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Supreme Court No. 96262-6
(Court of Appeals, Div. I No. 76630-9-I)

THE SUPREME COURT
STATE OF WASHINGTON

FREEDOM FOUNDATION,
Petitioner/Defendant,

v.

UNIVERSITY OF WASHINGTON,
Respondent/Defendant,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,
Respondent/Plaintiff,

**RESPONDENT SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 925'S SUPPLEMENTAL BRIEF**

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I. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Service Employees International Union Local 925 (“SEIU 925” or “Union”), the Plaintiff at the Superior Court and the Respondent before the Court of Appeals and this Court, seeks an order affirming the Court of Appeals’ decision enjoining Public Records Act (“PRA”) release of the documents at issue by Respondent University of Washington (“UW”) to Petitioner Freedom Foundation (“the Foundation”) because the documents at issue are not public records as defined by the PRA.

II. INTRODUCTION

The Foundation attempts to use the PRA to intrude upon the private, non-public, lives of UW professors through its request for documents,¹ including emails, that were created outside the scope of employment and do not relate to the conduct of government or the performance of a governmental or proprietary function. This Court should reject this attempt; hold the documents at issue – emails regarding union organizing for a Union not certified or recognized by UW, emails regarding a private nonprofit organization (the UW chapter of the

¹ The Foundation made a PRA request to UW for emails of Professor Robert Wood and three other UW professors, including emails to and from private accounts (@seiu925.org and @uwfacultyforward.org), information about union issues (including “right to work,” “SEIU,” and “Union”), and emails on the listserver of a private organization, the UW chapter of the American Association of University Professors. CP 36. Only the documents of Professor Wood are at issue in this case. The factual and procedural history is detailed in the Statement of the Case in SEIU 925’s Answer in Opposition to Petition for Discretionary Review (“SEIU 925 Answer”), 2-6.

American Association of University Professors (“AAUP”)), and other personal and private emails – are not public records; and affirm the lower courts’ injunctions enjoining release of such documents.

III. ISSUE PRESENTED

Whether this Court should affirm the Superior Court and Court of Appeals’ decisions enjoining the release of the documents at issue.

IV. ARGUMENT

A. The Documents at Issue Are Not Public Records Under the PRA.

A “public record” is “[1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(3). “All three elements of this three-pronged test must be satisfied for a record to be a public record.” *Dragonslayer, Inc. v. Wash. State Gambling Comm.*, 139 Wn.App. 433, 444, 161 P.3d 428 (2007), citing *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 564, fn 1, 618 P.2d 76 (1980). Only “public records” are subject to disclosure; non-public records are not subject to PRA disclosure. RCW 42.56.070(1); *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993); *Dragonslayer*, 139 Wn.App. at 444 (citation omitted).

Here, the Court of Appeals correctly held that the documents at issue are not, by definition, public records because they were not created within the scope of employment and do not relate to the conduct of government or the performance of a governmental or proprietary function.²

1. The records at issue are not public records because they were not created within the scope of employment.

In 2016, this Court proclaimed that “[f]or information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment.*” *Nissen v. Pierce County*, 183 Wn.2d 863, 878, 357 P.3d 45 (2015) (emphasis in original). Records are only within the scope of employment “when the job requires it, the employer directs it, or it furthers the employer’s interest....This limits the reach of the PRA to records related to the employee’s public responsibilities.” *Id.*, at 878 (citations omitted). The Court of Appeals here correctly reasoned that employees are agents of an employer, whose service is controlled by the employer or subject to the employer’s right to control. *SEIU 925 v. Univ. of Wash.*, 4 Wn.App.2d 605, 620 (2018) (citation omitted).

² While the documents at issue are not public records regardless of who has the burden of proof, *SEIU 925* does not have the burden on whether a document is a public record. *Dragonslayer*, 139 Wn.App. at 441; *see also Belenski v. Jefferson County*, 187 Wn.App. 724, 733 fn 5, 350 P.3d 689 (2015), *rev’d on other grounds*, 186 Wn.2d 452 (2016).

The documents at issue are emails of a professor about union organizing for a union not certified or recognized by UW, a private organization, and other personal and private matters. They are not required by the professor's job, directed by UW, and do not further UW's interest.³ UW does not have the right to control a professor's union organizing efforts. Thus, the scope of employment test is not satisfied. In fact, it appears that no party disputes that the documents at issue were not created within the scope of employment.

Nissen did not expressly limit the "scope of employment" test to emails from non-government accounts or non-government devices. *See, e.g.,* 183 Wn.2d at 878. Instead, this Court applied the scope of employment test to the records in that case, where both prongs two and three of the definition of public record were at issue. *Id.* at 880. Specifically, this Court held "that text messages sent or received by [a prosecutor] *in his official capacity* can be public records of the County, *regardless of the public or private nature of the device used to create them...*" *Id.* at 873 (emphasis added). This Court underscored the irrelevance of the nature of the device used to create the records in noting

³ Professor Wood's eight-page professional resume does not contain any reference to union organizing but does contain significant information about his research and other work at UW. CP 104-14. Similarly, a UW Atmospheric Sciences professor job posting makes no mention of a union or union organizing. CP 116-18. Professor Wood also states that his activities as a member of SEIU 925 and as (former) President of the UW AAUP are not part of his job duties and responsibilities at UW. CP 101.

that the PRA does not authorize “unbridled searches” for records, “[w]hether stored in a file cabinet or a cell phone.” *Id.* at 885. This Court also noted that the scope of employment test “limits the reach of the PRA to records related to the employee’s public responsibilities.” *Id.* at 878.

The Foundation now avers that *Nissen* found the “scope of employment” test applies only to the third prong of the definition of public record. Petition for Review (“Petition”), 5. However, this issue is not properly before this Court, because the Foundation failed to raise it at the Superior Court or prior to the Court of Appeals’ decision. SEIU 925 Answer, 6-7, 9-10. Even if this Court considers this untimely-raised issue and finds scope of employment applies to prong three, this test should be used here to find the records are not public.⁴ UW treated Professor Wood as a “custodian of records” and asked him to search his email – both UW and non-UW – for records responsive to the request, and provide them to the UW public records office. CP 42-43, 218-20. This is a similar posture to *Nissen*, where this Court found a county prosecutor should search his own records to determine which are public records under the PRA. 183 Wn.2d at 876-77. Further, applying scope of employment to these facts recognizes that the definition of public record is limited to those related to

⁴ In doing so, the court need not expand the reach of any holding beyond the records of this case. *See, e.g. Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, P.3d 737 (2015) (PRA requires “record-specific inquiry”).

conduct of government. Records created within the scope of employment relate to the conduct of government and those outside the scope of employment do not. *See, e.g., Belenski*, 187 Wn.App. at 735 (logs reflecting county employees' use of the internet *for work* relate to the conduct of government or the performance of a governmental or proprietary function); *Yakima Newspapers v. Yakima*, 77 Wn.App. 319, 324, 890 P.2d 544 (1995) (settlement agreement regarding dispute over fire chief's performance as fire chief is a public record, only because relates to governmental and proprietary functions of termination and provision of fire services). A document's form or location is not determinative of its public record status. RCW 42.56.010(3) (definition of public record applies "regardless of physical form or characteristics").

The documents at issue were not prepared, owned, used, or retained by Professor Wood or UW within the scope of employment. *Nissen* recognized that only when employees are acting within the scope of employment are their actions "tantamount to 'the actions of the [body] itself.'" 183 Wn.2d at 876 (citations omitted). Further, even if scope of employment does not apply, there is no allegation that UW prepared or used the documents at issue. The Foundation avers that UW "owned" and "retained" the documents because some, but not all, are on UW email accounts. *Nissen* provides dictionary definitions of "retain" ("to hold or

continue to hold [it] in possession or use”) and “own” (“to have or hold as property”). 183 Wn.2d at 882. However, there is no evidence that UW “holds or continue[s] to hold [] in possession or use,” or has or holds “as property” the email messages that are on a UW email account, as UW did not retrieve the records of Professor Wood itself; it asked Professor Wood to produce them. CP 42-43, 218-20.

Thus, the documents at issue were not created within the scope of employment and are not public records under the PRA.

2. The records do not otherwise relate to the conduct of government or the performance of a governmental or proprietary function.

In *Nissen*, this Court stated that *Confederated Tribes* and *Oliver* “suggest records can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government.” 183 Wn.2d at 880-81. In a footnote, the Court then emphasized “[i]t is worth repeating that records an employee maintains in a personal capacity will not qualify as public records, even if they refer to, comment on, or mention the employee’s public duties.” *Id.* at 881, fn 8.

Those cases cited in *Nissen* illustrate the types of records found to be public. *Confederated Tribes* involved records reflecting the amount of a Native American tribe’s “community contribution” required to be paid to government agencies under a tribal-state gaming compact, and relating to

actual administration by the government of gambling compacts with tribes, where the government negotiates, renegotiates, and enforces such compacts on behalf of citizens of Washington, distributes community contributions to impacted agencies, and relies on and uses the information in the records requested. 135 Wn.2d 734, 748, 958 P.2d 260 (1998). Similarly, *Oliver* examined patient medical records that contained information prepared and maintained by a public hospital *related to its “administration of public health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs,* all of which are carried out or relate to the performance of a government or proprietary function.” 94 Wn.2d at 566 (emphasis added).

The holdings of those cases are consistent with the Court of Appeals’ decision here and other Washington courts’ holdings that certain records are not public records. For example, this Court, acknowledging the broad mandate favoring disclosure in PRA, found that requests for verification of employment of a deputy prosecutor, seeking information about their position, salary, and length of service, in their government personnel file do not relate to the conduct of government or the performance of any governmental function. *Dawson*, 120 Wn.2d at 788-89. Thus, the information was found to be not a public record under the PRA. *Id.* at 789. Requests for verification of employment in an

employee's personnel file bear a much closer relation to the conduct of government than do the documents at issue here.

Emails of city council members, some of which were on city email and city servers, sorted by a consultant as "not conduct of government" were found to be personal and not related to the conduct of government or a governmental or proprietary function. *Forbes v. City of Gold Bar*, 171 Wn.App. 866, 288 P.2d 382 (2012), *rev. denied*, 177 Wn.2d 1002 (2013). Further, the oaths of attorney for attorneys a superior court could appoint are not public records because they do not relate to the conduct of government or the performance of any governmental function. *Smith v. Okanogan County*, 100 Wn.App. 7, 14-15, 994 P.2d 857 (2000).

"The legislative intent of the [PRA] is to require public access to information *concerning the government's conduct.*" *Dragonslayer*, 139 Wn.App. at 445 (emphasis added); *see also Comaroto v. Pierce County Medical Examiner's*, 111 Wn.App. 69, 72, 43 P.3d 539 (2002). "The basic purpose and policy of [the PRA] is to allow public scrutiny of government, *rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation.*" *Id.* at 72 (citation omitted, emphasis added). Thus, specific determinations, rather than general assertions, are required in order to demonstrate that the "conduct of government" prong of the public record definition is satisfied.

Dragonslayer, 139 Wn.App. at 445-46 (acknowledging PRA’s broad mandate, remand to trial court to make specific determinations about whether financial statements in possession of Gambling Commission, a government entity, were used by the Commission).

Thus, courts holding records to be public have made specific determinations, rather than general statements or speculation, that records relate to the conduct of government or the performance of a governmental or proprietary function. For example, one court found that 467 personal emails on the work computer of a secretary in the prosecutor’s office did not become public records until they were printed by the county and used for a proprietary function: preparing for litigation over her termination. *Tiberino v. Spokane County Prosecutor*, 103 Wn.App. 680, 683, 685, 688 13 P.3d 1104 (2000); *see also Yakima Newspapers*, 77 Wn.App. at 324; *Belenski*, 187 Wn.App. at 735-6; *Jane Does v. King County*, 192 Wn.App. 10, 23, 366 P.3d 936 (2015) (surveillance videos obtained by county to investigate a crime, a government function, are public records); *Comaroto*, 111 Wn.App. at 73-74 (suicide note in possession of county is public record because law enforcement “gathered and temporarily retained the note before delivering it to the medical examiner’s office, a government agency, to investigate and to determine the cause of...death, a government function”). Significantly, no Washington case has held records to be

public where the relation to the conduct of government is as nonexistent or attenuated as the alleged relation articulated by the Foundation here.

The four categories of documents at issue⁵ are not public records as defined by the PRA. First, Professor Wood's emails and documents about faculty union organizing for a union not certified or recognized by UW, including emails containing opinions and strategy regarding organizing and communications with SEIU 925, are not public records. They were sent and received in his personal capacity as a union member. They have no specific relation to the conduct of government or the performance of a governmental or proprietary function. They are personal and private discussions, involving personal and private deliberations about whether to join a private organization. They relate to *possible* unionization of UW faculty. Mere discussions about the possibility of unionization at a public university, sent and received in a personal capacity, are not related to the conduct of government or the performance of a governmental or proprietary function.

The Foundation contends that this category of emails are public records because they are *likely* to discuss topics such as lunch breaks or curriculum required, which relates to the state action of providing education. Petition, 12. However, nothing in the record shows that these

⁵ For a complete description of the categories, see SEIU 925 Answer, 5.

are the topics of the emails. Even if it did, such discussions, made by individuals in their private capacity, are not public records. *Nissen*, at 881, fn 8. Employment verification requests in government employee personnel files and oaths of attorneys, which could remotely involve government employment, are not related to the conduct of government. *See, e.g. Dawson v. Daly*, 120 Wn.2d at 845; *Smith*, 100 Wn.App. at 14-15. Further, in evaluating whether records relate to the conduct of government or the performance of the state's proprietary function as employer, courts have examined whether the state is acting as employer. *See, e.g. Tiberino*, 103 Wn.App. at 688; *Yakima Newspapers*, 77 Wn.App. at 324. This analysis is equally apt applied to the state acting to provide education. And, at this point in time, nothing about these union organizing emails bears a relation to the conduct of government or the provision of public education or government employment: there was and is no union negotiating a contract, filing grievances, or engaging in any activities that impact government education or employment.

Second, postings to the AAUP UW chapter listserver and personal emails sent or received by a professor in his personal capacity as AAUP UW chapter president and unrelated to UW business are not public records. Similar to emails on union organizing, they relate to the affairs of a private 501(c)(6) non-profit organization and are expressly unrelated to

UW business. CP 100. As such, they cannot be categorized as public records under the PRA. The AAUP's private nature and identity distinct from UW is underscored by the fact that participation in the AAUP UW chapter listserver is not limited to UW faculty or employees and includes people outside of the UW community. CP 100. The Foundation speculates that the AAUP emails relate to the state as employer and as educator, without any actual evidence, other than the AAUP's mission statement. As set forth above, that does not mean they relate to the conduct of government. They were sent or received in a private capacity and do not relate to the state acting in its proprietary function as educator or employer.

Finally, the other personal emails and/or documents unrelated to UW business are also non-public records, analogous to the "non-conduct of government" personal emails not subject to release in *Forbes*, and those that would not have been deemed public records in *Tiberino* except for the fact that they were relied upon in an employee's discharge, a proprietary function. While the documents at issue do *not* reflect excessive time promoting an outside organization, as the Foundation avers, this would not make the records public. *See* SEIU 925 Answer, 15. Further, the existence and time stamp of emails is not a public record. *See, e.g., Tiberino*, 103 Wn.App. at 691.

Thus, the documents at issue do not relate to the conduct of government or the performance of a governmental or proprietary function.

3. SEIU 925 meets the requirements for an injunction.

To obtain an injunction, a plaintiff must show: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) the acts complained of are either resulting in or will result in actual and substantial injury to plaintiff. *SEIU Healthcare 775 v. Dept. of Social and Health Services*, 193 Wn.App. 377, 393, 377 P.3d 214 (2016). As set forth in Sections IV.A.1 and IV.A.2, SEIU 925 has a clear legal and equitable right to prevent the disclosure of the documents at issue, because they are not public records subject to PRA release. Additionally, SEIU 925 and Professor Wood have a well-grounded fear of immediate invasion of this right because UW has declared it will release the documents at issue absent an order enjoining it from doing so. CP 120-21, 154, 215. Furthermore, release of information would significantly harm SEIU 925 and Professor Wood. CP 97-98, 104-05. Release would chill participation of SEIU 925 members and other faculty in union organizing. CP 97, 104-05. Release would reveal private communications regarding union organizing. CP 97, 104-05. Release of the AAUP listserv emails would impair the ability of faculty to freely discuss issues on a private organization's listserv. CP 97-98, 104-05. Finally, release of personal

emails of Professor Wood would harm him. CP 105. The Foundation’s stated aim of de-funding public sector unions and targeting SEIU and its locals compounds these harms. CP 96-97. Thus, SEIU 925 satisfies all three requirements to obtain an injunction.⁶

B. Other State Appellate Courts Have Consistently Held That Personal Documents (Including Union Emails) Are Not Public Records, And Are Not So Rendered Merely Because They Exist On An Agency Computer System Or Were Sent In Violation of Agency Policy.

A Michigan appellate court held that union emails on a public computer server sent during heated contract negotiations being reported in the media are personal and not subject to disclosure under the state’s statute, which defines “public record” similarly to the PRA. *Howell Education Association v. Howell Board of Ed.*, 287 Mich.App. 228, 231, 235, 246, 789 N.W.2d 495 (Mich. 2011). The court found the emails:

[D]o not involve teachers acting in their official capacity as public employees, but *in their personal capacity* as [union] members or leadership. Thus, *any emails sent in that capacity are personal....The release of emails involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.*

Id. at 246 (emphasis added). The *Howell* court also found that personal communications were not “transform[ed]” into public records merely because use of a public employer’s email system might be a potential

⁶ The injunctive relief standard in RCW 42.56.540 does not apply; that statute applies to enjoining *public* (not non-public) records. *Dragonslayer*, 139 Wn.App. at 441.

ethics violation. *Id.* at 242. If union emails on a school district's email system were not public records under a similar public records act in another state, even where they were sent in the midst of contract negotiations between the union and the district, the union organizing emails at issue here, some of which were sent using UW email addresses, cannot be public records under the PRA.

Further, courts in other states consistently hold that personal emails on a government email address are not public records. The Pennsylvania Commonwealth Court declared that:

We do not know of any state that has reached the conclusion that the contents of personal emails using a government email account are public records. To the contrary, all of the states that have addressed the issue have concluded that the contents of government employees' personal emails are not information about the affairs of government and are, therefore, not open to the public under their respective open records acts.

Penn. Office of AG v. Philadelphia Inquirer, 127 A.3d 57, 61, fn 8 (Penn. 2015). That court held emails unrelated to agency activity do not become public records merely because they were "sent, received or retained in violation of [public employer] policy." *Id.* at 63; *see also Penn. Office of AG v. Bumsted*, 134 A.3d 1205, 1209 (Penn. 2016).

The Colorado Supreme Court held emails not about a government function, but rather relating to a personal relationship, were not public records under their PRA, even if sent on public equipment, while

receiving public compensation, and between two public officials. *Denver Publishing Co. v. Board of County Comm. of Arapahoe*, 121 P.3d 190, 200-01 (Colo. 2005).

The Wisconsin Supreme Court proclaimed that personal emails are not public records because they have “no connection to government function.” *Schill v. Wisconsin Rapids School District*, 327 Wis.2d 572, 786 N.W.2d 177, 204 (Wisc. 2010). The court further stated that “while government business is to be kept open, the contents of employee’s personal emails are not a part of government business” simply because they are on government email systems. *Id.* at 183.

The Florida Supreme Court held that personal emails are not public records and their existence on an agency computer does not render them so. *Florida v. City of Clearwater*, 863 So.2d 149, 154 (Fl. 2003). “The determining factor is the nature of the record, not its physical location.” *Id.*; see also *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418, 502 Ariz. Adv. Rep 20 (Ariz. 2007) (emails do not become public records merely because on a government-owned computer system and personal emails are not public records).

Like other states’ courts, this Court should find the documents at issue are not public records.

C. The Foundation Is Barred From Asserting That The Categorizations And Declarations Are Insufficient, And Those Claims Lack Merit.

The Foundation is barred from raising its untimely issues regarding the sufficiency of the categorization of the documents at issue and the authors of the declarations. SEIU 925 Answer, 6-7, 17-18. The Foundation failed to raise the issues prior to the Court of Appeals' decision, thus these issues are not before this Court. The lower courts enjoined release of the documents at issue based upon the evidence the Foundation now challenges. The Foundation could have moved at the trial court to contest the evidence, including for in camera review, which it never did. However, even if these issues are before this Court, they lack merit because the categorizations and declarations are sufficient.

A public records case “may be decided based on affidavits alone” and such affidavits are “accorded a presumption of good faith.” *Forbes* 171 Wn.App. at 867, citing *O’Neill*, 170 Wn.2d at 153-54. Individuals can submit “‘reasonably detailed, nonconclusory affidavits’ attesting to the nature and extent of their search” to demonstrate records are not “public records” as defined by the PRA. *Nissen*, 183 Wn.2d at 855; *see also Forbes*, 171 Wn.App. at 862, 864, 866, 868 (affidavit categorizing emails of city officials as “conduct of business” and “not conduct of business” sufficient to demonstrate non-public record status of latter). An affidavit

may be completed by the person seeking to block disclosure. *Nissen*, 183 Wn.2d at 885.⁷

Here, Petitioner’s declarations are sufficiently particular to determine whether a given document relates to the conduct of government or a governmental or proprietary function, and are much more particular than the categories deemed sufficient in *Forbes*. CP 950-53, 955-56, 968-71, 973-82, 984-87. SEIU 925’s good faith declarations sorting the records at issue into descriptive categories, which sufficiently describe the content, is enough to make the determination that none of these categories of documents are public records under the PRA. Particularly given that both lower courts enjoined records based upon the categorizations and declarations, even if this court finds that the descriptions of the records are not sufficient, the proper remedy is to remand for further proceedings, with injunctive relief in place. *Dragonslayer*, 139 Wn.App. at 445-46; *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 795, 418 P.3d 102 (2018).

D. Release of the Documents At Issue Must Be Enjoined Because They Are Non-Public Records But Additionally Constitutional Provisions and Exemptions Prevent Their Release.

The documents at issue, including portions thereof, must also be enjoined from release because constitutional rights to privacy and

⁷ UW never made a determination as to whether the documents at issue are “public records” [CP 220], thus it was up to the party seeking to block disclosure, SEIU 925, to categorize the records and make that determination. In fact, SEIU 925 requested that UW categorize the documents. CP 406-07, 409-10.

association prevent their disclosure, as do statutory exemptions for privacy and for residential addresses and personal email addresses. *See* CP 96-97, 104-05, 327-30, 334, 882. Neither lower court reached these arguments. Therefore, should this court find any portion of the documents at issue to be public records, the case should be remanded to the trial court for consideration of the constitutional provisions and exemptions. *See, e.g., Dragonslayer*, 139 Wn.App. at 445-46; *Lyft*, 190 Wn.2d at 795.

V. CONCLUSION

For the foregoing reasons, SEIU 925 respectfully requests that this Court affirm the Court of Appeals' decision granting a permanent injunction enjoining UW's release of the documents at issue to the Foundation as non-public records.

RESPECTFULLY SUBMITTED this 28th day of February, 2019.

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CERTIFICATE OF SERVICE

I, Kristen Kussmann, hereby declare under penalty of perjury under the laws of the State of Washington that on February 28, 2019, I am causing the foregoing to be filed with the Washington State Supreme Court, and a true and correct copy of the same to be sent via email and U.S. Mail on February 28, 2019, to the following:

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SIGNED this 28th day of February, 2019, at Seattle, WA.

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February 28, 2019 - 2:57 PM

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