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No. 92913-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ALLAN A. TABINGO

Appellant,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS  
COMPANY, LLC,

Respondents.

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RESPONDENTS' ANSWER TO BRIEF OF INLANDBOATMEN'S  
UNION OF THE PACIFIC AS *AMICUS CURIAE* IN SUPPORT OF  
APPELLANT ALLAN A. TABINGO

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## A. INTRODUCTION

The Inlandboatmen’s Union of the Pacific as *Amicus Curiae* in Support of Appellant, contends that Defendants “American Seafoods” have incorrectly assumed that punitive damages are legally unavailable under the Jones Act, 46 U.S.C. §30104, by its incorporation of the Federal Employer’s Liability Act, 45 U.S.C. §§51-60 (“FELA”).<sup>1</sup> *Amicus Brief*, p. 2. This is no assumption. The foundational authority makes clear that FELA allows only compensatory damages, and since its enactment in 1908, over 100 years ago, “[n]o case under FELA has allowed punitive damages, whether for personal injury or death.” *McBride v. Estis Well Service, LLC*, 768 F.3d 382, 388 (5th Cir. 2014), *cert. den.*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015) (*citing Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993); *Kozar v. Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1240–43 (6th Cir.1971) (“there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed.”)). Indeed, as the Sixth Circuit has pointed out: “It has been

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<sup>1</sup> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C.A. § 30104 (West) (emphasis added).

the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993).

## **B. ARGUMENT**

### **1. FELA Permits an Injured Worker or His Beneficiaries to Recover Compensatory Damages Only**

Amicus is careful to articulate its contention in the negative: "The U.S. Supreme has never held that punitive damages are unavailable under FELA." *Amicus Brief*, p. 10. This is because the U.S. Supreme Court has made it clear since FELA's enactment in 1908 that FELA permits an injured worker, or his beneficiaries, to recover only *compensatory* damages.

In *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913), the case much later cited by the U.S. Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), as foundational to the FELA pecuniary damage limitation and its incorporation into the Jones Act, the U.S. Supreme Court described not only the damages a beneficiary might receive under FELA, but also the damages an injured worker might have recovered if he had survived: "If he had survived he might have recovered such damages as

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would have compensated him for his expense, loss of time, suffering, and diminished earning power.” *Vreeland*, 227 U.S. at 65 (emphasis added). Two years later, in *St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160 (1915), the U.S. Supreme Court again described the damages available both in the wrongful injury and death contexts:

The original act was adopted by Congress April 22, 1908. In its 1st section it provides for two distinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employee with a right to such damages as will **compensate** him for his personal loss and suffering,--a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (*Michigan C. R. Co. v. Vreeland*, 227 U. S. 68, 57 L. ed. 421, 33 Sup. Ct. Rep. 192; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 238, 38 L. ed. 422, 424, 14 Sup. Ct. Rep. 579), it invests his personal representative, as a trustee for designated relatives, with a right to such damages as will **compensate** the latter for any pecuniary loss which they sustain by the death.

*Craft*, 237 U.S. at 656 (emphasis added).

Notably, even before these foundational U.S. Supreme Court cases were decided, courts had expressly articulated that punitive damages were excluded:

... the measure of damages is compensation for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise, from the continued life of the deceased, excluding all consideration of **punitive elements**, loss of society,

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wounded feelings of the survivors and suffering of the deceased.

*Cain v. S. Ry. Co.*, 199 F. 211, 212 (E.D. Tenn. 1911) (citing *Fulgham v. Railroad Co.*, 167 F. 660 (W.D. Ark. 1909); and by analogy, *Baltimore & P.R. Co. v. Mackey*, 157 U.S. 72, 92, 15 S.Ct. 491, 39 L.Ed. 624; *In re Humboldt Lbr. Mfrs. Ass'n*, 60 F. 428 (N.D. Cal. 1894); *The Dauntless*, 121 F. 420 (N.D. Cal. 1903); *Hirchkovitz v. Railroad Co.*, 138 F. 438 (S.D.N.Y. 1905); *Swift & Co. v. Johnson*, 138 F. 867 (8th Cir. 1905); *Chicago, P. & S.L.R. Co. v. Wooldridge*, 174 Ill. 330, 51 N.E. 701 (1898); 8 Am. & Eng. Enc. Law (2d Ed.) 914; 13 Cyc. 362).

Indeed, since its enactment in 1908, over 100 years ago, “[n]o case under FELA has allowed punitive damages, whether for personal injury or death.” *McBride*, 768 F.3d at 388 (citing *Miller*, 989 F.2d at 1457); *Kozar*, 449 F.2d at 1240 (“there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed.”). As the Sixth Circuit pointed out: “It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers’ Liability Act.” *Miller*, 989 F.2d at 1457.<sup>2</sup>

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<sup>2</sup> The same bar has been similarly consistently applied under the Jones Act, and Amicus’ contention that punitive damages are recoverable under the Jones Act despite the FELA limitation on damages, *Amicus Brief*, Section II, is unfounded.

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The compensatory damage limitation is consistent with both the U.S. and Washington State Supreme Court authority specifically addressing the Jones Act. As the U.S. Supreme Court stated:

...whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which **he is entitled to but one indemnity by way of compensatory damages.**

*Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138, 49 S.Ct. 75, 73 L. Ed. 220 (1928) (emphasis added); *see also Williams v. Steamship Mut. Underwriting Ass'n, Ltd.*, 45 Wash. 2d 209, 215-16, 273 P.2d 803 (1954) (the Jones Act served to extend a seaman's right to **compensatory damages**).

**a. Congress Intended to Incorporate Existing Law Applicable to Railway Workers, which Did Not Include Punitive Damages as a Measure of Recoverable Damages**

Amicus' contention that it was Congress' expressed intent not to limit existing remedies and therefore Congress must have intended to incorporate the common law remedy of punitive damages into FELA is a

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“Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act.” *McBride*, 768 F.3d at 388 (citing, *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9<sup>th</sup> Cir.1987), *opinion modified on reh'g*, 866 F.2d 318 (9<sup>th</sup> Cir.1989) (“Punitive damages are non-pecuniary damages unavailable under the Jones Act.... Punitive damages are therefore also unavailable under DOHSA.”)

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recycled argument that was rejected by the Ninth Circuit as lacking merit almost 30 years ago. *See Wildman v. Burlington N. R. Co.*, 825 F.2d 1392, 1394-95 (9th Cir. 1987).

In *Wildman*, the Ninth Circuit explained “that ‘prior to the enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions.’” *Id.* at 1394 (quoting *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984)). The Court went on to state that “Plaintiff’s argument that this conclusion contravenes congressional intent is without merit.” *Id.* Indeed, the plaintiff in *Wildman*, just as Amicus here almost 30 years later, cited statements in the Congressional Record to the effect that the intention was not to limit existing remedies. *Id.* In fact, in *Wildman* the plaintiff cited proposed language expressly limiting the recovery under FELA to compensatory damages. *Id.* As the Court pointed out, “other passages indicate that some representatives believed that the limiting instruction embodied the law, and was therefore unnecessary.” *Id.* at 1395.

Indeed, none of the pre-FELA cases cited by Amicus supports its contention that a railway worker could recover punitive damages from his railway employer in a personal injury action for negligence. *Amicus Brief*, p. 4. Amicus makes this contention but fails to support it. *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893),

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*Amicus Brief*, p. 5, n. 4, was an action by a passenger for unlawful arrest. Similarly, *Milwaukee & St. Paul Ry.Co. v. Arms*, 91 U.S. (1 Otto) 489, 23 L.Ed. 374 (1875), was an injury action by a passenger arising out of a collision. *Philadelphia, W. & B. Ry v. Quigley*, 62 U.S. (21 How.) 202, 16 L.Ed. 73 (1859), an action for libel, was in fact distinguished, as not supporting the Amicus' argument, 45 years ago in *Kozar*, 449 F.2d at 1240, n. 2, 1243 ("It should also be noted that there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed.") *Denver & Rio Grande Ry. V. Harris*, 122 U.S. 597, 7 S.Ct. 1286, 30 L.Ed. 1146 (1887), *Amicus Brief*, p. 6, n. 5, involved an action for assault by a railway employee, but against a railway company that did not employ him. *Missouri Pac. Ry v. Humes*, 115 U.S. 512, 6 S.Ct. 110, 29 L.Ed. 463 (1885), was a property action implicating a statute allowing double damages. The remaining cases cited by Amicus are clearly identified as inapposite passenger cases. *Amicus Brief*, p. 6, n. 5.

Amicus attacks *Wildman's* reasoning that by failing to expressly authorize punitive damages FELA prohibited them. However, FELA's silence is consistent with the U.S. Supreme Court's understanding, as expressed in *Miles*, that the damages limitation was already well established. *Miles*, 498 U.S. at 32. Indeed, the Congressional Record indicates this was the prevailing understanding at the time FELA was

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enacted. *Wildman*, 825 F.2d at 1395. Amicus ignores the fact that after *Wildman*, the U.S. Supreme Court in *Miles* expressly addressed Congressional intent in this regard:

When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume Congress is aware of existing law when it passes legislation.

*Miles*, 498 U.S. at 32.

This conclusion is also consistent with the fact that “[n]o case under FELA has allowed punitive damages.” *McBride*, 768 F.3d at 388.

Equally significant, the purported “silence” in the statute is consistent with Washington State’s public policy on punitive damages. “Since 1891, in an unbroken line of cases, it has been the law of this state that punitive damages are not allowed unless expressly authorized by the legislature.” *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wash. 2d 692, 699-700, 635 P.2d 441 (1981) (*en banc*) (emphasis added) (“punitive damages are contrary to public policy”) (*citing Maki v. Aluminum Bldg. Prods.*, 73 Wash. 2d 23, 436 P.2d 186 (1968); *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891)), *amended*, 96 Wash. 2d 692, 649 P.2d 827 (1982). Neither FELA nor the Jones Act expressly

authorizes punitive damages. Under Washington State precedent, punitive damages would not be recoverable.

*Exxon Shipping Co. v. Baker*, 544 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), does not recommend a different conclusion. *Exxon* involved an argument, arguably waived in the first place, *id.* at 486-87, that the Clean Water Act (“CWA”) penalties for water pollution, 33 U.S.C. §1321, preempted maritime common law remedies relating to personal injury. *Exxon*, 544 U.S. at 488. The CWA did not in any way address maritime common law remedies relating to personal injury, and the Court saw “no clear indication of congressional intent to occupy the entire field of pollution remedies” or any indication punitive damages would frustrate the CWA remedial scheme. *Exxon*, 544 U.S. at 488-89. This was not the case with FELA and the Jones Act. Just as Congress’ enactment of FELA “took possession of the field of employers’ liability to employees in interstate transportation by rail,” so Congress’ enactment of the Jones Act “covers the entire field of liability for injuries to seamen, it is paramount and exclusive...” *Lindgren v. U.S.*, 281 U.S. 38, 45, 47, 50 S.Ct. 207, 74 L.Ed. 686 (1930).

Amicus also attacks the distinction in *Wildman* between a remedy as a means employed to enforce a right or redress an injury and damages as a measure of injury. Amicus contends the U.S. Supreme Court in

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*Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009), defined punitive damages as an independent, stand alone “remedy” available at common law. Although the Court starts its discussion of punitive damages by referring to such damages generally as a remedy, the Court immediately shifts to the term “damages” and in fact cites a treatise titled “Measure of Damages.” *Townsend*, 557 U.S. at 409 (citing 1 T. Sedgwick, *Measure of Damages* §349, p. 688 (9th ed. 1912)). The Court did not define punitive damages as a stand-alone remedy independent of any wrongful act. To the contrary it specifically related the damages remedy to “wanton, willful or outrageous conduct.” *Townsend*, 557 U.S. at 409. The Court variously used the term “remedy” to describe a measure of damages, *e.g.*, punitive damages, or a right of action, *e.g.*, maintenance and cure. *E.g. Townsend*, 577 U.S. at 415-16 (describing maintenance and cure and the Jones Act as remedies).

## **2. *Townsend* Does Not Authorize Common Law Damages Where Congress Has Spoken Directly**

Amicus would have this Court read *Townsend* as authorizing disregard and departure from express Congressional intent. Amicus is essentially arguing that, under *Townsend*, because the negligence remedy against railway employers existed at common law before FELA, FELA (a congressionally enacted negligence remedy specifically addressing such

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actions against railway employers) does not control the negligence remedy against railway employers. This is nonsensical. *Townsend* stands for the opposite. Under *Townsend*, where Congress has spoken the statute controls.

*Townsend* did not address FELA. Rather, *Townsend* addressed the availability of punitive damages in the maintenance and cure context. *E.g. Respondents' Brief*, p. 25, n. 8. Significantly, the U.S. Supreme Court went to great lengths to distance the maintenance and cure remedy from the remedies addressed by Congress via the Jones Act—if the statute enacted by Congress addressed the remedy, the statute would control: “Respondent is entitled to pursue punitive damages unless Congress has enacted legislation departing from this common-law understanding.” *Townsend*, 577 U.S. at 415 (emphasis added). As explained by the Fifth Circuit in *McBride*, 768 F.3d at 389-90, and as noted by the U.S. Supreme Court in *Townsend*, 577 U.S. at 420-21, the U.S. Supreme Court could allow punitive damages in seamen’s maintenance and cure claims, without running afoul of the Supreme Court precedent, precisely because maintenance and cure is not addressed by or defined by the Jones Act or any other act of Congress: “the Jones Act does not address maintenance and cure or its remedy.” *Townsend*, 577 U.S. at 420. Thus, it is “possible to adhere to the traditional understanding of maritime actions and remedies

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without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which ‘Congress has spoken directly.’” *Townsend*, 557 U.S. at 420–21 (quoting *Miles*, 498 U.S. at 31). Unlike the maintenance and cure remedy, Congress has spoken directly to personal-injury actions against railway (FELA) and maritime (Jones Act) employers. The U.S. Supreme Court in *Townsend* could allow punitive damages in maintenance and cure claims, without running afoul of Supreme Court precedent or Congress, precisely because maintenance and cure is not addressed by or defined by the Jones Act or any other act of Congress. “The availability of punitive damages for maintenance and cure actions is entirely faithful to these ‘general principles of maritime tort law,’ and no statute casts doubt on their availability...” *Townsend*, 557 U.S. at 421 (emphasis added).<sup>3</sup> *Townsend* clearly stands for the proposition that the federal statute on point controls the issue; *Townsend* does not authorize the circumvention of the very Act itself based on whatever remedy or measure of damages was available at common law. “The reasoning of *Miles* remains sound.” *Townsend*, 557 U.S. at 420.

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<sup>3</sup> Contrary to Amicus’ contention, *Amicus Brief*, p. 2, the Court in *Townsend* did not explicitly recognize that the availability of punitive damages under the Jones Act remains an open question. The Court expressly elected not to address the issue, because it was irrelevant: “...*Miles* does not render the Jones Act’s damages provision determinative of respondent’s remedies...” *Townsend*, 557 U.S. at 424, n. 12.

Here, there can be no dispute that when Congress enacted FELA, Congress “took possession of the field of employers’ liability to employees in interstate transportation by rail.” *See Lindgren*, 281 U.S. at 45, 46 (“paramount and exclusive”).<sup>4</sup> Whatever negligence remedy existed before FELA, it was altered when Congress occupied the field, enacted FELA, and thus took possession of the field of employer’s liability to employees in interstate transportation by rail. Indeed, as stated, there is not a single case since FELA’s enactment allowing punitive damages.

**3. Washington State Authority is in Harmony with the Federal Maritime Authority, Which Limits Recovery to Compensatory Damages**

Amicus contends this Court is faced with erroneous federal law and urges a departure. *Amicus Brief*, pp. 18-19. The fact is the Trial Court’s decision was correct and consistent with Washington State Supreme Court interpretations of federal maritime law dating back to *Peterson v. Pacific S.S. Co.*, 145 Wash. 460, 474, 261 P. 115 (1927), *aff’d*,

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<sup>4</sup> FELA expanded railway workers rights and remedies by specifically addressing their common-law rights and remedies. *See Amicus Brief*, p. 4. For example, FELA eliminated the contributory negligence bar to recovery under the common law. *The Arizona v. Anelich*, 298 U.S. 110, 119, 56 S.Ct. 707, 80 L.Ed. 1075 (1936); *see also Amicus Brief*, p. 7 (FELA eliminated assumption of risk). Amicus contends *Anelich* stands for the proposition that seamen have greater rights under the unseaworthiness doctrine, *Amicus Brief*, p. 15, n. 10, but as noted by the Fourth Circuit, the holding in *Anelich* was “tied to railroad-specific legislation.” *Martin v. Harris*, 560 F.3d 210, 220 (4<sup>th</sup> Cir. 2009).

*Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138, 49 S.Ct. 75, 73 L. Ed. 220 (1928) (“entitled to but one indemnity by way of compensatory damages”). Both federal case law and Washington State Supreme Court interpretations of federal maritime law mandate application of the compensatory damage limitation under FELA. *See Respondents’ Brief*, pp. 13, 15-16.

Moreover, the Trial Court’s decision is consistent with Washington State’s policy on punitive damages. The compensatory damages allowed under FELA (or the Jones Act for seamen) fully compensate the plaintiff for his injuries:

Beginning with *Spokane Truck & Dray Co. v. Hoefler*, supra, a number of reasons have been given by this court for rejecting punitive damages. All of them need not be enunciated here. In the context of this case, the argument that compensatory damages fully compensate the plaintiff for all injuries to person or property, tangible or intangible, is particularly in point. As the court observed in *Spokane Truck & Dray Co. v. Hoefler*, supra 2 Wash. at 52-53, 25 P. 1072:

Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But

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it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole.

*Barr*, 96 Wash. 2d at 700 (quoting *Spokane Truck & Dray Co.*, 2 Wash. at 52-53).

**C. CONCLUSION**

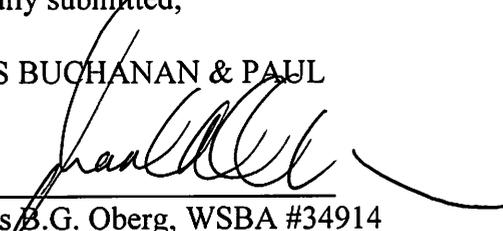
The Honorable Judge Bill Bowman should be affirmed.

DATED this 4<sup>th</sup> day of January, 2017.

Respectfully submitted,

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ANSWER TO *AMICUS CURIAE* BRIEF  
OF INLANDBOATMEN'S UNION - 15

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served via email, a copy of the *Answer to Brief of Inlandboatmen's Union of the Pacific as Amicus Curiae in Support of Appellant Allan A. Tabingo* in Supreme Court Cause No. 92913-1 on the following counsel of record:

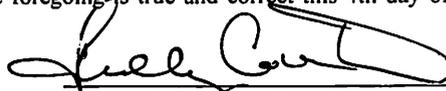
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 4th day of January, 2017.

  
Shelley Courter, Legal Assistant  
Signed at Seattle, Washington