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NO. 63919-6-I

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

IN RE THE INTEREST OF: A.F.J.;

MARY FRANKLIN,

Appellant/Cross-Respondent,

v.

JACKIE JOHNSTON,

Respondent/Cross-Appellant.

2010 OCT 19 PM 3:38

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**AMICUS CURIAE BRIEF
OF THE OFFICE OF THE ATTORNEY GENERAL**

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I. IDENTITY AND INTEREST OF AMICUS

This brief is submitted by the Department of Social and Health Services at the invitation of the court. The Department is involved in thousands of dependency actions each year and is the agency that approves and licenses foster parents. It is charged with protecting abused and neglected children within Washington State. At times that protection requires a transfer of custody of the child from the parent to the Department and it requires placement of the child in foster care. When foster care is necessary, the Department's goal is to return the child safely to his parent as soon as possible. Accordingly, the Department offers services to the parent to help correct parenting deficiencies and ensure the safe return of the child.

This case was filed as a custody matter, but it addressed issues that were raised in dependency and termination proceedings regarding the same child and the child's biological mother, Respondent, Jackie Johnston. Additionally, the trial court's decision directly affected the dependency proceeding, in that it added a new party (and new parent) to the matter – the Appellant, Mary Franklin. This Court's decision could have an impact beyond custody cases; it could affect dependency and termination cases by recognizing a right in foster parents to be considered

de facto parents to foster children, thereby adding a new party to the proceedings who stands in legal parity – and in conflict – with the natural parent.

II. ISSUES

The Court asked amicus to address the following issues:

1. Is the de facto parent doctrine available to foster parents?
2. Did the trial court err in concluding that Mary Franklin, A.F.J.'s foster parent, is A.F.J.'s de facto parent?

III. INTRODUCTION

The Department asks this Court to hold that the de facto parent doctrine is not available to foster parents, solely by virtue of their status as foster parents. With respect to the Court's second issue, the Department's position is that to the extent the trial court relied on Ms. Franklin's status as a foster parent in applying the *In re Parentage of L.B.* factors, it was incorrect.

The questions posed by this Court raise significant policy concerns that impact the legal, financial and emotional welfare of children - the answers to which could affect the very nature of this state's dependency proceedings. In a dependency, the proceeding initially attempts to reconstruct the family unit, so long as doing so does not jeopardize the child's health and safety. Children are placed in temporary foster care

placements with either licensed or unlicensed caregivers while their parents attempt to remedy their parental deficiencies. Placements with relatives and others who have a relationship to the child are strongly encouraged in order to reduce the trauma of being taken into protective custody and to maintain stability in the child's life. It would undermine the nature of dependency proceedings if a caregiver could become a de facto parent merely because they were a foster parent to a dependent child.

IV. STATEMENT OF THE CASE

The questions addressed in this amicus brief raise legal issues, and do not require a complete recitation of the facts of the underlying custody case. However, the facts described below are relevant to the Argument of the Department.

A little boy, A.F.J., was born to Jackie Johnston on November 20, 2005. CP at 558. During the first three to four weeks of his life, the baby lived with his mother Jackie Johnston while she was in inpatient treatment for drug abuse. CP at 655-56. During that time, Mary Franklin, who had been in an on-again off-again relationship with Ms. Johnston, sometimes brought the infant to her home for overnight visits. RP 4/8/09 at 19; CP at 655-56. By January 2006, Ms. Johnston had left treatment and, along with her son, was staying with Ms. Franklin. CP at 577.

Ms. Franklin called the Department's Child Protective Services (CPS) on January 22, 2006 to express her concern for the safety of the baby. CP at 840-41. Ms. Franklin reported that when she came home from work, she found Ms. Johnston unconscious on the bed with her two-month-old infant next to her. CP at 841. Later, Ms. Johnston said that she had taken a Xanax and fell asleep with the baby on the bed with her. *Id.* Four days later, Ms. Johnston called CPS and told them that she also used cocaine, and that she had last used it just two days earlier. CP at 843. The Department filed a dependency petition that day and took the child into protective custody. RP 3/30/09 at 56.

When it removed the baby from his mother's custody, CPS briefly removed the little boy from Ms. Franklin's home; within a week – at the initial shelter care hearing – he was placed by the Department with Ms. Franklin. CP at 655. The juvenile court found the child dependent pursuant to RCW 13.34.030(5)(c) – finding that there was no parent capable of adequately caring for the little boy. CP at 843. The court also found that it was contrary to the child's welfare to return home because he had no parent available to care for him; it then placed him in the custody of the Department, authorizing it to place the child with “a Responsible Adult Placement with the mother's paramour, Mary Franklin.” CP at 845.

Ms. Franklin was advised that she needed to become a licensed foster parent for the child to continue to be placed with her. RP 3/26/09 at 36-37. Her application to become a licensed foster parent was granted, and she began receiving foster care maintenance payments in September 2006. CP at 845.

On November 7, 2007, Mary Franklin filed a nonparental custody petition, under RCW chapter 26.10, and also alleged that she was a de facto parent to A.F.J. CP at 1-14. The trial court entered findings and conclusions in the nonparental custody matter on May 26, 2009, and found that "Jackie Johnston is a fit parent." CP at 707-08. The court also found that if the little boy were cut off from Ms. Franklin, he "would suffer detriment." CP at 709. The court further found Ms. Franklin to be a de facto parent to the little boy. *Id.*

The family law court made numerous other rulings, unrelated to the child, including an award of attorney's fees to Ms. Johnston. Ms. Franklin appealed the order on attorney's fees. CP at 1318-19. Ms. Johnston then cross-appealed and argued that the trial court had erroneously found Ms. Franklin a de facto parent. CP at 742-43; Br. of Respondent/Cross-Appellant at 37-46.

V. ARGUMENT

A foster parent should not be found a de facto parent solely as a result of the fostering relationship.¹ The Department places children in foster care on a temporary basis – often subsequent to a judicial finding that the parents should be temporarily deprived of their rights while parents work to be able to safely parent their children. In the vast majority of cases, foster parents are not properly found de facto parents because their role as caregiver is designed to be finite, and because the Department – not the parent – is responsible for the placement with the foster parent. A foster parent may properly be found a de facto parent only when the basis for the finding is established outside the foster care relationship.

A. **Foster Parents Should Not Be Considered De Facto Parents Merely As A Result Of Their Foster Relationship To The Child**

As the definition of the modern American family evolves, the definition of “parent” has grown to include persons whose relationships with children are not based on marriage, adoption, or biology. Mary L. Bonauto, Karen L. Lowey, & Susan D. Ricci, *Equity Actions Filed by de*

¹ The term foster parent is a broad category that includes foster parents who are licensed pursuant to WAC chapter 388-148, as well as unlicensed caregivers who may be relatives or “other suitable persons” who have a relationship with the child. WAC 388-25-0100. “Foster care” is defined as 24-hour per day temporary substitute care for the child placed away from the child's parents or guardians and for whom the Department has placement and care responsibility. This includes but is not limited to placements in foster family homes, foster homes of relatives, licensed group homes, emergency shelters, staffed residential facilities, and preadoptive homes, regardless of whether the Department licenses the home or facility and/or makes payments for care of the child.

facto Parents, in Mass. Continuing Legal Ed., Inc., *Paternity and the Law of Parentage in Massachusetts* (2d ed. 2009) (see ch. 12), at 2, available at Westlaw at PLPI MA-CLE 12-1. For those individuals who have no statutory remedy for custody or for establishing parentage, such as the Uniform Parentage Act or the adoption statute, the court may use its equitable powers as a means of achieving a just result for children and “parents.” See e.g., *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

In *In re L.B.*, the Supreme Court acknowledged the appropriate use of equity to establish the parent-child relationship. However, it was careful to limit the availability of the doctrine. Accordingly, a court may grant de facto parent status only to those adults who undertake a *permanent*, unequivocal, committed and responsible parental role in a child’s life. *In re L.B.*, 155 Wn.2d at 708. To be considered a de facto parent the prospective parent must prove: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the prospective parent and the child lived together in the same household; (3) the prospective parent assumed obligations of parenthood without expectation of financial compensation; and (4) the prospective parent had been in a parental role for a length of time sufficient to have a bonded, dependent relationship that is parental in nature. *Id.* Foster parents, by virtue of the

fostering relationship alone, cannot meet these requirements.

A de facto parent stands in legal parity with an otherwise legal parent. *Id.* In other words, the de facto parent, like the natural or adoptive parent, has a fundamental liberty interest in the care, custody and control of their child. *In re L.B.*, 155 Wn.2d at 710.

Importantly, recognition of a de facto parent is limited to those adults who have undertaken a *permanent* role in a child's life. *Id.* at 708. Under *In re L.B.*, de facto parent status is not available to every third party who cares for a child. *Id.* at 712. The American Law Institute cautions that "relationships with foster parents are . . . generally excluded [from the de facto parent doctrine] . . . because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children." ALI Principles of the Law of Family Dissolution § 2.03 comment c(ii).

A threshold requirement to recognize a de facto parent is a finding that the legal parent "consented to and fostered" the parent-child relationship. *In re L.B.*, 155 Wn.2d at 712. This finding ensures that any third-party caregiver, such as teachers, nannies, and relatives who care for a child in a role other than parent will not be found de facto parents. *Id.* A parent must have affirmatively established a family unit with a de facto parent and child. *Id.* at 712.

Therefore, foster parents are not properly considered de facto parents for three reasons. First, a foster care placement is intended to be temporary and does not evince a permanent parental role for the caregiver. Second, once the state intervenes and retains temporary custody of a child either voluntarily or through a court order, a parent can no longer be considered to have affirmatively fostered and consented to a permanent parenting role for a foster parent. Finally, legislative intent and public policy placing children's rights to health and safety at the center of a dependency proceeding whose purpose is to safely reunify families does not support finding foster parents to be de facto parents.

1. A Foster Parent Does Not Assume A Permanent Parenting Role

L.B. requires that recognition of a de facto parent be limited to those who have fully and completely undertaken a permanent parental role in the child's life. *L.B.*, 155 Wn.2d at 708. Foster parents do not meet this requirement.

A foster parent serves a vital but inherently limited role in a child's life. Foster care is temporary substitute care of a child who is placed away from the child's parents or guardians and for whom the Department has placement and care authority. RCW 74.15.020(1)(e); WAC 388-25-0010. Placement of a dependent child with foster parents is by its very nature "temporary, transitional and for the purpose of supporting reunification

with the legal parents.” *In re J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991). Foster care is for a planned period, and is not intended to be a permanent substitution of one home for another. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 823, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (*OFFER*). The U.S. Supreme Court observed the inherent challenge this raises – a more nurturing and homelike environment is better for children, but because the home is intended to be temporary, foster parents are encouraged not to become too attached to children in their care. *OFFER*, 431 U.S. at 836 n.40.

The “family” created by a foster placement is based in a contractual relationship governed by state law. *Id.* at 845-46; *In re J.H.*, 117 Wn.2d at 474. Foster parents are responsible for the “protection, care, supervision and nurturing of the child” in their care. RCW 74.13.330; *see also* WAC 388-25-0090 (expectations for licensed foster parents). In many cases foster parents who have provided a child a home for 90 days or more must be given at least five days’ advance notice of a proposed move of the child from the foster parent’s home. RCW 74.13.300.² However, this notice requirement is intended to minimize disruption to the child and does not create a substantive custody right in the foster parent. *Id.* In 2007, the legislature enacted legislation requiring that foster parents

² The legislature amended this statute in 2009, but the relevant portion was unchanged. Laws of 2009, ch. 520, §77, at 3057.

be provided notice of a right to be heard before each dependency hearing. RCW 13.34.096. Again, though, this notice requirement does not grant foster parents party status. *Id.*

Absent direct evidence indicating otherwise from outside the fostering relationship, the fostering relationship, on its own, does not meet the *L.B.* requirement that the relationship be intended to be permanent.

2. Parents Do Not Affirmatively Consent To And Foster A Permanent Relationship Between Their Children And Foster Parents

L.B. also requires a finding that the natural or adoptive parent consented to and fostered a parent-like relationship between the child and petitioner as a condition of finding a de facto parent. *In re L.B.*, 155 Wn.2d at 708. This element requires “active encouragement of the . . . parent by affirmatively establishing a family unit with the de facto parent and child. . . .” *Id.* at 712. This element can not be proven when a child is placed in foster care by the Department.

Once the state has custody of a child, a natural parent no longer has a right to independently consent to and foster a family-like relationship between a nonparent and the child. When the Department has custody of a child and has placed the child in foster care, a parent’s placement and decision-making authority is temporarily constrained. *See* RCW 13.34.062, RCW 13.34.120, RCW 13.34.138. Thus, a parent’s

ability to consent to establishing a permanent and family-like relationship with the foster parent is also constrained. As a result, the court cannot conclude that the parent consented to and fostered the parent-like relationship between the foster parent and the child.

The Department may accept custody of children when a parent signs a voluntary agreement placing the child in the custody of the Department or when a juvenile court orders a child placed into the custody of the Department. WAC 388-25-0045; RCW 73.13.031(6). In either case, parents do not place their children directly with foster parents – the Department has placement authority for the children in its care. *See* WAC 388-25-0025.

When a child is involuntarily removed from a parent's care, a hearing must be held within 72 hours of the removal. RCW 13.34.065. If certain elements are proven, the child may continue to be removed from the parent. RCW 13.34.065(5). Until a legislative change in 2007 that authorized placement with suitable unlicensed nonrelatives, the only out-of-home placement options were relatives or licensed foster parents. Laws of 2007, ch. 413, § 5, at 1887; *see also* RCW 13.34.130(1)(b)(ii).

In a dependency, absent good cause, the Department is to follow the wishes of the natural parent when making placement decisions. RCW 13.34.130(1)(b)(ii). A parent's wishes regarding placement may be

based simply on identifying a placement that will allow her maximum contact with her child, or a placement that will minimize trauma to the child. Thus, a parent's express wish that her child be placed with a particular person in a dependency is not the equivalent of consent to establish a parent-child relationship between the child and the foster care placement.

Additionally, a parent in a dependency does not establish a permanent family unit with a foster parent. It is uncommon for natural parents in dependency proceedings to reside with their children's foster parents, although it may occur if the natural parent is under 18 or when the child is placed in the home of a relative or another suitable person. When this does occur, in the vast majority of cases it is a temporary arrangement meant to provide stability to the parent and child and assist in reunification. Even if, as in this case, the parent violates a no-contact order to stay in the home of the foster parent and their child, this may occur because the parent seeks greater access to their child than is authorized by the Department or the court. A parent's effort to spend more time with their child in the child's placement is not an affirmative act meant to establish a permanent parent-child relationship between the child and foster parent.

When a parent's right to custody of their child is temporarily abridged, one cannot conclude that their actions represent affirmative consent to establish a new parent child-relationship with the foster parent. There are many valid reasons for parents to agree to specific foster placements, seek to reside in the home of a foster parent, or agree to temporarily co-parent their child with a foster parent that do not prove consent or affirmation of the foster parent's permanent role as a parent to their child.

3. Legislative Intent and Public Policy Would Be Thwarted If The De Facto Parent Doctrine Were Available To Foster Parents

Public policy and legislative intent weigh against permitting the fostering relationship to be a basis for establishing de facto parent status. Allowing foster parents to be considered de facto parents based on evidence obtained during the foster care placement itself would likely shift the focus of the dependency proceeding away from reunification with the natural parents, and would undermine the purpose of the dependency process. Additionally, parental decisions in a dependency that support stable placements of children and reunification of families are less likely to occur if they may form the basis for foster parents to be found de facto parents.

The legislature declared that “the family unit is a fundamental resource of American life which should be nurtured.” RCW 13.34.020. To that end, “the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized.” *Id.* “The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” *Id.* Thus, the legislature intends for families to remain intact so long as doing so is not harmful to children, and further provides that children’s rights include the right to a safe, stable and permanent home.

Initially, a dependency proceeding attempts to reconstruct the family unit. *In re Coverdell*, 30 Wn. App. 677, 679, 637 P.2d 991 (1981). In dependency proceedings, parents are “the biological or adoptive parents of a child unless the legal rights of that person have been terminated by judicial proceedings.” RCW 13.04.011(5). The Department is charged with coordinating remedial services in dependency proceedings that are aimed at addressing the family’s needs and at reunification. RCW 13.34.025. In terminating a parent’s rights to their child, the trial court must find the parent unfit, and cannot base any part of its decision on the child’s chance for “a better home” with a new parent. *In re Moseley*, 34 Wn. App. 179, 186, 660 P.2d 315 (1983).

De facto parents, however, stand in legal parity to an otherwise legal parent. *In re L.B.*, 155 Wn.2d 679 at 708. Thus, a de facto parent would become a party to any dependency proceeding, and would have the right to be heard and introduce evidence at all proceedings, to be represented by counsel including appointment of counsel if they are indigent, and to copies of Department records regarding the child. *See* RCW 13.04.020, RCW 13.34.090.

When considering whether to grant foster parents' motions to intervene in dependency proceedings, Washington courts have rejected arguments that foster parents should be allowed full party status in dependencies – even where the child has been placed with the foster parent for a lengthy period and views her as the parent figure. Adversarial participation in a dependency proceeding by a foster parent “has a tendency to shift the focus of the proceeding from the ability of the natural parent to care for the child to a comparison of the natural parent to the foster parent.” *In re Welfare of Coverdell*, 39 Wn. App. 887, 891, 696 P.2d 1241 (1984). This is an “unequal battle” for the parent, since it is her shortcomings that brought the case to the attention of the court. *Id.* Thus, a foster parent's participation in a dependency proceeding as a party is only appropriate when their interests do not conflict with the rights and interests of the legal parent. *In re J.H.*, 117 Wn.2d at 471-72.

Ms. Franklin's participation in the dependency of A.F.J. as a full party shifted the focus to apportioning contact and decision-making between the natural parent and the foster – now de facto – parent. *See, e.g.*, RP 5/22/09 at 52; RP 9/25/09 at 50, 52-53. Ms. Franklin became a party to the dependency proceeding of A.F.J. RP 9/25/09 at 7, CP at 1049-58. She moved to restrict Ms. Johnston's contact with her son such that her visitation – which had been Wednesday at 9:00 a.m. to Friday at noon plus four hours on Monday – would become supervised. RP 4/8/09 at 9; RP 9/25/09 at 26-27; RP 11/9/09 at 5, 15. If the court had granted her requests, the child would have continued to be placed with Ms. Franklin, and Ms. Johnston's contact with her son would have been greatly limited.

Additionally, if foster parents are recognized as de facto parents, they may seek custody – even complete physical custody – of the child. As between two parents, the dependency court decides placement based on the best interests of the child. *In re Dependency of R.W.*, 143 Wn. App. 219, 177 P.3d 186 (2008). Thus, instead of attempting to remedy a parent's deficiencies in hopes of safely reunifying her with her child, the court would determine which home is the best for the child – the foster/de facto parent's or the natural parent's.

Additionally, presumably if a dependency is based on a finding that there is no parent capable of caring for the child, any newly found de facto parent must also be found not capable of adequately caring for the child if the dependency is to continue. *See, e.g., In re J.W.H.*, 147 Wn.2d 687, 698, 57 P.3d 266 (2002) (trial court erred in entering the dependency order under RCW 13.34.030(5)(c) absent a finding that the nonparent custodians were incapable of adequately caring for the children). However, even the trial court in the underlying case found the dependency “an important vehicle for the protection and safety of the child.” RP 11/9/09 at 22. If foster parents are found de facto parents in dependencies, there may be no legal basis for continued court oversight.

Allowing a foster placement to form a basis for recognizing the foster parent as a de facto parent undermines the dependency process and contravenes legislative intent to maintain the family unit.

B. Foster Parents May Seek Custody of Dependent Children Through Other Legal Means

Legal proceedings already exist by which foster parents may obtain custody of a child in their care. Thus, the de facto parentage doctrine need not be extended to foster parents to achieve this outcome.

When it considered whether to extend the de facto parentage doctrine to stepparents, the Supreme Court found that the legislature evidenced an “ongoing intent to create laws accommodating stepparents

who seek custody on or following dissolution . . . by enabling stepparents to petition for custody.” *In re Parentage of M.F.*, 168 Wn.2d 528, 533, 228 P.3d 1270 (2010). Therefore, unlike in *L.B.*, no statutory void existed and the court declined to extend the de facto parentage doctrine to stepparents. *In re M.F.*, 168 Wn.2d at 535.

Similarly, there is no statutory void here. The legislature has established at least three statutory paths for foster parents to seek custody of foster children. First, a foster parent may obtain permanent custody of their foster child in a third-party custody action. *See* RCW 13.34.155. Second, a foster parent may become a guardian of a dependent child. *See* RCW 13.36.030. Finally, a foster parent may become a legal parent of the child through adoption, if the parent-child relationship between the natural parent and the child is terminated. *See* RCW chapter 26.33.

The legislature has established three different statutory schemes by which foster parents may obtain custody of foster children – third-party custody, guardianship and adoption. Unlike the circumstances facing the petitioner in *L.B.*, the foster mother in this case has statutory remedies that she can pursue. Thus the de facto parentage doctrine need not be extended to foster parents.

VI. CONCLUSION

The Department respectfully asks the court to hold that a foster parent may not be determined a de facto parent to a foster child solely by virtue of the fostering relationship. Foster parents serve important but inherently temporary roles for children who are placed in out-of-home care while their parents seek to correct parenting deficiencies that create a risk of harm to the children. The ultimate goal of the foster care system is to safely return those children to their parent's care. Permitting a foster parent to petition for recognition as the foster child's legal parent is inconsistent with juvenile law and public policy declaring that the family unit should remain intact so long as children can remain safe, and would undermine the dependency process for the natural parent and the child.

RESPECTFULLY SUBMITTED this 13th day of December, 2010.

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MARY FRANKLIN,

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JACKIE JOHNSTON,

Respondent/Cross-Appellant.

DECLARATION OF
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I, Corrinne Stamey, declare and state as follows:

That on December 13, 2010, I served a true and correct copy of the document entitled AMICUS CURIAE BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL on all parties or their counsel of record, by U.S. Mail with first class postage prepaid and by e-mail PDF attachment, addressed as follows:

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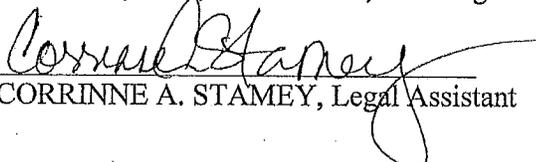
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 13th day of December, 2010, at Tumwater, Washington.


CORRINNE A. STAMEY, Legal Assistant

NO. 63919-6-I

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

IN RE THE INTEREST OF: A.F.J.;

MARY FRANKLIN,

Appellant/Cross-Respondent,

v.

JACKIE JOHNSTON,

Respondent/Cross-Appellant.

DECLARATION OF
SERVICE

2010 DEC 15 PM 1:45
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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

I, Corrinne Stamey, declare and state as follows:

That on December 13, 2010, I served a true and correct copy of the document entitled AMICUS CURIAE BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL on all parties or their counsel of record, by U.S. Mail with first class postage prepaid and by e-mail PDF attachment, addressed as follows:

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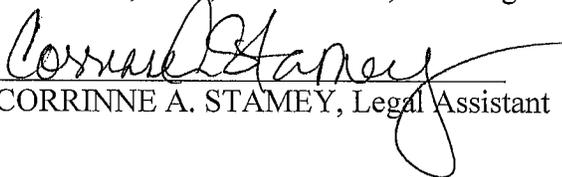
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Dated this 13th day of December, 2010, at Tumwater, Washington.


CORRINNE A. STAMEY, Legal Assistant