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No. 89714-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; EL CENTRO DE LA RAZA, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; WAYNE AU, PH.D., on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANTS' RESPONSE TO BRIEFS OF *AMICUS CURIAE*

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I. INTRODUCTION

The *amici* advocate for the abandonment of constitutional principles that have guided this State's educational policy since territorial times. Washington's founders believed that a uniform course of basic education and local voter control are necessary to ensure that the State offers every child a program of basic education. They drafted a Constitution steeped in these beliefs—imposing a paramount duty on the State to make ample provision for education through a general and uniform system of public schools subject to the supervision of an elected Superintendent of Public Instruction (“Superintendent”). And they dedicated necessary funds and tax revenue to the exclusive support of the “common schools.”

The *amici* (like the State and the Interveners) do not dispute this constitutional history. Instead, the *amici* spin a misleading and irrelevant tale about charter schools as a tried and true panacea to what ails the State's public schools. And they rely on out-of-state decisions from states that do not share Washington's unique constitutional protections or history.

In fact, the effectiveness of the private charter model, where each charter school is its own privately operated education experiment, is a matter of significant debate. Even if the *amici*'s portrayal of the nature

and effectiveness of charter schools was true (which it is not) and based on reliable evidence (which it is not), the *amici*'s policy preferences cannot alter the duties and restraints imposed by the Constitution.

In sum, the *amicus* briefs contain nothing more than policy fluff, irrelevant case law from other jurisdictions, and cursory recitation of the flawed arguments already made by the State and the Intervenors. The Charter School Act cannot be reconciled with the Washington Constitution. The Act is therefore unconstitutional.

II. ARGUMENT

A. The *Amici*'s Policy Arguments and Factual Assertions Are Irrelevant to the Constitutional Issues on Appeal.

This Court should disregard the vast majority of the *amici*'s submissions, which advance irrelevant (and misleading) policy arguments,¹ rely on dubious advocacy studies,² and improperly rehash legal arguments already set forth in the State's and Intervenors' opening and reply briefs.³ See RAP 10.3(e) ("Amicus must...avoid repetition of matters in other briefs."). "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention

¹ See, e.g., Brief of *Amicus Curiae* First Scholars, et al. ("First Scholars Br.") at 1-20; Brief of *Amicus Curiae* Pacific Legal Foundation ("PLF Br.") at 13-20 (alleged benefits of charter schools); Brief of *Amicus Curiae* National Alliance for Public Charter Schools, et al. ("Alliance Br.") at 3-6 (charter school effectiveness).

² See, e.g., First Scholars Br. at 16-17 n.41-42; PLF Br. at 18-20; Alliance Br. at 3-5 n.1-5.

³ See, e.g., Alliance Br. at 7-19 (cursory recitation of Appellants' six constitutional claims)

by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.” U.S. Supreme Court Rule 37(1). These *amicus* filings suffer from the same failings as those recently dismissed in *Frias v. Asset Foreclosure Servs., Inc.*, No. 89343-8, at 7, ___ Wn.2d ___ (Wash. 2014) (slip opinion) (rejecting *amici*’s factual assertions, policy arguments, and materials and decisions from unrelated cases in other jurisdictions).

Ignoring the historical context of the drafting and adoption of the Constitution’s education provisions, the *amici* focus on policy arguments regarding the alleged effectiveness of charter schools, as well as the public school system’s failures and Washington business leaders’ hiring woes. But charters schools’ claimed effectiveness has no bearing on the issue before this Court: whether the Charter School Act violates the Washington Constitution. See *Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, 51 Wash. 498, 505, 99 P. 28 (1909) (“*Bryan*”) (“[Courts] have turned a deaf ear to every enticement, and frowned upon every attempt, however subtle, to evade the Constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail.”); *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 571, 536 P.2d 1202 (1975) (policy argument not relevant to statute’s constitutionality). This Court cannot

rewrite the Constitution drafted by the state's founders to suit the policy preferences funded by the wealthy elite.⁴

Moreover, the appellate record confirms that the *amici's* conclusions are hotly debated. The studies cited by the *amici* (many of which are not part of the record) do not demonstrate that charter schools have made consistent educational improvement in educating students, particularly students of color or students of lower socio-economic backgrounds. CP 656-60, ¶¶ 5-12 (expert declaration identifying critical flaws in pro-charter studies and appending other studies that demonstrate charter schools fail to produce significantly better results than public schools); *see also* CP 664-835, Exs. A-J. The *amici* also fail to address the many ways in which charter schools fail students, particularly students of color, students from lower socio-economic backgrounds, and other vulnerable student populations. CP 656, ¶ 5. In fact, based on the significant evidence that charter schools fail to offer an equal and adequate education to students of color and other vulnerable student populations, several prominent organizations advocating on behalf of communities of

⁴ The same wealthy individuals who exercised a disproportionate amount of influence over the direction and outcome of the I-1240 election also provide substantial funding through their foundations for several *amici*: the National Alliance of Public Charter Schools, the National Association of Charter School Authorizers and Stand for Children (representing *amici* on three of the four briefs at issue) all identify the Walton Family Foundation and the Bill and Melinda Gates Foundation as principal funders. *See* CP 1018, ¶ 2; CP 1021-23, Ex. A.

color have made the decision not to support charter schools. CP 660-61, ¶ 13; CP 812-13, Ex. K; CP 650-51, ¶¶ 5-8.

But, again, this case is not about the policy debate of whether charter schools are good or bad. The issue is whether the Charter School Act is constitutional. It is not.

B. The *Amici's* Reliance on Authorities from States that Do Not Share Washington's Unique Constitutional Protections Is Misplaced.

It is not surprising that, on appeal, none of the parties relied on charter school case law from other states. *See Frias*, No. 89343-8, at 7 (declining to consider unrelated cases interpreting laws of other jurisdictions).⁵ As the trial court recognized, the Washington Constitution's education provisions are "significantly different" than those of other charter school states. VRP 4. Yet, the *amici* rely on out-of-state authority to advocate constitutional interpretations at odds with the undisputed history of the adoption of Washington's Constitution and this Court's precedent.⁶ These arguments are merely an effort to distract from the many ways in which the Act violates the Washington Constitution.

⁵ Likewise, the charter school laws "enacted by the various States vary considerably[.]" *Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 329, 929 A.2d 113 (2007) (cited in NASCA Br. at 3).

⁶ *See, e.g., Alliance Br.* at 7-20; *PLF Br.* at 4-13.

C. Charter Schools Are Not Subject to the Same Public Oversight as Common Schools.

The National Association of Charter School Authorizers *Amici* (“NACSA *Amici*”) suggest that the Act’s use of the terminology “public charter schools” is sufficient to establish that charter schools are “public schools.” NACSA Br. at 2. But the issue before this Court is not simply whether charter schools are “public” or “private,” but rather whether charter schools satisfy the constitutional definition of “common schools.” As the trial court correctly determined, they do not. *See* Appellants’ Br. at 20-21 (common school is, among other things, subject to and under the control of local voters); Appellants’ Reply Br. at 9-21 (same).

In the misguided attempt to establish that charter schools are public schools, the NACSA *Amici* also incorrectly contend that charter schools are subject to sufficient public oversight. But the NACSA *Amici* do not and cannot dispute that charter schools are operated by private school boards, not the elected school boards that oversee the operations of public common schools. *See* Appellants’ Br. at 15-16; Appellants’ Reply Br. at 17-18. Similarly, while the NACSA *Amici* contend that charter schools also are subject to the oversight of charter authorizers, they cannot dispute that the members of the Charter Commission are appointed, not elected. *See* Appellants’ Reply Br. at 8, 18. Nor can the NACSA *Amici* dispute

that individual Commission members must be charter school supporters rather than reflective of the general electorate. *See id.* Thus, the NACSA *Amici*'s claim that the public has the means "for expressing disapproval at the ballot box and securing appropriate changes" regarding charter schools is without basis. *See* NACSA Br. at 10.

Tellingly, even the NACSA *Amici* acknowledge the limited role of authorizers in overseeing charter school performance, conceding that that much of that oversight is left to the private school board. *See id.* at 12 ("Simply, when one, as an authorizer, does not directly operate a school one is less inclined to identify with that school's efforts, its struggles, and its successes, or, especially, excuse its failures."). In fact, other than the suggestion that a charter contract "may not be renewed" if the charter school's performance falls in the bottom twenty-five percent of public school performance, RCW 28A.710.200(2) (emphasis added), the NACSA *Amici* do not identify any real oversight of charter schools by charter authorizers. The NACSA *Amici* fail to establish that charter schools are subject to sufficient public oversight, let alone that they are subject to local voter control sufficient to constitute common schools.

The Alliance *Amici* urge this Court to approve of privately controlled charter schools because other states have done so. But they fail to mention that none of these other states' constitutions require local voter

control. For example, the Alliance *Amici* point to the Michigan Supreme Court's holding that charter schools under the Michigan charter law qualify as "public schools," as required by the Michigan Constitution. Alliance Br. at 9 (citing *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 455 Mich. 557, 566 N.W.2d 208 (1997)). But, there, the Michigan Supreme Court specifically distinguished the Washington Constitution, which defines "common school" as one that is "common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district." *Council of Orgs.*, 455 Mich. at 577 (quoting *State v. Preston*, 79 Wash. 286, 289, 140 P. 350 (1914)). The Michigan Supreme Court concluded that, unlike Washington, Michigan does "not have a requirement in our state constitution that mandates that the school be under the control of the voters of the school district.... [A] review of our constitutional history shows that our forefathers envisioned public education to be under the control of the Legislature." *Id.*

Similarly, the California Court of Appeal rejected a local voter control challenge because California's constitution "vests the Legislature with sweeping and comprehensive powers in relation to our public schools[.]" *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134, 89 Cal. Rptr. 2d 745 (1999) (cited in Alliance Br. at 8); *see also State ex rel.*

Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 111 Ohio St. 3d 568, 581, 857 N.E.2d 1148 (2006) (“*Ohio Congress*”) (state constitution vests legislature with authority to create additional schools that are “not a part of” the public school district and are subject to different standards and requirements) (cited in *Alliance Br.* at 8-9). The Washington Constitution, by contrast, imposes limits on the legislature’s power to create a public common school system.

The Georgia Supreme Court recently struck down a charter school law that permitted a statewide agency to establish and supervise charter school because the state constitution vested local school boards with exclusive control over general K-12 education. *Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 267-68, 710 S.E.2d 773 (2011). “[L]ocal school boards are comprised of members who live in their schools’ districts and must be elected to their positions by the parents and taxpayers residing in the areas from which the students are drawn and the local schools taxes are raised,” while the statewide commission was comprised of appointed members who were not accountable to either the parents or the taxpayers. *Id.* at 273-74. The court explained that the Georgia legislature could not

alter the strictures of the constitutional provisions on education through laws. *Id.* at 272.⁷

The Alliance *Amici* attempt to distinguish *Gwinnett* because local school boards are not explicitly referenced in article IX. *See* Alliance Br. at 10-11. But there is no dispute that Washington’s founders (like Georgia’s) sought to protect local voter control. *Bryan*, 51 Wash. at 504. The founders did so by dedicating the “entire revenue derived from the state common school fund and the state tax for common schools” to the exclusive use of the common schools. *See* Const. art. IX, § 2. As in *Gwinnett*, the Act violates this constitutional requirement by dedicating restrict moneys to private charter schools that are not subject to local voter control.

D. The Washington Constitution, Unlike Other State Constitutions, Favors Uniformity Over Experimentation.

The Alliance *Amici* and the PLF *Amici* also rely on out-of-state cases upholding charter school laws as evidence that the Act does not violate the uniformity guaranteed under article IX, section 2 of the Washington Constitution. *See* Alliance Br. at 11-14 (Colorado and California); PLF Br. at 5-13 (Colorado, California, and Ohio). Unlike the Act, however, these other state laws do not broadly exempt charter schools

⁷ In 2012, Georgia voters amended the constitution to allow state-commissioned charter schools. Ga. Const. art. 8, § 5, ¶ 7. Nothing prevents Washington voters from amending the Constitution to allow charter schools.

from the constitutionally required basic education program. *See* Appellants' Br. at 16-17, 32-35; Appellants' Reply Br. at 28-35.⁸

Beyond dissimilarities in the charter laws, other states' legislatures are not subject to comparable constitutional restraints as Washington's, which must provide a "general and uniform" public school system, Const. art. IX, § 2. For example, Ohio's constitution does not include a uniformity clause and, thus, the legislature has authority to set "different standards" for charter schools. *Ohio Congress*, 111 Ohio St. 3d at 576. The Colorado constitution similarly allows the legislature to create charter schools "that operate parallel to the local public schools." *Boulder Valley Sch. Dist., RE-2 v. Colo. State Bd. of Educ.*, 271 P.3d 918, 928 (Colo. 2009). And the California legislature also enjoys "sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education." *Wilson*, 75 Cal. App. 4th at 1134 (internal citations omitted) (California constitution, which requires only a "system of common schools," vests the state legislature with "plenary power").

⁸ The Alliance *Amici* also wrongly contend that Washington charter schools are required to comply with basic education and discipline requirements. *See* Alliance Br. at 14. As explained in Appellants' Opening Brief and Appellants' Reply Brief, although charter schools must adopt the same basic education "goals" as public schools, they need not offer the basic education program or comply with discipline laws. Appellants' Br. at 16-17, 32-35; Appellants' Reply Br. at 28-35.

Notably, the Florida Supreme Court—interpreting the only other state constitution with a provision identifying basic education as the state’s paramount duty—held that a program providing public funding to private schools violated the state’s constitutional duty to provide a general and uniform public school system. *Bush v. Holmes*, 919 So.2d 392, 409-10 (Fla. 2006). Much like charter schools, the Florida private schools did not have to follow uniform public school laws, including the standard curriculum for basic education. *Id.* The *Bush* court’s decision hinged on Florida’s constitution, which (like Washington’s) prohibited the diversion of public school funds to a parallel system of schools operated by private organizations. *See id.* In fact, a Florida appellate court also struck down a statewide charter commission that created a “parallel system of free public education escaping the operation and control of local elected school boards.” *Duval Cnty. Sch. v. State*, 998 So.2d 641, 643 (Fl. App. Ct. 2008).

Like Florida, Washington’s Charter School Act creates a separate, parallel structure to existing common schools but with very different requirements, oversight, and control. This “alternative option” for basic education was rejected by the State’s founders. The Act therefore violates the “general and uniform” system requirement of article IX, section 2.

E. The Act Improperly Delegates the State’s Paramount Constitutional Duty to Provide for Education.

The *amici* incorrectly contend that the Act does not constitute an improper delegation of the State’s paramount duty under article IX, section 1 to provide for public education. Specifically, the Alliance *Amici* rely on out-of-state authority from California and New Jersey, which states do not establish the provision of education as the state’s “paramount duty.” Thus, in the California authority identified by the Alliance *Amici*, the legislature’s delegation of the education program to charter schools was not subject to the same heightened standards governing the determination of content for Washington’s basic education program. *Compare Wilson*, 75 Cal. App. 4th at 1134, with *McCleary v. State*, 173 Wn.2d 477, 521, 269 P.3d 227 (2012) (the Washington legislature has a constitutional duty to provide substantive content to “basic education” and the components of the “basic education program” required under article IX). Likewise, in the New Jersey authority identified by the Alliance *Amici*, the court also analyzed a delegation of legislative authority, not the delegation of a paramount constitutional duty. *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. 174, 230, 727 A.2d 15 (N.J. Super. Ct. App. Div. 1999), *aff’d as modified*, 164 N.J. 316, 753 A.2d 687 (2000).

The NACSA *Amici* also incorrectly suggest that the delegation of the State's paramount duty makes sense as a policy matter.⁹ Specifically, the NACSA *Amici* contend that delegation of the State's duty is an attempt to "moderate bureaucratic aspects of the public education system with a participatory stakeholder 'voice.'" NACSA Br. at 16. But the NACSA *Amici* fail to articulate how, for example, delegating decisions about the provision of education to private boards and organizations gives "parents concerned with their child's education," "employers who will hire public school graduates," or "community members, looking to public school students as the citizens being prepared to perpetuate democratic institutions" any voice in the provision of public education. *See* NACSA Br. at 16-17. To the contrary, the Act unconstitutionally delegates key decisions about the substantive content of the basic education program to private entities in violation of the Constitution. *See* Appellants' Br. at 37-42; Appellants' Reply Br. at 37-40.

F. The Act Violates the Requirement that the Superintendent Supervise All Matters Pertaining to Public Schools.

The Alliance *Amici* also incorrectly contend that the Act does not violate article III, section 22, which mandates that "[t]he superintendent of

⁹ In the attempt to distract from the Act's improper delegation, the NACSA *Amici* raise the wholly irrelevant issue of the delegation of authority in the collective bargaining context, which is not an issue before the Court and which is irrelevant to the delegation of the State's paramount duty to provide for education. *See* NACSA Br. at 14-15 (noting that collective bargaining relates to "teacher employment").

public instruction shall have supervision over *all matters* pertaining to public schools.” Const. art. III, § 22 (emphasis added). The Alliance *Amici* base this contention entirely on case law from other states interpreting constitutional provisions and charter school laws that are dissimilar from Washington’s Constitution and the Charter School Act. *See Alliance Br.* at 18.

For example, in the California case cited by the Alliance *Amici*, the legislature specifically declared that charter schools were under “the exclusive control of the officers of the public schools.” *Wilson*, 75 Cal. App. 4th at 1139 (quoting Cal. Assembly Bill No. 544, § 47615, subd. (a)(2)); *see also id.* at 1140 (noting that the California charter school law authorized the school board to revoke a charter and the superintendent to recommend revocation). Likewise, in the Michigan and Utah cases cited by the Alliance *Amici*, charter schools were subject to the supervisory authority of the state boards of education in those states, which were vested with supervisory authority over all public schools. *See Council of Orgs.*, 455 Mich. at 583-84; *Utah Sch. Boards Ass’n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1131 (Utah 2001).

As the Alliance *Amici* concede, the Act provides for the Superintendent’s supervision of charter schools “except as otherwise

provided” in the Act.¹⁰ *See* Alliance Br. at 19; *see also* Appellants’ Br. at 42-44 (articulating how the Act removes the Superintendent’s supervisory authority over charter schools). Thus, in contrast to California, Michigan, and Utah, which vest the appropriate public bodies with supervisory authority over charter schools, the Act unconstitutionally interferes with the Superintendent’s ability to supervise charter schools.

G. The Act Unconstitutionally Diverts Funds from Public Schools that *Currently* Lack Sufficient Basic Education Funding.

The diversion of public school funds to support private charter schools exacerbates the State’s ongoing violation of its paramount duty to provide ample funding for basic education for all children. Appellants’ Br. at 35-37; Appellants’ Reply Br. at 35-37. Contrary to the Alliance *Amici*’s suggestion, no other state court has rejected a similar constitutional claim. *See* Alliance Br. at 14-15 (citing New Jersey and Ohio cases). In fact, the New Jersey Supreme Court acknowledged that the diversion of public school funds to charter schools would be unconstitutional if it impeded the local public schools from offering an adequate basic education. *In re Grant of Charter Sch. Application of*

¹⁰ The Alliance *Amici* also incorrectly assert that “the Superintendent has only certain oversight responsibility, such as administering the funding system and academic requirements.” Alliance Br. at 19 (citing RCW 28A.150.250, 28A.655.070). While the cited statutes confirm that the Superintendent supervises matters such as funding and academic requirements, these statutes *do not* limit the Superintendent to supervising such matters, as any such limitation would violate article III, section 22.

Englewood on the Palisades Charter Sch., 164 N.J. 316, 335, 753 A.2d 687 (2000). Thus, the court held that upon a preliminary showing of potential harm, the state commissioner must consider the fiscal impact on local public schools when deciding whether to approve a charter school application and, if approved, determining the percentage of state per pupil allocation that would be diverted to the charter school. *Id.* at 336 (New Jersey charter law typically diverted 90 percent of the state per pupil allocation). And while the Ohio Supreme Court rejected a challenge to the devotion of state funds to charter schools, the decision was rendered several years *after* the court issued a writ of prohibition terminating litigation on the adequacy of the public school financing system. *See State ex rel. State v. Lewis*, 99 Ohio St. 3d 97, 104, 789 N.E.2d 195 (2003).

This Court recently held the Washington legislature in contempt for failing to adopt a plan or make meaningful progress toward full funding of the basic education program the legislature itself designed. Order, *McCleary v. State*, No. 84362-7 (Wash Sept. 11, 2014). While the path to adequate basic education funding remains uncertain, it is clear that taking funds *away* from this program to support private charter schools violates article IX, section 1.

H. The Charter School Act Diverts Local Public School Levies to Purposes Not Approved by Local Voters.

Appellants have demonstrated that the Act unconstitutionally takes local levy money away from the public schools to support private charter schools, a purpose not approved by local voters. *See* Appellants' Br. at 45-47; Appellants' Reply Br. at 44-47. The Alliance *Amici* concede that the Constitution restricts use of local levy money to its approved purpose but point to *Ohio Congress* to support the Act's funding provisions. But the Ohio charter law does not divert *any* local levy monies to charter schools. 111 Ohio St. 3d at 579. The Act's repurposing of locally approved moneys to private organizations is exceptional and, more to the point, unconstitutional.

III. CONCLUSION

The Charter School Act is an unconstitutional law that takes money away from struggling public schools to support private organizations' education experiments and that jeopardizes the educational uniformity that the State's founders sought to protect. The Act also strips the Superintendent of the supervisory authority reserved by article III, section 22, and redirects local levies to a purpose not approved by the voters under article VII, section 2(a). Accordingly, this Court should hold, as a matter of law, that the Charter School Act is unconstitutional.

RESPECTFULLY SUBMITTED this 14th day of October, 2014.

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Subject: League of Women Voters of WA et al., v. State of WA - Supreme Court Cause No. 89714-0: Appellants' Response to Briefs of Amicus Curiae

Attached for filing please find Appellants' Response to Briefs of *Amicus Curiae* and accompanying Proof of Service.

These pleadings are being filed by Jamie L. Lisagor on behalf of Appellants LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; EL CENTRO DE LA RAZA, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; WAYNE AU, PH.D., on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children.

Jamie Lisagor's is an attorney at the law firm of Pacifica Law Group. Her WSBA No. is 39946.

If you have any questions regarding this filing, please feel free to contact me at the contact information listed below.

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