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NO. 51495-8-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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AWOT ZERU,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT,  
WASHINGTON STATE DEPARTMENT  
OF SOCIAL AND HEALTH SERVICES**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In an administrative proceeding, the Department of Social and Health Services (DSHS), found Mr. Zeru to have sexually abused a minor. He filed a petition for judicial review of this administrative decision within the filing deadline, but failed to serve his petition on DSHS for 120 days after the deadline. The superior court granted DSHS's motion to dismiss for lack of subject matter jurisdiction.

Mr. Zeru acknowledges that under binding precedent of the Washington Supreme Court, recently reaffirmed in *Stewart v. Dep't of Emp't Sec.*, 419 P.3d 838 (2018), his petition for judicial review must be dismissed. He therefore argues that the case law requiring strict compliance with RCW 34.05.542(2) to invoke the superior court's appellate jurisdiction is erroneous and harmful. In place of this decisional law, Mr. Zeru argues that he should be allowed to serve his petition 120 days after the service deadline, and still be heard by the court if he can demonstrate good cause for his failure to comply with the service requirements. That argument should be rejected.

The long-standing decisional law that strict compliance with the service requirements of the Administrative Procedures Act (APA) is necessary to access the court's jurisdiction was correctly decided and promotes good public policy and there is no basis for overturning it. The

Washington Constitution allows the Legislature to condition a court's statutory appellate jurisdiction on compliance with mandatory procedures. RCW 34.05.542 is one such mandatory procedure, intended by the Legislature to act as a jurisdictional bar to a petition for review of agency action. This law promotes the public policy of finality of administrative orders. The APA governs judicial review of several kinds of agency orders—some of which impact large numbers of people, parties as well as non-parties to a case. Once an administrative order has been issued, 30 days has passed, and no appeal has been filed and served, impacted people should be allowed to rely on the administrative decision.

*Stewart* convincingly reaffirmed that strict compliance with RCW 34.05.542 is necessary to invoke the jurisdiction of the court. Mr. Zeru did not comply with RCW 34.05.542. His petition for judicial review was correctly dismissed.

## **II. RESTATEMENT OF THE ISSUES**

The petitioner failed to serve his petition for judicial review within the 30 days required by RCW 34.05.542(2). Did he, therefore, fail to invoke the court's subject matter jurisdiction?

## **III. COUNTER STATEMENT OF THE CASE**

After an administrative hearing, an appeal to an administrative review judge, and a request for reconsideration, Mr. Zeru was found by

DSHS to have sexually abused a child in a final Reconsideration Decision issued on March 31, 2017. CP at 3. He was mailed a copy of the Reconsideration Decision the same day. CP at 30. Along with the decision, Mr. Zeru received an instruction sheet indicating how he could petition for judicial review of the decision. AR at 2. The instruction sheet stated:

**DEADLINE** for Superior Court Cases – **30 DAYS**: The Superior Court, the Board of Appeals, and the state Attorney General's Office **must all RECEIVE** copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Reconsideration Decision.

AR at 2 (boldface, underline, and capitalization in original). At oral argument in the trial court, Mr. Zeru conceded that he had notice of the final decision and these instructions. VRP at 11.

Mr. Zeru filed a petition for judicial review challenging this finding in Thurston County Superior Court on May 1, 2017. CP at 2. He did not serve the Attorney General's Office or the attorney who handled the underlying administrative matter on behalf of DSHS until August 28, 2017, 150 days after service of the final order. CP at 10-11, 25, 27. Mr. Zeru did not serve DSHS with his petition for judicial review until September 14, 2017, 168 days after service of the final order. CP at 30-31. DSHS filed a motion to dismiss the petition for lack of subject matter jurisdiction on October 18, 2017, which the superior court granted. CP at 23, 45-46.

#### IV. ARGUMENT

##### A. Standard of Review

Whether a court has subject matter jurisdiction is a question of law reviewed *de novo*. *Dougherty v. Dept. of Labor and Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). Questions of statutory interpretation are likewise reviewed *de novo*. *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

##### B. Mr. Zeru Failed to Invoke the Superior Court's Subject Matter Jurisdiction and his Petition for Review Must be Dismissed Because he Failed to Serve his Petition for Review Within the 30 Day Time Limit.

Binding precedent of the Washington Supreme Court requires Mr. Zeru's petition for judicial review to be dismissed for failure to invoke the court's jurisdiction. *See Stewart*, 419 P.3d 838; *see also Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995). Mr. Zeru acknowledges that this binding precedent applies to his case and he instead argues that the decisional law should be overturned. *See* Opening Brief at 3. But the doctrine of *stare decisis* requires that to overturn decisional law, the law to be overturned must have been erroneously decided and harmful. *In re Stranger Creek and Tributaries in Stevens Cty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

As shown below, the precedent Mr. Zeru argues against was not erroneously decided. Because the Legislature created the court's

jurisdiction to review administrative decisions, the Legislature can condition that jurisdiction on compliance with procedural requirements. RCW 34.05.542(2) is one such condition, and the cases requiring strict compliance with the service procedures of the APA are good law. The law is also not harmful because it promotes the finality of administrative decisions and enables parties affected by administrative orders to rely on them without the shifting sands of a late appeal. Moreover, Washington's law is analogous to law followed by the federal government and other states. Finally, as a lower appellate court, this Court must follow *Stewart*.

**1. Service of the petition within 30 days is required to invoke the court's subject matter jurisdiction**

It is undisputed that Mr. Zeru did not serve his petition for judicial review within 30 days as required by RCW 34.05.542(2). Strict compliance with the APA's service requirements is necessary for the superior court "to exercise its appellate jurisdiction pursuant to article IV, section 6 of the Washington Constitution." *Stewart*, 419 P.3d at 843. "[U]nder the Administrative Procedure Act (APA), the superior court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party files a petition for review in the superior court and serves the petition on all of the parties." *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). "Both of these steps must be

accomplished within 30 days after the service of the final decision of the agency.” *Id.* at 927. (quoting former RCW 34.05.130(2)) (internal quotation marks omitted).

The Washington Supreme Court has dismissed several petitions for judicial review for failure to invoke the court’s jurisdiction where the service requirements of the APA, or similar administrative schemes, were not followed. *Stewart*, 419 P.3d 838; *Skagit Surveyors and Engr’s, L.L.C. v. Friends of Skagit Cty.*, 135 Wn.2d 542, 958 P.2d 962 (1998); *Union Bay Pres. Coal.*, 127 Wn.2d 614; *City of Seattle*, 116 Wn.2d 923; *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990).

Mr. Zeru argues that recent decisions of the Washington Supreme Court undermine this line of cases. Opening Brief at 2. *Stewart*, however, decided only last month, refutes this argument. This Court must apply the law as decided by the Washington State Supreme Court, and dismiss Mr. Zeru’s petition. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Despite the binding precedent, Mr. Zeru argues that procedural requirements need not be met in order to invoke the court’s jurisdiction. *See* Opening Brief at 2. He cites *Dougherty v. Dep’t of Labor and Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003) in support of this argument. *Id.* But *Dougherty* held that an APA requirement that an appellant file their petition

in a certain county was a limitation on venue and not jurisdiction. *Id.* at 317. This decision is therefore consistent with decisions of the Court that a party must serve a petition for judicial review as required by the APA in order to invoke the court's jurisdiction. In fact, the *Dougherty* decision cites *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990), a Washington Supreme Court case in which an untimely petition was dismissed, for the proposition that "statutory requirements must be met before jurisdiction is properly invoked." *Dougherty*, 150 Wn.2d at 319 (internal citations and quotations omitted). Further, in holding that filing a petition for review in the improper county invoked the appellate jurisdiction of the superior court, the *Dougherty* court noted that the appellant's filing was "otherwise timely." *Id.* The same cannot be said when an appellant fails to serve a petition within the statutory timeline, as occurred here. *See City of Seattle*, 116 Wn.2d at 928 ("Service after the time limit cannot be considered to have been actual service within the time limit.").

Mr. Zeru's failure to serve DSHS or its attorneys within the 30-day time limit means that he failed to invoke the court's appellate jurisdiction and his petition for review must be dismissed. *Stewart*, 419 P.3d 838.

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**2. The Washington State Constitution does not prohibit the Legislature from requiring a petitioner to follow certain procedures to invoke the superior court's appellate jurisdiction**

Under the Washington State Constitution, the Legislature may condition the superior court's appellate jurisdiction in statutory causes of action upon procedural requirements, such as service requirements. The holding that a petition for judicial review served after the statutory deadline must be dismissed comports with the requirements of the Washington State Constitution.

The Washington State Constitution explicitly allows the Legislature to grant appellate jurisdiction to the Superior Courts. The superior courts "shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law." Wash. Const. art. IV, § 6. Because the Legislature has the constitutional authority to grant appellate jurisdiction, the Legislature has the constitutional authority to condition the exercise of that jurisdiction on certain procedures, like compliance with service deadlines. *Stewart*, 419 P.3d 838. Some procedural requirements, unless the Legislature uses very clear language, are not jurisdictional. *Dougherty*, 150 Wn.2d at 317 ("Unless mandated by the clear language of the statute, we generally decline to interpret a statute's procedural requirements

regarding location of filing as jurisdictional.”). But other procedural requirements, like service deadlines, are jurisdictional. *Fay*, 115 Wn.2d at 198 (“[I]n order to invoke the jurisdiction of the superior court an appealing party must file and serve notice within the 30-day appeal period.”). Where the jurisdiction of the court has not been invoked, an order of dismissal must be entered and the objection may not be waived. *Stewart*, 419 P.3d 838.

While Mr. Zeru is correct that the “type of controversy” determines the subject matter jurisdiction of a court, and all a party may do is “invoke” it (Opening Brief at 2), this is a distinction without a difference. The APA grants superior courts subject matter jurisdiction over judicial reviews of final orders. RCW 34.05.570. Whether or not a given appellant timely appeals a final order does not change the blanket grant of statutory appellate jurisdiction. *See Dougherty*, 150 Wn.2d at 319. But if a party does not invoke the court’s jurisdiction by complying with all jurisdictional procedural requirements, the court still has no power to act. *Fay*, 115 Wn.2d at 197.

In the context of a Land Use Petition Act (LUPA) challenge, this Court has held that failure to timely file a LUPA petition also results in a failure to invoke the jurisdiction of the superior court, despite the fact that court still has jurisdiction over LUPA petitions. *Nickum v. City of*

*Bainbridge Island*, 153 Wn. App. 366, 382, 223 P.3d 1172 (2009). The *Nickum* court held that “[t]he proper phraseology is that parties who fail to timely file a LUPA petition may not avail themselves of the superior court’s jurisdiction to hear the petition and may not maintain a LUPA action in superior court.” *Id.* at 380 n.9. Because the time limit controlled access to the superior court’s jurisdiction, the time limit could not be equitably tolled, even though the petitioners did not have notice of the acts they sought review of, and filed their petition within 9 days of receiving notice. *Id.* at 372, 381.

While DSHS’s motion for summary judgment may have used improper phraseology (*see* CP at 22), the ultimate outcome is the same. There is no constitutional violation where the Legislature conditions a court’s exercise of statutory appellate jurisdiction on compliance with certain procedures. Wash. Const. art. IV, § 6; *Fay*, 115 Wn.2d at 198. As argued below, RCW 34.05.542(2) is one such condition. Therefore, the decisional law that RCW 34.05.542(2) must be complied with to invoke the superior court’s jurisdiction over a petition for judicial review is correct, and should not be overturned.

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**3. The Legislature intended RCW 34.05.542 to be a jurisdictional procedural requirement**

*Stewart* reaffirmed that compliance with the service requirements of RCW 34.05.542 is necessary to invoke the superior court's judicial review jurisdiction. *Stewart*, 419 P.3d 838. This decision was not erroneous because both by its plain language and by legislative acquiescence, the Legislature intended that RCW 34.05.542(2) act as a jurisdictional bar to untimely petitions for judicial review.

In interpreting a statute, the court's objective is to give effect to the intent of the Legislature. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10. Where a statute's meaning is plain, the courts must give effect to that plain meaning. *Id.* The plain meaning of a statute "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11. The court also "presumes that the Legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). Courts will find procedural requirements to be jurisdictional where the language "demonstrate[s] the Legislature's intent

to prevent a court from considering untimely filings.” *Nickum*, 153 Wn. App. at 381.

RCW 34.05.542(2) states, “A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.” The statute uses the mandatory term “shall.” “[S]hall” imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Martin*, 137 Wn.2d 149, 154, 969 P.2d 450 (1999). By using the word “shall”, RCW 34.05.542(2) indicates that timely service of a petition for review is necessary for the court to grant review. Moreover, RCW 34.05.542(5) limits this requirement by providing that, “[f]ailure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.” But if failure to serve the Attorney General’s Office is not grounds to dismiss, then that necessarily implies that failure to serve the agency is grounds to dismiss the petition—otherwise the language of RCW 34.05.542(5) would not be necessary. Statutes should be construed so that no portion is rendered superfluous. *Sim v. Wash. State Parks and Recreation Comm’n*, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978).

Finally, because RCW 34.05.080 prohibits an agency from changing the time limits in RCW 34.05.542(2), the service requirement sets out a mandatory condition of bringing a petition for judicial review under the

APA. Because RCW 34.05.542(2) requires proper service for the court to consider a petition for review, it is jurisdictional and controls access to the superior court's appellate jurisdiction. *See Nickum*, 153 Wn. App. at 382.

In addition to the plain language, legislative acquiescence in the decisions of the courts also show that the Legislature intended RCW 34.05.542(2) to be a jurisdictional bar to untimely petitions. *Stewart* held exactly this: "The [L]egislature, with its broad constitutional authority to prescribe rules for judicial review of decisions by inferior courts in civil cases, has had ample opportunity to amend the statutes if our interpretations were incorrect or if the consequences have proved harmful. It has not done so." *Stewart*, 419 P.3d at 843. As stated above, a long line of cases has interpreted RCW 34.05.542(2) as a jurisdictional requirement. *See Union Bay*, 127 Wn.2d at 617 (holding that service on a party's attorney did not constitute service on a "party of record."); *see also Skagit Surveyors and Engr's, LLC*, 135 Wn.2d at 556. The Legislature has even amended RCW 34.05.542 in response to the Supreme Court's decisions. Directly superseding the holding in *Union Bay*, the Legislature amended RCW 34.05.542 to allow service on a party's attorney to count as service on the party itself. Laws of 1998, ch. 186; *see also Skagit Surveyors and Engr's, LLC*, 135 Wn.2d at 556 n.8. But, RCW 34.05.542 has not been amended to allow for remedies other than dismissal when a petition is filed

or served late. This shows that the Legislature has acquiesced in these interpretations. *See Stewart*, 419 P.3d 838.

In short, the decisional law that RCW 34.05.542(2) must be complied with in order to invoke the superior court's appellate jurisdiction was not erroneously decided. The constitution allows the Legislature to condition the exercise of a superior court's statutory appellate jurisdiction on compliance with procedural requirements. Wash. Const. art. IV, § 6; *Fay*, 115 Wn.2d at 198. Second, RCW 34.05.542(2) was intended by the Legislature to act as such a jurisdictional bar. *Stewart*, 419 P.3d 838.

**4. Requiring service within the statutory time limit serves to promote the public policy of finality of and reliance on administrative orders**

Finally determining the parties' and third-parties' rights thirty-days after the issuance of the administrative order promotes the finality of administrative decisions and also allows those who are affected to rely on them. Requiring compliance with RCW 34.05.542(2) to invoke the appellate jurisdiction of the superior court serves this interest and the law is not harmful, but is good public policy.

The APA governs several kinds of administrative decisions with broad impacts. These include whether a hospital can be built,<sup>1</sup> whether

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<sup>1</sup> *King Cty. Pub. Hosp. Dist. No. 2 v. Wash. State Dept. of Health*, 178 Wn.2d 363, 309 P.3d 416 (2013).

zoning ordinances are lawful,<sup>2</sup> whether a neighborhood business can sell cannabis,<sup>3</sup> and whether a watershed analysis should be approved.<sup>4</sup> The decisions that agencies make, reviewed under the procedures of the APA, affect many people—sometimes everyone in the state. Where judicial reviews of those decisions are not filed and served within thirty days, parties to the case as well as third parties ought to be entitled to rely on them. It would not be fair for a party to materially alter their position in reliance on an administrative decision, only to find out 150 days after issuance of that decision that an appeal has been filed.

Mr. Zeru responds that elevating procedural requirements into jurisdictional prerequisites has this consequence, because lack of subject matter jurisdiction may be raised for the first time on appeal. Opening Brief at 5. But this ignores the fact that petitions for judicial review of administrative decisions are themselves appeals. Allowing a petition to go forward after the filing and service deadlines have expired, even if there are compelling equitable reasons, frustrates the legitimate expectations of parties and non-parties to the case. Requiring a petitioner to both file and

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<sup>2</sup> *Skagit Surveyors and Eng'rs, LLC*, 135 Wn.2d at 555.

<sup>3</sup> *In re Botany Unlimited Design and Supply, LLC*, 198 Wn. App. 90, 391 P.3d 605 (2017).

<sup>4</sup> *Alpine Lakes Protection Soc'y v. Wash. State Dept. of Nat. Res.*, 102 Wn. App. 1, 979 P.2d 929 (1999).

serve their petition for judicial review within 30 days to invoke the subject matter jurisdiction of the superior court is not harmful law.

**5. Washington's law is consistent with federal jurisprudence and the law of other states**

Noncompliance with procedural requirements deprives courts of jurisdiction under federal law and under the law of other states. Washington's law is not anomalous, and is in fact common.

Under federal law, failure to petition for judicial review of agency action within a statutory time limit often deprives the court of subject matter jurisdiction. *See, e.g., Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 438 F.3d 937, 944 (9th Cir. 2006). The federal APA does not have a provision, similar to Washington's, that prescribes the time limit for filing a petition for judicial review for all agency decisions. *See* 5 U.S.C. §§ 701-06. Rather, the time limits for filing such petitions are often found in the statutes giving an agency decision-making authority. *See, e.g.,* 16 U.S.C. § 1855(f)(1) (30 days to petition for judicial review from certain decisions of the Secretary of Commerce). These limitations are often found to be jurisdictional, and, if a petition is not filed within the prescribed time, the federal court is deprived of subject matter jurisdiction. *Stone v. I.N.S.*, 514 U.S. 386, 405, 115 S. Ct. 1537 (1995) ("Judicial review provisions, however, are jurisdictional in nature and must be construed with

strict fidelity to their terms.”); *see also Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360 (2007) (dismissing appeal filed after statutory appeal deadline in reliance on district court order purporting to extend the deadline).<sup>5</sup>

Washington’s law is also in accord with the law of other states that condition exercise of subject matter jurisdiction on compliance with procedural prerequisites. Illinois,<sup>6</sup> California,<sup>7</sup> Oregon,<sup>8</sup> and Colorado<sup>9</sup> all hold that their courts lack subject matter jurisdiction over administrative appeals brought after a statutory deadline.

Washington’s decisional law that statutory deadlines to file appeals from administrative agencies must be complied with in order to invoke the court’s subject matter jurisdiction is commonplace in American

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<sup>5</sup> Such time limits are not always found to be jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436, 131 S. Ct. 1197 (2011). Whether a time limit bars a federal court from exercising its subject matter jurisdiction is a question of statutory construction. *Id.*

<sup>6</sup> *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 338, 770 N.E.2d 177 (2002); *Nudell v. Forest Pres. Dist. of Cook Cty.*, 207 Ill.2d 409, 423, 799 N.E.2d 260 (2003) (“[T]he requirement that a complaint for administrative review be filed within the specified time limit is jurisdictional.”).

<sup>7</sup> *Pressler v. Donald L. Bren Co.*, 32 Cal.3d 831, 837, 654 P.2d 219 (1982) (“The time for filing a notice of appeal from a decision of the Labor Commissioner is mandatory and jurisdictional.”); *Palagin v. Paniagua Constr., Inc.*, 222 Cal.App.4th 124, 132, 165 Cal.Rptr. 3d 612 (2013).

<sup>8</sup> *Ososke v. Driver and Motor Vehicle Serv.’s*, 320 Or. 657, 661, 891 P.2d 633 (1995) (“[T]he untimely filing of a petition for judicial review of a final order of DMV is a jurisdictional defect.”); *Pub. Util. Comm’n of Or. v. VCI Co.*, 231 Or.App. 653, 657, 220 P.3d 745 (2009).

<sup>9</sup> *Greyhound Racing Ass’n of S. Colo., Inc. v. Colo. Racing Comm’n*, 41 Colo.App. 319, 321, 589 P.2d 70 (1978) (“The failure to perfect a petition for review within the time proscribed by [statute] is jurisdictional.”); *Castle Rock Const. Co. v. Dep’t of Transp.*, 849 P.2d 869 (Colo.App. 1992).

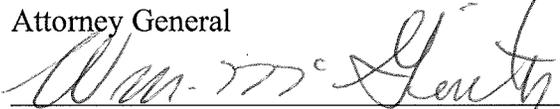
jurisprudence. The federal courts also follow their own version of it, and Washington's sister-states also follow it. It should not be overturned.

## V. CONCLUSION

The superior court was correct to dismiss Mr. Zeru's petition, and this Court should affirm its decision.

RESPECTFULLY SUBMITTED this 20 day of July 2018.

ROBERT W. FERGUSON  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of July 2018, I served a true and correct copy of the Brief of Respondent, Washington State Department of Social and Health Services, on all parties or their counsel of record on the date below as follows:

*Attorney for Appellant:*

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Rachel Myers  
Desmond Law Group, P.S.  
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 day of July 2018, at Tumwater, Washington.



DONA BETH FISCHER  
Legal Assistant

**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

**July 20, 2018 - 1:15 PM**

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