No. 93273-5
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 72948-9-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,

Petitioner,

v.

LAUREN SELIG, MARTIN SELIG and
TEMPLE DE HIRSCH SINAI,

Respondents.

RESPONDENTS SELIGS' ANSWER TO PETITION FOR REVIEW

John P. Zahner, WSBA No. 24505
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-2886
Facsimile: (206) 749-1936
Email: jack.zahner@foster.com
Attorneys for Respondents Selig

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A. Relief Requested by Respondents.

This Court should deny review of the Court of Appeals decision and leave the remains of Lauren Selig's late husband undisturbed at his grave site at the Hills of Eternity Cemetery in Seattle. Generally, exhumation of one who is permanently buried is considered abhorrent to custom and the law. The Court of Appeals carefully considered Petitioner's request, read the inter-related provisions of the General Cemetery Act as a whole, and concluded that the Legislature intended reasonable limitations on reinterments. *In re Faenov*, __ Wn. App. __, __ P.3d __, 2016 WL 2865188 (May 16, 2016) (cited in this Answer as "Op. ¶__"). It is undisputed that in the absence of advance instructions from the decedent himself, the surviving spouse has a vested right to choose the final resting place of her late husband. The Court of Appeals decision correctly recognizes that the Cemetery Act provides a necessary corollary to that vested right: a reinterment petition cannot be permitted over the objection of a surviving spouse, because the statute gives her priority over all other next of kin. Op. ¶34.

If this Court were to overturn the Court of Appeals decision, it would necessarily invite more painful intra-family reinterment disputes going forward. Under Petitioner's theory of the case any family member wanting reinterment could pursue an action seeking to overcome the

objection of one higher on the kinship priority for such decisions. Nothing in the statute or at common law would permit such a result and the resulting public policy would be to open the door to many more such disputes. The Petition should be denied.

B. Restatement of the Case.

Kyril Faenov and Lauren Selig Lived in Seattle for More Than a Decade. Kyril Faenov grew up in Russia. (CP 132) He studied physics and mathematics, and he moved to Portland, Oregon after graduating from high school. In 1998, Kyril moved from Portland to Seattle when Microsoft acquired Valence Research, an Internet company Kyril had co-founded. (CP 132)

In 2000, Lauren Selig was studying law and business at Northwestern University in Chicago, Illinois. (CP 133) That summer, she worked in Seattle at Play Networks and Microsoft. It was during a weekend trip to Seattle in early 2000 that Ms. Selig met Kyril. They dated from 2000 until 2002, at which time they got engaged. (CP 133) Ms. Selig moved to Seattle and they bought a house in Madison Park. (CP 133)

Ms. Selig and Kyril were married in the summer of 2003 at the Scimatar Ridge Ranch in Anacortes. (CP 133) Their wedding was presided over by Rabbi Chaim Levine. (CP 133)

After their wedding, Kyril and Ms. Selig settled into their lives in Seattle. (CP 133) Ms. Selig worked for her father's real estate company, Martin Selig Real Estate, and Kyril continued to work for Microsoft. (CP 133) They also started building a family. Their daughters were born in 2005 and 2009, which immediately connected them to their community and the girls' schools. (CP 133) Kyril and Ms. Selig never discussed moving away from Seattle except a brief conversation when Kyril considered, but declined, taking a new Microsoft job in China. Kyril never expressed any emotional or familial desire to move back to Portland. (CP 133)

Kyril Faenov Succumbed to His Mental Illness on May 25, 2012. Kyril had a brilliant mind but he also suffered from mental illness, which resulted in many visits and long stays in psychiatric facilities. (CP 133) Throughout their marriage Ms. Selig was devoted to Kyril and she supported him unconditionally through several difficult years. (CP 133) On May 25, 2012, Kyril committed suicide. (CP 133)

The period following Kyril's death was the hardest and most painful Ms. Selig had ever experienced. (CP 133) There was so much sadness and grief. Shortly after she learned that Kyril had died, Ms. Selig contacted Kyril's mother, Marina Braun. (CP 133) They both understood the requirement in the Jewish tradition that Kyril's body be buried without

delay. (CP 133) Ms. Selig informed Ms. Braun that Ms. Selig together with her father, Martin Selig, and Rabbi Levine, had decided that the burial should occur at the Hills of Eternity Cemetery in the Queen Anne neighborhood in Seattle. (CP 133) Ms. Braun did not object to the location of the burial. (CP 133) She only asked that they delay the funeral to allow Kyril's father to travel from Japan, which they did. (CP 133) Ms. Braun attended the funeral with her daughter, who traveled from Israel. (CP 134) Ms. Braun participated in the funeral by placing earth on Kyril's coffin. (CP 134)

On behalf of his daughter and their family, Martin Selig entered into an Interment Agreement with Temple De Hirsch Sinai to obtain "the right of perpetual interment ... for Kyril Faenov in the Hills of Eternity Cemetery." (CP 136-137; see also CP 139-140) Mr. Selig paid $13,200 as consideration for the decedent's burial plot. (CP 136-137; see also CP 139-140)

Before he died, Kyril had maintained a website, Faenov.com, where he hosted his resume and a handful of email accounts for certain family members, not including Ms. Selig. (CP 134) Ms. Braun asked what would happen with the website and Ms. Selig responded that she was welcome to continue hosting it. (CP 134)

Lauren Selig Relocated Her Family to Los Angeles After Kyril Died. Life in Seattle became very difficult for Ms. Selig and her daughters after Kyril died. (CP 134) So many places that they loved as a family, like the Arboretum and the park near their home, were painful to see or visit because of their memories of Kyril. (CP 134) As a widow, Ms. Selig could not leave her house without neighbors and friends constantly asking how she and her daughters were coping. (CP 134) The outpouring of support was always appreciated, but it became difficult to start the healing process. (CP 134)

After Kyril died, Ms. Selig's daughters asked whether they could change their last names from "Faenov" to "Selig." (CP 135) Ms. Selig and her family spent considerable time discussing the girls' feelings and she became genuinely convinced they wished to have the same last name as their only living parent. (CP 135) The daughters' name changes were finalized in July 2012.

During the year after Kyril died, Ms. Selig decided to move her family to Los Angeles. (CP 134) She made every effort to make it a smooth transition for her family, including allowing her daughters to finish the school year and enjoy their summer vacations. (CP 134) During this time, Ms. Selig and her daughters visited Kyril's grave as often as was appropriate for their family. (CP 134)

In Los Angeles, Ms. Selig launched a film production company and she enrolled her daughters in a wonderful school. (CP 134) She and her daughters have made several trips back to Seattle to visit family and friends, and on every occasion they have visited Kyril's grave. (CP 134) One of Ms. Selig's daughters attends summer camp in Seattle every year. (CP 134)

The Selig Family Placed a Permanent Headstone for Kyril Faenov's Grave. In Ms. Selig's Jewish tradition, a headstone is not added to the gravesite for the first year after death. (CP 135) At the time the petition in superior court was filed, Ms. Selig's daughters were approaching the age where they could help design a headstone to remember their father, which is what they agreed to do as a family. (CP 135) As Kyril's surviving spouse, this is Ms. Selig's decision to make. (CP 135) Also at the time of the petition, an interim headstone had been installed while the Selig family finished designing their own. (CP 135) A permanent headstone has since been installed at Kyril's grave site.

C. Grounds For Denial of Review.

This Court should deny review for three reasons: (1) the Court of Appeals' interpretation of chapter 68.50 RCW is unassailably correct; (2) reversing the Court of Appeals here would open the door to more intra-

family disputes over burials and requests for reinterments, while denying review here will properly limit such disputes; (3) the Court of Appeals decision enforcing the statute as written does not impermissibly divest the superior court of jurisdiction.

1. The Court of Appeals Decision Is Unassailably Correct.

As a matter of statutory interpretation, the Court of Appeals' interpretation of chapter 68.50 RCW, the General Cemetery Act, Human Remains, is unassailably correct. The Court read the statute as a whole, gave meaning to each provision, and harmonized the legislative intent across multiple sections of the statute. See Op. ¶¶16-34.

The Court started its statutory analysis with Kyril's burial. The plain language of the statute provides that, in the absence of prearrangments from the decedent, the right to control the disposition of the decedent's remains "vests in" the person listed in kinship priority, here, clearly Ms. Selig as the surviving spouse. RCW 68.50.160(3)(c); Op. ¶¶16-17. Ms. Selig chose Seattle, where the couple lived and raised their daughters. The Petitioner does not attempt to argue that anyone other than Ms. Selig had the vested right to bury her late husband.

The two questions the Court of Appeals necessarily confronted were: (1) Does the statute evince a legislative intent to provide some repose to Ms. Selig's decision to bury Kyril's remains in Seattle? (2) Did

the legislature intend to authorize someone lower on the statutory kinship hierarchy to petition for reinterment over the objection of Ms. Selig? By reading the statutory provisions together, the Court of Appeals correctly answered the first question Yes and the second question No.

In unambiguous language, RCW 68.50.200 provides that before human remains can be moved from a plot in a cemetery, one must obtain the consent of the cemetery authority and the written consent of the persons listed in priority of their kinship, starting with the surviving spouse:

> Human remains may be removed from a plot in a cemetery with the consent of the cemetery authority and the written consent of one of the following in the order named:
>
> (1) The surviving spouse or state registered domestic partner.
>
> (2) The surviving children of the decedent.
>
> (3) The surviving parents of the decedent.
>
> (4) The surviving brothers or sisters of the decedent.
>
> If the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient: PROVIDED, That the permission shall not violate the terms of a written contract or the rules and regulations of the cemetery authority.

Here, both Ms. Selig and the cemetery authority objected to exhumation and reburial of Kyril's remains. The Court of Appeals interpreted RCW 68.50.200 to mean exactly what it says: both the cemetery authority and next of kin, as listed in the hierarchical order, must consent for a reinterment to go forward. Op. ¶34. The Court concluded that the surviving spouse's vested right to choose the burial location was intended to endure. Op. ¶¶23-24. Informing the Court's judgment is RCW 68.50.160(6)'s requirement that the person or persons with kinship priority be financially responsible for all aspects of the burial. *Id.* And as the Respondents argued in the trial court below, RCW 68.50.200 also expressly prohibits the exhumation of remains if doing so would violate the terms of a written contract. Here, on his daughter's behalf, Martin Selig entered a contract with the cemetery authority which granted the right to perpetual interment of Kyril's remains in the Hills of Eternity Cemetery. (CP 139)

The Court of Appeals interpreted subsection 200's provision for court permission to reinter as applying when someone with kinship priority has died or when there is disagreement among persons within the same tier in kinship priority (i.e., disagreement among children or parents). Op. ¶¶26-27. As the decision reasoned, the statute should not be interpreted to provide that all family members are on equal footing to

request a reinterment; otherwise the vested right in subsection 160 would hardly amount to a vested right at all, and the kinship priority list in subsections 160 and 200 could simply be bypassed. Op. ¶¶24-25.

The Court of Appeals likewise rejected the Petitioner's argument that subsection 220 provided an alternate route to bypass the restrictions placed on reinterment by subsections 160 and 200. Op. ¶¶29-32. By reading the entire statute together, the Court correctly concluded that subsection 220 applied to exhumations requested for public purposes, such as to allow the investigation of the cause of death. *Id.*

In short, the Court of Appeals engaged in a careful and deliberate examination of the entire statutory framework. The Court's conclusions, as a matter of statutory interpretation and logic, are unassailable.

2. Petitioner's Interpretation of the Statute Would Engender More Disputes Over Reinterments.

The Petitioner's interpretation of RCW 68.50.200 would unsettle the statutory framework by allowing any family member who is lower on the kinship priority list to proceed with a court action against someone higher on the priority list who objects to reinterment. Leaving the Court of Appeals decision intact would result in fewer disputes and less litigation, because enforcing subsection 200's kinship priority would

likely dissuade kin lower on the priority list from bringing such actions. Or if such actions were brought, they would be summarily dismissed.

The Petitioner proffers four hypotheticals as examples of how the Court of Appeals decision here will engender more disputes. See Petition for Review at p. 16. But the opposite is true; the Court of Appeals decision correctly forecloses such disputes. Hypothetical #3 is this case, Hypothetical #4 is the converse of this case (where surviving spouse and cemetery want to reinter the remains and someone lower on the priority list objects). In both hypotheticals, the answer is No, the "kin" referenced in the hypothetical – meaning the person lower on the kinship priority list of RCW 68.50.200 – cannot prevail over someone higher on the priority list. In Hypothetical #2, the answer is also No, not without the permission of the person first on the list of kinship priority. With respect to Hypothetical #1, Respondents respectfully submit that it would be a rare cemetery authority to refuse permission to a next of kin with priority; but if it did, under the plain language of the statute, that refusal would control.

Moreover, the Petitioner nowhere acknowledges the full implications of the fact that she is *two levels* below on the list of kinship priority. The children of the decedent, whether adults or minors, are listed above the parents of the decedent in priority of decision-making on reinterment. If Petitioner's theory of the case were to prevail, the Court

would effectively encourage more reinterment lawsuits where minor children might have to be named as party defendants, have guardians appointed, and endure painful litigation at a time when they are trying to heal from their loss.

3. The Court of Appeals' Interpretation of the Statute Does Not Impermissibly Divest the Superior Court of Jurisdiction.

The Petitioner's constitutional argument does not withstand even modest analysis. The Supreme Court has long recognized that the legislature is in the business of enacting laws that express its public policy judgments and the Supreme Court's role is not to second-guess those judgments. *Aetna Life Ins. Co. v. Washington Life and Disability Ins. Guaranty Ass'n*, 83 Wn. 2d 523, 527-30, 520 P.2d 162 (1974). "We are not a super legislature. This court neither approves nor condemns any legislative policy." *Id.* at 528 (internal citation and quotation omitted).

Just because a statutory restriction or limitation provides that a litigant cannot prevail in a given matter under certain facts, does not mean the superior court's "jurisdiction" was unconstitutionally limited under Article IV, § 6 of our state constitution. Thus, a superior court is not considered to be divested of its jurisdiction even though the court may summarily dismiss a landlord's unlawful detainer action for failure to provide proper notice to a tenant. *Tacoma Rescue Mission v. Stewart*, 155

Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010). Similarly, one who fails to follow the procedural requirements of the Land Use Petition Act will summarily lose in superior court, but the superior court has jurisdiction to determine whether the case will go forward or not. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 n.9, 223 P.3d 1172 (2009).

For her constitutional argument, Petitioner relies too heavily on *Newlon v. Alexander*, 167 Wn. App. 195, 272 P.3d 903 (2012). While *Newlon* involved the burial of human remains and contains some sweeping language about the general jurisdiction of superior courts, the facts and the arguments advanced in the case demonstrate its inapplicability here. In *Newlon*, the parents of a minor child disagreed on how the boy should be buried. 167 Wn. App. at 198. The father petitioned to the Spokane County Superior Court in the family law matter related to their dissolution proceedings. *Id.* The parents stipulated to an expedited hearing before the same judge that handled their dissolution, and unless cremation was ordered, agreed to be bound by the court's decision. *Id.* The mother prevailed and the child's remains were buried in Spokane. *Id.* Almost a year later, the father moved to vacate the court's ruling. *Id.* at 199. After losing at the trial court, the father appealed and among other arguments, asserted that RCW 68.50.010 "vests subject matter jurisdiction in coroners rather than the superior courts." *Id.* at 200. Division III of the Court of

Appeals thoroughly rejected the father's argument on constitutional and statutory grounds. *Id.* at 201-03. *Newlon* does not help the Petitioner and if anything, *Newlon* supports a need for the careful, integrated statutory interpretation performed by the Court of Appeals in this case.

To the extent that Petitioner argues that aspects of RCW 68.50.200 as written are unconstitutional, the Petitioner has completely failed to carry her burden. A challenge to the constitutionality of a statute must face "the heavy presumption of constitutionality accorded a legislative act." *Aetna Life Ins. Co.*, 83 Wn.2d at 528. The legal standard is that "[a] statute's alleged unconstitutionality must be proven 'beyond all reasonable doubt' before it may be struck down." *Id.* (citations omitted). Petitioner has made no effort to comply with this heavy burden.

D. Conclusion.

The decision below properly interprets the statute as a whole and respects the Legislature's public policy judgment that reinterment requests should be appropriately limited. This Court should not expand this type of painful intra-family litigation. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 15th day of July, 2016.

s/John P. Zahner
John P. Zahner, WSBA No. 24505
FOSTER PEPPER PLLC
1111 Third Avenue; Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-2886
Facsimile: (206) 749-1936
Email: jack.zahner@foster.com
Attorneys for Respondents Selig

PROOF OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, the the following is true and correct:

That on July 15, 2016, I arranged for service of the foregoing **Respondents Seligs' Answer to Petitioner Marina Braun's Petition for Review,** to the court and to the parties to this action as follows:

Ms. Karen R. Bertram Kutscher Hereford Bertram Burkhart PLLC 705 2nd Ave Ste 800 Seattle, WA 98104-1711 kbertram@khbblaw.com	☒	US Mail Via Email
Matthew M. Menzer Menzer Law Firm, PLLC 705 Second Ave. Suite 800 Seattle, WA 98104 mnm@menzerlawfirm.com	☒	US Mail Via Email
Gail E. Mautner Lane Powell PC 1420 5th Ave Ste 4200 P. O. Box 91302 Seattle, WA 98111-9402 mautnerg@lanepowell.com	☒	US Mail Via Email
Catherine W. Smith 1619 8th Avenue North Seattle, WA 98109 cate@washingtonappeals.com	☒	US Mail Via Email

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I DECLARE under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of July, 2016.

s/*John P. Zahner*
John P. Zahner, WSBA No. 24505

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Cc: Jack Zahner <jack.zahner@foster.com>; Colleen Hickman <colleen.hickman@foster.com>
Subject: Braun v. Selig - Docket No. 93273-5

Re: Marina Braun v. Lauren Selig, et al.
Supreme Court Docket No. 93273-5

Dear Clerk:

Attached here is Respondents Seligs' Answer to Petition for Review in the referenced matter.

John P. Zahner, WSBA No. 24505
Foster Pepper PLLC
1111 Third Ave., Ste. 3000
Seattle, WA 98101-3292
Jack.zahner@foster.com
Phone: (206) 447-2886

Colleen Hickman
LEGAL ASSISTANT FOR JOHN "JACK" P. ZAHNER, KURT B. PETERSON,
ANDREW T. KING, and MIRIAM H. CHUNG
FOSTER PEPPER PLLC | 1111 Third Avenue, Suite 3000 | Seattle, WA 98101
colleen.hickman@foster.com | Tel: 206-447-2720 | Fax: 206-447-9700 | foster.com