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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAGDALENO GAMBOA and MARY J. GAMBOA,
Husband and wife,

Petitioners/Respondents,

v.

JOHN M. CLARK and DEBORAH C. CLARK,
Husband and wife,

Respondents/Appellants.

RESPONDENTS' SUPPLEMENTAL BRIEF

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IV. ARGUMENT

A. **Petitioners have failed to establish all elements of their claim for a prescriptive easement.**

Prescriptive easements are disfavored. *Kunkel v. Fisher*, 106 Wn. App. 599, 600 n. 11, 23 P. 3d 1128, *review denied*, 145 Wash.2d 1010 (2001). The claimant must prove use of the servient land that is: (1) open and notorious; (2) over a uniform route; (3) continuous and uninterrupted for 10 years; (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able assert and enforce his rights. *Kunkel*, 106 Wash. App. 602.

To commence the running of the prescriptive period, the Gamboas must make a distinct, positive assertion of a right adverse to the property owner. *Kunkel*, 106 Wash. App. 604; *Roediger v. Cullen*, 26 Wash. 2d 690, 706, 175 P. 2d 669 (1946); *Nw. Cities Gas Co. v. Western Fuel Co.*, 13 Wash. 2d 75, 84, 123 P. 3d 771 (1942). However, in unchallenged Finding of Fact 8, the trial court found that “[t]he Gamboas and the Clarks both used the roadway as described above without any disputes until 2008. Each party was aware of the other’s use of the roadway, but neither objected to the other’s use until a dispute arose in 2008.” CP 214.

Since they made no positive assertion of their claim to use the road until 2008, the Gamboas' adverse use, of the road did not commence until that year, if at all. Therefore, the Gamboas have not established the required elements of their claim for a prescriptive easement for continuous use for 10 years, adversity, and knowledge of the owner of the adverse use. It is essential that all of the elements of a prescriptive right must be shown for the Gamboas to prevail. *See Nw. Cities Gas Co.*, 13 Wash. 2d 84.

The Court of Appeals' majority opinion mentioned the trial court's finding that the parties jointly used the road without objection until 2008, but the Court of Appeals did not address the devastating impact of that finding upon the Gamboas' prima facie case. *Gamboas*, 180 Wn. App. 256, 321 P. 3d 1236, *review granted*, 332 P.3d 984 (2014). Nevertheless, this Court may affirm the decision of the Court of Appeals on any ground in the record. 5 C. J. S., Appeal & Error, § 990 (“*An appellate court generally is not confined to the grounds on which an intermediate court has based its judgment, but, in order to uphold such judgment, may consider grounds not noticed by the intermediate court, or which were not passed on because of the determination reached by the intermediate court.*”(footnotes omitted)). Because the Gamboas did not and cannot

satisfy all of the elements of their claim for a prescriptive easement, the majority opinion of the Court of Appeals should be affirmed.

B. The Court of Appeals' majority opinion correctly interpreted Washington law of prescriptive easements.

The Court of Appeals' majority opinion began its analysis of the relevant presumptions by looking to the principles discussed in the seminal decision in *Northwest Cities Gas Co. v. Western Fuel Co.* The first principle the Court of Appeals recognized was the presumption of permissive entry. *Gamboa*, 180 Wash. App. 267 (*Quoting Nw. Cities Gas Co.*, 13 Wash. 2d 84).

In *Northwest Cities Gas Co.*, 13 Wash. 2d 84, the Court relied upon *People's Sav. Bank v. Bufford*, 90 Wash. 204, 206, 155 P. 1068 (1916): “*There is a presumption attending always, that one who enters into the possession of the property of another, enters with the permission of the true owner, and holds in subordination to his title.*” Thus, for nearly one hundred years, the starting point in any discussion in Washington of prescriptive easements has been the presumption of permissive use upon entry of the land of another.

The presumption of permission is more than a mere presumption. It is a property right. “*The presumption that one entering upon the property of another does so in subordination to the title of the real owner*

is a valuable right of property.” *People’s Sav. Bank*, 90 Wash. 207. Any discussion of the issues in this case must give primacy to the presumption of permission.

The Court of Appeals’ majority opinion addressed the circumstances that allow a shift in the presumption from permissive to adverse use. Central to its analysis was the principle, recognized in *Northwest Cities Gas Co.*, that “*proof that the use by one of another’s land has been open, notorious, continuous, uninterrupted, and for the required time creates a presumption that the use was adverse, unless otherwise explained...*” *Nw. Cities Gas Co.*, 13 Wash. 2d 85. *Gamboa*, 180 Wn. App. 278-79. In particular, the Court of Appeals’ majority opinion concluded that the use of the qualifying phrase, “*unless otherwise explained,*” given its placement in the sentence, operates to prevent the presumption of adverse use in certain circumstances. *Ibid.*

The Court of Appeals’ majority opinion concluded that the Court’s language in *Nw. Cities Gas Co.*: “ ‘[c]reates a presumption...unless’ is telling us something about what can prevent the presumption from being created, not what overcomes it once it is created...” *Gamboa*, 180 Wn. App. 278-79. The Court of Appeals thus correctly applied the grammar rule of the “*last antecedent,*” in which, unless a contrary intention appears

in the document, qualifying words and phrases refer to the last antecedent.

In re Sehome Park Care Ctr., Inc., 127 Wash. 2d 781.

The Court of Appeals' majority opinion also considered the remainder of the sentence in *Northwest Cities Gas Co.*, concluding that, if "otherwise explained" means "unless disproved," *Northwest Cities* says the same thing twice in the same sentence. *Gamboa*, 180 Wash. App. 279. The Court of Appeals thereby avoided an absurd result. *Viking Properties, Inc. v. Holm*, 155 Wash. 2d 112, 122, 118 P.3d 322 (2005).

The Court of Appeals' majority opinion identified two "other explanations" that will prevent the presumption of adverse use. One is the presence of neighborly accommodation, as recognized in *Roediger*, 26 Wash. 2d 690. *Gamboa*, 180 Wash. App. 270. The other is the adverse claimant's use of a road built by the owner of the servient estate or his predecessors for their own use, as recognized in *Cuillier*, 57 Wash. 2d 624. *Gamboa*, 180 Wash. App. 272.

The analysis of the Court of Appeals' majority opinion regarding the effect of evidence of neighborly accommodation upon a presumption of adverse use finds support in other Washington decisions. In *Imrie v. Kelley*, 160 Wash. App. 1, 10, 250 P.3d 1045, *review denied*, 171 Wash.2d 1029 (2011), the court held that the findings in that case did not support adverse use, but instead supported an inference of neighborly

accommodation. In *Kunkel*, 106 Wash. App. 602, the court recognized that a use is not adverse if it is permissive, that permission can be express or implied, and that a permissive use may be implied in any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence. In *Crites v. Koch*, 49 Wash. App. 171, 177-78, 741 P.2d 1005 (1987), the practice of farmers parking their equipment on their neighbors' fields demonstrated a neighborly courtesy, and the court's finding of a prescriptive easement was therefore reversed. In *Miller v. Jarman*, 2 Wash. App. 994, 471 P.2d 704, *review denied*, 78 Wash.2d 995 (1970), the parties' reciprocal use of each other's driveway was found to support an inference of neighborly courtesy, and therefore permissive, not adverse, use. In each of those cases, evidence of neighborly accommodation was sufficient to support an inference of permissive use, thereby negating a finding of adverse use. In each of those cases, evidence of neighborly accommodation "*otherwise explained*" why the use was not adverse, overcoming any presumption of adverse use. *Imrie*, *Kunkel*, *Crites* and *Miller* thus lend support to the analysis of the majority opinion of the Court of Appeals in this case.

C. The Court of Appeals' majority opinion correctly interpreted *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004).

Drake v. Smersh, 122 Wash. App. 147, 89 P.3d 726 (2004) does not conflict with the holding of the Court of Appeals' majority opinion that evidence of neighborly accommodation overcomes the presumption of adverse use. In *Drake*, the court found that there was no evidence of neighborly accommodation. *Drake*, 122 Wn. App. 154-55. The trial court's findings of adverse use in *Drake* were uncontested. *Drake*, 122 Wash. App., 155. The record in *Drake* contained no evidence to controvert the unchallenged findings of fact that the plaintiff's use of the driveway was adverse. "*Because we cannot draw a reasonable inference of permissive use from the facts in this case and there are sufficient facts in the record supporting that Drake's use was adverse, we affirm the trial court's decision.*" *Drake*, 122 Wash. App. at 147-56.

Here, in contrast to *Drake*, the record is replete with evidence that the Clarks allowed the Gamboas to use the road as a matter of neighborly accommodation. Mr. Gamboa and Mrs. Clark had discussions about growing grapes. RP I p. 25.-26. Until 2008, Mr. Clark never voiced any objection to the Gamboas' use of the road. RP I p. 26. Prior to 2008, the Gamboas had no arguments with the Clarks. RP I p. 28. Mr. Gamboa observed Mr. Clark using the road with his farming equipment. RP I p.

36. Mr. Gamboa has seen Mr. Clark using the road since 1995. RP I p. 52. When Mr. Clark asked Mr. Gamboa to move his vehicles from the road, Mr. Gamboa complied. RP I p. 44. Mr. Gamboa complied with Mr. Clark's request to move his vehicles, as Mr. Gamboa did not want to interfere with Mr. Clark's farming and Mr. Gamboa wanted to be a good neighbor. RP I p. 75. The Clarks did not exclude the Gamboas from using the road. RP II p. 168. The Clarks and the Gamboas had a friendly relationship for years. RP II p. 168. The Clarks decided not to charge the Gamboas rent to use the road. RP II p. 169. Mr. Clark had not seen Mr. Gamboa blade the road, but if he had, he would not have objected, and he would have interpreted such an act as a neighborly gesture. RP II p. 170. In 2001, during a dry spell, Mr. Gamboa loaned Mr. Clark his tractor with a front loader. RP II p. 242. Mr. Gamboa tried to be as neighborly as he could. RP II p. 242. The facts of this case are far different than the facts in *Drake*. The evidence of neighborly accommodation in this case is sufficient to overcome any presumption that the Gamboas' use of the road was adverse.

Other factual differences distinguish *Drake* from this case. In *Drake*, the court found adversity in the use by the plaintiff's predecessor of a bulldozer to construct a driveway from his house to the road on the defendants' property. *Drake*, 122 Wash. App. 155. The Gamboas did not

construct a driveway to access the road on the Clarks' property. In *Drake*, the record did not show any relationship between the parties' predecessors to support an inference of permissive use. *Drake*, 122 Wn. App. 154-55. Here, in contrast, the parties maintained a friendly relationship for years prior to 2008. Thus, the facts in *Drake* do not remotely resemble the facts of this case.

In *Drake*, the court's citation to four other appellate decisions reveals the court's implicit recognition that a finding of permissive use is appropriate where there is evidence of a close personal relationship, neighborly sufferance, or a custom of neighborly courtesy between farmers. *Drake*, 122 Wn. App. 154-55 n. 20, 21, 22. (Citing *Kunkel*, 106 Wash. App. 602, *Granston v. Callahan*, 52 Wash. App. 288, 294, 759 P.2d 462, 1005 (1988), *Miller*, 2 Wash. App., 997, and *Crites*, 49 Wash. App. 171).

It is anticipated that the Gamboas will place much emphasis on the following excerpt from the opinion in *Drake*:

[W]e recognize on reflection that our analysis in *Kunkel* extended the *implication* of permissive use by neighborly accommodation too far when we applied a *presumption* of permissive use. At least one legal scholar criticizes *Kunkel* for applying a presumption of permissive use akin to the "vacant lands doctrine" in a case where both pieces of land were developed and in the face of Washington cases establishing that another's use of improved land is presumed hostile or adverse. Because

Kunkel has been interpreted to apply a presumption of permissive of permissive use in prescriptive easement cases involving developed land, we take this opportunity to clarify the rule. In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may *imply* that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements. In contrast, courts should only apply the “vacant lands doctrine” and its *presumption* of permissive use in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.

122 Wn. App. 153-54.

The Court of Appeals in *Drake* misinterpreted its earlier decision in *Kunkel*. The presumption of permission recognized in *Kunkel* was the presumption that arises upon entry on to the land of another, the same presumption that was recognized in *Nw. Cities Gas Co.*, 13 Wash. 2d 84, and *People's Sav. Bank*, 90 Wash. 206. In *Kunkel*, the plaintiff never proved his prima facie case of adverse use. Thus, the presumption of permission never shifted in *Kunkel* to a presumption of adverse use. Consequently, there was in *Kunkel* no need to discuss the how to overcome the presumption of adverse use, nor to discuss any of the other “*explanations*” to overcome that presumption. *Kunkel* did not recognize a presumption of permission in order to defeat a presumption of adverse use. There was thus no need for the court in *Drake* to clarify *Kunkel*.

The rule announced by the Court of Appeals in *Drake* is not inconsistent with the Court of Appeals' majority opinion. The court in *Drake* ruled that when the facts support an inference that use was permitted by neighborly sufferance or accommodation, a court may imply that use was permissive, and accordingly conclude the claimant has not established the adverse element needed to impose a prescriptive easement. *Drake*, 122 Wash. App. 154. Implicit in that ruling is the recognition that the inference of neighborly sufferance or accommodation is fatal to a presumption of adverse use.

Drake's limitation of the presumption of permissive use to undeveloped land occurred within its discussion of the effect to given to evidence of neighborly accommodation. *Drake*, 122 Wn. App. 153-54. *Drake* did not address the presumption of permission arising from entry on to the land of another that was recognized in *Nw. Cities Gas Co.*, 13 Wash. 2d 84, and *People's Sav. Bank*, 90 Wash. 206. Nor did *Drake* discuss the presumption of permission arising from an adverse claimant's use of a road built or maintained by a servient owner or his predecessor. *See Roediger*, 26 Wash. 2d 711; *Cuillier*, 57 Wash. 2d 627.

The Court of Appeals' majority opinion addressed the Gamboas' reliance upon *Drake*. *Gamboa*, 180 Wn. App. 273-80. The Gamboas argued that under *Drake*, a reasonable inference of neighborly

accommodation will not prevent a shift in the presumption from permissive to adverse use. According to the Gamboas, the presumption will still shift to adverse use, and the burden will then be upon the servient owner to rebut the presumption by showing that the use was permissive, and any evidence of neighborly accommodation may, but need not, be found persuasive by the trier of fact. As explained so well by the Court of Appeals, under the Gamboas' reading of *Drake*, introduction of evidence of neighborly accommodation would trigger a substantial evidence review in which the trial court would be free to accept or reject as persuasive the evidence offered of neighborly accommodation. Such a reading would force the servient owner to demonstrate on appeal that he had introduced evidence of permissive use so overwhelming that, as a matter of law, it rebutted the presumption of adverse use. The Court of Appeals, however, noted that the court in *Drake* inquired whether the defendant had provided any evidence of neighborly accommodation-suggesting that if it had, the defendant would have been entitled to an implication that the plaintiff's use of the road was permissive. *Gamboas*, 180 Wash. App. 274. The Court of Appeals noted that the court in *Drake* found no evidence of neighborly accommodation. The Court of Appeals concluded that the fact the court in *Drake* could not draw an inference of reasonable accommodation was

significant, because if it could, it would affect the applicable presumptions and burden of proof. *Gamboa*, 180 Wash. App. 275.

The Court of Appeals also rejected the Gamboas' reading of *Drake* that evidence of neighborly accommodation would not prevent a shift to a presumption of adverse use, unlike cases of vacant, unenclosed land. The Court of Appeals concluded that *Roediger* did not treat a vacant land case as uniquely entitled to a presumption of adverse use, concluding instead that permissive use may be implied in any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence, and in noting the presumption of permission arising from the use of a neighbor's road. *Gamboa*, 180 Wash. App. 276.

The Court of Appeals' majority opinion also noted that courts of other jurisdictions do not refer to a "*vacant lands doctrine*" and that the reporter's note to Restatement (Third) of Property: Servitudes § 2.16 collected four categories of case *Drake*, that overcome the presumption of non-permissive use: (1) wild, vacant, unenclosed land, (2) a road built and used by the owner, (3) a close relationship between adverse claimant and owner, and (4) local custom of neighborly accommodation. *Gamboa*, 180 Wash. App. 276.

The Court of Appeals' majority opinion also noted that from the time that *Northwest Cities Gas Co.* was filed, the principle that the initial presumption of permission can shift to a presumption of adverse use has always been subject to the qualifier that unobjected use will shift the presumption "*unless otherwise explained*" (*Quoting Nw. Cities Gas Co.*, 13 Wash. 2d, 85). *Gamboa*, 180 Wash. App. 277. The Court of Appeals further concluded that the qualifier "*otherwise explained*" is reasonably read as contemplating exceptions like the exception for vacant land and the general nature of the qualifier contemplated that there might be other explanations sufficient to prevent a shift in the presumption. *Id.* The Court of Appeals also recognized both *Roediger* and *Cuillier* as cases in which the Supreme Court identified "*other explanations*" of unobjected-to use that are sufficient to prevent a shift to a presumption of adverse use. *Id.*

The Court of Appeals' majority opinion concluded that failure to recognize that a reasonable inference of neighborly accommodation overcomes a presumption of adverse use would fail to extend any meaningful protection to the acquiescent neighbor who will often lose without such a rule. *Gamboa*, 180 Wn. App. 279-80. Such a failure would fail to satisfy the rule that prescriptive easements are disfavored. *Kunkel*, 106 Wn. App. 600 n. 11.

The Court of Appeals' majority opinion presents ample reasons to reject the Gamboas' argument regarding *Drake*.

D. The Court of Appeals' majority opinion correctly analyzed *Roediger v. Cullen*, 26 Wash. 2d 690, 175 P.2d 669 (1946) and *Cuillier v. Coffin*, 57 Wash. 2d 624, 358 P.2d 958 (1961).

The Court of Appeals' majority opinion recognized that an adverse claimant's use of a road located on another's property is an "explanation" that defeats a presumption of adverse use. *Gamboa*, 180 Wash. App. 272. The record in this case provides strong support for this explanation. With the exception of the entry off Allen Road, the road is located on the Clarks' property. EX 69; CP 187. Unchallenged Finding 8 found that each of the parties used the road without objection by the other until 2008. CP 214. These facts strongly resemble the facts in *Cuillier v. Coffin*, *Kunkel v. Fisher* and *Imrie v. Kelley*. In each of those cases, the adverse claimant's use of the road located on a neighbor's land was found to be permissive, and not adverse. *Cuillier*, 57 Wn. 2d 627-28; *Kunkel v. Fisher*, 102 Wn. App. 604-05; *Imrie v. Kelley*, 160 Wn. App. 9-10. Both *Roediger v. Cullen* and *Cuillier v. Coffin* recognized the joint use of a road on another's land as giving rise to a presumption of permissive use. *Roediger*, 26 Wash. 2d 711; *Cuillier*, 57 Wash. 2d 627. Thus, both the record in this case and established authority support the Court of Appeals'

majority opinion that the Clarks were entitled to a presumption of permissive use. *Gamboa*, 180 Wash. App. 282.

From its analysis of the decisions in *Roediger* and *Cuillier*, the Court of Appeals' majority opinion announced the following rule: "*Evidence that supports a reasonable inference of neighborly accommodation or that demonstrates no more than a claimant's noninterfering use in common of a road constructed by his neighbor (or the neighbor's predecessor) will prevent a shift from the initial presumption of permissive to adverse use.*" *Gamboa*, 180 Wash. App. 280.

The Court of Appeals took care to point out that the rule it announced did not mean that the servient owner would always prevail. Rather, the Court of Appeals noted that a claimant may still establish a prescriptive right "*when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement.*" (Quoting *Nw. Cities Gas Co.*, 13 Wash. 2d 87). *Gamboa*, 180 Wash. App. 280.

It will not serve for the Gamboas to argue that because it is unknown who built the road, the rule announced in *Cuillier* does not

apply. Neither *Cuillier* nor *Kunkel* nor *Imrie* required proof as to who constructed the road as a requirement for the rule adopted in *Cuillier*.

E. The Court of Appeals' majority opinion correctly concluded that evidence of neighborly accommodation prevents a presumption of adverse use from arising and preserves the initial presumption of permission.

The Court of Appeals' majority opinion concluded that a servient owner who presents evidence from which to infer neighborly accommodation prevents a presumption of adverse use from arising and preserves the initial presumption of permissive use. *Gamboa*, 180 Wash. App. 278.¹ The majority opinion's conclusion finds support in *Anderson v. Secret Harbor Farms*, 47 Wash. 2d 490, 288 P.2d 252 (1955). *Anderson* illustrates how a presumption in a prescriptive easement case is defeated. In *Anderson*, the court ruled that "*just as soon as there is proof that the use of another's land has been open, notorious, hostile,*

¹ The majority opinion criticized *Cuillier* for holding that unchallenged use for the prescriptive period is a circumstance from which an inference of adverse use may be drawn, as opposed to *Nw. Cities Gas Co.*'s conclusion that such use creates a presumption. *Gamboa*, 180 Wash. App., 278. *Cuillier*'s holding of an inference has been repeatedly followed by Washington courts. See *Imrie*, 160 Wash. App., 9; *Lingvall v. Bartmess*, 97 Wash. App. 245, 252, 982 P.2d 690 (1999); *Smith v. Breen*, 26 Wash. App. 802, 805, 614 P.2d 671 (1980); *Washburn v. Esser*, 9 Wash. App. 169, 171 n. 1, 511 P.2d 1387 (1973); *Miller*, 2 Wash. App., 997. The majority opinion's criticism of *Cuillier* must therefore give way to the wide acceptance of *Cuillier* given in *Imrie*, *Lingvall*, *Smith*, *Washburn* and *Miller*. Even if a presumption of adverse use is present here, the evidence of neighborly accommodation presented by the Clarks is sufficient under *Roediger*, *Cuillier*, *Imrie*, *Kunkel*, *Granston*, *Crites* and *Miller* to destroy such a presumption.

continuous, uninterrupted, and for the required time, the presumption of a permissive use is spent; it disappears....” 47 Wn. 2d 494.

While *Anderson* described how a presumption of permissive use is defeated, there is no reason to believe that *Anderson* does not also support defeat of a presumption of adverse use by evidence of neighborly accommodation. *Anderson* compels the conclusion that the presumptions of permissive and adverse use in prescriptive easement cases are defeated by introduction of contrary evidence. *Anderson* therefore supports the Court of Appeals’ majority opinion that evidence supporting a reasonable inference of neighborly accommodation or noninterfering use of a neighbor’s road will prevent a shift from the initial presumption of permissive to adverse use.

Anderson compels the conclusion that the presumption of permissive use in this case was never defeated, as unchallenged Finding 8 establishes that the Gamboas never met their *prima facie* case of adverse use. CP 214.

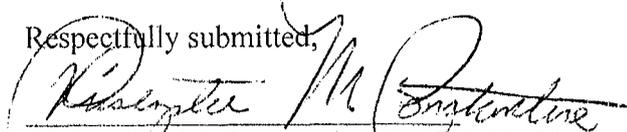
Anderson undermines the dissenting opinion in this case. According to the dissent, an essential attribute of a Morgan presumption is that once contradictory evidence is produced, the presumption does not disappear. *Gamboa*, 180 Wash. App. 289. Under *Anderson*, production of contradictory evidence makes the presumption disappear. 47 Wn. 2d

494. *Anderson* thus undermines the dissent's characterization of the presumptions in this case as Morgan presumptions.

IV. Conclusion.

The Court of Appeals' majority opinion is well grounded in the principles announced in *Northwest Cities Gas Co. v. Western Fuel Co.*, *Roediger v. Cullen*, and *Cuillier v. Coffin*. The Court of Appeals' majority opinion should be affirmed.

Respectfully submitted,



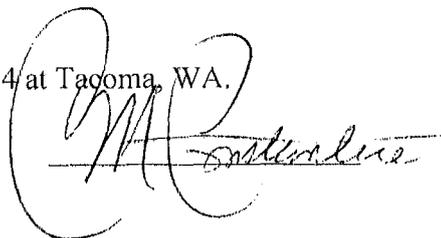
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V. Certificate of Mailing

The undersigned does hereby certify that on October 1, 2014, he served a copy of the Respondents' Supplemental Brief, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

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Dated this 1st day of October, 2014 at Tacoma, WA.

A handwritten signature in black ink, appearing to read "Kevin Montoya", written over a horizontal line. The signature is stylized and cursive.

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Attention: Clerk

Re: *Gamboa v. Clark*, No. 90291-7

Enclosed please find the original of Respondents' Supplemental Brief and my letter of this date. Please file these documents with the Court.

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