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(Ninth Circuit No. 16-35314)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT IN

SHANNON C. ADAMSON and NICHOLAS ADAMSON,
Husband and Wife,

Plaintiffs-Appellees,

v.

PORT OF BELLINGHAM, a Washington Municipal
Corporation,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE WASHINGTON PUBLIC PORTS
ASSOCIATION**

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I. INTRODUCTION

This case asks what liability standards apply to a landlord who leases marine facilities to a long-term tenant using a lease document, but reserves for itself a subservient right to use a portion of the leasehold property when not otherwise in use by the tenant and agrees to repair and maintain the leased premises. Washington Public Ports Association (“WPPA”) submits this brief as amicus curiae urging this Court to reaffirm that, under Washington law, a port’s liability on leased property is governed by landlord tenant law, and that a port is not stripped of those protections and put back into the position of a possessor by terms in the lease reserving a junior right to use a marine berth or a general lease obligation to maintain and repair.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Legislature founded WPPA in 1961 as a non-profit organization. It is funded primarily with public funds in the form of dues contributed by its member port districts and is subject to audit by the State Auditor. Currently, WPPA includes 69 of Washington’s 75 port districts as its members, including the Ports of Seattle, Tacoma, Bellingham, Everett, Vancouver, Olympia, Bremerton, Walla Walla, Anacortes and many others. WPPA’s mission is to promote the interests of the public port districts in Washington through governmental relations, ongoing education,

and advocacy programs. It speaks to all branches of Washington government as the collective voice of the Washington public port districts.

Ports are unique among Washington public agencies insofar as their primary purpose is to promote economic development. To this end, WPPA's members build, operate, and lease airports, marine terminals, marinas, railroads, and industrial parks. They make significant investments in infrastructure by building facilities to house profitable businesses that, in turn, provide employment and reinvest in local communities. Just like commercial landlords everywhere, ports enter into lease agreements with businesses who operate on port properties in exchange for rent that is paid to the port.

WPPA members own marine port facilities in the Puget Sound, on the Columbia River, the Strait of Juan de Fuca, and along the Washington coast. Many lease their marine facilities to long-term marine tenants, and regularly include language in their lease agreements stating that any ship berth included in the lease is subject to a priority or preferential use term. The purpose of the priority use language is to allow the port the opportunity to put the berth to other economic uses when it is not otherwise in use by the tenant, thereby maximizing the economic potential of the port's property. A reservation of this junior right by the port does not interfere with the tenant's exclusive use. It affects neither when nor how a marine

tenant chooses to use the leased facilities. Rather, it seeks to optimize the inevitable periods in maritime commerce when the tenant is not using the berth.

Priority use terms are an important tool to make the most efficient use of a limited public resource. Port harbor facilities must account for the public's interest in managing shorelines by fully utilizing existing facilities, rather than constructing new ones, and account for environmental and recreational interests. These policies are laid out in the Shoreline Management Act, RCW 90.58.020 *et seq.* Priority use agreements are a way to maximize use of existing infrastructure, instead of building additional infrastructure, without disrupting the long-term tenant's own use of the facilities.

A federal district court ruled in this case that, under Washington law, a port is held to the standards of a possessor of property, and therefore not entitled to protections available to other landlords, when a crewmember of a maritime lessee was injured while working on leased property, because the area of the leased premises where the injury occurred was subject to a priority use term and the port contracted to retain a duty to repair and maintain.

If correct, the federal court's ruling would fundamentally change the ways in which Washington maritime ports operate. The answer to the

certified question is of utmost importance to WPPA members around the state who have entered into similar leases with the expectation that a port, like any other commercial property owner in Washington, is entitled to rely on landlord liability standards and is not required to supervise the activities of its long-term maritime lessees.

III. ARGUMENT

A. Washington Ports Have Relied on Priority Use Provisions in Marine Facility Leases For Decades.

The lease between the Port of Bellingham and the Alaska Marine Highway System (“Ferry”) covers specified property at the Bellingham Cruise Terminal for a tenancy of fifteen years, ending on September 30, 2024. Appellant’s Excerpts of Record (“ER”) 340-341. The leased premises include priority use of the “Marine Facilities,” defined as including a vehicle ramp, passenger ramp, and a ship’s berth. *Id.* The “priority use” term reserves the right of the Port to allow other uses of the Marine Facilities so long as those uses do not unreasonably interfere with Ferry’s own use. *Id.* The Ferry retains the right to exclusive use of the berth at any time on any given day. It is only when the Ferry is not otherwise using the Marine Facilities that the Port may invoke its subservient right to use them. “As a practical matter, only the Ferry used the passenger ramp, and the priority use provision effectively gave the Ferry exclusive control of the ramp when it was in Port—no other ship could dock at that time.”

Ninth Circuit Certification Order at pg. 8.

The priority use term in the Port's lease with the Ferry is typical of marine facility lease agreements entered into by ports throughout Washington, including the Port of Seattle and the Port of Tacoma. *See Barnett v. Lincoln*, 162 Wash. 613 (1931) (analyzing Port of Seattle lease with preferential use provision for marine facility).¹ These leases are public records that may be obtained through a records request to the respective port. RCW 42.56.070 (1). This Court may take judicial notice of the existence and prevalence of these preferential use terms because they are found in contracts of public entities, are not subject to reasonable dispute, and are capable of accurate and ready determination by resort to the ports' own public records. ER 201(b)(2); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487 (2015) (taking judicial notice of publicly recorded mortgage documents); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015) ("judicial notice may be

¹ The Port of Seattle posts additional leases that include preferential use provisions on its public records website. *See, e.g.*, <https://portofseattle.nextrequest.com/documents/221976>, <https://portofseattle.nextrequest.com/documents/222300>, <https://portofseattle.nextrequest.com/documents/221780>. The Port of Tacoma similarly uses leases that contain preferential use language, which are available on its public records website. *See, e.g.*, http://www.portoftacoma.com/sites/default/files/NorthwestInnovationWorksTacomaLLC_Lease_05_01_14.pdf.

taken of public records and government documents available from reliable sources”); *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (taking judicial notice of public utility contract).

Maritime commerce is peripatetic and sporadic by nature. The preferential use language contained in the Ferry lease, like that contained in leases entered into by ports throughout Washington, is a contractual recognition that a ship-operating lessee will only need exclusive use of the berthing facilities when its ships are in fact at berth, leaving open the option for the port to use the berth for other economic generating activities when it is not in use by the lessee. When the Ferry chooses to use the Marine Facilities, its right to possession is exclusive as to all others, including the Port. There are no restrictions on when or how often the Ferry may use the Marine Facilities. That too is entirely within the Ferry’s control. When the Ferry is not using the Marine Facilities, it has agreed that the Port may put them to other uses that do not unreasonably interfere with the Ferry’s operations (though in practice this never occurred and the Ferry was in fact the exclusive user). In this regard, the arrangement might better be described as needs-based exclusive use, rather than priority use. Regardless of the nomenclature, the effect is the same: when the Ferry uses the Marine Facilities it has the right to exclude all others. The existence of the

“preferential use” term gives the Port no greater right to direct and control the Ferry’s use of the leased Marine Facilities than if the Ferry was there 24/7.

Ports have been relying on priority use terms in marine terminal leases for nearly a century with the understanding that these terms do not deprive the port of its status as a lessor and convert it back into the possessor of the property. This Court’s 1931 decision in *Barnett v. Lincoln*, 162 Wash. 613 (1931), set the precedent for this well-established practice. *Barnett* involved a lease between the Port of Seattle and a fish processing company called Salmon Terminals for property on Pier 40 in Seattle. The agreement provided Salmon Terminals with the right to use specified warehouse space and, importantly, a “preference” for use of berthing and wharf space. *Id.* at 393. The question before this Court was whether the agreement was a lease, in which case the Port was required to obtain a bond from the lessee, or was merely a license, which did not confer possession. *Id.* at 616-617.

This Court explained that whether an agreement creates a landlord tenant relationship is determined by the intent of the parties as ascertained from consideration of the entire instrument. “If exclusive possession or control of the premises, or a portion thereof, is granted, even though the use is restricted by reservations, the instrument will be considered to be a lease

and not a license.” *Id.* at 617-618. Thus, where Salmon Terminals was given exclusive rights to use certain property and preferential use of the berth, the Court held that the agreement as a whole constituted a lease. *Id.* at 621.

It is noteworthy that the *Barnett* Court examined the lease as a single, holistic agreement for purposes of determining whether the parties intended to create a tenancy. *Id.* This Court did not parse out specific terms of the agreement and prescribe a tenancy for some and a license for others. Instead, the Court held that *despite* the preferential use provision, the agreement as a whole was a lease. *Id.* at 621. As a result, the entire lease was found to be void because the port had not obtained a bond that was required by statute any time the port tendered possession and control of port property to a tenant via a lease. *Id.* at 624.

The federal district court in this case took a very different approach. Rather than analyzing the lease as a whole, as mandated by *Barnett*, it focused entirely upon the priority use provision, as it applied to the Marine Facilities portion of the leased property. ER at 16. The federal court found that the priority use provision—standing *alone*—did not convey continuous or perpetual exclusive use and therefore the Port was not entitled to landlord protections for portions of the leased premises subject to that provision. *Id.* This piecemeal approach to analyzing the parties’ contract violates the

analytical framework this Court articulated in *Barnett*. Moreover, it appears to conflate the importance of whether the Ferry had “exclusive” use of the Marine Facilities, i.e. the right to control and exclude all others, with whether the Ferry’s use was continuous or sporadic, which has no effect on whether it was exclusive when in use.

Washington ports have entered into numerous marine terminal leases since 1931 that include preferential use terms with the understanding that they have created a landlord tenant relationship with the marine lessee. A port who has leased property to a tenant is no longer obligated to supervise and oversee the use of its leased property because, under longstanding Washington law, a landlord owes no general duty of care to those who enter upon the property while in the tenant’s control. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969) (“lessor is not liable for injuries caused by apparent defects after exclusive control of the property has passed to the lessee”). Until the district court’s decision in this case, WPPA is not aware of a single instance in which a Washington court has deprived a port of its lessor status merely because the lease included priority use term for a marine berth or the port agreed to undertake maintenance and repairs.

The Ninth Circuit asks “whether priority use can be considered to give exclusive control” to a tenant, such that landlord liability and not

possessor liability governs the Port's common law obligations. Ninth Circuit Certification Order at pg. 10. WPPA respectfully submits that the answer to that question has been settled law since *Barnett*, in which this Court held that an agreement between a port and a private entity for the use of space at a marine terminal is a lease, despite a preferential use term for the berth and wharf, because the port had effectively yielded exclusive possession of the premises to its tenant as against the world. *Barnett*, 162 Wash. at 619-621.

Ports Cannot Control Maritime Tenant Operations Sufficiently to Prevent Accidents While a Vessel is at Berth.

Leases of marine facilities to vessel owners and operators are unique from other commercial leases. This is due, in part, to the unique duties imposed on vessel owners and operators under federal maritime law. These maritime obligations limit a port's ability to control marine tenants' activities at berth. As a matter of law and good policy, courts should not saddle ports with duties to control activities which are already highly regulated by federal law or otherwise incentivize a port to inject itself into a vessel owner's day-to-day operations. Ports are not in the business of operating vessels or supervising a vessel's crew.

Under long-standing maritime law, vessel owners are required to control the means of accessing the vessel or risk vicarious liability for

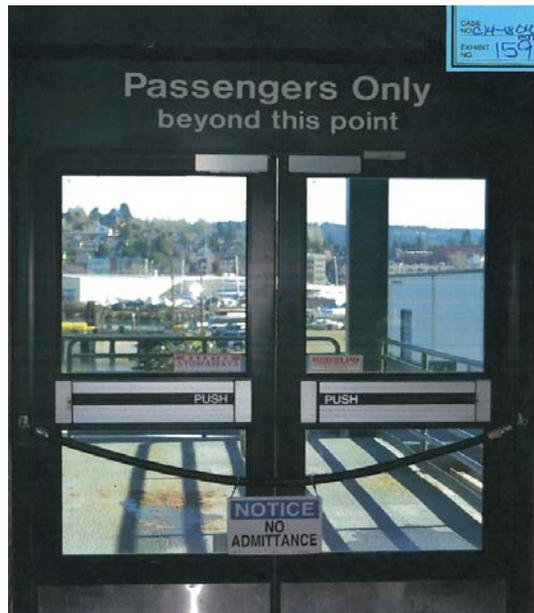
abdicated their duties. Indeed, vessel owners and operators have a non-delegable obligation under general maritime law to provide safe ingress and egress from the ship for their crewmembers and passengers. *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir. 1969) (collecting long line of cases holding that a shipowner employer has a fundamental, non-delegable duty to provide its crew members with a reasonably safe means of ingress and egress from its vessels); *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1319-1320 (11th Cir. 2003) (describing shipowner's duty to maintain reasonable, safe means for passengers to board and disembark as "non-delegable" and a "high degree of care"); *see also Landers v. Bollinger Amelia Repair, Ltd. Liability Corp.*, 403 Fed. App'x 954, 956-957 (5th Cir. 2010) (maritime law imposes no duty on dock owner to provide safe ingress and egress to vessel at berth). Vessel owners cannot simply delegate their duty to a port. *See, e.g., Dise v. Express Marine, Inc.*, 476 Fed. App'x 514, 521 (4th Cir. 2011) (explaining that shipowner can be held vicariously liable for alleged negligence of others who are performing the operational activities of the ship). Imposing additional, state law duties of care on a port requiring it to retain active control over the marine facilities while in the exclusive use of a vessel owner sets up an unnecessary battle for control between the port, who already contractually agreed to hand over control, and the marine tenant, who has a non-delegable duty to ensure the

safety of the use.

Treating a Ferry crewmember as a business invitee of the Port for purposes of ensuring the safety of the Marine Facilities imposes on the Port a common law duty to supervise, train, and oversee all active use of the Marine Facilities by the Ferry's crew, because heavy industrial equipment like the passenger ramp in question must be *used* properly in order to avoid injuries. This is, in practice, a virtually impossible task because the Ferry has complete control over when the equipment is used, which crewmember or Ferry-contractor performs the work, and what training and supervision they receive. Liability is tied to control under Washington law, and courts should not impose duties on ports to control the business activities of marine tenants over which the tenant, by law, exercises complete and non-delegable control.²

² This is a very different situation than a public wharfinger or marina operator, who is in the business of operating a public wharf or marina and, as such, has a general duty of care to its own invitees. *See, e.g., Gregg v. King County*, 80 Wash. 196, 200-201, 141 P. 340 (1914) (comparing public wharf to public highway and holding that county owed duty of care with respect to wharf (not access ramp) it owned and operated for public use); *Emerson v. Anderson*, 55 Wn.2d 486, 348 P.2d 401 (1960) (marina owed duty of care to provide safe docks (not access ramp) to public from whom it accepted payment for moorage). Here, the Ferry was a long-term, exclusive lessee, and had exclusive control over when and how it used the Marine Facilities. Unlike a public dock, of which a port would merely allow use, the Port had no control over the leased Marine Facilities when they were in use by the Ferry.

In addition to their federal common law obligations to provide safe ingress and egress, vessel owners also have statutory security duties under maritime law to restrict and control access to their vessels. For example, 33 C.F.R. § 104.265 requires a vessel owner to strictly control access to its vessel. 33 C.F.R. § 104.292 imposes additional security requirements for passenger vessels and ferries. These regulations mandate that vessel owners like the Ferry maintain strict control over access points to their vessels, allowing only ticketed passengers, crewmembers, or other authorized individuals holding a Transportation Worker’s Identification Card (“TWIC”) to board. These security restrictions are epitomized by the following picture of the crash door leading to the passenger walkway in question:



ER 818. The Ferry testified at trial that it controlled these doors and who went beyond them whenever the Ferry was at the berth. ER 615-616. No one was permitted through the doors and onto the walkway without the Ferry's permission. *Id.* This is the essence of leased premises: the ability to exclude all others.

Port personnel are not passengers, are not crewmembers, and are therefore not permitted into the secure areas absent an authorized escort or a TWIC card. 33 C.F.R. § 104.265(a). These vessel security requirements are yet another reason why a port-lessor cannot, does not, and should not retain active control over marine facilities in use by a tenant vessel operator.

Finally, the nature of the command structure on large, crewed vessels further complicates the ability of the port to control the activities of a marine tenant the way it may choose to control non-marine tenants. It is axiomatic that mariners follow a rigid command structure and must follow the directions of their captain. As the U.S. Supreme Court explained:

Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Everyone and everything depend on him. He must command and the crew must obey. Authority cannot be divided.

Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 38 (1942) (holding that the

NLRB abused its discretion by ordering the reinstatement of seamen who had been discharged by the vessel's master after refusing a command to return to work from a strike, because refusing the master is mutiny). A port employee cannot control how a crewmember does his or her job. Should any conflict arise between the instructions of the vessel master or the advice of the port-side employees, the crewmember will always follow the command of their master.

The unique qualities of maritime commerce distinguish marine facilities from this Court's analysis in *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) ("*Afoa I*"). *Afoa I* did not raise the question presented here of whether landlord or possessor liability was the appropriate standard to govern the port's duties, because there was indisputably no lease between the port and the plaintiff's employer. Thus, this Court proceeded on the assumption that premises liability law applied and addressed the question of whether the plaintiff was a licensee or invitee, both of which carry duties of care subscribed to possessors of property. *Id.* at 805.

The airport in *Afoa I* retained "exclusive control and management" of the area where the injury occurred in lease agreements it signed with the airlines, and also granted licenses to private companies who worked on the premises. *Id.* at 465. As a result of this and other evidence showing the port exercised active control over the plaintiff's activities on the property,

this Court found “the Port [was] the only entity with sufficient supervisory and coordinating authority to ensure safety in [that] complex, multiemployer work site.” *Id.* at 465, 479. This Court made clear, however, that aspects of its decision were “unique” to the highly complex working environment of a large airport. *Id.* at 481.

Afoa I could not be further from the case at hand, where the Port was severely restricted from accessing the site in question whenever it was in use by the Ferry. The Port had no authority to control or direct who the Ferry chose to operate the ramp, when it was operated, or what training or supervision the Ferry’s operator received. Absent the Ferry’s consent, the Port lacked authority to even access the Marine Facilities while the Ferry was there. The Port was the Ferry’s landlord, not its business manager or general contractor.

To be exposed to business invitee liability, the Port would have had to possess the authority to control the Ferry’s use of the Marine Facilities while the Ferry was using them. Otherwise, the Port would lack the ability to prevent the accident by ensuring that the Ferry crewmembers were properly trained and operated the ramp correctly. The priority use provision only gave the Port the right to use the Marine Facilities when the Ferry was *not* using them. Nothing in the lease allowed the Port to interfere with the Ferry’s exclusive possession, use, and control when the Ferry was at berth.

And, as shown above, federal law strictly limited the Port's ability to control the Ferry's activities when a vessel was there.

The issues presented in this case walk the fine line between state law and federal maritime law. This Court should not impose additional state law duties on a landlord port that would force it to interfere with the vessel owner's own duties under federal maritime law. Once a port surrenders possession and control of marine facilities to a marine tenant—even if periodic—it cannot exercise the type of control necessary to prevent workplace injuries to the maritime tenant's personnel.

C. **Imposing Possessor Liability on Ports With Leased Marine Facilities Would Have Sweeping Implications for Washington Ports.**

The district court's decision to treat a crewmember of a long-term marine tenant as a business invitee of the port represents a fundamental change in the settled expectations of WPPA members. Ports throughout Washington have entered into long-term leases of maritime facilities that, despite contractual reservations, were based on the expectation that a landlord tenant relationship was being created. The implications of treating tenant employees as business invitees cannot be overstated.

With some exceptions that are not presently at issue, a landlord is not subject to liability to a tenant who is injured as a result of conditions on its leased property. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d

12 (1969). That is because it is the tenant, and not the landlord, who possesses and controls the property at the time of injury. On the other hand, a landowner who maintains control of its property, rather than leasing it to another, is subject to liability for injuries that occur as a result of conditions on the property. *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 224, 377 P.2d 642 (1963). A possessor of property owes its business invitees a duty of reasonable care to inspect for dangerous conditions and take reasonable steps to protect the invitee from harm. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994).

If crewmembers of long-term marine tenants are now business invitees of the landlord port, then ports across Washington will be held to higher standards than any other commercial landlord in Washington. The federal court’s ruling will require Washington ports to hire and train additional employees to supervise and oversee their long-term marine tenant’s operations as to any portion of leased property subject to a priority use reservation, even though those provisions give the tenant unfettered access and control over the marine facilities whenever the tenant chooses to exercise those rights. Indeed, ports would be required to station someone at a leased berth at all times, even during tenant operations, to ensure that they remain safe for the tenant’s crew, passengers and others. These new common law obligations would be in addition to duties the port contracts to

retain via the lease (i.e. a duty to maintain and repair) and duties already imposed on landlords under Washington common law.³

The practical effect of the ruling is that ports will be forced to choose between foregoing the priority use terms previously approved by this Court so that a landlord tenant relationship is assured, or attempting to exercise the type of pervasive control that would be necessary in order to meet duties of care imposed on possessors of property at common law. Since it is unlikely that a port will be able to exercise pervasive control over vessel crewmembers, the result will be that marine berths sit idle while no vessel is calling.

The lease in question is for heavy industrial property, being used to berth an ocean-going vessel by professional, experienced, licensed mariners at the direction of the ship's officers. Converting the Port's relationship with the Ferry into that of a possessor and its invitee has the additional consequence of turning the Ferry's passengers—there for the economic benefit of the Ferry's business—into additional invitees of the Port even after they have left the common spaces of the terminal building, passed

³ The Port in this case contracted to undertake a duty to maintain and repair, above and beyond its common law duties as a landlord. Imposing an additional common law duty to retain pervasive control of the Marine Facilities would convert the Port back into a possessor and negate any need for the contractual agreement to maintain and repair.

through the crash doors secured by the Ferry, and entered the Marine Facilities that are under the Ferry's exclusive control. Short of taking complete control of the ramp back from the Ferry and operating it with Port controlled employees, the Port cannot ensure the safety of the Ferry's passengers once they are on Ferry-controlled premises.

IV. CONCLUSION

The federal district court's ruling upends a long history of port marine tenant leases which have included priority lease provisions for marine facilities. Holding ports to additional possessor liability standards in these unique circumstances places ports in the impossible position of trying to control that which they cannot properly control: the activities of a marine tenant while at berth. The implications of this ruling on WPPA members is real and substantial. For these reasons, WPPA respectfully requests that this Court answer the certified question by re-affirming that landlord liability principles, and not possessor liability, govern claims against a port for injuries sustained by marine tenant employees on leased property in use by and under the exclusive control of the tenant, regardless of the priority use clause and regardless of the duty to maintain and repair.

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Dated: January 30, 2019

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I hereby certify that on the 30th day of January, 2019, I caused to be served the foregoing **BRIEF OF AMICUS CURIAE WASHINGTON PUBLIC PORTS ASSOCIATION** via the Court of Appeals E-Filing System on the following party at the following address:

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