants review, respondents intend to submit a supplemental brief per RAP 13.7. Respondents also refer the Court to its briefings before the Court of Appeals, as much of the petition for review echoes arguments made to the appellate court.

profession must be considered to be of a universal, homogenous nature regardless of particulars about an RN's job or duties or patients. As the record amply shows, the duties and experiences of RNs at Lourdes vary as much as the patients they treat and health concerns they address. The nature of a surgical RN's work is scheduled and predictable; the nature of an emergency department RN's work is markedly unpredictable. The trial court correctly concluded individual factors influence if an RN missed rest breaks or meal periods, reported them, and received pay. While arguing their theories applied universally, plaintiffs' actual proposals for how they envisioned proving such theories almost all involved individual inquiries. The trial court did not abuse its discretion in concluding requirements under CR 23(b) were not met.

1. The trial court did not abuse its discretion in determining plaintiffs failed to meet the requirements of CR 23(b).

The first and third identified errors both incorporate arguments about the standard of review. Defendants address that standard first.

Appellate courts review a trial court decision on class certification for abuse of discretion. *Schnall v. AT&T Wireless Svcs, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011). A trial court abuses its discretion only if the decision is "manifestly unreasonable" or untenable. *Id.*; *Lacey Nursing Ctr., Inc. v. Department of Revenue*, 128 Wn.2d 49, 47, 905 P.2d 338

(1995); *Moeller v. Farmers Insurance Company of Washington*, 155 Wn. App. 133, 147, 229 P.3d 857 (2010). Stated another way, it means "no reasonable judge would have ruled as the trial court did." *State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). This Court has held the standard is abuse of discretion; the cases cited by plaintiffs do not say otherwise.[5]

While conceding Washington courts apply an abuse of discretion standard, plaintiffs then argue for less deference, even asserting the standard is really de novo because CR 32 requirements present either a matter of law or a mixed law and fact question. Without making a clear point, they also argue that Washington's wage and hour law and cases about finding in favor of class in close cases change the abuse of discretion to a less deferential standard. True, the Court of Appeals "wondered" about that, but did not suggest it had bearing in this case. The Court of Appeals did not state its ruling on CR 23(b) was a close call.

After presenting mixed arguments on the correct standard of review, plaintiffs ask the Court to weigh the evidence and find they met all the requirements of CR 23. This request wholly ignores the standard of

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[5] *Tapper v. Employment Sec Dept,* 122 Wn.2d 397 (1993) and *Pasco v. PERC*, 119 Wn.2d 504 (1992) both discuss the standard of review of an administrative agency decision; as petitioners concede, the balance of the cases cited are not Washington cases.

review. If a record shows, as it does here, that a trial court rigorously considered all the requirements of CR 23, the appellate courts will not disturb that decision. *Schnall* at 266; *Lacey Nursing Ctr.* at 47.

2. The trial court performed a rigorous review and addressed all criteria under CR 23.

The Court of Appeals rejected plaintiffs' argument that the trial court failed to make findings on the criteria of CR 23 or did not provide a rigorous review. Plaintiffs do not agree with the reasons – characterizing them as legally inadequate or unsupportable – but that does not mean the trial court failed in its duties.

Appellate courts review to determine if the trial court rigorously considered all the requirements of CR 23. *Schnall* at 266; *Lacey Nursing Ctr.* at 47. This record provides little doubt that Judge Spanner embarked on a rigorous analysis of the class certification issues. He first considered the issue in May 2013, received substantial briefing and evidence over the course of the next two years, and addressed a renewed motion again in May 2015. At the initial motion, he expressed its doubts about class certification but gave plaintiffs the opportunity to convince him otherwise by defining their broad theories through summary judgment motions. With a record of almost 1000 pages, briefing that total hundreds of pages and

four different opportunities to hear oral arguments, Judge Spanner unquestionably provided a rigorous review.

Plaintiffs complain that the trial court did not hold an evidentiary hearing. (They inaccurately suggest the appellate court labeled this a failure by the trial judge.) But plaintiffs never asked the trial court for an evidentiary hearing; to the contrary, they represented to the court that they did not intend to present live testimony. (RP 7). Plaintiffs appear to contend an evidentiary hearing is necessary before ruling on class certification – an unsupported contention that is contrary to prior case law. *Oda v. State*, 111 Wn. App. 79, fn. 4, 44 P.3d 8 (2002). The record reveals a rigorous review.

The trial court also properly addressed each CR 23 requirement. In both written and oral rulings, Judge Spanner explained his reasoning. A review of Judge Spanner's questions and comments in the various hearings and rulings below reveal that he focused on whether plaintiffs showed that universal, not individual factors determined if a particular RN on a particular shift missed a rest or meal break. "Hours worked" as well as the "nature of work" or "relief from work" constitute factual questions. *White v. Salvation Army*, 118 Wash. App. 272, 275, 75 P.3d 990 (2003); *Pellino v. Brinks*, 164 Wash. App. 668, 267 P.3d 383 (2011). As Judge Spanner highlighted, differences by department, shift, role and duties,

manager, patient numbers and acuity all influenced whether rest or meal breaks were taken. Further, the trial court referenced the cases cited, arguments, and motions of the parties, all confirming that CR 23 criteria were considered. *See Hill v. Garda CL NW*, 198 Wn. App. 326, 341-42, 394 P.3d 390 (2017) (citing *Eriks v. Denver*, 118 Wn.2d 451, 167, 824 P.2d 1207 (1993)).

Plaintiffs' attack on the trial court for a lack of detail in its rulings is also somewhat disingenuous. When the trial court ruled on the class certification motion, they did not ask the court for more detailed findings. They did not seek further articulation in reviewing the proposed order. Principles of preservation and judicial efficiency dictate that if plaintiffs wanted further detail, they should have asked the trial court at that time, not wait to appeal and ask this Court to remand for that detail.

The trial court performed a rigorous analysis and addressed each requirement of CR 23. The Court of Appeals rightly affirmed the denial of class certification.

3. The Court of Appeals properly deferred to the express and implied findings of the trial court.

Plaintiffs' third argument overlaps the prior two, returning to the standard of review issue answered above. See part IV.B.1 infra. Again, as

in the second error, plaintiffs attack the appellate court for assuming inferences and findings in the evidence were construed against plaintiffs.

Plaintiffs make much of the Court of Appeals' statement that it inferred the trial court resolved evidentiary conflicts in defendants' favor. In terms of factual implications, the abuse of discretion standard does support such an approach. A trial court's decision must be "untenable" and one "no reasonable judge" could make on the record. *Arredondo*, 188 Wn.2d at 256. The "no reasonable judge" standard sounds akin to a directed verdict. Regardless, the appellate courts look to see if the record reasonably allows the conclusion. Presumably, if evidence supports two sides of an issue, then a decision either way would be "reasonable". Here, evidence supports Judge Spanner's ruling; his decision was not untenable.

Further, the trial court made clear statements about some evidence that require no inference from the court. For example, the trial court expressly stated plaintiffs had not presented evidence of a hospital-wide illegal policy or culture that prohibited breaks. (RP 180-81; 248-49, 1648-49). And the trial court questioned plaintiffs' characterization of evidence and even administrative rules to fit their purpose. (RP 54-58, 177-78). As the Court of Appeals noted, the trial court found the predominance requirement of CR 23(b)(3) not satisfied because individual issues would overcome issues that could be generalized to all RNs. A reasonable judge

could make this finding, and even the plaintiffs pointed to individualized facts that influenced if they personally missed rest breaks or meal periods. The trial court noted differences between departments would require at least nine subclasses, and a reasonable judge could readily make that finding on this record. In fact, plaintiffs suggested to the court that subclasses by department may be necessary. Last, the trial court concluded a class action was not superior to other options such as joinder or individual lawsuits. Again, a reasonable judge could draw that conclusion from the record. Statutory attorney fees already facilitate wage lawsuits by individual employees. It is not manifestly unreasonable to conclude that employees could pursue individual lawsuits, whether in small claims or superior court, given the many individual issues. Joinder remains a possibility; plaintiffs indicated they had no agreements with other RNs yet to join the suit. (RP 409). Plaintiffs failed to show the trial court's decision was manifestly unreasonable or point to any evidence making it so.

4. The trial court adequately articulated its ruling on manageability and superiority under CR 23(b)(3).

Plaintiffs' fourth argument overlaps its second and third arguments, contending that the Court of Appeals failed to identify what required individualized proof. Defendants disagree.

First, plaintiffs concede that damages may need individual determinations, and that alone supports the trial court's determination that a class action would be unmanageable. The trial court was not required to agree with plaintiffs that a bifurcated case or other methodology would resolve all manageability concerns about individual damages and make class treatment the superior option. The admitted need to individually determine damages makes the trial court's ruling manifestly reasonable; however, Judge Spanner made it clear that he had substantial concerns in class management of liability questions as well.

The hearing records and briefings confirm the trial court found individual issues about whether an RN missed a rest break or meal period in the first instance turned on many situation-specific factors: department, manager, shift, role, duties, number of patients, acuity of patients. (Appx. S.Ct. 55). The trial court was addressing the threshold question of whether an RN had "hours worked" due to missed rest or meal breaks. It noted individual factors would influence the ability to get "relief from duties" or take "intermittent breaks". (RP 215, 305; CP 1651-52). The trial and appellate court discussed cases relating to rest breaks and meal periods, including cases specific to the health care industry. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846 (N.D. Ohio 2013) (noting that the ability to exercise

breaks turned on unit, shift, manager, patients, and job duties). It is evident the "individual factors" related to the core questions about whether a particular RN missed rest breaks or meal periods.

Plaintiffs downplay the individual factors influencing liability; but as both Judge Spanner and the Court of Appeals note, defendants have not conceded any improper act. Judge Spanner recognized and considered the holdings of *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), and *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003), and found an absence of any such central "illegal" practice at Lourdes that treated all RNs the same and resulted in them missing rest or meal breaks. (RP 248-49; CP 1648-49).

Despite the attempt to gloss over individual differences in proving missed breaks, plaintiffs themselves were unable to define how to universally prove their own theories on a class-wide basis. When challenged on their core theory of commonality – the contention that an RN "in assignment" cannot receive breaks – plaintiffs did not articulate a class-wide form of proof. Admitting that not all RNs have patient assignments at all times, plaintiffs proposed individualized inquiries into documentation for each patient for each RN over the course of the applicable period. (CP 353-55). Once those "in assignment" were identified, "hand offs" for each potential break or meal would need to be

explored. But plaintiffs agreed there is no standard for what "hand off" would be sufficient to transfer patient responsibility. (RP 215-16). The trial court rightly had concerns about managing a class when individual factors would influence each element of proof.

5. Court of Appeals comment about small claims is not reversible error.

Plaintiffs contend the Court of Appeals' comment about small claims court presents "reversible error" – a ludicrous assertion unsupported by any case law. The court's comment is both true and, were it an error for some undefined reason, it does not substantially influence the decision or create harm that warrants reversal.

The trial court found a class action would not be superior to joinder or individual lawsuits; arguably a small claims action would be an individual option. (CP 997). RCW 12.40.010 allows monetary claims of less than $5,000 to be filed in small claims court. But as defendants also pointed out below, the built-in attorney fee provisions for wage claims under state and federal law makes an individual lawsuit in superior court a viable option as well. Wage claims are not claims that require a compilation before they are worthwhile for an individual or attorney to pursue. Joinder or individual lawsuits (whether small claims or in superior court) are all valid options if RNs other than plaintiffs have wage claims.

6. Plaintiffs failed to raise and preserve an objection to presenting summary judgment motions; the trial court properly exercised its discretion under CR 23(d) in hearing summary judgment motions prior to the class certification motion.

Plaintiffs next contend the trial court's decision to hear summary judgment motions was improper. Plaintiffs did not object to Judge Spanner's request that the parties present motions; in fact, they began the summary judgment process before their initial motion for certification even came before the court. (RP 122-25, 126-29). The failure to object at that time waives any perceived error; their own actions in filing a motion before presenting their class certification motion implies that they did not object to the procedure.

A trial court has broad discretion to determine the course of proceedings in class action cases. CR 23(d); *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005). This includes delaying a ruling on class certification until after deciding motions for summary judgment. *Id.* Plaintiffs also ignore that they had not convinced the trial court in May 2013 that a class should be certified. The summary judgment motions and subsequent revisiting of the class motion gave them the opportunity to convince the court.

7. No reversible error on 23(b)(1) or (b)(2).

As the Court of Appeals recognized, plaintiffs primarily pursue a CR 23(b)(3) claim; they have intermittently added arguments about class certification under CR 23(b)(1) or (b)(2).

The trial court and Division III properly interpreted plaintiffs' claims as primarily for monetary relief. Case law supports that basis to reject mandatory classes under 23(b)(1) or (b)(2). *Nelson v. Appleway Chevrolet, Inc.* 160 Wn.2d 173, 189, 157 P.3d 847 (2007); *Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003). Additionally, the trial court rejected 23(b)(1) and 23 (b)(2) classes because plaintiffs failed to show prejudice to absent class members or the need for declaratory or injunctive relief. (Appx. S.Ct. 54). When they filed an Amended Complaint limiting their claims to the period before March 2015, plaintiffs essentially made their prior request for injunctive relief moot.[6] And plaintiffs were unable to articulate to the trial court why they needed a declaratory judgment. (RP 111-12, 124-25). The trial court considered and did not abuse its discretion in denying class certification on these other grounds.

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[6] Plaintiffs alleged this occurred because of the lawsuit. Respondents acknowledge a change in March 2015 but deny it was prompted by the lawsuit. Regardless, the change limiting the applicable period to March 2015 moots any injunctive relief.

V. CONCLUSION

For the reasons outlined above, defendants respectfully ask the Court to deny plaintiffs' petition for discretionary review of the unpublished opinion of the Court of Appeals.

Dated: July 3, 2017

Respectfully submitted,

Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the original and one copy of **ANSWER TO PETITION FOR SUPREME COURT REVIEW** via efiling on the following:

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I further certify that on this date, I mailed a copy of the foregoing **ANSWER TO PETITION FOR SUPREME COURT REVIEW** via email only to the following:

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DATED: July 3, 2017

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