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STATE OF WASHINGTON
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NO. 99404-8

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK KIHURIA,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW
TREATED AS ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Mr. Kihuria left two especially vulnerable adults to roam a parking lot and medical facility. Due to cognitive impairments and physical disabilities that rendered them unable to care for themselves or make rational decisions, this placed them in significant danger. Adult Protective Services found that Mr. Kihuria had neglected these especially vulnerable adults, and the Court of Appeals correctly upheld that finding.

Mr. Kihuria's petition for review is based on fundamental misunderstandings of the Administrative Procedure Act, unsupported constitutional arguments, and a request that this Court reweigh the evidence. Because the Court of Appeal properly limited its review to the agency action at issue in this litigation, Mr. Kihuria identifies no conflict with precedent, and Mr. Kihuria's unsupported theories do not present a significant question of constitutional law or issue of substantial public interest, this Court should deny review.

II. IDENTITY OF RESPONDENT

The Department of Social and Health Services (Department or DSHS) is the Respondent. The Department asks this Court to deny review of the Court of Appeals decision designated in Part III.

III. COURT OF APPEALS DECISION

Petitioner, Patrick Kihuria, seeks discretionary review of the Court of Appeals decision affirming two substantiated findings against him for neglect of vulnerable adults Arthur and Thomas while they were in his care on August 12, 2015. The appeal was resolved by an unpublished decision issued on November 16, 2020.

IV. ISSUES PRESENTED FOR REVIEW

- A. Did DSHS correctly determine that Patrick Kihuria neglected vulnerable adults in his care when he left them alone in a parking lot and waiting room while he was inside a building and attending a medical appointment for another vulnerable adult?
- B. Did the Final Order in this case correctly limit the decision to the single issue for which Mr. Kihuria timely and properly sought review?
- C. Did Mr. Kihuria receive due process when he was notified in writing of the substantiated findings and appeal process, utilized that appeal process, and was afforded a full evidentiary hearing with witnesses, exhibits, direct and cross examination, and was provided with a written decision with further appeal rights?
- D. Is the language of RCW 74.34.020(16)(b) constitutional and not vague as written or as applied to Mr. Kihuria?

V. COUNTERSTATEMENT OF THE CASE

Mr. Kihuria left two vulnerable adults in his care, Thomas and Arthur, ages 72 and 82 in 2015, without supervision in a parking lot near a medical facility and inside that facility. CABR 310, 356, 530;¹ RP Vol. 1 at 76; RP Vol. 2 at 84, 93-103.² Thomas and Arthur both resided in Mr. Kihuria's Adult Family Home (AFH), called Safe Haven, at the time of the incident on August 12, 2015, and he was responsible for all of their care and supervision needs. CABR 310, 356, 530; RP Vol. 1 at 76; RP Vol. 2 at 84-85, 93-103; RCW 70.128.060; RCW 70.128.135; WAC 388-76-10020; WAC 388-76-10130(7); WAC 388-76-10195; WAC 388-76-10400. According to reports outlining their capacities, known as CARE reports,³ both Arthur and Thomas had memory issues, and each was said to make "poor decisions/unaware of consequences." CABR 444-45, 586-87. Arthur needed to be within sight of a caregiver and Thomas needed to be monitored

¹ The Certified Appeal Board Record was not enumerated within the Clerk's Papers. Therefore, internal pagination of the CABR by Bates stamp will be used in referring to the CABR.

² Mr. Kihuria failed to file the report of proceedings from the administrative hearing with the Court of Appeals. The Department filed the correct transcript with the Court of Appeals and will refer to it as "RP" herein, with indications as to which of three volumes is being cited, as each volume begins pagination anew. The transcript of the superior court proceeding is irrelevant to the issues before this court. *Tapper v. Emp. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

³ Mr. Kihuria complains in his briefing that the CARE report in evidence for Arthur was printed on May 4, 2018, long after the incident of August 12, 2015. Pet. Mtn. at 10-11. However, the report was produced on August 10, 2015, two days before the incident, and had input from Mr. Kihuria's AFH. CABR 437.

to “ensure he does not wander off the property.” CABR 443, 589. Arthur and Thomas had both suffered recent falls and had at least occasional need for assistance with mobility. CABR 445-47, 590, 592.

Mr. Kihuria testified that he was familiar with the assessments for all of his residents. RP Vol. 2 at 101-03, 137. He described Arthur as having “a lot of complication because he had a serious car accident before he came to my home.” RP Vol. 2 at 93. Mr. Kihuria specifically testified that he was aware of Thomas’ memory issues, aggression, and exit-seeking from the time he came to the AFH. RP Vol. 2 at 95-96, 136-38. He said that Thomas “had a lot of demand,” because “he had bad behavior.” RP Vol. 2 at 95.

On August 12, 2015, Mr. Kihuria took his four AFH residents to an important medical appointment for James. RP Vol. 2 at 109; RP Vol. 3 at 72. He altered his practice of bringing two cars and two caregivers for this trip because James’ daughter was scheduled to attend the appointment with him as the designated Power of Attorney (POA) for James. RP Vol. 2 at 106, 109-10, 117. James’ daughter did not arrive, leaving Mr. Kihuria with four vulnerable adults to supervise. CABR 314-15; RP Vol. 2 at 119. Mr. Kihuria chose to move forward with the appointment, and ended up leaving two residents in the car and bringing two into the building. CABR 316-17; RP Vol. 2 at 111-13; RP Vol. 3 at 69-70. Arthur was in the car while Thomas went inside with Mr. Kihuria and James. *Id.*

Mr. Kihuria entered the second-floor exam room with James, but Thomas was not allowed in due to patient privacy concerns. RP Vol. 2 at 122; RP Vol. 3 at 72-73. Mr. Kihuria described moving in and out of the exam room to see Thomas in the waiting room and Arthur and Guy in the parking lot through the building's windows. RP Vol. 2 at 78, 125-27; RP Vol. 3 at 78-79. Despite the attempts at supervision, Thomas went downstairs and out to the parking lot and Arthur left Mr. Kihuria's car and came into the clinic, where he made disjointed statements about the police and a baby in the car that concerned clinic staff. CABR 322-27; RP Vol. 2 at 52-53; RP Vol. 3 at 79-80. Thomas was wandering the parking lot looking at cars and appearing confused. CABR 326-27, 369; RP Vol. 2 at 49; RP Vol. 3 at 79-80.

Staff had to track Mr. Kihuria down with only the name "Patrick" from Guy, and it took several minutes of asking around the clinic to find him. CABR 369; RP Vol. 2 at 51, 79, 121-22. Clinic Manager Patricia Wigington later called Adult Protective Services (APS) to report Mr. Kihuria's behavior with the four residents. CABR 278-82.

On December 15, 2015, Patrick Kihuria was sent a letter notifying him that APS had made substantiated findings that he had neglected vulnerable adults Arthur, Guy, and Thomas, by leaving them without supervision in the parking lot and/or vehicle during James' appointment at

Group Health. CABR 341-49, 492-99. The APS letter was amended on May 9, 2018, to correct some date discrepancies, but the essential findings remained as previously stated. CABR 608-16.

Following written instructions in his notification, Mr. Kihuria requested a hearing on each of the findings of neglect. The Office of Administrative Hearings (OAH) assigned Docket Numbers 01-2016-LIC-00019, 01-2016-LIC-00020, 01-2016-LIC-00021, and 01-2016-LIC-00160 to his hearing requests. CABR 254-66, 341-49, 492-99. No other Department actions have been addressed under the four docket numbers assigned, and judicial review was sought only as to those four docket numbers. CP 1-4; CABR 1-27, 66-88.

A hearing was held at OAH on May 3-4 and August 14, 2018. CABR 1, 69. ALJ Erika Lim issued an Initial Order reversing the APS findings. CABR 66-88. However, that decision was itself reversed by the DSHS Board of Appeals (BOA) in a Review Decision and Final Order (Final Order) dated February 25, 2019.⁴ CABR 1-27, 66-88. The Final Order explained requirements and time limits for initiating judicial review in superior court. *Id.*

⁴ The Final Order upheld the findings as to Arthur and Thomas only, leaving the finding against Guy as unsubstantiated. CABR 24.

On March 21, 2019, Mr. Kihuria timely filed a petition for judicial review of the Final Order in King County Superior Court. CP 1-4. On December 6, 2019, Mr. Kihuria's review request was largely denied, although the superior court overturned a finding related to a different incident involving one of the same vulnerable adults at issue in this case.⁵ CP 291-92. Mr. Kihuria promptly appealed that decision to the Court of Appeals Division I.

Mr. Kihuria argued at the Court of Appeals that there was not a sufficient basis to find that he neglected vulnerable adults Arthur and Thomas because he really could see and supervise all residents appropriately at the medical appointment for James. Brief of Appellant (App. Br.) at 23-24, 32-33, 47. Mr. Kihuria additionally claimed the right to appeal a different DSHS decision, revocation of his AFH license, even though he received separate formal notice in a letter that set forth his separate appeal rights for that action. App. Br. at 6-7, 43-46; CP 166-69. Mr. Kihuria presented no constitutional arguments beyond due process to the Court of Appeals, which rejected his claims because he did not meet his burden as a petitioner to show that the DSHS Final Order was incorrect under the standards of review allowed by the Washington Administrative Procedure Act (APA). App. Br. at 3-4; *Kihuria*

⁵ The Department did not cross-appeal as to the second incident.

v. DSHS, No. 80938-5-I slip. op. at 6-14 (unpublished) (Wash. Ct. App. Nov. 16, 2020).

Following the unpublished decision from Division I, Mr. Kihuria now seeks discretionary review from this Court. His arguments have changed markedly from what was presented at the Court of Appeals, and he asserts new constitutional arguments that lack merit and were not reviewed at any prior stage of the case. Review should be denied.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

The motion for discretionary review fails to establish a basis for acceptance of review. The Court of Appeals decision is consistent with existing appellate case law and does not involve a constitutional issue. The alleged errors are fact-specific, lack merit, and do not raise an issue of substantial public interest. Review should be denied under RAP 13.4(b).

A. The Court Of Appeals Decision Correctly Reviewed Only The Decision Appealed

Throughout his appeal process, Mr. Kihuria has attempted to circumvent the requirements of the Administrative Procedure Act. The agency action at issue here is the final order upholding Adult Protective Services' founded finding of neglect. CABR 1-27, 66-88. Mr. Kihuria improperly requested that the Court of Appeals also review two separate agency actions: the revocation of his adult family home license by

Residential Care Services, and an action by the Department of Health regarding his certified nursing assistant credential. This would have resulted in an end-run around the established requirements that individuals timely request a hearing and exhaust administrative remedies. *See* RCW 34.05.413(2), (3) (permitting time limits for requesting hearings); RCW 34.05.534 (requiring exhaustion of administrative remedies); WAC 388-71-01240(1) (setting time limit for hearing request). The Court of Appeals correctly limited its review to the final order subject to review. Mr. Kihuria has not demonstrated any basis for this Court to review this issue.

A person must exhaust administrative remedies in order to obtain judicial review of an agency action. RCW 34.05.534.⁶ New issues and information are seldom allowed. RCW 34.05.554, .558. The proper way to seek review of other agency actions is to request a new administrative hearing. RCW 34.05.413, .534.

The final order that is subject to review in this case concerns APS's December 15, 2015, substantiated finding of neglect by Mr. Kihuria. The hearing on this agency action before the ALJ took place in May and August 2018. CABR 1, 69. In February 2019, the DSHS Board of Appeals issued its final order. CABR 1-27, 66-88. On June 6, 2019, well after this

⁶ While the statute contains some exceptions, none are met in this case.

administrative process was completed, Residential Care Services revoked Mr. Kihuria's adult family home license. CP 166-69. This was a separate agency action, and, as the notice clearly advised him, Mr. Kihuria had the opportunity to request an administrative hearing to challenge revocation. CP 168. He failed to exhaust administrative remedies, precluding judicial review. RCW 34.05.534.

Similarly, the Department of Health (DOH) took action regarding Mr. Kihuria's certified nursing assistant credential on April 18, 2019 when it granted an ex parte motion for summary suspension of the credential. CP 181-92. Mr. Kihuria was notified of this action and given the opportunity to respond. CP193-95. As Mr. Kihuria acknowledges in his briefing, he resolved the DOH matter with an agreed stipulation and \$2,000 fine. Pet. Mtn, at 20. Thus, Mr. Kihuria made the choice not to seek remedies regarding his CAN credential through the judicial review process. *Id.*

Mr. Kihuria's argument that "[t]he Court of Appeals' opinion conflicts with the Secretary of the DOH authority," Pet. for Rev. at 19, fundamentally misunderstands the final order at issue in this case. The final order of the DSHS Board of Appeals upheld substantiated findings of neglect by Mr. Kihuria. CABR 341-49, 492-99. Contrary to Mr. Kihuria's suggestion, it neither impacted Mr. Kihuria's certified nursing assistant credential nor revoked his adult family home license. Those were addressed

through separate agency actions. CP 166-69, 181-92. The remainder of Mr. Kihuria’s argument at pages 18 through 20 proceeds from this fundamental misunderstanding and, as a result, entirely lacks merit.⁷

The Court of Appeals did not make a legal or constitutional error in limiting review to the substantiated findings of neglect which Mr. Kihuria properly appealed. *Kihuria*, slip. op. at 12-14. Review by this Court is not warranted.

B. The Finding That Mr. Kihuria Negligently Treated Arthur and Thomas Was Supported By Substantial Evidence

Mr. Kihuria asks this Court to grant review in order to reweigh the evidence and reach a different conclusion. Pet. Mtn. at 1, 4-5, 9-10, 16, 19-20. But under the APA unchallenged findings of fact are treated as verities on appeal, *Tapper v. Emp. Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993), and reviewing courts must accept “the fact-finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences,” *Sunderland Family Treatment Serv. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Even if reweighing of the evidence were appropriate, this would not present

⁷ DOH specifically commented on its lack of authority over the matter in its May 14, 2019 letter to Mr. Kihuria, in which it identified DSHS as the agency with “oversight of these issues.” CP 178.

an issue of substantial public interest to support review by this Court under RAP 13.4(b)(4).

On review, the Court of Appeals appropriately gave deference to the fact finder, here the Review Judge, and did not reweigh the evidence. *Kihuria*, slip op. at 7. Mr. Kihuria does not show an entitlement to relief on what are largely disagreements with what evidence was given weight in the decision.⁸ *Id.*

Mr. Kihuria also implies that the evidence did not support neglect under RCW 74.34.020(16)(b) because “[n]o damage or harm occurred to the vulnerable adult’s health, welfare, or safety.” Pet. Mtn. at 18. Mr. Kihuria mistakenly assumes that there is not a clear and present danger to a vulnerable adult unless that danger actually manifests in a tangible way during the neglect incident. *Id.* However, the question is not whether harm actually befell Arthur and Thomas in the parking lot, but whether there was a clear and present danger that it could. RCW 74.34.020(16)(b).

The extreme vulnerability of Arthur and Thomas, impaired to the point that they could not recognize and avoid danger, is what makes even a parking lot unsafe. CABR 372-74, 378-83, 443-48. “Danger” is what is discussed in the statute and so danger, not an actual fulfillment of that

⁸ Although Mr. Kihuria speaks of the Court of Appeals’ beliefs in his briefing, the Court of Appeals did not reweigh the evidence, but properly affirmed findings supported by substantial evidence in the record. *Kihuria*, slip. op. at 7.

danger, is what must be analyzed in determining whether the finding of negligent treatment was correctly made. RCW 74.34.020(16)(b).

Here, the danger was great and Mr. Kihuria disregarded the risk to the detriment of these vulnerable elders, for whom he alone was responsible. CABR 67, 278-85, 289-96, 326-27, 368-69; RP Vol. 1 at 89, 95-99, 100-02, 110-12; RP Vol. 2 at 19-21, 50-53, 78-80, 106-27; RP Vol. 3 at 40-41, 52-53, 66-79. At most, Mr. Kihuria was sometimes in a position to view risks; he was not, however, in a position to protect against them. RP Vol. 3 at 73-81. His ability to watch as his vulnerable charges encountered any possible car, unknown individuals, or other dangers present in a parking lot situation is irrelevant. CABR 316, 319, 322-29, 333-34. Substantial evidence readily supports that Mr. Kihuria neglected vulnerable adults under RCW 74.34.020(16)(b).

The Court of Appeals correctly analyzed and disposed of Mr. Kihuria's arguments related to the sufficiency of the evidence. *Kihuria*, slip op. at 8-11. This fact-specific issue does not warrant review.

C. Mr. Kihuria Presents No Viable Argument That RCW 74.34.020(16)(b) Is Unconstitutionally Vague

Mr. Kihuria advances two vagueness arguments. Neither warrant review. First, Mr. Kihuria argues that the CARE assessments' use of the terms "constant monitoring and "be in caregiver eyesight at all times" are

too vague for persons of ordinary intelligence to understand. Pet. Mtn. at 7-11. Second, for the first time in his petition for review, Mr. Kihuria argues that RCW 74.34.020(16)(b) is unconstitutionally vague. Pet. Mtn at 7-13. Both of Mr. Kihuria’s arguments lack merit. Mr. Kihuria’s argument regarding the terms in the CARE assessment is irrelevant, as the legal inquiry is whether Mr. Kihuria committed “neglect,” as defined in RCW 74.34.020(16)(b); Mr. Kihuria would be have engaged in neglect even if the CARE plan did not include the challenged terms. Mr. Kihuria’s argument regarding the constitutionality of RCW 74.34.020(16)(b) is so lacking in merit that it presents no “significant question.”

1. Neglect Here Was Based On The Statutory Definition, Not On CARE Plans For The Vulnerable Adults

The Court of Appeals correctly observed that Mr. Kihuria’s premise—that the Board of Appeals defined neglect to require constant monitoring—was incorrect:

The record does not support Kihuria’s argument that the BOA interpreted the statute defining neglect to require “constant monitoring” of a vulnerable adult. The Final Order makes clear that Kihuria’s failure to monitor Arthur and Thomas constituted neglect in light of the vulnerable adults’ needs.

Kihuria, slip op. at 12. This is precisely right. The final order found neglect based on the statutory definition in RCW 74.34.020(16)(b), not mere noncompliance with a provision of the CARE plan. The final order was based on Mr. Kihuria’s disregard of serious limitations in the ability of Arthur and Thomas to function on their own, each needing monitoring to

prevent dangers that being left alone in the parking lot presented to them in light of their conditions. CABR 22-24. Mr. Kihuria was not held to a one-on-one care standard or to constant supervision, just to the standard of refraining from “a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety.” RCW 74.34.020(16)(b); CABR 19-23. As a result, Mr. Kihuria’s constitutional and statutory arguments based on these phrases lack merit.

This Court need not accept review under RAP 13.4(b) to address the unremarkable decision by the Court of Appeals that the findings of neglect here were made by applying the facts to the statute rather than to a CARE plan or other Department regulation.

2. Mr. Kihuria Has Not Shown That RCW 74.34.020(16)(b) Is Too Vague To Be Understood

Mr. Kihuria fails to identify any significant issue of constitutional law at issue in this case. His vagueness argument to RCW 74.34.020(16)(b) lacks any merit.

RCW 74.34.020(16)(b) is presumed constitutional, and it is Mr. Kihuria’s burden to prove vagueness beyond a reasonable doubt. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). To do so, he must establish “that persons ‘of common intelligence must necessarily guess at [the statute’s] meaning and differ as to its application.” *Id.* But “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions

would be classified as prohibited conduct.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citations omitted).

Mr. Kihuria does not come close to meeting his burden and so does not establish a “significant question” for purposes of RAP 13.4(b)(3). Mr. Kihuria cites a single case in support of his vagueness argument, *Giaccio vs. Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966), but his long quotation from that case establishes nothing more than the general test for vagueness. Pet. Mtn. at 12-13. The words of the statute are not confusing, and it uses ordinary and commonplace phrases to define what behavior constitutes neglect:

(16) “Neglect” means . . . an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety

RCW 74.34.020(16)(b). This readily identifies who the statute applies to (those with a duty of care) and narrowly defines the scope of prohibited, limiting it to “a *serious* disregard of consequences” where those consequences “constitute a clear and present danger” to the “health, welfare, or safety” of the vulnerable adult. *Id.* (emphasis added). These are all terms that persons of ordinary intelligence would know and use.

Regardless, because the statute “clearly applies” to Mr. Kihuria’s conduct, he may not challenge it on vagueness grounds. *See Haley*, 117 Wn.2d at 740. There is no dispute that Mr. Kihuria had a duty of care with respect to his residents. The danger was clear and present because Arthur

and Thomas did not have the physical and mental skills to avoid common situations in the parking lot or office building, such as meeting people, dealing with traffic, or negotiating changing walking terrain and low obstacles. RP Vol. 2 at 101-03, 137; CABR 3-5, 19-24. The omission is Mr. Kihuria's physical absence, leaving these two especially vulnerable adults in a situation that was dangerous in light of their specific vulnerabilities. The danger to health, welfare, and safety arose from potential outcomes such as a fight between Thomas and bystanders, a traffic accident, or a fall. *Id.* Persons of ordinary intelligence are able to determine that individuals as compromised in their functioning as these two vulnerable adults face serious risks when alone in public places.

Mr. Kihuria has not demonstrated that vagueness is a significant question in this case.

D. Passing References To “Fair Labor Law And The US Constitution” Do Not Justify Review

“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Ursich v. Ursich*, 10 Wn. App. 2d 263, 278, 448 P.3d 112 (2019) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290). Mr. Kihuria argues that a requirement that he provide one on one care or keep his clients within eyesight at all times violates unspecified “fair labor law and the US Constitution.” Pet. for Rev. at 12. Insofar as the constitutional reference refers to anything other than his vagueness argument, it is entirely undeveloped and does not justify

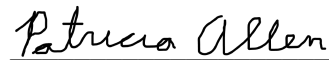
review. Similarly, Mr. Kihuria does not develop his reference to “fair labor law,” and it is far from clear whether that argument would be relevant to whether Mr. Kihuria neglected vulnerable adults. Whether he is entitled to additional compensation is simply not before the Court.

VII. CONCLUSION

The motion for discretionary review does not meet the requirements of RAP 13.4(b), and the Department respectfully requests this Court deny review.

RESPECTFULLY SUBMITTED this 2nd day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original document(s) to which this Declaration is affixed/attached, was filed in the Washington State Supreme Court, under Case No. 99404-8, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Charles M. Greenberg at cmg@triadlawgroup.com; vberryparalegal@gmail.com.

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

DATED this 2nd day of April, 2021, at Seattle, WA.



NICK BALUCA
Legal Assistant

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

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