

FILED
SUPREME COURT
STATE OF WASHINGTON
5/3/2019 4:24 PM
BY SUSAN L. CARLSON
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NO. 96578-1

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Petitioner,

v.

EVERGREEN FREEDOM FOUNDATION, d/b/a FREEDOM
FOUNDATION,
Respondent,

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,
Respondent.

**SUPPLEMENTAL BRIEF OF PETITIONER SERVICE
EMPLOYEES INTERNATIONAL UNION, LOCAL 925**

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I. INTRODUCTION

Appellant Service Employees International Union Local 925 (“Local 925 or SEIU 925”) submits this supplemental brief in its appeal of a Thurston County Superior Court order denying SEIU 925’s motion for injunctive relief to prevent Respondent Washington State Department of Early Learning (“DEL”)¹ from disclosing the list of the names, addresses, and email addresses of child care providers to Public Records Act (“PRA”) requestor and Respondent Freedom Foundation (“the Foundation”). SEIU 925 argues that the trial court’s order, failing to grant a preliminary injunction in the face of newly enacted Initiative 1501 (“I-1501”), and the appellate court’s affirmance of this decision are in error. In particular, SEIU 925 argues: (1) the trial court should have applied the law in effect at the time it issued its ruling on SEIU 925’s motion for an injunction; and (2) the trial court should have determined that the voters intended I-1501 to apply retroactively, and as a result, granted SEIU 925’s motion for an injunction.

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¹ On July 1, 2018, DEL became part of the Washington State Department of Children, Youth, and Families (DCYF). DCYF’s website notes that DCYF oversees all of the services that DEL provides. Washington State Department of Children, Youth, and Families, *About Us*, <http://dcyf.wa.gov/about/about-us> (last visited 11.26.2018).

II. STATEMENT OF ISSUES

1. Did the Court of Appeals err where it affirmed a lower court order involving the Public Records Act that failed to apply the law in effect at the time of the ruling on a motion for a preliminary injunction?
2. Did the Court of Appeals err when it did not find that a ballot initiative took retroactive effect based on voter intent, as determined by the language of the ballot initiative, notwithstanding that the ballot initiative did not explicitly mandate retroactivity?

III. STATEMENT OF THE CASE

Working Connections Child Care (“WCCC”), the largest child-care subsidy program in Washington, provides child care to support qualifying low-income working families. CP 276. The federal program, Temporary Assistance to Needy Families (“TANF”), provides much of the funding for WCCC. The definition of “public assistance programs” in RCW 74.04 includes the WCCC subsidy. *See* RCW 74.04.004(5) (“‘Public assistance’ or ‘public assistance programs’ means public aid to persons in need including... working connections child care subsidies.”). The Department of Social and Health Services (“DSHS”) retains a list of child care providers who serve families who receive WCCC subsidies, and this list includes the names and personal contact information of these providers. CP 276. DSHS

shares this information with the Department of Early Learning (“DEL”).

SEIU 925 represents in-home child care providers—both those who are licensed to provide care in their homes and license exempt providers who are called “family, friend and neighbor” providers. *Id.* at 275. As the exclusive bargaining representative of licensed and license-exempt providers, SEIU 925 is a signatory to a contract with the State of Washington; the contract includes a determination of the rate of subsidy payments to providers throughout the state. RCW 41.56.028(2)(c); CP 275. While SEIU 925 collects dues payments from its members, it does not collect dues from providers who have not signed up to be members. Providers who have not signed up to be members of SEIU 925 do not pay dues or fees to the union. CP 275.

For several years, the Foundation has employed the PRA to acquire lists of the names and contact information of child care providers represented by SEIU 925 and the individual home care providers represented by SEIU 775 in an attempt to contact these providers and dissuade them from continuing to financially support their respective unions. CP 21. A recent Washington Court of Appeals decision recognized that the Foundation’s motivation in seeking these lists “appears to be political.” *SEIU Healthcare 775 NW v. Dep’t of Soc. and Health Serv.*, 193 Wn. App. 377, 406, 377 P.3d 214 (2016).

On November 4, 2016, DEL informed SEIU 925 that the department received a PRA request from the Foundation for:

- The first name, last name, work mailing address, and work email address of all licensed family child care providers, as defined by RCW 41.56.030(7).
- The first name, last name, work mailing address, and work email address of all license-exempt family child care providers, as defined by RCW 41.56.030(7).

CP 285-86.

The Foundation in submitting its requests in this case told DEL that its purpose was to use the requested information for the same purpose described as political in *SEIU Healthcare 775NW*: “to inform providers of their constitutional and statutory rights regarding union membership and representation.”² *Id.* DEL further informed SEIU 925 that in event SEIU 925 did not move for a temporary restraining order (“TRO”) barring the release of the requested records, DEL anticipated releasing the information by November 22, 2016. *Id.*

On November 8, 2016, Washington voters voted to enact Initiative

² In *SEIU Healthcare 775NW*, 193 Wn. App. at 227, the appellate court noted that the Foundation’s stated purpose for requesting the list of IPs in that case was “to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments.” The appellate court stated, “As the trial court noted, this purpose appears to be political rather than commercial.”

1501 (“I-1501”) by an overwhelming margin.³ I-1501’s purpose is to “protect the safety and security of seniors and vulnerable individuals”. CP 299. The law includes two independent statutory provisions designed to protect the names, addresses, and email addresses of family child care providers from disclosure by state agencies. First, RCW 43.17.410(1) bars the disclosure of this information by any state agency, including DEL. RCW 43.17.410(1) states, “neither the state nor any of its agencies shall release sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations, as those terms are defined in RCW 42.56.640.” RCW 42.56.640(2)(b) defines “sensitive personal information” to include names, addresses, and email addresses in addition to other personally identifying information. RCW 42.56.640(2)(a) makes explicit that “in-home caregivers for vulnerable populations” includes “family child care providers as defined in RCW 41.56.030.” *Id.*

I-1501 also amended the PRA to explicitly exclude the release of the requested information from disclosure in RCW 42.56.640(1). *See* RCW 42.56.640(1) (“Sensitive personal information of vulnerable individuals and sensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying under this chapter.”).

³*See* <http://results.vote.wa.gov/results/current/State-Measures-Initiative-Measure-No-1501-concerns-seniors-and-vulnerable-individuals.html> (last visited Nov. 29, 2016).

I-1501 states that the purpose of RCW 43.17.410(1) and RCW 42.56.640(1) is to advance the public policy of protecting vulnerable populations from identity theft, consumer fraud, and other forms of victimization. CP 299, 304, 306; RCW 9.35.001(2); RCW 43.17.410(1). The initiative affirmatively states that the law must be liberally construed to promote this public policy. CP 306.

On November 17, 2016, SEIU filed a motion for a TRO. CP 257.

On November 18, 2016, the parties agreed to extend the November 22 deadline for the release of records until December 9, so that SEIU 925's preliminary injunction could be heard before the records in question were released. CP 311, 317. Thus, the trial court did not rule on SEIU 925's TRO motion.

On December 8, 2016, I-1501 went into effect. Const. art. II, § 1(d).

On December 9, the Honorable Mary Sue Wilson, Thurston County Superior Court, denied SEIU 925's motion for a preliminary injunction. CP 967-68. Judge Wilson explained her ruling in an oral decision that is incorporated into the trial court's written order. CP 968; Verbatim Report of Proceedings ("VRP").

Regarding I-1501, the trial court noted that the law prohibited disclosure of the requested records and that it was effective at the time the trial court decided this case. VRP 43:9-17. However, the trial court

concluded that because the Foundation's request preceded the effective date of the initiative, the trial court must determine whether the law applied retroactively. The trial court acknowledged that an initiative will be applied retroactively where there is an indication that the voters so intended, and that such an indication may be found in "a legislative statement of a strong public policy that would be served by retroactive application." VRP 43:18-44:8. Judge Wilson found that the initiative contained a legislative statement of a public policy "to protect seniors and vulnerable individuals from identity theft and other financial crimes by preventing the release of public records that could be used to victimize them." VRP 44:17-21. However, the trial court concluded that this policy would not be served by applying the law to pending PRA requests and that an average voter would not believe that the initiative was intended to prevent agencies from continuing to release public records that could be used to victimize seniors and vulnerable individuals when it became law. VRP 45:1-11. The trial court reasoned that the initiative did not contain "a statement that it's important to stop something right now that's in progress." VRP 45:1-4. Judge Wilson thus concluded that the law did not prevent state agencies from continuing to release records that contained sensitive personal information of in-home caregivers for vulnerable populations in response to pending PRA requests. *Id.*

Noting that this matter raised two “novel” issues on which there is no appellate authority, the trial court ordered DEL not to release the disputed records until December 19, 2016, in order to give SEIU 925 the opportunity to file this appeal and seek emergency injunctive relief to preserve the fruits of its appeal. VRP 52:13-16, 55:17-23.

On January 25, 2017, Division II Commissioner Eric Schmidt granted SEIU 925’s motion for emergency injunctive relief and enjoined the release of the records until this appeal is resolved. Commissioner’s Ruling (January 25, 2017).

On September 18, 2018, the Court of Appeals issued the decision below, affirming the Superior Court’s order denying SEIU 925’s motion for injunctive relief. *SEIU 925 v. State of Wash. Dep’t of Early Learning*, No. 49726-3-II (September 18, 2018) (Appendix at 1-19)(“*SEIU 925 v. DEL*” or “decision below”).

IV. ARGUMENT

A. Standard of Review

A decision granting or denying an injunction under the PRA is reviewed de novo. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 791, 418 P.3d 102 (2018). The party seeking to prevent disclosure bears the burden of proof. *Id.* If the Court determines that the “other statute exemption” applies, then the Court decides whether the party seeking to enjoin

disclosure has shown that disclosure clearly is not in the public interest and would result in substantial and irreparable harm to any person or vital government interest. *Id.* at 796.

When deciding whether a public records may be withheld from disclosure based on the “other statute exemption”, the Court will begin with the presumption that the Public Records Act (“PRA”) imposes an affirmative duty to disclose public records unless the information in question is subject to a specific exemption within the PRA or the information’s disclosure is restricted by another statute. *Id.* (citing *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 36, 769 P.2d 283 (1989)). “When a PRA request is made and a third party asserts an “other statute” exemption, the court first looks at whether the other statute exempts disclosure in the particular context.” *Id.* at 780. If the information is exempt under the “other statute,” then “judicial inquiry commences” with the court applying the PRA injunction standard. *Id.*

B. The Court Below Erred in Refusing to Apply the Law in Effect at the Time the Trial Court Issued Its Decision.

When the trial court ruled on SEIU 925’s preliminary injunction motion, I-1501 was in effect. *Supra* at 9-10. As noted above, I-1501, in addition to amending the PRA, also prohibited state agencies from releasing providers’ personal information. I-1501, § 10 (codified at RCW 43.17.410).

In its decision below, the Court of Appeals acknowledged that “Generally, a court is to apply the law in effect at the time it renders its decision.” *SEIU 925 v. DEL*, at *13. However, rather than adhere to the “law in effect” at that time, the Court of Appeals relied on dicta in a footnote in *John Doe A. v. Washington State Patrol*, which stated:

After the records request was made, and prior to oral argument, the legislature amended RCW 4.24.550(3)(a) to add ‘and any individual who requests information regarding a specific offender.’ Laws of 2015, ch. 261, § 1(3). Because this section was not made retroactive, we consider the statute as it existed at the time the request was made. *However, the new language would not change our result.*

SEIU 925 v. DEL at *13 (citing *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 375 n. 2, 374 P.3d 63 (2016), *review denied*, 189 Wn.2d 1019 (2017)) (emphasis added). Based on this footnote, the court below determined that I-1501 would not be operating prospectively if the law was applied to a PRA request that was already pending when the initiative took effect. *Id.* In doing so, the court below implied that in order for I-1501 to apply to a pending PRA request the initiative would have to apply retroactively. *Id.* However, as the Washington Supreme Court noted, the amended language in *Washington State Patrol* would not have changed the Court’s result, and thus, whether to apply the statute as it existed at the time the request was made was not determinative of the outcome in that case.

John Doe A v. Wash. State Patrol, 185 Wn.2d at 375 n. 2.

In contrast, the court in *Puget Sound Advocates for Ret. Action v. State of Wash. Dep't of Soc. and Health Servs.* No. 50430-8-II (October 30, 2018) (unpublished) (“*PSARA*”) took a more analytically sound approach when confronting the same issue. *PSARA* also analyzed whether applying I-1501 to a public records request initiated prior to I-1501’s effective date would constitute a prospective application of the law. *Id.* at *13. The *PSARA* court held,

[R]egardless of whether I-1501 can be applied retroactively, RCW 43.17.410(1) operates *prospectively* to prohibit DSHS from releasing individual providers’ names and associated birthdates after the effective date of I-1501 regardless of the date the public records request was filed.

Id. at *1 (emphasis added). In reaching this conclusion, the *PSARA* court relied on *In re. Flint*, 174 Wn.2d 539, 547, 277 P.3d 657 (2012). *PSARA* at *4.

Prospective application of a statute occurs when the event that triggers or precipitates the operation of the statute takes place after its enactment. Prospective application can be found even if the triggering event originates in a situation that existed before the statute was enacted.

In re Flint, 174 Wn.2d 539, 547, 277 P.3d 657 (2012) (internal citations omitted) (refusing to find a statute applied retroactively where three violations of community custody triggered a return to confinement and these violations occurred after the statute limiting discretion came into effect). As *In re Flint* noted in the context of personal restraint, a statute does not operate retroactively just “because some of the requisites for its actions are drawn from a time antecedent to its passage” or “because it upsets expectations based on prior law”. *Id.*

Applying the rule from *In re Flint* here, although the request was made prior to the effective date of the initiative, the application of I-1501 was triggered only when the agency was obligated to actually release records. That obligation did not arise until December 9—after the trial court’s ruling and when I-1501 was in effect. This result would accord with the Court of Appeals’ holding in *PSARA* that “RCW 43.17.410(1) prohibits a state agency from releasing individual providers’ names and birthdates at any time after the effective date of that statute, regardless of whether that information was requested before the effective date.” *PSARA* at *9.

While the *PSARA* court declined to grapple with whether a public records request created a vested right, we do so here because as the *PSARA* court stated, this step is the next phase of the prospective application analysis. *PSARA* at *9. In contrast to the misguided conclusion of the court

below, the submission of a PRA request does not create a vested right. In its analysis of I-1501's retroactive application, the court found "a vested right in public documents is created when a request for the public records is made" *SEIU 925 v. DEL* at *12 (citing dicta in *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 449, 161 P.3d 428 (2007)). The court below reached this conclusion even though SEIU 925 did not argue that the I-1501 was a curative amendment. *Id.* The court below relied on *Dragonslayer's* discussion regarding vested rights even though it is merely dicta and therefore should not govern. *See id.* The *Dragonslayer* court relied on clear legislative history to conclude that "[t]he legislature considered and rejected having the amendments [to the PRA] apply retroactively." 139 Wn. App. at 448-49. If the *Dragonslayer* court had grappled with the case law, then it would have come to the contrary conclusion—a PRA request does not create a vested right upon the submission of the request.

"Vested rights doctrine is based on constitutional principles of fundamental fairness, reflecting an acknowledgement that development rights are valuable and protectable property rights." *Vashon Island Comm. for Self-Government v. Washington State Boundary Review Board for King Cty.*, 127 Wn.2d 756, 768, 903 P.2d 953 (1995) (finding that a vested right was not created when the Committee petitioned for incorporation status and

that in general the vested rights doctrine is limited to land use applications). A vested right “must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*” *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) (quoting *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975)) (emphasis in original). “No one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.” *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 305, 174 P.3d 1142 (2007) (quoting *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 633 P.2d 482 (1982); *State ex rel. Washington State Sportsmen’s Council, Inc. v. Coe*, 49 Wn.2d 849, 852, 307 P.2d 279, 281 (1957) (holding that ballot petitioners do not have a vested right in submitting their initiative under a previous version of a constitutional amendment even when the petitioners had submitted their ballot initiative to the Secretary of State, who gave it a serial number and transmitted it to the Washington Attorney General). “The general rule is that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others. This rule is especially applicable to injuries resulting from the exercise of public powers.” *Citizens*

Against Mandatory Bussing v. Palmason, 80 Wn.2d 445, 452, 495 P.2d 657 (1972).

Here, the PRA cannot create a vested right because it is not the type of property interest protected by due process. *See Vashon Island*, 127 Wn.2d at 768. Instead, the Foundation has a mere expectation in the PRA continuing to operate the way it had previously, prior to the enactment of I-1501. *In re Marriage of MacDonald*, 104 Wn.2d at 750. The Foundation acquires no vested right to preserve and apply an earlier version of the PRA. *Wash. State Farm Bureau Federation*, 162 Wn.2d at 305 (“No one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.”). Nor does the Foundation have a cognizable right “to be protected against consequential injuries arising from a proper exercise of rights by others.” *Palmason, supra* at 452. The providers’ effort through their union to invoke I-1501’s protections – and prevent the State from releasing records the law prohibits from disclosure – infringes upon no vested right; it is simply an exercise of providers’ newly endowed rights under I-1501. *Palmason*, 80 Wn.2d at 452. Thus, despite the cursory analysis of the *Dragonslayer* court, a PRA request does not endow the requestor with a vested right at the time of the request. As a result, the Court should find that I-1501 would be operating prospectively on the Foundation’s PRA request in this case.

C. The Court Below Should Have Found That I-1501 Operates Retroactively Because the Language of I-1501 Evinces Retroactive Intent.

Alternatively, the court below should have found that I-1501 operated retroactively. In its review and application of *State v. Rose*, 191 Wn. App. 858, 867-72, 365 P.3d 756 (2015)—which lays out the test for determining retroactivity in the ballot initiative context—the court below failed to properly analyze I-1501’s language and its voter guide. A close reading of *Rose* establishes that voters intended to apply I-1501’s language to pending PRA requests.

There are three independent recognized grounds for retroactive application of a statute: (1) where the Legislature or the voters for a ballot measure so intended; (2) where the statute is remedial; and (3) where the statute is curative. *See, e.g. McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 342, 12 P.3d 144 (2000). While the court begins its analysis by looking for express language indicating retroactive intent, *see e.g. City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987), the intent for the initiative to apply retroactively may be “fairly conveyed” from the language of the ballot initiative, and if the statute is ambiguous, its legislative history. *State v. Rose*, 191 Wn. App. at 868. Because the statute at issue is a voter initiative, the court examines the language of the initiative “from the perspective of the average informed lay voter rather than from the

perspective of the legislature.” *Id.*

The language in I-1501 fairly conveys the intent of the voters to apply I-1501 to pending PRA requests. In *Rose*, the court began by examining the ballot initiative’s statement of intent: “the people intend to stop treating adult marijuana use as a crime and try a new approach” and the new approach is identified as to “[a]llow[] law enforcement resources to be focused on violent and property crimes”. *State v. Rose*, 191 Wn. App. at 868 (applying Initiative I-502, an initiative decriminalizing adult marijuana use, retroactively to a criminal prosecution for marijuana possession in the sentencing phase). This statement is as definite as the statement of intent in I-1501 which states, “It is the intent of part three of this act to protect seniors and vulnerable individuals from identity theft and other financial crimes by preventing the release of public records that could be used to victimize them.” CP 304 (I-1501, §7); 299 (I-1501 §2) (“It is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by ... prohibiting the release of certain public records that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals.”). Just as in *Rose* where the court found:

Lay voters presented with an initiative that they are told will ‘stop treating marijuana use as a crime’ are more likely to make the common law assumption that prosecution will be ‘stopped’ on the effective date than that prosecutions will be ‘saved’ by a contrary state law.

Id. at 869, so too here should the Court find that if an initiative says that certain records will not be released in order to protect vulnerable individuals, then a lay voter would likely understand that a state agency would be “prohibit[ed]” from releasing these records on the initiative’s effective date.

Yet, despite the same type of declarative and forceful language and articulated policy rationale included in I-1501’s language, the court below found, “There is no clear policy statement showing voter intent to prevent the disclosure of provider information is retroactive”, and therefore the Court declined to continue to step two of the analysis. *SEIU 925 v. DEL* at *11. “Analysis of legislative intent regarding retroactivity is not ordinarily restricted to the statute’s express language, and may be gleaned from other sources, including legislative history.” *Rose*, 191 Wn. App. at 870 (quoting *State v. Kane*, 101 Wn. App. 607, 614, 5 P.3d 741, 745 (2000), as amended (Aug. 4, 2000)). In *Rose*, the Court found that the statements: “Our current marijuana laws have failed. It’s time for a new approach”; and “Treating adult marijuana use as a crime costs Washington State millions in tax dollars and ties up police, courts, and jail space. We should focus our scarce public safety dollars on real public safety threats” in the voters’ pamphlet fairly conveyed disapproval of the continued application of the State’s old policy. *Id.* Similar to the clear change in policy articulated in the voter’s pamphlet

in *Rose*, the voters' guide accompanying Initiative 1501 stated, "We cannot let fraudulent telemarketers and other criminals continue to prey on them. We need the protections offered by I-1501[.]" Declaration of Robert Lavitt In Support of SEIU 925's Motion for Expedited Consideration and Emergency Motion for Injunctive Relief Pending Appeal ("Lavitt Dec.") Ex. B at 5 (Voters' Guide: 2016 General Election, Initiative Measure No. 1501)(Nov. 8, 2016). The court below erred by failing to consider the I-1501 ballot guides, as *Rose* instructs, and by failing to conclude a reasonable voter would understand I-1501 to prevent the release of prohibited records on the date the initiative takes effect. This Court should find that the language of the voter's guide buttresses a finding of retroactivity in the language of I-1501 itself and determine that I-1501 fairly conveys voter intent to apply retroactively.

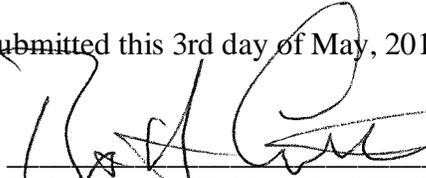
V. CONCLUSION

The trial court's denial of SEIU 925's injunction and the court below's affirmation of that denial were reversible error. Consistent with *PSARA*, I-1501 operates prospectively to prohibit the release of child care providers' personal information requested by the Foundation. When properly analyzed, I-1501 also satisfies the test articulated in *Rose* in that a reasonably informed voter would understand a state agency to be prohibited from continuing to release providers' personal information upon the initiative's effective date.

I-1501's declaratory and forceful language, along with its clear statements of policy, establishes its retroactive application under *Rose*. Thus, SEIU 925 respectfully requests that the Court issue an order reversing the trial court's denial of SEIU 925's motion for an injunction.

Respectfully submitted this 3rd day of May, 2019.

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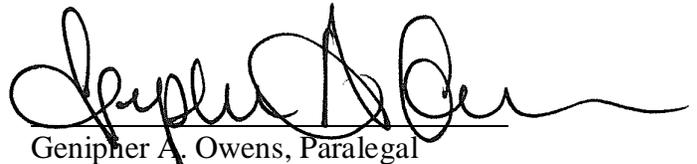
DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the State of Washington that on May 3, 2019, I caused the foregoing Supplemental Brief of Petitioner to be filed with the Clerk of the Court via the Washington State Appellate Court's Secure E-Filing Portal and, pursuant to the e-service agreement between the parties, a true and correct copy of the same to be delivered via e-mail to the following:

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May 03, 2019 - 4:24 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96578-1
Appellate Court Case Title: Service Employees International Union Local 925 v. Department of Early Learning, et al.
Superior Court Case Number: 16-2-04580-1

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