SUPREME COURT NO. 100194-1

Court of Appeals No. 80864-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CATHLEEN ROBERTSON, *et al*,
Plaintiffs-Petitioners,

v.

VALLEY COMMUNICATIONS CENTER,
Defendant-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
HON. MICAHEL K. RYAN, JUDGE

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review filed by Plaintiffs-Petitioners Cathleen Robertson et al. ("Employees") should be denied because it does not – and cannot – meet any test for discretionary review under RAP 13.4(b). The Court of Appeals' opinion ("Opinion") does not conflict with decisions of this Court or a Court of Appeals; nor does it raise any significant question of law or issue of substantial public interest.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the Court of Appeals' decision that Employees failed to present a genuine issue of fact as to whether looking for a preferred chair or ergonomic equipment pre-shift constituted compensable work consistent with applicable precedent?

2. Did the Court of Appeals correctly follow authority from this Court in evaluating the trial court's exclusion of expert survey evidence?

3. Did the Court of Appeals' evaluation of evidence regarding time spent by some employees on some occasions looking for a preferred chair or ergonomic equipment, including

any training on the use of chairs or other ergonomic equipment, raise an issue of substantial public interest? [1]

III. COUNTERSTATEMENT OF THE CASE

A. VCC Practices and Policies.

1. VCC's shift-change policies.

Defendant-Respondent Valley Communications Center ("VCC") employs Call Receivers, who answer 911 calls, and Dispatchers, who dispatch first responders to citizens. CP 650 ¶ 2. They perform their duties at consoles in VCC's Communications Room ("Com Room"). CP 651. Work shifts are staggered, with small groups of employees starting every two hours. *See, e.g.*, CP 716-22. Employees, a class of VCC Call Receivers and Dispatchers, claimed that VCC unlawfully

[1] Employees include as an issue for review the question of whether the trial court erred in dismissing their claims for double damages, but they acknowledge that this issue does not meet the test for review under RAP 13.4(b). Petition for Review ("Pet.") at 4, n.1. In support of this issue, Employees inaccurately assert that "the record contained no evidence of a bona fide dispute at the time wages were withheld . . . ." Pet. at 4. The evidence in the record showed that, before this lawsuit was filed, management explained to lead Plaintiff Cathleen Robertson and her union the legal authority supporting its position that the activities Employees identified as preparatory activities are not compensable work. CP 3169-72, 3175-83, 3185-88.

failed to pay class members for certain pre-shift activities that Employees alleged constituted compensable work.

Because VCC provides 24-hour emergency services, punctuality is important. CP 812 ¶ 15. VCC's policies advise employees that they "are expected to be in attendance, on-time and prepared for work," CP 724 § 2.0, and that Employees are expected to take personal responsibility for making any necessary preparations prior to the start of their scheduled shift. CP 726 § 3.3.1. Like many employers, VCC expects employees to be on-time, but does not require them to arrive early or tell them how early to arrive. CP 655 ¶ 18, 489-90. Whether an employee chooses to cut it close or leave a cushion, VCC expects them to be at their console and ready to work at the scheduled time. CP 655 ¶ 18. VCC praises employees who organize their routines to consistently meet that expectation, *e.g.,* CP 1570, and counsels tardy employees that they need to build in more time to be at their console on time. CP 1885.

2. VCC's early departure and rounding policies ensure that all work time is paid.

The nature of Call Receiver and Dispatcher work can sometimes lead to slight variations in shift-end times. When possible, VCC allows employees to leave up to 15 minutes before shift-end, while still receiving pay for a full shift. CP 630 ¶ 4, 955-56, 984-85. When employees need to continue

working short amounts of time past shift-end, VCC uses "rounding practices," per federal regulations and state guidance,[2] to compensate them for extra time worked. CP 631 ¶ 7. VCC rounds to the nearest quarter-hour based on "the seven-minute rule." *Id.* If an employee works up to seven minutes extra, pay is rounded down to the shift end-time; if the employee works more than seven minutes extra, pay is rounded up to the next quarter-hour, so the employee receives 15 minutes of overtime pay. *Id*.

The rounding rule, combined with VCC's policy of allowing employees to leave early when able, ensures that, on balance, any extra time worked is compensated. CP 630-31 ¶¶ 4,7. Data shows that employees punch out before shift-end on 80% of shifts (on average 3.86 minutes early), while still being paid to the end of their shifts. CP 441-77, 3907-08, 3978-86.

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[2] *See* 29 C.F.R. § 785.48 (approving rounding, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked"); 29 C.F.R. § 785.47 (insignificant or insubstantial periods of time outside of scheduled work hours may be disregarded); Wash. Dep't. of Labor & Indus., Employment Standards, Admin. Policy ES.D.1 at 5-6 (rev. May 2004), https://lni.wa.gov/workers-rights/_docs/esd1.pdf (approving rounding based on a 7-minute rule).

3. Employees engage in various pre-shift activities, including many purely personal activities.

Before shift start, Employees engage in a variety of activities, often involving use of VCC-provided amenities like the kitchen, locker rooms, smoking areas, collecting optional ergonomic equipment, and internet access for employee use on personal electronic devices. CP 651 ¶ 3.

For example, employees might socialize, make food, text their friends and family, collect things from their lockers, sign up for breaks, check overtime opportunities, organize their consoles, and/or log into the computer systems. *See generally* CP 3396; 3400-3419. Some employees occasionally spend time looking for a preferred chair or ergonomic equipment available in the Com Room. CP 3407-10. As Call Receiver Gibson explained, "[T]here are a plethora -- a vast array of chairs in the room, and you can pick any chair or you can find the one that you like the best." CP 3540. For example, "[a]bout half the time, [Call Receiver Broming] will cho[o]se a different chair than the one already at [her] console." CP 610 ¶ 6. On the other hand, Dispatcher Gildehaus will "sit at whatever chair's at the console" and does not use a carpal board. CP 3555. Even if an employee prefers a certain chair or other ergonomic equipment, if not readily available, employees

often start shifts without first locating a preferred item. CP 3407-10, 3373, 3749, 3543, 3620, 3626, 3680, 3681, 3695, 3769, 3650, 3566, 3468, 3510, 619 ¶ 10, 3584. As Dispatcher Lewis, who likes to use certain carpal boards, explained, "[S]ometimes they're at the desk next to me; sometimes they're not. So it just varies." CP 3593.

B. Procedural Background.

The class action complaint in this matter was filed on March 17, 2016. CP 4887-4901. Employees moved to certify the class on December 7, 2016, asserting that *any and all activities* class members engaged in on VCC's premises prior to the start of their shift were compensable work due to VCC's tardy policy and policy requiring employees to take responsibility for being prepared to start their shifts on time. CP 1072-1109. The trial court granted class certification, finding that Employees had raised common issues regarding whether VCC's requirement that employees take personal responsibility for being prepared to start their shifts on time created liability for compensable work activities for which Employees were not compensated. CP 795-808.

1. The trial court dismissed claims for double damages and six pre-shift activities.

In January 2018, VCC moved, in part, for summary judgment on Employees' claims for double damages for alleged willful withholding of wages. CP 3010-36. Support for the motion included a declaration from VCC's Deputy Director attaching VCC's responses to claims for pay for pre-shift time by lead Plaintiff Cathleen Robertson (provided over a year before this lawsuit was initiated), in which VCC communicated the legal authority supporting its belief that the time was not compensable work. CP 3169-3208. The trial court granted VCC's motion, in part, holding that double damages in this matter are not available as a matter of law. CP 3364-66.

In November 2018, Employees moved for summary judgment asking the court to find that nine pre-shift tasks were compensable, including signing up for breaks and locating a chair or any ergonomic equipment. CP 1500-01. VCC responded and cross-moved for summary judgment, asking the court to rule as a matter of law that the tasks identified by Employees were <u>not</u> compensable work activities. CP 3367, 3377-79.

The court partially ruled in VCC's favor and dismissed Employees' claims for six tasks, leaving only three pre-shift

tasks in dispute: gathering/assembling guidebooks/resource materials; reviewing/clearing messages from the CAD system; and, for Dispatchers, receiving briefing from the out-going Dispatcher. CP 3813. The trial court dismissed the six tasks because, in part, Employees had failed to adduce specific facts to establish that they "were ever subject to the 'restriction' or 'control' of the employer." CP 3811.

2. The trial court excluded expert opinion evidence based on a defective survey.

Around early March 2019, Employees' counsel sent a survey to class members. *See* CP 2367-2441, 2319. On April 4, 2019, VCC took the deposition of Employees' economics expert Dr. Bernard Siskin, who testified that the survey had been created by his colleague, with input from Employees' counsel, and that his opinion about classwide damages for alleged pre-shift work was based on the results of the survey. *See* CP 2308, 2314 at 22:23-23:1, 2315-16, 2318-19, 2324, 2835.

Dr. Siskin's opinion on damages was based on the following assumption: "We're relying on the assumption that when they answered the question which asked how much time do you spend on this task pre-shift, the person was answering what he spent pre-shift." CP 2329 (emphasis added). However, the survey form did not ask how much time the

employee spent on the three activities "pre-shift"; rather, it asked employees how much time they spent on the activities "per shift." Responses to the form and evidence about Employees' activities in the workplace showed that Employees likely understood the form to ask about "per shift" time spent on the activities, rather than "pre-shift" time. *E.g.,* CP 2559-60, 2577-78, 2381, 2452, 4047.[3]

On April 24, 2019, VCC filed a motion asking the court to exclude Dr. Siskin's opinion testimony about pre-shift damages.[4] CP 2284-97. After the trial date was continued until September 30, 2019, VCC had the opportunity to retain Dr. Robert Palmatier, an expert in the field of surveys, who prepared a report outlining his opinion about the invalidity of the survey based on accepted academic standards. CP 3998-4210. VCC moved to allow Dr. Palmatier to testify at a *Frye* hearing and/or at trial. CP 3990-97. Dr. Peter Nickerson,

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[3] For example, named Plaintiff Scott Castonguay estimated more time on the nine activities "per shift" than records show he spends in the building pre-shift. CP 2381. That is not surprising, as he testified that he performs some of the activities at issue after his shift begins. CP 2452.

[4] VCC alternatively asked the trial court to hold a hearing to evaluate whether the evidence met the standards set forth in *Frye v. United States,* 293 F. 1013, 34 ALR 145 (D.C. Dir. 1923). CP 2285.

VCC's economics expert, and Dr. Palmatier outlined the many problems with the survey content, methodology, and analysis. CP 2554-64, 4022-4210. As Dr. Palmatier explained with respect to the crucial question of pre-shift time:

> The survey is neither precise nor clear as to if the respondent should report times for the tasks listed for only 'preshift work' or for any time the task was performed 'during their shift,' or for both periods combined.

CP 4032.

Dr. Palmatier noted that the ambiguity of the questions was supported by the fact that of the 74 respondents that completed the survey, 13 gave average times that exceeded the average time they were in the VCC building prior to their shift. CP 4033-34. He opined that "[a] survey where 18% of the response[s] were impossible would be grounds to reject the survey as fundamentally flawed." CP 4034. Dr. Palmatier's ultimate opinion regarding the survey data was:

> The overwhelming breadth of issues associated with this data collection make it impossible to interpret, predict, or even correct the documented bias[] associated with this data. This data collection process would not be acceptable in any academic or business research setting. The questions are unclear and ambiguous as empirically documented in this report, thus, in accordance with the Manual of Scientific Evidence that states (p. 388), "If the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey," I would reject the survey for use. In addition, there are

> at least nine fatal flaws that each in its own right, even if everything else was preformed [sic] correctly, would undermine the reliability of the results to preclude its use.

CP 4049.

The trial court granted the motion to exclude the opinion testimony of Dr. Siskin based on the flawed survey, explaining that the survey "is so fundamentally flawed that any testimony regarding the same could be entirely misleading and confusing to the jury," such that it should be excluded under ER 403 and ER 702. CP 4306-07.[5]

3. After class counsel conceded they could not prove classwide damages for fewer than all nine claimed activities without the defective survey, the trial court dismissed the remaining pre-shift work claims.

Following the trial court's order excluding the opinion of Dr. Siskin based on faulty survey evidence, Employees submitted an offer of proof in which they asserted that without the survey data, "it would not be possible to estimate Class-

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[5] Employees argue that the opinions of Dr. Palmatier "were not admitted nor considered in the trial court." Pet. at 11. This is incorrect. VCC cited to Dr. Palmatier's report in supplemental briefing regarding the admissibility of the survey, *see* CP 4299, n.2, and the trial court's order excluding the survey evidence explicitly noted that the court had considered that supplemental briefing. CP 4307.

wide damages based upon available evidence, as witnesses who were deposed in discovery were not asked to provide a figure for only the 3 of 9 tasks," and Employees thus could not offer proof of "a necessary element of Plaintiffs' claim for recovery." CP 3007. In response to this concession, VCC made an oral motion for summary judgment seeking dismissal of the remaining three claims, which the trial court granted. CP 4315-16; RP 359:4-11, 364:4-11.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court accepts review of a decision of the Court of Appeals only under the limited circumstances delineated in RAP 13.4(b). Review is appropriate if a Court of Appeals decision conflicts with a decision of the Supreme Court or another Court of Appeals or if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3), (4). Neither circumstance is presented here.

A. The Court of Appeals' Decision Regarding Whether Employees Presented a Genuine Factual Issue that Locating Ergonomic Equipment was "Work" Is Consistent with Applicable Precedent.

The Court of Appeals' determination that Employees failed to present evidence of a genuine issue of fact as to

whether time spent by some employees, on some occasions, looking for preferred chairs or ergonomic equipment was "hours worked" does not conflict with any precedent of the Supreme Court or another Court of Appeals.

The Court of Appeals first noted that the Minimum Wage Act requires employees to be compensated for all hours worked. Opinion at 9 (citing RCW 49.46.020, .130). It then noted that hours worked includes any time an employee is "authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place." *Id*. (citing WAC 296-126-002(8)). The Court of Appeals then looked at policy guidance from the Department of Labor & Industries ("L&I") regarding when time spent conducting preparatory tasks is considered hours worked ("L&I policy"). *Id.* (citing Wash. Dep't of Labor & Indus., Admin. Policy ES.C.2, at 8 (rev. Sept. 2, 2008)). In so doing, the Court of Appeals noted that "[a]n agency policy can be useful in determining the meaning of statutory terms." *Id.*, n.6 (citing *Stahl v. Delicor of Puget Sound, Inc.,* 148 Wn.2d 876, 886-87, 64 P.3d 10 (2003); *Richardson v. Dep't of Labor and Indus.,* 6 Wn. App. 2d 896, 909, 432 P.3d 841 (2018), *review denied,* 193 Wn.2d 1009, 439 P.3d 1069 (2019)).

The Court of Appeals noted that under the L&I policy, compensable preparatory tasks are those which are "integral or

necessary to the performance of the job." *Id.* It further pointed out that pursuant to the L&I policy, when an employee does not have control over when and where preparatory activities can be made, the activities are considered hours worked. *Id.*

Applying these standards to the question of whether Employees established a genuine issue of fact as to whether time spent looking for a certain chair or ergonomic equipment is work, the Court of Appeals concluded that "Employees point to no specific facts that establish the use of ergonomic equipment was 'integral or necessary' to the completion of the job [and] no evidence that VCC required employees to use this ergonomic equipment or that an employees were ever disciplined for not using ergonomic equipment." *Id.* at 9-10. In support of this conclusion, the Court of Appeals pointed to evidence that both employees and supervisors describe the selection of chairs and use of ergonomic equipment as "a matter of preference." *Id.* at 10. The Court of Appeals rejected Employees' argument that the on-time reporting policy made looking for a preferred chair or optional ergonomic equipment "integral or necessary to the performance of the job," noting that the "policy does not set out specific requirements for what

preparations must occur. It does not require the use of ergonomic equipment." *Id*.[6]

Even though Employees relied on the L&I policy as appropriate for determining whether preparatory tasks are compensable, *id.* at 239, n.6, they now argue that the Court of Appeals' reliance on the standard set forth in the L&I policy conflicts with this Court's decision in *Weeks v. Chief of State Patrol,* 96 Wn.2d 893, 639 P.2d 732 (1982). Employees' effort to manufacture a conflict fails.

Weeks did not involve the question of what pre-shift, preparatory tasks are compensable as "hours worked." Rather, this Court addressed the question of whether and when a lunch period of employees was compensable. In so doing, this Court first looked to *Lindell v. General Elec. Co.,* 44 Wn.2d 386, 267 P.2d 709 (1954), in which this Court found that the lunch hour of patrolmen at a nuclear plant was "work," as "[t]hey were

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[6] Employees argue that the Court of Appeals contradicted itself in finding an issue of fact as to whether signing up for breaks is work, but no issue of fact as to whether looking for ergonomic equipment is work. While this argument is not relevant to the criteria for review by this Court, it ignores that the Court of Appeals identified additional evidence presented by Employees regarding break sign-ups, such as performance reviews addressing an employee's ability to sign up for breaks pre-shift and a memorandum from management discussing the expectation to sign up for breaks before shift-start. *Id.*

under the domination and control of their superiors and were subject to be called out on a moment's notice." *Weeks,* 96 Wn.2d at 897 (citing *Lindell*, 44 Wn.2d at 394). This Court also looked to the regulation governing meal periods, which provides: "Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty ... at a prescribed work site in the interest of the employer." *Weeks,* 96 Wn.2d at 898 (citing WAC 296-126-092(1)).

Employees here attempt to bring the pre-work time occasionally spent by some employees looking for a chair or ergonomic equipment under the *Weeks'* analysis that a lunch hour is compensable because employees are on-call. Pet. at 14. They do by asserting that "employees could be called into their shifts early during their preparation time." *Id*. However, Employees' suggestion that they are "under the domination and control of their superiors," *Weeks,* 96 Wn.2d at 897, during the entire time when they happen to be in the building before their work shifts is not supported by the evidence. First, employees are not required to be on-site at any particular time pre-shift. CP 655, ¶ 18. There are no limitations on their ability to leave the VCC building before shift-start, and the evidence in the record is that they do so. *E.g.,* CP 3512, 3544. Employees point to testimony of one employee that on one occasion he agreed to start work early at the request of a supervisor, and he

claims he was not paid for this time. Pet. at 14 (citing CP 1573, 1952). Such work outside of Employees' scheduled work time is governed by the overtime terms of collective bargaining agreement. CP 653, 673-74. One employee's assertion that on one occasion he was not properly paid per the union contract for overtime does not convert all time employees are in the building before work, from whenever they choose to arrive, no matter what they are doing, to the equivalent of a paid lunch hour.[7]

The Court of Appeals' evaluation of whether Employees presented a genuine issue of fact as to whether looking for a chair or ergonomic equipment before a scheduled shift constitutes "hours worked" does not conflict with the precedent of this Court.

[7] Pursuant to the terms of the collective bargaining agreement, Employees could be requested to work mandatory overtime whether they are at home on a day off or on the VCC premises. CP 673-74. By Employees' logic, VCC would have to pay everyone around the clock, regardless of location. This is obviously an absurd result.

B. The Court of Appeals' Evaluation of Evidence of Training Regarding Ergonomic Equipment Does Not Raise an Issue of Substantial Public Interest.

Although not identified as an issue presented for review, Employees argue that an issue of substantial public interest is raised by the Court of Appeals' evaluation of evidence of training employees receive regarding ergonomic equipment and whether such training makes the time spent looking for preferred ergonomic equipment pre-shift "work." The Court of Appeals' consideration of the evidence regarding such training and its determination that "Employees point to no specific facts that establish the use of ergonomic equipment was 'integral or necessary' to the completion of the job," Opinion at 9, does not raise an issue of import beyond this case.

The "training" evidence presented by Employees regarding ergonomic equipment does not support their argument that the time some employees occasionally spend locating such preferred equipment is "necessary or integral" to the job. Employees cite to several pages of the record to support their allegation that VCC trained them to use ergonomic equipment and to locate it pre-shift. *See* Pet. at 10-11, n.3, 4. Many of the cited pages say nothing about training related to ergonomic equipment. *See* CP 1654, 1678, 1701-2, 1733, 1766, 1841. Those pages that do refer to training

either discuss general training about ergonomics or how to use the available equipment (*see* CP 1690, 1719, 1758, 1866, 2121, 3574) or training that employees should locate whatever equipment they might prefer before starting work, if they have chairs or equipment they like to use (*see* CP 1773, 1801, 1834, 1846). The Court of Appeals considered this evidence in conjunction with other undisputed evidence regarding time spent looking for chairs or ergonomic equipment, which established that many employees do not have chair or equipment preferences, and that those who do only occasionally spend time looking for these items pre-shift. *Supra,* § III.A.3. The Court of Appeals' determination that the evidence regarding locating ergonomic equipment, including that relating to training, did not establish that such activities were "integral or necessary" does not raise an issue of interest beyond the parties in this case.

C. The Court of Appeals' Determination That the Trial Court Did Not Abuse its Discretion Regarding the Admissibility of Expert Evidence Does Not Merit Review.

The Court of Appeals followed settled precedent in evaluating the trial court's decision to exclude expert evidence. Specifically, the Court of Appeals reviewed the trial court's exclusion of the expert testimony for an abuse of discretion,

under which a decision will be overturned only if it is "manifestly unreasonable or based on untenable grounds or reasons." Opinion at 15 (citing *Philippides v. Bernard,* 151 Wn.2d 376, 393, 88 P.3d 939 (2004); *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). The Court of Appeals determined that this standard was not met, as:

> The trial court's decision rested on its view that the survey and Siskin's opinions from it were not helpful to the jury and would confuse them because "he asked the wrong question." This is not manifestly unreasonable. The distinction between "preshift" and "per shift" is a central issue in this case: employees cannot recover for tasks performed during their shift because they have already been compensated for that time.

Id. at 15-16. As detailed above and recognized by the Court of Appeals, ample evidence in the record supported the trial court's determination that the faulty survey likely caused confusion, such that the results were unhelpful to the trier of fact. *Supra* § III.B.2; Opinion at 16.

The Washington cases cited by Employees do not conflict with the application of these standards by the Court of Appeals, as all of them recognize the role of the trial court in determining under ER 702 whether the proffered evidence

would be helpful to the trier of fact.[8] *E.g., State v. Cauthron,* 120 Wn.2d 879, 890, 846 P.2d 502 (1993) ("If there is a precise problem identified by the defense which would render the test unreliable, then the testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact."); *Johnson v. Harvey,* 44 Wn.2d 455, 456–57, 268 P.2d 662, 663 (1954) ("Whether or not he was so qualified is a matter largely within the discretion of the trial court, and we will not disturb its ruling unless it is manifest that its discretion has been abused.").[9]

V. CONCLUSION

As Employees have not satisfied any of the criteria for review by this Court, their Petition for Review should be denied.

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[8] Some cases cited by Employees have no apparent relevance. *E.g., State v. Meyer,* 37 Wn.2d 759, 769, 226 P.3d 204 (1951) (evaluating trial judge's decision to admit evidence that appellants objected to as irrelevant).

[9] Employees also argue that the Court of Appeals incorrectly concluded that they "conceded below that they would be unable to prove damages on anything less than the full nine preshift tasks." Pet. at 12 (citing Opinion at 17-18). However, counsel for the Employees conceded just that. *See* RP 351:11-359:2; CP 3007.

DATED this 11th day of October, 2021.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ***via Electronic Court Filing (ECF)*** on the following:

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