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SUPREME COURT NO. 95347-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John,
Appellants

v.

State of Washington
Respondent

BRIEF FOR *AMICUS CURIAE* INDEPENDENCE INSTITUTE

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STATEMENT OF AMICUS INTERESTS

The Independence Institute is a non-profit Colorado public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. As explained in the accompanying motion for leave to file, this brief is intended to present the Court with a detailed explication of the text and original meaning of the Electoral College provisions of Article II and of the Twelfth Amendment.

As detailed in the motion, the work of the Independence Institute's scholars has been cited by many courts, including the Supreme Court of the United States and the Washington State Supreme Court.

STATEMENT OF THE CASE

Amicus adopts Plaintiffs' Statement of the Case.

SUMMARY OF ARGUMENT

The United States Constitution permits, in fact requires, presidential electors to exercise their best discretion when casting votes for president and vice president. As shown by the definitions of key words in contemporaneous dictionaries and other sources, this discretion is inherent in the text of the original Constitution and of the Twelfth Amendment.

The 1787 Constitutional Convention knowingly copied existing electoral models in which elector discretion was protected. Leading Founders affirmed that presidential election was to be free of state control. In fact, the Convention specifically and overwhelmingly *rejected* a proposal to allow the States to elect the president. During the ratification debates, the Constitution's advocates and opponents agreed that presidential electors would exercise full discretion.

The Twelfth Amendment did not change this. Insofar as relevant to elector discretion, the Congress that proposed the Amendment retained the original Constitution's key language. The congressional debates show broad agreement that electors would retain the right, and duty, to exercise their best judgment. The Constitution does not grant those who *appoint* electors the power to control their judgment any more than the presidential power to *appoint* judges includes authority to control their decisions.

ARGUMENT

I. Standard sources used to interpret the Constitution tell us that presidential electors are free to exercise discretion.

In fining presidential electors for casting votes in accordance with their best discretion, the Washington Secretary of State was attempting to enforce RCW 29A.56.340, which provides that "Any elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." This statute violates the U.S. Constitution.

The controlling constitutional language appears in the Twelfth Amendment: "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . ." U.S. Const. amend. XII. Evidence of this provision's meaning can be gleaned from the debates in the Eighth Congress, which proposed the Twelfth Amendment. That evidence is discussed below.

But evidence of the Constitution's original language is useful as well. The relevant wording in the Twelfth Amendment is almost identical to the corresponding language in the original Constitution: "The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves . .

. ." U.S. Const. art. II, §1, cl. 3. Moreover, the Twelfth Amendment was ratified relatively soon after the constitutional ratification process was complete, 2 *The Documentary History of the Ratification of the Constitution* 19, 25 (John P. Kaminski et al. eds. 2011) [hereinafter *Documentary History*][1] (ratification chronology), and several members of the Congress proposing it had been key Founders: Senators Pierce Butler, Abraham Baldwin, and Jonathan Dayton had been delegates to the Constitutional Convention, while others—such as Representatives William Findley and John Smilie of Pennsylvania and Thomas Sumter of South Carolina—had been delegates to state ratifying conventions.

As explained below, all the evidence tells us that presidential electors were to exercise their best judgment when voting.

II. Constitutional words and phrases demonstrate that presidential electors are free to exercise discretion.

A. "Ballot"

In both the original and Twelfth Amendment versions of the text, the electors vote *by ballot*. When the Constitution and the Twelfth Amendment were adopted, "ballot" invariably meant secret ballot—secrecy being the crucial distinction between that method of voting and the other methods,

[1] The *Documentary History* is not generally available online, so hardcopy volumes must be used. They are available in the Gallagher Law Library at the University of Washington, call no. KF4502.D63.

such as *viva voce*. 1 William Blackstone, *Commentaries on the Laws of England* *175 (1st ed., 1765) (distinguishing public voting from voting "privately or by ballot"). Hence in 1800, Senator (and former Framer) Charles Pinckney could say on the floor of the Senate, "[T]he Constitution expressly orders that the Electors shall vote by ballot; and we all know, that to vote by ballot is to vote secretly." *Charles Pinckney in the United States Senate*, Mar. 28, 1800, in 3 Max Farrand, *The Records of the Federal Convention of 1787* 385, 390 (1937) [hereinafter *Farrand's Records*].[2]

It is sometimes claimed that the Twelfth Amendment changed the original Constitution's ballot secrecy rule by requiring that electors vote for two persons "one of whom, at least, shall not be an inhabitant of the state with themselves" and that they "shall make distinct lists of all persons voted for . . . and of the number of votes for each." However, the same requirement was in the original Constitution. U.S. Const. art. II, §1, cl. 3, and an intent to change the secrecy rule is inconsistent with the decision of the Twelfth Amendment's framers to retain the word "ballot." Moreover, as anyone familiar with election practice knows, the integrity of both the rules and ballot secrecy can be preserved simply by tagging ballot forms before they are used and then distributing them at random. For example, when

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[2] *Farrand's Records* are online at the Library of Congress' "American Memory" website, at https://memory.loc.gov/ammem/amlaw/lwfr.html.

electors meet at their state capital, each randomly receives an unmarked envelope containing two blank ballots of the same color, or displaying the same number or letter. This number, letter, or color is different from those drawn by all other electors. Electors insert the names of their preferred candidates and place the forms in a ballot box. Those counting ballots will not know which elector has cast the two ballots inscribed with the number "5," for example, but they will know if that elector voted for two persons from his or her home state.

Of course, the whole point of voting by ballot is to hide the elector's choice to ensure that choice is free. But laws such as RCW 29A.56.340 deny that freedom of choice.

B. "Elector"

A second key word in both the original Constitution and the Twelfth Amendment is *Elector.* Contemporaneous dictionaries tell us that *by definition* an "elector" exercises free choice. Nathan Bailey, *An Universal Etymological English Dictionary* (Edinburgh, 1783) (unpaginated) ("defining "elector as "a chuser"); 1 Samuel Johnson, *A Dictionary of the English Language* (London, 6th ed. 1785) (unpaginated) (giving first definition as "He that has a vote in the choice of any officer"); 2 E. Chambers, *Cyclopaeda; or, an Universal Dictionary of Arts and Sciences* (London, 1779) (unpaginated) ("a person who has the right to *elect*, or

choose another to an office, honour, &c. The word is formed of the Latin *eligere, to choose."*) (italics in original).

A definition in the leading contemporaneous law dictionary confirms this. Giles Jacob's *New Law-Dictionary* was the most popular of its kind in America. Herbert A. Johnson, *Imported 18th Century Law Treatises in American Libraries 1700-1799* at 61 (1978) (Jacob's dictionary was in 12 of 22 surveyed libraries, more than any other law dictionary). Although Jacob's law dictionary did not define "elector," it defined "Election" as "when a man is left to his own free will to take or do one thing or another, which he pleases." Giles Jacob, *A New Law-Dictionary* (10th ed., London, 1783) (unpaginated).

These definitions are consistent with the Constitution's use of "Electors" to designate voters for the U.S. House of Representatives. U.S. Const. art. I §2, cl. 1 ("The . . . Electors in each State shall have the Qualifications . . . ."). They are *inconsistent* with RCW 29A.56.340, which seeks to dragoon presidential electors into subordinating their own free discretion to the demands of the State.

III. Because the Constitution does not grant the State power to control or coerce electors, that power does not exist.

The Constitution grants the States power to determine how electors are appointed. U.S. Const. art. II, §1, cl. 2. It does not follow, however, that

because States may *appoint* electors, they later may *control* electors. Quite the contrary.

The Constitution's text informs us when an appointer may control the conduct of appointees. In the case of executive functions, the Constitution both authorizes the president to *appoint* executive branch officials, U.S. Const. art. II, §2, cl. 2, and to *control* their subsequent conduct. *Id*., art. II, §3 (power to "take Care that the Laws be faithfully executed"); *id*. art. II, §2, cl. 1 (power to require opinions from heads of departments); *id.*, art. II, §2, cl. 1 (vesting the executive power in the president). *Cf. Myers v. United States,* 272 U.S. 52, 117-18, 47 S.Ct. 21, 25, 71 L.Ed. 160, 166 (1925) (explaining that president must have authority to remove officers because of the power granted by the Executive Vesting Clause and Take Care Clause); *id*. at 119 (explaining that "the express recognition of the power of appointment" in the Constitution reinforces the view that the Executive Vesting Clause granted executive power to the president). In addition, art. II, §3 provides that the president commissions officers; the Founders understood this commissioning power to carry authority to supervise—because in the Founders' day the same person granting a commission generally issued instructions. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice,* 31 Whittier L. Rev. 1, 14 (2009).

Thus, these express textual grants—not the appointment power alone—are why the president's authority to remove executive branch officials is incident to appointment.

On the other hand, the Constitution's other grants of appointment power do *not* include authority to supervise or remove. For example, the president's power to "appoint . . . Judges of the supreme Court," is *not* accompanied by a textual prerogative to remove or control them. U.S. Const. art. II, §2, cl. 2. Similarly, before adoption of the Seventeenth Amendment, the Constitution provided that state legislatures would appoint Senators, but did not grant the separate power to dictate how they voted. U.S Const. art. I, §3, cl. 1. In the case of presidential electors, the Constitution grants states power to appoint them, U.S. Const. art. II, §1, cl. 2, but not to direct their decisions after appointment.

The natural reading of the text is buttressed by the fact that the Constitution is a document of enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316, 405, 4 L.Ed. 579, 601 (1819). A power not expressly listed is granted only if incidental to an enumerated power. *Id.* at 406. To be incidental to an enumerated power, however, it must be of lesser importance than the enumerated power. For example, Congress's authority to "regulate" interstate commerce does not include the "great substantive and independent power" to compel individuals to engage in commerce. *N.F.I.B.*

v. Sebelius, 567 U.S. 519, 561, 132 S.Ct. 2566, 2592, 183 L.Ed.2d 450, 481 (2012); *see also* Robert G. Natelson, "The Legal Origins of the Necessary and Proper Clause," in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Gay Seidman, *The Origins of the Necessary and Proper Clause* 52, 61 (2010) ("[U]nder the Founders' law, a power cannot be incidental to a principal [enumerated] power unless it is of lesser importance than the principal.").

Authority to dictate subsequent behavior is at least as important as authority to appoint in the first instance. That is why the Constitution expressly grants the president authority over the executive branch. The decision *not* to grant the States like authority over presidential electors confirms that the States have no such authority.

IV. Proceedings at the Constitutional Convention show that presidential electors, once appointed, are to exercise discretion.

The first Constitutional Convention delegate to propose a system of presidential electors was James Wilson of Pennsylvania. 1 *Farrand's Records* 77 (Journal, June 2, 1787). Wilson was born, raised, and educated in Scotland, 2 *Documentary History* 733, and his proposal likely was based on the Scottish method for choosing members of the British House of Commons. In Scotland, those members were chosen by "commissioners" elected by voters or by local governments. Alexander Wight, *A Treatise on*

the Laws Concerning the Election of the different Representatives sent from Scotland to the Parliament of Great Britain 115 (Edinburgh, 1773)[3] (discussing qualifications of freeholders who elect commissioners); *id* at 277-300 (outlining freeholders' election of commissioners); *id*. at 347-70 (describing commissioners' election of members of Parliament); *id* at 318-19 (describing election by local government councils).

Free choice was inherent in the Scottish process, and commissioners could be required to swear that they had not received anything of value—apparently including their position as elector ("Office, Place, Employment")—in exchange for their votes. *Id.* at 359-60; 16 Geo. 2, ch. 11, §34 (1743). A Scottish elector's choice was not dictated by the locality choosing him.

Another model for the framers was the Maryland constitution's provision for choice of state senators by electors elected by the voters. Md. Const. art. XVIII (1776). At the Constitutional Convention, Alexander Hamilton noted that this model had been "much appealed to." 1 *Farrand's Debates* 289 (June 18, 1787). *See also id.* at 218 (June 12, 1787, reporting that Madison discussed the Maryland system). Elector discretion was part of this model. Electors were required to swear that they would "elect

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[3] Available at the Eighteenth-Century Collections Online database; enter "Wight" and 1773 in the "Advanced Search" feature. https://quod.lib.umich.edu/e/ecco/.

without favor, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." Md. Const. art. XVIII.

Madison reported that one of Wilson's goals was to ensure the president was "as independent as possible of . . . the States." 1 *Farrand's Debates* at 69 (June 1, 1787). Most other framers shared the same goal, for when Elbridge Gerry proposed that the president be chosen by "the suffrages of the States, acting though their executives, instead of Electors," *id.* at 80 (June 2, 1787), the convention trounced his motion by a margin of ten states to zero, with one state delegation divided. 1 *Id.* at 80 (June 2, 1787); *id.* at 174-175 (Journal, June 9, 1787). As Edmund Randolph observed, "A Natl. Executive thus chosen will not be likely to defend with becoming vigilance & firmness the national rights agst. State encroachments." *Id.* at 176 (June 9, 1787).

The convention was determined that state governments were not to hijack the presidential election.

V. The debates over the Constitution's ratification confirm that presidential electors, once appointed, are to exercise discretion.

The most-quoted ratification-era statement on the subject is Alexander Hamilton's *Federalist* No. 68:

> A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. . . . And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

16 *Documentary History* 376, 377.

Federalist No. 68 elaborated a point that Hamilton had made in *Federalist* No. 60:

> The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

Id. at 195, 196.

In *Federalist* No. 64, John Jay likewise implied elector choice and independence:

> The convention . . . have directed the President to be chosen by select bodies of electors, to be deputed by the people for that express purpose . . . As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.

16 *Id.* at 309, 310.

There is also a wealth of evidence outside the pages of *The Federalist*. In his second *Fabius* letter supporting ratification, John Dickinson described elector conduct in a way consistent only with free choice:

> When these electors meet in their respective states, utterly vain will be the unreasonable suggestions derived for partiality. The electors may throw away their votes, mark, with public disappointment, some person improperly favored by them, or justly revering the duties of their office, dedicate their votes to the best interests of their country.

Fabius II, 15 April 1788, in 17 *id.* at 120, 124-5.

Similarly, Roger Sherman, another convention delegate, wrote that the president would be "re eligible as often as the electors shall think proper." Letter of Dec. 8, 1787, in 14 *id.* at 386, 387. An essayist signing his name *Civis Rusticus* wrote that choice of "the president was by electors." Va. Independent Chron., Jan. 30, 1788, in 8 *id.* at 331, 335 (1988).

Still other ratification advocates emphasized that the Constitution would protect electors from outside influence. In explaining the importance of the Same Day Clause, James Iredell, later a Justice of the U.S. Supreme Court, told the North Carolina ratifying convention:

> Nothing is more necessary than to prevent every danger of influence. Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But [with the Same Day Clause] [i]t is probable that the man who is the object of the choice of

> thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in a high degree, the confidence and respect of his country.

4 *Elliot's Debates* 105. *See also* Caroliniensis, Charleston City Gazette, April 1, 1788, in 27 *Documentary History* 235, 238 (pointing out that the presidential electors are not subject to popular tumult because they meet in different states).

Some participants in the ratification debates discussed how presidential electors would be appointed. *E.g.*, A Democratic Federalist, Independent Gazetteer, Nov. 26, 1787, in 2 *id.* at 294, 297 (observing that state laws could allow the people to vote for them). But none claimed the appointers would dictate their electors' votes. Appointment of electors and their subsequent conduct were distinct subjects.

Opponents of the Constitution agreed that electors would have discretion. The essayist *Centinel* asserted that the state legislatures would "nominate the electors who choose the President of the United States." Centinel II, Pa. Freeman's J., Oct. 24, 1787, in 13 *Documentary History* 457, 459. "Candidus" feared "the choice of President by a detached body of electors [as] dangerous and tending to bribery." Candidus I, Indep. Chronicle, Dec. 6, 1787, in 4 *id.* 392, 395 (1997).

VI. The congressional debates on the Twelfth Amendment confirm that presidential electors, once appointed, are to exercise discretion.

The relevant language in the Twelfth Amendment is almost identical to the language in the original Constitution. There is no satisfactory explanation of why, if the standards of elector discretion were altered, the Constitution's language was not. Indeed, the debates in the Eighth Federal Congress, which proposed the Amendment, confirm that elector discretion was to continue. They show that the electors would represent the states and people only in the same general way that members of Congress and convention delegates do: considering the wishes of their constituents but relying ultimately on the evidence before them and on their best judgment.

Thus, members of Congress referred to presidential candidates being "intended by the electors," 8 *Annals of Congress* 735 & 739 (1803) (Joseph Gales ed., 1852) [hereinafter *Annals*][4] (Rep. Holland); "preferred by the electors," *id.* at 740 (Rep. Holland); and "selected by the Electors." *Id*. at 696 (Rep. Purviance). *Cf. id.* 535 (Rep. Hastings, "the Electors . . . will be induced (from the uncertainty which of the two voted for will be elected President) to give their ballots for two persons, either of whom shall be well qualified to discharge the important powers or duties of First Magistrate").

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[4] The *Annals of Congress* are available online at the Hein Online database, in the "U.S. Congressional Documents" library.

Even Rep. Clopton, a professed advocate of direct popular election, *id*. at 422, used similar language acknowledging that the electors would choose. *Id.* at 491 ("intended . . . by a majority of the Electors") & *id.* at 495 ("contemplated for President by any of the electors").

Rep. Elliot referred to the risk of introducing "a person to the Presidency, not contemplated by the people or the Electors." *Id.* 668. Rep. Thatcher worried that "those Electors who are not devoted to the interest of the ruling faction will exercise a preference of great importance, they will select the candidate least exceptionable." *Id.* at 537. Senator Pickering even urged electors to change their recent voting habits, *id*. at 198, something he clearly assumed they were free to do. See also *id.* at 718 (similar exhortation by Rep. Goddard).

At least one member, Senator Hillhouse, suggested that, as an alternative to a presidential run-off in the House of Representatives, electors be re-convened to vote again. *Id.* at 132-33. This suggestion assumes, of course, that electors could debate, re-consider, and change their votes—the very process RCW 29A.56.340 purports to punish. And Members of Congress believed electors had a duty to vote for those they deemed best qualified. *Id.* at 709 (Rep. Lowndes, referring to electors' "obligation of voting for none but men of high character"); *id.* at 752 (Rep. Griswold,

referring to "the great and solemn duty of Electors . . . to give their votes for two men who shall be best qualified . . . . ").

Several Members alluded to the risk electors might be corrupted and therefore not vote for the best candidates. *E.g., id.* at 141 (Senator White); *id*. at 155 (Senator Plumer) & *id*. at 170 (Senator Tracy). Senator Tracy worried that "by the force of intrigue and faction, the Electors may be induced to scatter their votes for both President and Vice President . . . ." *Id.* at 174. Rep. Purviance feared the time might come when Electors were bought "by promises of ample compensation," *id*. at 692. Rep. Griswold worried the electors could be bought by lures of public office. *Id.* at 750; *see also id*. at 170-74 (Senator Tracy, speaking of the danger of corruption among electors and intrigue with them). Of course, the above concerns and wishes *necessarily* rest on the premise that presidential electors have freedom to choose.

The famous Virginia Senator John Taylor of Caroline thought choice by electors was preferable to choice by Congress: "Would the election by a Diet," he asked, "be preferable or safer than the choice by Electors in various places so remote as to be out of the scope of each other's influence, and so numerous as not to be accessible by corruption?" *Id.* at 115.

Under the original Constitution, each elector voted for two persons without designating whom the elector favored for president or vice

president. U.S. Const. art. II, §1, cl. 3. Much of the debate over the Twelfth Amendment centered on whether to replace this double-vote rule with what participants called the *designation principle*. It was embodied in the words, "The Electors shall . . . name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." U.S. Const. amend. XII. Members debated the merits of the double-vote versus designation principles according to how well each would operate in the context of elector discretion. Thus, Rep. Randolph defended designation this way:

> When Electors designate the offices and persons, respectively, for whom they vote, after choosing the person highest in their confidence for President, they will naturally make choice of him who stands next in their esteem for Vice President; but where they are not permitted to make this discrimination, they will, to secure the most important election, give all their votes to him whom they wish to be President, and scatter the other votes; thus leaving to chance to decide who shall be Vice President.

Id. at 768.

Rep. Holland, another designation advocate, decried the double-vote rule because

> The Electors are compelled to put two persons' names in a box, depriv[ing] them of the liberty of exercising their rationality as to the application of either person to any specific office, and must leave the event to blind fate, chance, or what is worse, to intrigue to give him a President.

Id. at 736.

On the other hand, Senator Plumer, who supported the double-vote rule, argued that designation would have "a tendency to render the Vice President less respectable. . . . In electing a subordinate officer, the Electors will not require those qualifications requisite for supreme command . . . ." *Id.* at 155. Senator White, another double-vote advocate, argued that designation would "render[] the Electors more indifferent about the reputation and qualification of the candidate [for vice president], seeing they vote for him but as a secondary character." *Id*. at 143. Senator Tracy supported the double-vote because, under that system, "The Electors are to nominate two persons, of whom they cannot know which President will be; this circumstance . . . induces them to select both from the best men." *See also id.* at 709 (similar argument by Rep. Lowndes).

Thus, the framers of the Twelfth Amendment, like the framers and ratifiers of the original Constitution, understood that electors could—indeed, were obliged to—exercise their judgment and vote as they thought best. True, electors are representatives of the states and people, but *they represent the people in the same way legislators and convention delegates do—by exercising their best judgment*. The results of legislative deliberations may not always comport with campaign pledges, but for constitutional purposes, their votes are "presumed to be the will of the people." *Id*. at 720 (remarks by Rep. G.W. Campbell during the

congressional debates on the Twelfth Amendment). Similarly, during the debates over the Constitution, many candidates for election to the state ratifying conventions announced stands, even pledges, to vote one way or another. Yet they remained free to change their minds after considering the debate at the conventions themselves. Indeed, if convention delegates had lacked the right to vote according to their best judgment, the battle to ratify the Constitution would have been lost! 23 *Documentary History* 2501-09 (editor's notes, describing votes at the New York and Virginia ratifying conventions).

Both the original Constitution and the Twelfth Amendment were designed to ensure similar discretion for presidential electors.

CONCLUSION

RCW 29A.56.340 is clearly designed to coerce presidential electors into voting as the State directs rather than honoring their constitutional duty to exercise their best discretion. The statute thereby violates the plain text and original meaning of the Constitution. Accordingly, the decision below should be reversed.

Respectfully submitted,

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Dated: December 5, 2018

CERTIFICATE OF SERVICE

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