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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE WELFARE OF

K.M.M.,

MINOR CHILD.

**RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH
SERVICES' SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

K.M.M., born in 2002, has been in foster care since 2009. K.M.M., in her testimony and through counsel, supported the termination of her father's rights due to the harmful relationship between herself and the father, J.M. The father claims that, because he has addressed serious individual deficits that existed at the beginning of the dependency, the trial court could not have found him currently unfit to parent K.M.M. The father's claims misread the court's findings that supported termination and he intertwines that misreading with a contention that the Department did not provide all necessary services that could have permitted reunification with the child.

The record demonstrates the dependency court supervised a long dependency in which the Department provided services and worked collaboratively with the parties to address issues preventing reunification. The trial court's findings, supported by substantial evidence, demonstrate that contact between K.M.M. and J.M. became harmful to her. Due to the father's own actions, services to reinitiate such contact failed and reunification became impossible. Facing these facts, the court entered well supported findings, detailing that J.M. was currently unfit to provide parental care for K.M.M. See CP 112 (Finding that "Because the attachment bond no longer exists, [J.M.] *is currently unable to parent*

[K.M.M.]” (emphasis added). The court also found the Department had demonstrated each of the six elements defining parental unfitness under RCW 13.34.180, which include offering or providing all services capable of reuniting J.M. with K.M.M. This Court should affirm and hold that the findings address J.M.’s current unfitness to parent K.M.M. and establish the constitutionally required showing to terminate his parental rights.

II. ISSUES PRESENTED

1. Whether the trial court’s findings demonstrate current parental unfitness where the court found a current inability to parent as a result of the absence of an attachment bond and the inability of the father to be a parent to the child, or have any relationship with her?
2. Whether substantial evidence supports the trial court’s findings that all necessary services capable of correcting the parental deficits and reuniting the child were offered or provided to the father?

III. STATEMENT OF THE CASE

J.M. fathered two young girls, K.M.M. and K.M., with the mother, D.C. CP 58. Both parents had substance abuse and domestic violence issues that caused the Department to file dependency petitions in February 2009 on six-year-old K.M.M. and on the infant K.M. CP 58. The mother then had another child, K.C., in 2010, by a different father. CP 60.¹

K.M.M. had already suffered significant developmental delays

¹ The mother, D.C., chose to relinquish her parental rights and, thus, she is not a party to this appeal. K.C. and K.M. remain in her care.

when she was removed from her parents' care in February 2009. She had emotional, social, and intellectual delays. RP 66. She had significant problems attaching to, and relying on, adults to meet her needs. RP 64, 66. When she was removed from her parents, six-year-old K.M.M. was parentified, in that she was attempting to take care of her infant sister, K.M., and make sure that K.M.'s needs were met. RP 64.

K.M.M. began individual therapy with Cory Staton to address her emotional and developmental issues in September 2009. RP 63. Ms. Staton testified that the therapy addressed K.M.M.'s need to learn how to develop secure attachments. RP 66. The foster parents, as her day-to-day caretakers, were involved in some of K.M.M.'s individual therapy sessions. RP 68. The plan was for the biological parents to become involved in this therapy as she was transitioned home and as they became her primary caretakers. RP 69. Contrary to the father's contentions, K.M.M.'s individual therapy was not focused on developing specific attachments, but rather on having K.M.M. learn how to rely on adults in general. RP 71. For example, developing a secure attachment to the foster parents would make it easier for K.M.M. to attach to her parents. RP 139-40. A child can have multiple attachments. RP 142. Tom Sherry, another experienced therapist who later evaluated K.M.M., agreed with this

approach. RP 267, 268. The Department also offered services to both parents to address their deficits. CP 58-62.

In April 2012, K.M.M., who was then age nine, began to resist participating in visits with her parents. RP 29-30. The court appointed an attorney to represent K.M.M. RP 31. Ms. Stanton, who continued to provide individual therapy to K.M.M., consulted with a child psychiatrist over the issue of parent-child visitation. RP 49, 81, 83. The parties also held meetings to explore ways to resume visits and came up with alternative solutions, including seeking an outside family therapy expert to address the issue. RP 30-31, 83; Ex. 36, Ex. 37. As a result of this agreement, the dependency court, in July 2012, ordered an experienced family therapist, Tom Sherry, to consult with the parties and recommend the best way to resume visits. Ex. 13, CP 323-24.

During August and September 2012, Mr. Sherry met with all of the parties and reviewed documents as part of his evaluation. RP 225, 228-29, 237. He also concluded that family therapy for purposes of reunification could not occur. RP 243. Mr. Sherry opined that it would be harmful and detrimental to K.M.M. to force her to visit with her parents. RP 272. He concluded that her decision not to visit her parents was tied to her sense of self and needed to be respected. RP 272. Mr. Sherry, however, developed a parent-child contact plan in which the parents would have incidental

contact with K.M.M. during scheduled sibling visits. RP 238. If the sibling contact was maintained, and K.M. and K.C. were then successfully returned to the mother, K.M.M. might be open to resuming greater contact with the parents. RP 238. Thus, once the two younger siblings were placed with the mother, K.M.M. would be present at the picking up and dropping off for visits between the children and encounter the mother in a natural context. RP 239-41. The father would later be present at the child exchanges for sibling visitation purposes. RP 241. The purpose of this plan was to help K.M.M. become more open and willing to interact with her parents by facilitating natural contacts incidental to K.M.M.'s ongoing visits with her younger siblings. RP 238.

Mr. Sherry also recommended some limited family therapy, once these incidental contacts occurred, although not for the purpose of reunification. RP 243. Instead, this family therapy would support the children in their different placements, in which K.M.M. remained with her foster parents, the other two children would be placed with the mother, and the younger sibling K.M. continued her on-going visits with the father. RP 242-43, 246.

The parties then implemented Mr. Sherry's plan for incidental parent-child contact during scheduled sibling visits. K.C. and K.M. were first placed in the mother's care in October 2012. CP 61. The social

worker, the guardian ad litem, and the child's therapist worked with K.M.M. to prepare her for the incidental contact with her mother during her visits with her siblings. RP 321-323. There were two such incidental contacts in November 2012 between the mother and K.M.M. RP 325-26.

The father was then introduced to these incidental contacts with K.M.M. during subsequent sibling visits. RP 326. Social worker Patty Pritchard prepared the father for his first incidental contact visit with K.M.M., instructing him to avoid overwhelming the child and to avoid being upset if she would not engage with him. RP 326-27, 364, 365. The social worker, the guardian ad litem, and the child's therapist also prepared K.M.M. for the contact as well. RP 328. The father, however, did not comply with his portion of this plan.

At the father's first incidental contact visit in December 2012, K.M.M. hid in the back of the van. RP 328. J.M., however, approached the van talking "very loudly," opened the door of the van while continuing to talk very loudly to K.M.M., and then put his hands on her, while she was attempting to hide from him. RP 328-29. K.M.M. was very scared, very disturbed, and upset by these events. RP 289, 329. The father did not understand the trauma he had caused the child by departing from the agreed incidental contact plan. RP 330. K.M.M. remained very upset at what had happened and refused to see the parents. RP 329. As a result, the

dependency court suspended visits between the parents and K.M.M., finding a threat to her health, safety and welfare. RP 389. At subsequent review hearings, the dependency court continued to suspend visitation due to the threat to K.M.M.'s health, safety and welfare. Ex. 14-16.

At the December 2012 review hearing, the dependency court also ordered family therapy, as detailed by Mr. Sherry in support of the children's different placements and their on-going visitation. Ex. 14; RP 242-43, 246. K.M.M., however, refused to see her siblings and would not participate in any form of family therapy. RP 393, 401, 450.

A termination trial began in October 2013. In her testimony, K.M.M. consistently referred to J.M. and D.C. by their first names, and referred to the foster parents as her parents. *See, e.g.*, RP 282, 284-85, 303. K.M.M. does not trust her biological parents and does not want to visit with them. RP 287-88. She instead wants to be adopted by the foster parents. RP 303. J.M. testified that he believed K.M.M. had been coached and that she should be placed in a different foster home. RP 539, 541-42.

The trial court found all court-ordered services had been offered or provided to the father. FOF IX, CP 107; FOF XIII, CP 108. The court also found that reunification services are not capable of resolving this case. FOF IX, CP 107. The court found that "because the attachment bond no longer exists, [J.M.] *is currently unable to parent* [K.M.M.]." CP 112

(emphasis added). In explaining the father's current parental unfitness, the court found the parent-child relationship, the attachment bond, no longer exists and that it cannot now be repaired. FOF XV, CP 109. The court found that the child's psyche reached the point where K.M.M. would no longer tolerate or engage in visits with her parents. FOF XII, CP 108.

IV. ARGUMENT

The trial court found that J.M. could not parent K.M.M. due to the absence of any relationship or any attachment bond. The trial court also found that the Department had provided services to address this barrier to any potential reunification. However, the father's own actions undermined any potential success of these services. Faced with this evidence, the trial court properly found that there are no other services that are capable of reunifying this father and child. Each of the required findings under RCW 13.34.180(1) were established by clear, cogent, and convincing evidence, and demonstrate current parental unfitness as defined by state law.

A. The Court Properly Ruled That the Father is an Unfit Parent Due to the Absence of Any Parent-Child Relationship, a Relationship That Cannot be Repaired.

1. A Termination Case First Examines Whether a Parent is Currently Unfit to Parent the Child at Issue.

"A parent has a constitutional due process right not to have his or her relationship with a natural child terminated in the absence of a trial

court finding that he or she is currently unfit to parent the child.” *In re Welfare of A.B.*, 168 Wn.2d 908, 919, 232 P.3d 1104 (2010). To satisfy this constitutional mandate, “Washington’s termination statute requires certain statutory factors be proved by clear, cogent, and convincing evidence before termination may be considered. See RCW 13.34.180(1), .190(1)(a).” *In re the Welfare of C.S.*, 168 Wn.2d 51, 55, 225 P.3d 953 (2010), (citing *In re the Dependency of K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995). “[S]atisfaction of the six statutory elements of subsection .180(1) is an implicit finding of unfitness, satisfying the due process requirement that a court must find parents currently unfit before terminating the parent-child relationship.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 577, 257 P.3d 522 (2011) (citing *K.R.*, 128 Wn.2d at 141-42). In *A.B.*, this Court emphasized how the first prong of a termination case must focus on the current unfitness to parent the child, recognizing that current unfitness can found explicitly or implicitly. *A.B.*, 168 Wn.2d at 920. But, that finding should be inferred only when all the facts and circumstances in the record demonstrate it was intended. *Id.* at 921.

2. Current Parental Unfitness is a Case Specific Evaluation of the Parent and Child Before the Court.

The father argues as if the trial court’s findings about how he has addressed his individual personal deficits exist in a vacuum. He gives no

consideration to the trial court's findings about the actual parent-child relationship at issue. Motion for Discretionary Review at 11. But, Washington courts have never held that the parental unfitness inquiry examines only the individual personal deficits of a parent or whether a person is generally fit in the abstract. Unfitness relates to the specific parent-child relationship at issue. As a result, a parent's unfitness, and a trial court's ruling on the issue, may take many different forms.

For example, a parent can be unfit if the parent lacks the necessary capacity for giving parental care. *In re Aschauer*, 93 Wn.2d 689, 694, 611 P.2d 1245 (1980). A parent can also be unfit if the parent cannot meet a child's basic needs. *In re Custody of B.M.H.*, 179 Wn.2d 224, 235-36, 315 P.3d 470 (2013). Current parental unfitness may be based on a finding that the parent could not provide the child with "*basic nurturance*, health, or safety." *In re Welfare of A.B. (A.B. II)*, 181 Wn. App. 45, 61, 323 P.3d 1062 (2014) (emphasis added); RCW 13.34.020. Under RCW 13.34.020, "health" includes both physical and mental health.

The Court should reject the father's overbroad claim that a termination cannot occur if he becomes "fit" in the abstract. A trial court must apply RCW 13.34.180 to determine if that individual "at the time of trial, is currently unfit to parent *the child*" who is before the court. *A.B.*, 168 Wn.2d at 908 (emphasis added). The *A.B.* decision did not change this

principle. The *A.B.* majority reversed because the conflicting findings in that case made it impossible to discern if the trial court actually found that the father “was currently unfit to parent *his daughter.*” *Id.* at 922 (emphasis added). The dissent similarly evaluated current parental fitness by looking at the inability for that father and that daughter to forge the emotional attachments necessary for that child’s well-being. *Id.* at 935 (Chambers, J., dissenting).

3. The Trial Court’s Findings Demonstrate Current Parental Unfitness Consistent with *A.B.*

Consistent with the *A.B.* decision that findings must demonstrate current parental unfitness, the trial court found that “because the attachment bond no longer exists, [J.M.] *is currently unable to parent* [K.M.M.]” CP 112 (emphasis added). This finding is supported by substantial evidence and explained by the specific facts present in this case, and the particular parent and child at issue.

Here, the trial court found that the parent-child relationship, “the attachment bond,” no longer exists between these two individuals. FOF X, CP 107; FOF XIV, CP 108; FOF XV, CP 109; FOF XVIII, CP 109-10. Further, “[the child’s] psyche got to the point where she would no longer tolerate or engage in visits with her biological parents.” FOF XII; CP 108. The child has taken the “strong position that she will not engage with her

parents.” FOF XV, CP 109. After years of supervising this dependency and services, the trial court found that any further attempts to repair this absent bond would cause great harm to the child. FOF X; CP 107; FOF XV, CP 109. The dependency court had repeatedly suspended visitation between J.M. and K.M.M. due to the threat to her health, safety, and welfare. Thus, due to the lack of an attachment bond and the lack of any parent-child relationship, the father is currently unable to provide the child with “basic nurturance, health, or safety.” See *A.B. II*, 181 Wn. App. at 61. J.M. cannot have a relationship with K.M.M., let alone parent her.

The Court of Appeals decision correctly found that there is no meaningful distinction between a parent who is unable to parent a child, a parent who is unable to meet a child’s needs including basic nurturance, and a parent who cannot meet the child’s needs. Opinion at 29-30; *Aschauer*, 93 Wn.2d at 694 (a parent is unfit if she lacks the necessary capacity for giving parental care); *B.M.H.*, 179 Wn.2d at 235-36 (a parent is unfit if she cannot meet a child’s basic needs). Accordingly, there is no conflict with *A.B.* The findings here, unlike those in *A.B.*, establish a current inability to parent K.M.M.

4. Current Parental Unfitness is Not Restricted to Whether an Individual Addressed the Individual Personal Deficits That Existed at the Beginning of a Dependency.

The trial court's specific findings of parental unfitness are also consistent with the Legislature's judgment that parental unfitness encompasses more than just an individual's personal deficits. Unfitness may arise from the absence of a parent-child relationship due to a parent's lengthy failure to provide for a child's basic needs. For example, the failure of a parent to maintain contact with a child creates a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned home. RCW 13.34.180(1)(e)(iii). Clearly, the lack of a parent-child relationship may be a significant deciding factor in determining current unfitness, regardless of whether an individual engaged in treatment for past substance abuse or domestic violence problems. The same point also holds true in a parental abandonment case.

Again, the key lesson from prior rulings by this Court is that a trial court must evaluate the actual ability to parent a particular child, not just a parent's individual personal deficits. For example, the decision in *In re the Welfare of C.S.*, 168 Wn.2d 51, 225 P.3d 953 (2010), concerned a mother who had remedied her individual drug use issues, but could not parent her special needs child. The Court in that decision was not concerned with how a

particular “deficit” or “condition” was labeled, but rather whether services were offered to address the “deficit” or “condition.” The Court noted that services should go beyond individual “parental deficits” and address “conditions” preventing reunification, regardless of how the issue is labeled. *C.S.*, 168 Wn. 2d at 56, n.3. The necessary corollary to this analysis is that if the mother in *C.S.* remained unable to parent her child, after receiving specific services on how to parent this special needs child, then termination could be appropriate because all necessary services would have been provided to her and, although now sober, she may still be currently unfit to parent that specific child. *C.S.*, 168 Wn. 2d at 58.

Thus, the issue at trial was not whether J.M. continued to have substance abuse problems. Instead, the court had to examine whether J.M. could provide K.M.M. with basic nurturance, health, and safety. He was not able to do this in 2009, due to his substance abuse, domestic violence, and parental neglect issues, which had left six-year-old K.M.M. with significant social, emotional, and developmental delays. FOF XI, CP 107. The evidence demonstrated that J.M. could not parent K.M.M. more than four years later, at the time of trial, because he had no parental relationship with her, and there was no prospect for ever creating such a parental relationship. FOF X, CP 107, FOF XIV, CP 108. While the facts here required a more searching examination by the trial court compared to a

case involving a parent with an on-going methamphetamine addiction, the facts nonetheless constitute current parental unfitness.

B. Substantial Evidence Supported the Finding That All Necessary Services Capable of Correcting the Father's Parental Deficits Were Offered and/or Provided.

The father argues that substantial evidence does not support the trial court's finding that all necessary services, capable of correcting his parental deficits, were offered or provided. He mischaracterizes the record to claim the Department failed to offer him family therapy and that bonding and attachment services were offered to the foster parents, but not to him. Substantial evidence, however, supports the findings that all services capable of reuniting K.M.M. with J.M. have been offered or provided, and that there was no probability that family therapy, or any other reunification service, could remedy the lack of a parent-child relationship between J.M. and K.M.M.

1. Family Therapy Could Not Remedy the Parental Unfitness, the Lack of a Parent-Child Relationship.

J.M. first claims, based on a mischaracterization of the record, that the Department failed to offer him "family therapy" or other reunification services. *See* Motion at 14. With the agreement of all parties, the dependency court, on July 5, 2012, ordered Tom Sherry, a family therapist, to perform an evaluation on the appropriateness of parent-child

visitation and how it could occur. Ex. 13. Patty Pritchard had just taken over as the social worker on the case. RP 313. She quickly submitted an "exception to cost" form to obtain funding for family therapist Tom Sherry to assess the family system and provide recommendations to move the case forward. Ex. 36, CP 436. About three weeks later, on August 17, 2012, the Department held a Child Protective Team (CPT) meeting. Ex. 37, CP 438. The meeting notes indicate that overnight visits were to soon begin for the mother and the two other children as part of a reunification. Ex. 37, CP 438. The CPT participants noted that "Tom Sherry, an independent therapist – will be working with K.M.M. and [the parents] concerning visitation and reunification." Ex. 37, CP 438, RP 358-59.

During August and September 2012, Tom Sherry reviewed documents and met with both parents, other individuals, and with K.M.M. twice, once at the beginning and again at the end of his evaluation. RP 225, 228-29, 237. Mr. Sherry reported that family therapy, as part of a reunification process, could not occur in this case. RP 243, 313, 358-59. K.M.M. did not want to participate in visits and her decisions needed to be respected in order to avoid harm to her. RP 237, 272. Instead, Mr. Sherry developed a plan for incidental contact during sibling visits, so K.M.M. could have contact with her parents and ideally progress to even more interaction with the parents. RP 238.

This record shows that services were offered but failed and further services would have been futile. "Where the record establishes that the offer of services would be futile, the trial court can make a finding that the Department has offered all reasonable services." *In re C.S.*, 168 Wn.2d at 56 n.2. Such is the case here. Substantial evidence supports the findings that there was no reasonable probability that family therapy, or any other kind of reunification therapy, could remedy the lack of a parent-child relationship. FOF XIII, CP 108; FOF XIV, CP 108.

The substantial evidence includes Tom Sherry's conclusion that family therapy, as part of a reunification process, would not work. RP 243. It included the parties' failed attempt to implement the sibling contact plan where J.M. did not comply with the plan and ended up causing great trauma to the child during his first incidental contact. RP 238, 289, 329. It includes the evidence that K.M.M. refused to see either of her parents again and evidence that to force K.M.M. to visit with the father would be harmful and detrimental to her. RP 272, 289, 329, 390-91. The dependency court appropriately suspended further visits due to the harm J.M. had caused the child. RP 289, 329, Ex. 14, CP 333. Visits remained suspended at the time of the trial. Ex. 15-16.

The father, however, claims that family therapy with Tom Sherry, for purposes of reunifying the father with K.M.M., was ordered by the

dependency court in December 2012. Motion at 14. This argument misreads the record. It is contradicted by Mr. Sherry's evaluation that family therapy as part of a reunification could not occur in this case. RP 243. Mr. Sherry had instead recommended that once K.M.M.'s siblings were successfully reunified with the mother, one type of family therapy could be appropriate. RP 245-46. But the purpose of this family therapy was to support the sibling relationships, and their various placements -- the siblings living with the mother, and K.M. visiting with the father, and K.M.M. living with her foster parents. RP 246. This therapy was not designed to reunify K.M.M. with a parent. RP 243.

Thus, the dependency court in December 2012 actually ordered J.M. to participate in family therapy to support K.M.M. in her foster placement and to help maintain on-going sibling relationships. Ex. 14, CP 332. The court had already suspended visitation between K.M.M. and the parents. RP 330. At the same review, the court reiterated its order that contact between K.M.M. and her parents should remain suspended. Ex. 14, CP 334. But, the court also ordered monthly contact between K.M.M. and her siblings. Ex. 14; CP 333, RP 391. Thus, the family therapy ordered by the dependency court was to support sibling relationships and visitation, not to reunify K.M.M. with J.M. And when K.M.M. subsequently refused to see her siblings, this service became futile. Again,

substantial evidence supports the findings that all services capable of reuniting K.M.M. with J.M. have been offered or provided, and that there was no probability that family therapy could resolve the situation.²

2. K.M.M. Participated in Individual Therapy, Not Bonding and Attachment Services, to Address Her Own Individual Issues From When She Came into Care.

The father next argues that the Department failed to offer him bonding and attachment services. *See* Motion at 17-18. The father mischaracterizes the record by maintaining that the child's individual therapy sessions were bonding and attachment services provided to the foster parents, but not to him. *See* Motion at 17-18. The Court of Appeals correctly concluded that substantial evidence supported the finding that K.M.M. had participated in individual therapy to address her individual issues arising from when she came into care. FOF XI, CP 107.

K.M.M. had significant issues when she entered foster care in 2009. To address these issues, K.M.M. participated in individual therapy with Cory Staton. RP 63. K.M.M. was not learning how to attach to a particular person; her participation in individual therapy would make it easier for K.M.M. to attach to her biological parents. RP 139-40. The foster parents, as her current day-to-day caretakers, were involved in some

² The Dependency court also denied the father's motion for reconciliation/reunification services at the August 2013 review, in which the court continued to suspend visitation between K.M.M. and J.M. Ex. 16.

of K.M.M.'s individual therapy sessions. RP 68. The biological parents would then become involved in those individual sessions when she was transitioned home and they became her day-to-day caretakers. RP 69.

Contrary to J.M.'s arguments, K.M.M.'s participation in individual therapy is not analogous to the *C.S.* decision. *See* Motion at 17-18. In *C.S.*, services were provided to a foster parent, but not the parent. No such conclusion can be drawn from the trial record or the court's findings concerning K.M.M.'s individual therapy. Instead, substantial evidence supports the findings that all services capable of reuniting K.M.M. with the father have been offered or provided. FOF XII, CP 108. Substantial evidence also supports the finding that there is no service capable of correcting the now severed parent-child relationship. FOF XIV, CP 108.

V. CONCLUSION

The Court of Appeals properly ruled that substantial evidence supports the trial court's detailed findings in this case. The findings demonstrate that this father was currently unfit because he was unable to parent this child based on the lack of an attachment and the lack of a parent-child relationship. The trial court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of February,

2016.

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DECLARATION OF MAILING

I, AMANDA KAPPELMAN, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

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Subject: RE: Supreme Court No. 91757-4 - In re the Welfare of K.M.M. Respondent's Supplemental Brief

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Subject: Supreme Court No. 91757-4 - In re the Welfare of K.M.M. Respondent's Supplemental Brief

Good morning,

Attached please find Respondent's Supplemental Brief. Hard copies will follow to opposing counsel.

Sincerely yours,

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"If you light a lamp for another, your own way will be lit.." Nichiren