

Case No. 74338-4-1

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION I

RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Petitioners-Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

and

PHILLIPS 66 COMPANY,

Intervenor-Respondent.

**BRIEF OF *AMICI CURIAE* LEGAL VOICE, ECONOMIC
OPPORTUNITY INSTITUTE, AND WASHINGTON STATE
LABOR COUNCIL, AFL-CIO**

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BRIEF OF AMICUS CURIAE LEGAL VOICE

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I. INTERESTS OF AMICI CURIAE

The identities and interests of *Amici Curiae* Legal Voice, the Economic Opportunity Institute, and the Washington State Labor Council, AFL-CIO, are fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith.

II. INTRODUCTION

Nationally as well as in Washington State, there is a growing recognition of the prevalence of family caregivers in the workforce. Laws and workplace policies are increasingly beginning to address these realities of 21st century workers' lives by including minimum labor standards and other protections for employees, so that a family's economic security is not derailed by a family member's illness or birth of a child, intimate partner violence, or a family crisis. Washington State has long been a leader in shaping laws and policies relating to family caregiving. The legislature originally passed the law at issue in this case – the Family Care Act - in 1988, even before federal law required job protections for workers taking unpaid family or medical leave. This important law ensures that at least those workers who have access to paid leave for certain purposes can choose to use it to care for their families.

The pinched interpretation of the Family Care Act suggested by the Department of Labor and Industries and the employer in this case is simply not in keeping with the intent of this groundbreaking law. Both the Family Care Act

and the Domestic Violence Employment Leave law, RCW 49.76 (which incorporates the same language at issue in this case) contemplate that employees should have the ability to choose among types of leave for certain important reasons, including family caregiving responsibilities and sexual violence survivors' needs, to engage in activities to protect their own and their family's safety and health. For employees facing these difficult circumstances on the home front, maintaining the connection to employment is critical; paid leave allows them to address those needs without losing the source of income that is particularly important in those times of family crisis.

Therefore, although the question presented in this case is one of technical statutory interpretation, the Court's ruling on this issue will have dramatic and profound effects on working families in Washington, and on women in particular, due to their disproportionate representation among primary caregivers. This decision will also significantly affect survivors of sexual violence, particularly domestic violence, whose access to paid leave impacts their ability to achieve economic independence and security and, thus, to successfully escape abuse. *Amici Curiae* urge this Court to interpret the language in a manner consistent with the legislative intent of the statute to allow employees to balance the demands of work and family, including caregiving and health and safety needs.

III. STATEMENT OF THE CASE

Amici Curiae adopt the Petitioner's Statement of the Case.

IV. ARGUMENT

A. THE LEGISLATURE’S PURPOSE IN PASSING THE FAMILY CARE ACT AMENDMENTS WAS TO ENHANCE WASHINGTON EMPLOYEES’ ABILITY TO BALANCE THEIR JOB RESPONSIBILITIES WITH FAMILY CAREGIVER DUTIES.

The Legislature enacted the Family Care Act in 1988 in an effort to address “the changing nature of the workforce brought about by increasing number of working mothers, single parent households, and dual career families.” Laws of 1988, Ch. 236 §1. The Legislature recognized that it was necessary to strike a balance between the needs of families and the demands of the workplace in order to promote family stability and economic security. *Id.* In order to accomplish such a balance, the Legislature further declared that it was in the public interest for employers to accommodate employees by providing “reasonable leave” from work for family reasons. *Id.*

Although the Family Care Act does not require employers to provide paid sick leave, it does require that employers who do provide paid time off for employees’ illness must permit employees to use their paid sick or other leave to care for qualifying family members. In 2002, the Legislature amended the statute to specify that employees have the right not only to use their own sick leave, but also to choose the kind of paid leave they wish to use for family care. In 2005,

the Legislature again amended the Family Care Act by expanding the definition of the term “sick leave or paid time off” to include, *inter alia*, “disability leave” that is not covered by the Employee Retirement Income Security Act (ERISA). The amended statute requires that if paid time is not allowed to an employee for illness, employers must allow employees to use such “disability leave” for family care in the same manner that those employees are allowed to use “disability leave” for their own illness. RCW 49.12.265.

Since the original Family Care Act was passed 28 years ago, these same concerns that motivated it have only become more acute. Family caregiver demands on working families, and on women in particular, have grown exponentially. A family caregiver is broadly defined as one who provides unpaid assistance to a person with a chronic or disabling condition.¹ On average, caregivers spend 24.4 hours per week providing care to loved ones.² Roughly 20 percent of the workforce is estimated to be involved in caregiving.³ Due to deeply entrenched gender roles, caregiver duties fall disproportionately on the shoulders of women. In the same way that women are expected to provide the majority of child care, they are also the most likely family members to be enlisted to provide

¹ American Family Physician, *Caregiver Care* (June 2011) available at <http://www.aafp.org/afp/2011/0601/p1309.html>.

² American Association of Retired People, *Caregiving in the U.S.* (June 2015) available at <http://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf>.

³ Health Advocate, Inc., *Caregiving: The Impact on the Workplace*, (2010) available at <http://healthadvocate.com/downloads/webinars/caregiving.pdf>.

unpaid care to the elderly.⁴ More than 60 percent of caregivers are women.⁵ And, as compared to white women, women of color may devote more time to caring for extended family members, including grandchildren and elderly relatives.⁶

At the same time as they are more likely to have caregiving responsibilities, women's contributions to family economic security have also grown. Women make up roughly half of all workers on U.S. payrolls, and regardless of family type, the majority of mothers work outside the home.⁷ Indeed, 24.1 percent of families have a breadwinning mother who earns at least as much as her husband and may be bringing in the sole income.⁸

The demands on workers with family caregiver duties are also likely to continue to increase over time. As the baby boomer generation ages and the number of elderly Americans grows, the number of employed persons with family caregiving responsibilities is likely to continue trending upwards. The first wave of baby boomers turned 65 in 2011, and by 2050 it is projected that up to twenty percent of the population will be older than the retirement age.⁹ Nearly one in five

⁴ Heather Boushey and Sarah Jane Glynn, *The Effects of Paid Family and Medical Leave on Employment Stability and Economic Security* (April 2012) available at: <https://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/BousheyEmploymentLeave1.pdf>.

⁵ Health Advocate Inc., *supra* at note 3.

⁶ *Id.*

⁷ Sarah Jane Glynn, Center for American Progress, *Breadwinning Mothers, Then and Now*, at 6 (June 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

⁸ *Id.* at 7.

⁹ Heather Boushey and Sarah Jane Glynn, *supra* note 4.

of those over the age of 65 need help with basic daily activities, and most people who provide care for older family members are themselves employed.¹⁰ In the next two decades the number of older Americans is expected to more than double.¹¹ Within this population, the fastest growing segment are those age 85 and older, which is a segment most likely to be frail and to suffer from chronic conditions such as diabetes, arthritis, lung, and heart disease.¹² As health costs continue to escalate, the care of these older generations is likely to increasingly fall on their family members, who in addition to being predominantly unpaid as caregivers, are in the workforce, often are at the peak of their careers.¹³

The phenomenon of families simultaneously caring for both aging parents and children has become so prevalent that a new term has been coined to describe it: “the sandwich generation.”¹⁴ According to a 2007 study, “sandwiched couples” comprise between nine to thirteen percent of American households.¹⁵ Pew Research estimates that forty-two percent of Generation X women have both children younger than 18 and parents older than 65.¹⁶

¹⁰ *Id.* at p. 3.

¹¹ Health Advocate, Inc., *supra* note 3, at p. 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at p. 3.

¹⁵ *Id.*

¹⁶ Institute for Women’s Policy Research, *Briefing Paper: The Need for Support for Working Families* (February 2016), at p.2.

While emotionally rewarding, the demands of caregiving can be taxing on caregivers, increasing their need for respite, rest, rejuvenation. Forty-three percent of caregivers reported that their caregiving duties were highly stressful, especially for caregivers who provided more than twenty hours per care per week and those who lived with the people for whom they were caring.¹⁷ In another survey of working caregivers, one in five female caregivers age 18 to 39 reported that stress was always present in their lives.¹⁸

As a consequence of these stressors, caregivers face significantly increased risks of becoming ill themselves. In general, caregivers report higher levels of depression, heart disease, blood pressure and immune issues, and have been found to be more likely to have shortened lifespans than non-caregivers.¹⁹ One half of all caregivers have at least one chronic health condition.²⁰ One in five caregivers describes his or her health as fair or poor, and 17 percent believe that their health has deteriorated as a result of providing care, particularly over a protracted period of time or when their caregiver duties have gone from light to heavy.²¹ In a Centers for Disease Control report, fifty-one percent of caregivers

¹⁷ American Association of Retired People, *Caregiving in the U.S.*, *supra* at note 2. at p. 53.

¹⁸ Health Advocate, *supra* note 3.

¹⁹ Health Advocate, *supra* at note 2.

²⁰ American Family Physician, *supra* note 1.

²¹ American Family Physician, *supra* at note 1.

report that they do not have time to take care of themselves, and nearly half of them said that they are too tired to tend to their own needs and care.²²

While Washington State was one of the early laws to recognize the need for paid family caregiving leave, the changing demographics in the workforce have served only to increase the importance of the Family Care Act's motivating purpose. Within this context, an interpretation of "sick leave or other paid time off" that results in limiting employees' access to paid leave for family care would contravene the statute's policy objectives.

B. THE STATUTORY MANDATE GIVING EMPLOYEES THE CHOICE OF THE TYPE OF LEAVE THEY WISH TO USE FOR CAREGIVING DUTIES WILL BE RENDERED MEANINGLESS IF EMPLOYEES ARE FORCED TO USE VACATION OR UNPAID LEAVE FOR FAMILY CARE

Under the Family Care Act, if an employee is entitled to sick leave or other paid time off for their own illness, the statute mandates that the employer "shall allow an employee to use *any or all of the employee's choice of sick leave or other paid time off*" to care for a qualifying family member. RCW 49.12.270 (emphasis added). The statute was amended in 2002 for the specific purpose of giving employees their choice of the type of leave that they wanted to use for family care. Laws of 2002, Ch. 243 § 1. Just three years later, the statute was

²² Centers for Disease Control and Prevention, *Family Caregiving: The Facts*. Available at: <http://www.cdc.gov/aging/caregiving/facts.htm>.

amended again in 2005. Under the 2005 amendment to the Family Care Act, where “paid time is not allowed to an employee for illness,” the definition of “sick leave or other paid time off” was expanded to include “time allowed... under the terms of an appropriate ... collective bargaining agreement, or employer policy... to an employee for disability under a plan, fund, program, or practice” that is not covered by ERISA or paid for with insurance. Laws of 2005, Ch. 499 § 1.

As a factual matter, in this case Phillips 66 offered several types of leave: (1) vacation leave; (2) personal holidays; and (3) short-term disability (“STD leave”). CP²³ 913 ¶ 5.2-5.3 (ALJ Decision). As the terms denote, each type of leave was designated for a different purpose. Both Appellants in this case, Honeycutt and Westergreen, sought to use STD leave to care for family members who were experiencing health issues. *Id.*, ¶¶ 5.6, 5.9, 5.11. Phillips 66 denied both employees’ requests to use paid STD leave for family care. *Id.*, ¶¶ 5.9 & 5.11. Instead, Phillips 66 informed the employees that they could use other paid leave or unpaid leave for purposes of family care. *Id.*, ¶¶ 5.6 & 5.11.

In response to Appellant Honeycutt’s request for leave, Phillips 66 notified her that she had two options: use her vacation leave or take leave without

²³ The Clerk’s Papers are cited here as “CP.”

pay. *Id.*, ¶ 5.6. Both Appellants had previously bid on their vacation days and had scheduled their vacation leave for later in the year. *Id.*, ¶¶ 5.7 & 5.14.

This Hobson's choice is precisely what the Legislature was trying to prevent. Employees should be able to choose the paid leave that is intended for illness and that is used when an employee is ill – in this case, STD leave – not between vacation leave, which is for another distinct purpose, or unpaid leave.

1. Limiting Employees' Options for Paid Leave for Family Care to Their Vacation Leave Deprives Employees of Their Choice and Is Inconsistent with the Legislative Intent.

Respondent Department of Labor and Industries and Intervenor Phillips 66 both contend that Appellants in this case were “allowed” by Phillips 66 to use “other paid leave,” specifically vacation leave, and, therefore, Phillips 66 was not required to allow Appellants to access disability leave for their family care needs. However, this interpretation of the Family Care Act completely disregards the language in RCW 49.12.270(1) requiring employers to allow employees to use “any or all of the employee’s choice of sick leave or other paid time off” for family care.

Under Respondent and Intervenors’ interpretation of the Family Care Act, employers could easily prevent employees from accessing non-ERISA-covered STD leave for family care by simply “allowing” employees to use their vacation leave or personal holidays for family care, as Phillips 66 did in this case.

Requiring employees who want to access paid leave to use their vacation leave for family caregiver duties in this manner is the antithesis of allowing employees their choice of the kind of paid leave they wish to use for family care. This strained interpretation is completely at odds with the underlying policy purposes of the Family Care Act and should be rejected by this Court.

2. Vacation Leave Has a Distinct Purpose, and Limiting Employees' Ability to Use Vacation Leave for Its Intended Purpose Would Have Negative Consequences on Employee Health.

Requiring employees to use vacation leave for caregiving duties would also have the practical effect of depleting employees' paid leave available for their *own* rest, relaxation and respite. As discussed *supra*, family caregivers already suffer from stress and exhaustion due to their caregiving responsibilities. Depriving such employees of their ability to use paid vacation time for their own rest and renewal will have negative impacts on their health and productivity – particularly so for the exact population of employees who need leave for family caregiving responsibilities.

While employers are increasingly providing consolidated leave plans, or “paid time off” (PTO) plans that include one bucket of paid leave for multiple purposes, including illness, vacation, personal reasons, and holiday, this is not the case at Phillips 66. Therefore, although the Department’s regulations at WAC 296-130-030 do specifically discuss such PTO policies, they do not apply to this

case. Instead, Phillips 66 provides for vacation leave for rest and recuperation and STD leave for illness, as well as two personal holidays.

The vacation leave at issue in this case was specifically bargained for, and for the specific purpose of rest and respite – *not* for the employee’s illness. The Department and Phillips 66’s interpretation of this vacation leave to be the functional equivalent of PTO would undermine the bargained-for right as well as contravene the legislative intent. The relevant provision of the CBA describes “vacation” as a distinct category of leave explicitly intended for employees to use for “rest and recuperation.” CP 523-524 (CBA). As discussed in Section A *supra*, far from providing “rest and recuperation,” caregiving duties frequently create additional stress and fatigue on employees, and on women in particular since women are disproportionately called upon to assume caregiver responsibilities. Consequently, the use of paid vacation leave for family care is inconsistent with the operative collective bargaining agreement governing the terms of employment at Phillips 66.

Interpreting the vacation leave in a situation such as this as time off “for illness” contravenes the purpose of such leave. There are many reasons why employees would bargain – as they did with Phillips 66 – to keep the category of vacation leave distinct from other paid time off for illness. A study conducted by the Society for Human Resources Management (SHRM) showed overwhelming

agreement among managers and human resource professionals that “fully utilizing vacation leave drives higher employee performance and productivity, boosts organizational morale, contributes to employee wellness and results in higher employee retention.”²⁴

There is also strong evidence that vacation time improves health. For example, one study over a nine-year period of 12,000 men with a high risk for heart disease found that men who take frequent annual vacations were 21 percent less likely to die from any cause and were 32 percent less likely to die from heart disease.²⁵ Likewise, women who took vacation only once every six years or less were almost eight times more likely to develop coronary heart disease or have a heart attack compared to women who vacationed at least twice a year.²⁶ Vacations also decrease the likelihood of suffering from depression and also reduce stress.²⁷

Furthermore, in this case Phillips 66’s “STD leave” is administered in the same manner as sick leave. If an employee is unable to work due to a non-job related illness or injury, they are entitled to paid leave for up to 52 weeks under

²⁴ Project Time Off, *Vacation’s Impact on the Workplace*, 1 (2013), available at <http://www.projecttimeoff.com/research/vacation%E2%80%99s-impact-workplace>.

²⁵ National Heart, Lung and Blood Institute, Multiple Risk Factor Intervention Trial for the Prevention of Coronary Heart Disease.

²⁶ *Id.*

²⁷ Wednesday Martin, “Gone Fishin’: Why You Can’t Afford to Skip Another Vacation,” *Psychology Today*, July 2010 (citing University of Pittsburgh’s Mind Body Center study of 1400 subjects).

Phillips 66's STD plan. In order to receive paid STD leave under this plan, employees are simply required to notify their supervisor within 24 hours of their illness. The employee's absence in this instance is entered into the company's timekeeping system as STD leave. This Court should not allow an employer such as Phillips to circumvent the requirements of the Family Care Act by simply labeling their sick leave as "STD leave." The Court should also reject Phillips 66's attempt to disavow its obligations to provide bargained-for vacation leave for purposes of rest and recuperation and should instead enforce the Family Care Act's mandate that employees get to choose the kind of paid leave to use for their family care responsibilities.

3. A Substantial Proportion of Employees Cannot Afford to Take Unpaid Leave, so Depriving them of Paid Leave for Family Caregiving Has the Practical Effect of Denying Leave.

Although the Appellants in this case used unpaid leave for their family caregiving responsibilities, many employees simply cannot afford to take unpaid leave. Data regarding employees' use of unpaid leave under the Family and Medical Leave Act ("FMLA") indicates that using unpaid leave for family care is not a viable option for a substantial proportion of employees. Many workers who are only eligible for unpaid leave under the FMLA simply cannot afford to take it. A 2000 survey of eligible employers and employees conducted for the U.S. Department of Labor found that often workers who needed leave did not take it

for financial reasons because the leave is unpaid. Almost eighty percent of eligible workers who did not take leave after a qualifying life event said that they would have taken leave had it been paid.²⁸ A 2012 study found that forty-six percent of workers who needed leave and did not take it reported that they did not do so because they could not afford to.²⁹

While ensuring job protected unpaid leave is available may help, many of the same concerns the Family Care Act sought to address, ensuring *paid* leave for family caregiving is important to achieve practical access to time off. Thus, a narrow interpretation of the statute would undermine employees' ability to balance their employment, and the economic security that comes with that employment, with family caregiving needs.

C. LIMITING ACCESS TO PAID LEAVE WOULD NEGATIVELY IMPACT EMPLOYEES CONFRONTING DOMESTIC VIOLENCE

The Court's ruling in this case will impact not only workers with family caregiving needs, but also survivors of sexual violence who also are entitled to job-protected leave under a separate statute, RCW 49.76. The purpose of RCW 49.76 is to allow "reasonable leave from employment for employees who are victims of domestic violence, sexual assault, or stalking, or for employees whose family members are victims, to participate in legal proceedings, receive medical

²⁸ Heather Boushey and Sarah Jane Glynn, see note 4 *supra*.

²⁹ *Id.*

treatment, or obtain other necessary services.” RCW 49.76.010(4). Employees taking leave under this statute “may elect to use the employee's sick leave and other paid time off, compensatory time, or unpaid leave time,” RCW 49.76.050(6), and “ ‘sick leave and other paid time off’ have the same meanings as in [the Family Care Act,] RCW 49.12.265.’ ” RCW 49.76.020(1).

Nearly 20 million women and men suffer from domestic violence, sexual violence or stalking by intimate partners every year in the United States.³⁰ The consequences of sexual violence are devastating: Domestic violence, sexual assault and stalking result in nearly two million injuries and nearly 1,300 deaths.³¹ And this violence often results in disruption to employment; women who experience intimate partner violence are more likely to miss work, more likely to work fewer hours, and more likely to leave a job than are non-abused women.³²

Often, abusers engage in economic abuse to control their partners, including limiting access to credit and money, controlling employment opportunities, and excluding them from financial decisionmaking.³³ Thus, survivors of domestic violence often stay with their abusers because they are

³⁰ National Partnership for Women & Families, *Fact Sheet: Survivors of Domestic and Sexual Violence Need Paid “Safe Days,”* (Oct. 2015), available at <http://www.nationalpartnership.org/research-library/work-family/psd/survivors-of-domestic-and-sexual-violence-need-paid-safe-days.pdf> (citation omitted).

³¹ *Id.*

³² Adrienne E. Adams, et al., *Does Job Stability Mediate the Relationship Between Intimate Partner Violence and Mental Health Among Low-Income Women?*, 83 *Am. J. of Orthopsychiatry* 600, 605 (2013).

³³ Jennifer L. Matjasko et al., *The Role of Economic Factors and Economic Support in Preventing and Escaping from Intimate Partner Violence*, 31 *J. of Policy Analysis and Mgmt.* 32, 123 (2013).

financially dependent on them.³⁴ By contrast, it is well-established that job security and economic independence can help women succeed in leaving violent relationships.³⁵

Thus, survivors of intimate partner violence are placed in the difficult position of needing time off from work to take care of their safety and legal needs, yet needing the pay from their jobs. In passing the domestic violence employment leave law in 2008, the Legislature made specific findings about the connection between sexual violence survivors' access to leave from employment and their safety, stating that “[i]t is in the public interest to reduce domestic violence, sexual assault, and stalking by enabling victims *to maintain the financial independence necessary* to leave abusive situations, achieve safety, and minimize physical and emotional injuries, and *to reduce the devastating economic consequences of domestic violence, sexual assault, and stalking* to employers and employees.” RCW 49.76.010(1). (Emphasis added). Further, the Legislature noted that “[o]ne of the best predictors of whether a victim of domestic violence, sexual assault, or stalking will be able to stay away from an abuser is his or her degree of economic independence.” RCW 49.76.010(2).

A limited interpretation of the Family Care Act so that employees cannot choose to use their available paid disability leave for domestic violence leave

³⁴ *Id.*

³⁵ *Id.* at 122-128.

purposes would severely limit their ability to attain safety, and therefore, would circumvent the purpose of RCW 49.76, as well as of the FCA.

V. CONCLUSION

The Court's decision in this case has the potential to impact many employees beyond the parties in this case. As our workforce changes to include more family caregivers – particularly women who are sole or significant contributors to family income – the more important it is to have workplace policies that support continued employment and income despite family illness, childbirth, or other significant family events. These same concerns hold true for survivors of domestic violence, sexual assault, and stalking, for whom economic independence and security can, quite literally, provide a lifeline away from abuse.

Thus, the Family Care Act should be interpreted to fulfill the purpose of legislative amendments – first, to allow employees the choice of what form of paid leave they use for family care purposes, and second, to ensure that if employees do not have paid leave intended for use during the employee's illness, that they have access to non-ERISA short term disability plans for family care purposes. Thus, the Court should clarify that the statute allows employees who have vacation leave not intended for illness, but for vacation, to have access to their paid disability leave.

RESPECTFULLY SUBMITTED this 27th day of May, 2016.



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CERTIFICATE OF SERVICE

I, Nancy French, certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served the foregoing documents upon counsel of record at the address and in the manner described below, on _____, 2016.

a. Motion of Legal Voice, Economic Opportunity Institute, and Washington State Labor Council, AFL-CIO For Leave to File Brief as *Amici Curiae*;

b. Brief of Amicus Curiae Legal Voice

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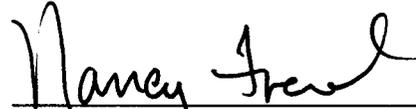
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I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 27th day of May, 2016.



Nancy French