

No. 87198-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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**ADORA SVITAK, a minor child by and through her guardian, JOYCE SVITAK; TALLYN LORD, a minor child by and through his guardians JUSTIN LORD and SARA WETSTONE; HARPER LORD, a minor child by and through his guardians JUSTIN LORD and SARA WETSTONE; ANNA IGLITZIN, a minor child by and through her guardians DMITRI IGLITZIN and EILEEN QUIGLEY; JACOB IGLITZIN, a minor child by and through his guardians DMITRI IGLITZIN and EILEEN QUIGLEY; COLIN SACKETT, a minor child by and through his guardians BJ CUMMINGS and TOM SACKETT,**

**Petitioners,**

**v.**

**STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her official capacity as Governor of Washington state; TED STURDEVANT, in his official capacity as Director of the Department of Ecology; PETER GOLDMARK, in his official capacity as Commissioner of Public Lands; PHIL ANDERSON, in his official capacity as Director of the Department of Fish and Wildlife,**

**Respondents.**

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***AMICI CURIAE* MEMORANDUM IN SUPPORT OF PETITION FOR DIRECT REVIEW OF BISHOPS BOERGER, HOFSTAD, AND WELLS OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; FAITH ACTION NETWORK; THE PACIFIC NORTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; THE PACIFIC NORTHWEST CONFERENCE OF THE**

*AMICI CURIAE* MEMORANDUM IN SUPPORT OF PETITION FOR DIRECT REVIEW

**UNITED METHODIST CHURCH; THE RIGHT REVEREND  
GREGORY RICKEL, VIII BISHOP OF OLYMPIA, THE  
EPISCOPAL CHURCH IN WESTERN WASHINGTON; THE  
SISTERS OF ST JOSEPH OF PEACE; WASHINGTON  
UNITARIAN UNIVERSALIST VOICES FOR JUSTICE**

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**TABLE OF CONTENTS**

I. IDENTITY AND INTEREST OF *AMICI CURIAE*..... 1

II. ISSUE ADDRESSED BY *AMICI* ..... 3

III. STATEMENT OF THE CASE ..... 3

IV. ARGUMENT IN SUPPORT OF DIRECT REVIEW..... 3

    1. The Inequities of Climate Change Threaten Human Rights ..... 3

    2. The Laws of the United States Should be Construed to Be  
    Consistent with International Human Rights Law..... 4

    3. International Human Rights Law Is Relevant in State Courts  
    as Persuasive Authority for Interpretation of State Law..... 5

    4. The Public Trust Doctrine Case at Issue Threatens Human  
    Rights of Substantial Public Importance Protected  
    under International Human Rights Laws..... 7

V. CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### CASES

<i>Eggert v. Seattle</i> , 81 Wash.2d 840, 505 P.2d 801 (1973).....	5,6
<i>Moore v. Ganim</i> , 233 Conn. 557, 660 A.2d 742 (Conn. 1995) .....	7
<i>Simmons v. Roper</i> , 112 S.W.3d 397 (Mo. 2003).....	6
<i>Sterling v. Cupp</i> , 290 Or. 611, 625 P.2d 123 (Or. 1981).....	6
<i>Wilson v. Hacker</i> , 200 Misc. 124, 101 N.Y.S.2d 461 (N.Y.Sup. 1950)....	6

### STATUTES

RAP 4.2(a)(4) .....	10
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### TREATIES AND INTERNATIONAL DOCUMENTS

Committee on Economic, Social & Cultural Rights, <i>Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 15</i> (2002), U.N. DOC. E/C.12/2002/11 (Jan. 20, 2003) .....	8
Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) .....	5
International Covenant on Economic, Social, and Cultural Rights, <i>opened for signature</i> Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) .....	4
Restatement (Third) of Foreign Relations Law §102(2) (1987) .....	5
Special Rapporteur on the Right to Food, <i>Interim Report on the Right to Food, transmitted by Note of the Secretary-General</i> , U.N. Doc. A/65/281 (Aug. 11, 2010) (by Olivier De Schutter) .....	10

U.N. Human Rights Council Res. 7/23, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008). .....	4
U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <i>Report on the Relationship Between Climate Change and Human Rights</i> , ¶ 70, U.N. Doc A/HRC/10/61 (Jan. 15, 2009) .....	7
Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).....	5
Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331 .....	5

**OTHER AUTHORITIES**

Donald Anton, <i>Is the Environment a Human Rights Issue?</i> , ANU COLLEGE OF LAW RESEARCH PAPER NO. 08-11 (2008).....	7
FINAL REPORT, NATIONAL CLIMATE ASSESSMENT HEALTH SECTOR WORKSHOP: NORTHWEST REGION 1 (2012) .....	8
Hurst Hannum, <i>The Status of the Universal Declaration of Human Rights in National and International Law</i> , 25 G.A. J. INT’L & COMP. L. 287 (1996) .....	5
J. Elizabeth Jackson et al., <i>Public Health Impacts of Climate Change in Washington State: Projected Mortality Risks due to Heat Events and Air Pollution</i> , 102 CLIMATIC CHANGE 159 (2010) .....	9
UNIVERSITY OF WASHINGTON CLIMATE IMPACTS GROUP, WASHINGTON CLIMATE CHANGE IMPACTS ASSESSMENT 1 (2009) .....	9
Vaughan Lowe, <i>Sustainable Development and Unsustainable Arguments</i> , in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19 (Alan Boyle & David Freestone eds., 1999) .....	5

## I. IDENTITY AND INTEREST OF *AMICI CURIAE*

*Amici* represent diverse faith-based communities serving Washington and include: **Bishops Boerger, Hofstad, and Wells of the Evangelical Lutheran Church in America (ELCA)**, serving three synods comprised of 255 congregations and 102,000 members of the ELCA in Washington. The Bishops are led by the 1993 ELCA social statement, “Caring for Creation: Witness, Hope, and Justice,” and commit to “protect portions of the planet that are held in common, including the oceans and the atmosphere;” **Faith Action Network (FAN)**, a statewide interfaith (Christian, Jewish, and Muslim) advocacy organization created in 2011, which believes that all of creation—including the atmosphere—is a sacred trust that humanity and its institutions have a responsibility to protect; **The Pacific Northwest Conference of the United Church of Christ (UCC)**, a denomination founded in 1957. The Conference is made up of 83 churches, 2 camps, and a senior community spread throughout Washington, Northern Idaho, and Alaska. The UCC Center for Environmental Justice in Port Orchard, Washington, teaches and advocates for environmental justice through educational, spiritual, and hands-on initiatives; **The Pacific Northwest Conference of the United Methodist Church (UMC)**, founded in 1968 with a heritage dating back to the 18<sup>th</sup> century. The Conference is comprised of 260 churches, with

approximately 52,000 individual members located throughout Washington and northern Idaho. In a 2009 edict, the Council of Bishops noted “[w]hile we are not experts on . . . global issues, we are experts on the moral and ethical life that strengthens and supports God’s intentions for Creation;”

**The Right Reverend Gregory Rickel, VIII Bishop of Olympia, The Episcopal Church in Western Washington**, admitted in 1910, the Diocese of Olympia is made up of more than 31,000 Episcopalians in 106 faith communities in Western Washington. Under Bishop Rickel’s leadership and understanding that environmental sustainability, justice, and spirituality are inextricably linked, the Diocese and many of its church communities are taking steps to reduce their carbon footprint and advocate for those most negatively affected by climate change; **The Sisters of St Joseph of Peace**, a congregation of Roman Catholic vowed religious women, founded in 1884. Since 1890, the Sisters have served Washington in ministries of health care, education, housing, spiritual care, and social service with a particular concern for people who are poor and marginalized. In 2008, the Congregation’s General Chapter recognized the adverse affects of climate change and committed to study, pray, and act against such destructive forces; and **Washington Unitarian Universalist Voices for Justice (UU Voices)**, a nonprofit established in 2005 promoting social welfare and Unitarian Universalist values through state

legislative advocacy. Climate change is one of UU Voices' top legislative priorities.

Concerns about the impact of climate change on vulnerable populations lie at the core of the diverse religious commitments of the *Amici*. These commitments hold that seeking justice is the heartbeat of human responsibility and is the responsibility of governing bodies. Justice demands meeting the essential material needs and conditions for human dignity, social participation, and human flourishing. Climate change is a fundamental threat to these ends. The quest for justice grounded in religious commitment thus implies moral and legal entitlements including protection of the atmosphere that are of substantial public importance.

## **II. ISSUE ADDRESSED BY AMICI**

Whether the protection of the atmosphere under Washington's public trust doctrine presents a fundamental and urgent issue of broad public import meriting direct and accelerated review?

## **III. STATEMENT OF THE CASE**

*Amici* adopt the Statement of the Case of Petitioners Svitak et al..

## **IV. ARGUMENT IN SUPPORT OF DIRECT REVIEW**

### **1. The Inequities of Climate Change Threaten Human Rights**

The United Nations Human Rights Council [HRC] issued

Resolution 7/23 stating that climate change "poses an immediate and far-



reaching threat to people and communities around the world,”<sup>1</sup> recognizing “that human beings are at the centre of concerns for sustainable development and that the right to development must be fulfilled so as to equitably meet the development and environmental needs of present and future generations,”<sup>2</sup> and “that the world’s poor are especially vulnerable to the effects of climate change....”<sup>3</sup>

*Amici* respectfully draw this Court’s attention to the important link between climate-induced human rights impacts and the diverse calls of faith-based communities for moral action on climate change. The atmosphere’s protection under the public trust doctrine is consistent with principles of international law, and its destruction is fundamentally an issue of broad public import that merits direct and urgent review.

## **2. The Laws of the United States Should be Construed to Be Consistent with International Human Rights Law**

State courts have used international human rights principles emanating from non-ratified human rights treaties—such as the International Covenant on Economic, Social, and Cultural Rights [ICESCR]<sup>4</sup> and the Convention on the Rights of the Child [CRC]<sup>5</sup>—to

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<sup>1</sup> U.N. Human Rights Council Res. 7/23 65–66 ¶ 1, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008).

<sup>2</sup> *Id.* at ¶ 7.

<sup>3</sup> *Id.* at ¶ 8.

<sup>4</sup> *See* International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16,

guide judicial decision-making, even though these treaties are not binding in state court.<sup>6</sup> State courts have also relied upon customary international law.<sup>7</sup> Many international legal scholars consider that the Universal Declaration of Human Rights [UDHR],<sup>8</sup> a sweeping document that values essential human rights and dignity in all persons, is binding customary international law.<sup>9</sup>

### **3. International Human Rights Law Is Relevant in State Courts as Persuasive Authority for Interpretation of State Law**

Arguments support the use of authoritative but non-binding international legal principles to guide interpretations of state law,<sup>10</sup> including a decision by this Court that relied on the UDHR as supplemental authority in a civil case. In *Eggert v. Seattle*, 81 Wash.2d 840, 841, 505 P.2d 801 (1973), this Court invoked the right to freedom of

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at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>5</sup> See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

<sup>6</sup> The U.S. has not ratified either treaty. As a signatory to the ICESCR and the CRC, however, the United States is obliged to “refrain from acts which would defeat the object and purpose” of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>7</sup> “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of Foreign Relations Law §102(2) (1987).

<sup>8</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).

<sup>9</sup> See, e.g., Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 G.A. J. INT’L & COMP. L. 287 (1996).

<sup>10</sup> See Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INT’L LAW AND SUSTAINABLE DEV.: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19, 31 (Alan Boyle & David Freestone eds., 1999) (“Norms may function primarily as rules for decision, of concern to judicial tribunals, rather than as rules of conduct.”).

movement protected by the UDHR to support its holding, which rejected Seattle’s one-year residency requirement for civil service job applicants as unconstitutional. The Court referred to the UDHR in a discussion about the right to freedom of movement, citing article 13, section 1 of the UDHR, which declares that “[e]veryone has the right to freedom of movement and residence within the borders of each State.” *Eggert*, 81 Wash.2d at 841, 505 P.2d at 802.

Other states have regularly incorporated norms of international human rights law into state court decisions.<sup>11</sup> In *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (N.Y.Sup. 1950), the Supreme Court of New York relied on international human rights law principles to eliminate gender discrimination, even though state statutes didn’t explicitly prohibit sex discrimination. The Court cited UDHR provisions in ruling that a particular sex discrimination policy violated “fundamental principle[s]” of equity underlying “American democracy” and state law. *Id.* at 134–36, 101 N.Y.S.2d at 472–74. The Court found the UDHR’s provisions “[i]ndicative of the spirit of our times,” *id.* at 135, 101 N.Y.S.2d at 473,

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<sup>11</sup> See, e.g., *Sterling v. Cupp*, 290 Or. 611, 622 n.21, 625 P.2d 123 (Or. 1981) (en banc) (invoking the UDHR, the ICCPR, and the European Convention on Human Rights to interpret state constitutional provisions governing the treatment of prisoners); and *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (citing the Convention on the Rights of the Child to ban the death penalty for juveniles), *aff’d*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

citing UDHR article 2.<sup>12</sup> Although freedom of movement and sex discrimination are not directly on point, the children's request to protect the atmosphere for future generations under the public trust doctrine is consistent with the UDHR's fundamental principles of equity that have guided decisions by this and other courts.

#### **4. The Public Trust Doctrine Case at Issue Threatens Human Rights of Substantial Public Importance Protected under International Human Rights Laws**

According to Former Vice President of the International Court of Justice, Judge Christopher Weeramantry, "The protection of the environment is . . . a vital part of contemporary human rights doctrine, . . . as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration [of Human Rights] and other human rights instruments."<sup>13</sup> Although the human rights impacts of climate change may not rise to a strict legal violation of obligations under international law,<sup>14</sup> a number of relevant human rights instruments may be

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<sup>12</sup> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . ." UDHR, *supra* note 8, art. 2. *See also Moore v. Ganim*, 233 Conn. 557, 637–39, 660 A.2d 742 (1995) (Peters, J., concurring) (invoking the UDHR and the ICESCR to determine a minimum core legal obligation to provide a safety net for the poor).

<sup>13</sup> Donald Anton, *Is the Environment a Human Rights Issue?*, ANU COLLEGE OF LAW RESEARCH PAPER NO. 08-11 (2008) (citing *Gabcikovo-Nagymaros Project (Hung. v. Slov.)* 1997 I.C.J. 7, 91–92) (separate opinion of Judge Weeramantry), *available at* <http://ssrn.com/abstract=1126470>.

<sup>14</sup> *See* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *Report on the Relationship Between Climate Change and Human Rights*, ¶ 70, U.N. Doc A/HRC/10/61 (Jan. 15, 2009) *available at* <http://www.ohchr.org/Documents/Press/AnalyticalStudy.pdf>.

looked to for guidance when evaluating climate change–related harms to vulnerable populations in Washington.

**Article 3 of the UDHR** declares that “[e]veryone has the right to life, liberty and security of person.”<sup>15</sup> Protection of the environment—including the atmosphere—is necessary to fulfill the human right to life itself. In Washington, climate change increases the risk of increased heat-related mortality, respiratory ailments, spread of water-borne diseases, psychological and social disruption, and migration.<sup>16</sup>

**General Comment 15 of the ICESCR** defines the right to water. “Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”<sup>17</sup> Following major flooding events, drinking water systems in Washington may contaminate with bacteria; sea-level rise may contaminate wells and septic systems along the coast; and salt-water intrusion may also threaten the drinking water supply.<sup>18</sup>

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<sup>15</sup> UDHR, *supra* note 8, art. 3.

<sup>16</sup> FINAL REPORT, NAT’L CLIMATE ASSESSMENT HEALTH SECTOR WORKSHOP: NORTHWEST REGION 1, 12–13 (2012) [hereinafter NORTHWEST NCA REPORT], [http://www.joss.ucar.edu/ohhi/nw\\_nca\\_health\\_sector\\_feb12/Health\\_and\\_CC\\_NW\\_Report.pdf](http://www.joss.ucar.edu/ohhi/nw_nca_health_sector_feb12/Health_and_CC_NW_Report.pdf) (last visited June 1, 2012).

<sup>17</sup> Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 15* (2002), U.N. DOC. E/C.12/2002/11 (Jan. 20, 2003).

<sup>18</sup> See NORTHWEST NCA REPORT, *supra* note 16, at 11.

**Article 25 of the UDHR** declares that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, [and] the right to security....”<sup>19</sup> Populations in Washington who speak English as a second language will be more vulnerable in climate sensitive emergencies if they cannot understand the risks involved or lack the means to evacuate.<sup>20</sup>

**Article 12 of the ICESCR** recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>21</sup> In King County, the risk of death is on average 11 percent higher on a “heat event day,” defined as the hottest one percent of days.<sup>22</sup> Under even moderate climate change scenarios, public health researchers predict a significant increase in heat-related mortality in the greater Seattle area.<sup>23</sup> Rising temperatures are shown to have more negative consequences on elderly and low-income populations.<sup>24</sup> Mental health

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<sup>19</sup> UDHR, *supra* note 8, art. 25.

<sup>20</sup> See NORTHWEST NCA REPORT, *supra* note 16, at 12.

<sup>21</sup> ICESCR, *supra* note 4, art. 12.

<sup>22</sup> NORTHWEST NCA REPORT, *supra* note 16, at 8 (citing J. Elizabeth Jackson et al., *Public Health Impacts of Climate Change in Wash. State: Projected Mortality Risks due to Heat Events and Air Pollution*, 102 CLIMATIC CHANGE 159, (2010)), available at <http://www.springerlink.com/content/q18872n535285835/fulltext.pdf>.

<sup>23</sup> See J. Elizabeth Jackson et al., *Public Health Impacts of Climate Change in Wash. State: Projected Mortality Risks due to Heat Events and Air Pollution*, 102 CLIMATIC CHANGE 159, 174 (2010), available at <http://www.springerlink.com/content/q18872n535285835/fulltext.pdf>.

<sup>24</sup> See UNIVERSITY OF WASH. CLIMATE IMPACTS GROUP, WASH. CLIMATE CHANGE IMPACTS ASSESSMENT 1, 392 (2009), <http://ceses.washington.edu/db/pdf/wacciareport681.pdf> (last visited June 1, 2012).

impacts are expected to impact marginalized and socioeconomically disadvantaged populations the most.<sup>25</sup>

**Article 11 of the ICESCR** declares a “right to adequate food” for present and future generations, which requires international cooperation and harmony between human rights and environmental policies.<sup>26</sup> In Washington, isolated populations without ready access to public services may experience delays in food delivery or food-borne illness in the event of increased power outages or wildfires.<sup>27</sup>

**Article 27(1) of the CRC** recognizes the right of every child to maintain a “standard of living adequate for the child’s physical, mental, spiritual, moral, and social development.”<sup>28</sup> The children’s Complaint stipulates the considerable threat that climate change poses to their enjoyment of such rights. *See* CP 22–27 (including engaging in outdoor activities, enjoying Washington’s rich biodiversity, and serving others).

#### IV. CONCLUSION

For the reasons stated above, *Amici* respectfully ask the Court to grant Petitioner’s Motion for Direct Review of the Superior Court’s ruling, pursuant to RAP 4.2(a)(4).

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<sup>25</sup> *See* NORTHWEST NCA REPORT, *supra* note 16, at 13.

<sup>26</sup> *See* ICESCR, *supra* note 4, art. 11; *see also* Special Rapporteur on the Right to Food, *Interim Report on the Right to Food, transmitted by Note of the Secretary-General*, ¶ 2, U.N. Doc. A/65/281 (Aug. 11, 2010) (by Olivier De Schutter).

<sup>27</sup> *See* NORTHWEST NCA REPORT, *supra* note 16, at 12.

<sup>28</sup> CRC, *supra* note 5, art. 27(1).

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of June, 2012.

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**DECLARATION OF SERVICE**

I, Jennifer J. Marlow, hereby declare that on this day I caused this *Amici Curiae* Memorandum in Support of Petition for Direct Review to be served on Petitioners via electronic mail and on Respondents via electronic mail and U.S. Mail, next day delivery.

Stated under oath this 6th day of June, 2012, in Seattle, Washington.

/s/ Jennifer J. Marlow  
Jennifer J. Marlow