The Honorable Judge Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT SR., et al., Plaintiffs, v. PIERCE COUNTY SUPERIOR COURT, et al., Defendants.	NO. 3:16-CV-05464-RJB JUDICIAL AND PROSECUTORIAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS NOTE FOR MOTION CALENDAR: August 26, 2016

I. INTRODUCTION

All of Plaintiffs' claims against the Prosecutorial and Judicial Defendants are impermissible collateral attacks on Plaintiffs' state court judgments. Whether couched as challenges to the Assistant Attorneys General's authority to prosecute them, the superior court's authority to issue search warrants and convict them, or an unnamed appellate court's authority to hear their appeals, Plaintiffs, in the end, seek federal orders to invalidate their state court criminal convictions.

The *Rooker-Feldman* doctrine, which precludes federal district courts from hearing actual or de facto appeals of state court judgments, squarely forecloses Plaintiffs' claims. Plaintiffs argue at length that the State lacks criminal jurisdiction, while in the process mischaracterizing the Defendants' arguments and court decisions, but the Court should not address any of the substantive arguments regarding the State's jurisdiction, because *Rooker-Feldman* requires that

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Plaintiffs first see those arguments through in the state courts. The state courts' decisions on those matters are reviewable by the federal courts only through habeas (under limited circumstances, *see* 28 U.S.C. § 2241) or via United States Supreme Court review of the Washington Supreme Court's decision (*see* 28 U.S.C. § 1257). For this reason, and the additional reasons stated below and in their Motion to Dismiss, the Prosecutorial and Judicial Defendants respectfully request that the Court dismiss all claims[1] against them in this lawsuit.

II. REVIEW OF UNDISPUTED FACTS

To decide the Prosecutorial and Judicial Defendants' Motion to Dismiss, this Court need only consider the following facts as alleged by Plaintiffs:

Plaintiffs Marlene Comenout, Robert Comenout, Sr., Robert Comenout, Jr., and Lee Comenout, Sr. were convicted and sentenced for violations of Washington laws regarding the possession and sale of contraband cigarettes. Complaint (Dkt. 1) ¶ 26.[2] Plaintiffs have appeals pending with the Washington State Court of Appeals. Complaint (Dkt. 1) ¶ 26.

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[1] It is rather difficult to discern what causes of action Plaintiffs are asserting in this lawsuit. While they cite to a number of federal statutes in their Complaint, only two appear to provide procedural mechanisms for this Court to consider the substantive provisions to which they refer: the All Writs Act, 28 U.S.C. § 1651, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. Neither provides a basis for relief against the Judicial and Prosecutorial Defendants for the reasons stated herein.

[2] Specifically, Plaintiffs entered *Alford* guilty pleas to the following charges:

Marlene Comenout:
Count I: Unlawful Selling of Unstamped (Contraband) Cigarettes, Wash. Rev. Code § 82.24.110(1)(a) (gross misdemeanor)
Count II: Possession of Less than 10,000 Contraband Cigarettes, Wash. Rev. Code § 82.24.110(1)(o) (gross misdemeanor)

Robert Comenout:
Count I: Engaging in or Conducting Business of Cigarette Purchasing, Selling or Distributing Without a License, Wash. Rev. Code § 82.24.500 (Class C Felony)
Count II: Possession of More than 10,000 Contraband Cigarettes, Wash. Rev. Code § 82.24.110(2)(b) (Class C Felony)

Lee Allen Comenout:
Count I: Engaging in or Conducting Business of Cigarette Purchasing, Selling or Distributing Without a License, Wash. Rev. Code § 82.24.500 (Class C Felony)
Count II: Possession of More than 10,000 Contraband Cigarettes, Wash. Rev. Code § 82.24.110(2)(b) (Class C Felony)

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Plaintiffs allege that the State Prosecutors (Assistant Attorneys General Michael Pellicciotti and Joshua Choate) lacked the authority to criminally prosecute them for activities that occurred on the allotted land, and seek a declaration invalidating their past representation against Plaintiffs in the superior court litigation. Complaint (Dkt. 1) ¶ 29.

Plaintiffs further allege that the Pierce County Superior Court "allowed the filing of [the] criminal complaints against four Plaintiffs without territorial or personal jurisdiction," and request injunctive relief with respect to their prior superior court criminal proceeding and "potential subsequent proceedings." Complaint (Dkt. 1) ¶ 27. Plaintiffs seek declaratory and injunctive relief against Pierce County Superior Court, the Assistant Attorneys General, and other unnamed judges aimed at invalidating their criminal convictions and influencing future judicial review of their convictions. *See generally id.* ¶¶ 3, 7, 8, 27, 29, 32, 36, 47, 50, 60-61, 63, 64.

III. ARGUMENT IN REPLY

A. Plaintiffs' Claims Seeking To Remedy Injuries Allegedly Caused By State Court Judgments Are Barred By *Rooker-Feldman*, And Should Be Dismissed.

"*Rooker–Feldman* is a powerful doctrine that prevents federal courts from second-guessing state court decisions." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). This doctrine provides that beyond the limited authority to examine state judicial proceedings pursuant to habeas corpus review of certain custodial situations, *see, e.g.*, 28 U.S.C. § 2241, district courts have no authority to review the proceedings or final judgments of state courts. *Young v. Murphy*, 90 F.3d 1225, 1230 (7th Cir.1996) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)). Only the Supreme Court has the congressional

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Robert Comenout, Jr.:
Count I: Engaging in or Conducting Business of Cigarette Purchasing, Selling or Distributing Without a License, Wash. Rev. Code § 82.24.500 (Class C Felony)
Count II: Possession of More than 10,000 Contraband Cigarettes, Wash. Rev. Code § 82.24.110(2)(b) (Class C Felony)

Declaration of Joshua Choate, Exs. A-H.

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and constitutional authority to review state court proceedings. U.S. Const. art. III, § 2; 28 U.S.C. § 1257.[3]

Plaintiffs contend their criminal convictions are invalid because the prosecutorial defendants lacked jurisdiction to investigate or prosecute them, and the state court lacked the authority to convict them, either of which should void their convictions. But federal district courts lack jurisdiction to entertain appeals of state court decisions. *Ritter v. Ross*, 992 F.2d 750 (7th Cir.1993) (extending the doctrine to apply to decisions of lower state courts); *Keene Corp. v. Cass*, 908 F.2d 293 (8th Cir. 1990) (same). Plaintiffs may not obtain review of their state court judgments simply by recasting the issue as a declaratory judgment or injunctive action. *See Cooper v. Ramos*, 704 F.3d 772, 780 (9th Cir. 2012) (rejecting plaintiffs' attempt to recast claim to avoid *Rooker-Feldman*, including challenges to the prosecutors' actions).

Additionally, the *Rooker-Feldman* doctrine bars federal courts not only from reviewing the judgments of state courts, but also from reviewing the proceedings leading to state court judgments. *Young*, 90 F.3d at 1230 (citing *Feldman*, 460 U.S. at 482).[4] The Ninth Circuit has held that the doctrine bars review of non-final as well as final state court decisions. *See Dubinka v. Judges of Superior Ct.*, 23 F.3d 218, 221 (9th Cir. 1994). Litigants who believe a state proceeding violated federal law must appeal that decision through the state courts and ultimately to the United States Supreme Court. *Garry v. Geils*, 82 F.3d 1362, 1368 (7th Cir. 1996) (citing *Wright v. Tackett*, 39 F.3d 155, 157-58 (7th Cir. 1994)). This Court does not have

[3] Because this is an issue of subject matter jurisdiction, it may be raised and considered at any time in the litigation. *See Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986); *Fleming v. Gordon & Wong Law Group, P.C.*, 723 F. Supp. 2d 1219, 1222 (N.D. Cal. 2010) (citing *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933, 937 (9th Cir. 1998)).

[4] Plaintiffs' challenges to the Prosecutorial Defendants seek only to declare their acts without jurisdiction such that all of their actions, and the resulting criminal convictions, be declared void. Complaint (Dkt. 1) at p. 7, ¶ 7 (seeking a declaration that the State attorneys lacked jurisdiction because the State lacked jurisdiction), p. 50 (Count II). In that light, their challenges to the Prosecutorial Defendants' jurisdiction are subsumed in their claims seeking to invalidate their criminal convictions.

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jurisdiction to review Plaintiffs' criminal judgments, or the proceedings underlying those judgments.

In response to the Judicial and Prosecutorial Defendants' Motion to Dismiss, Plaintiffs assert that *Rooker-Feldman* does not apply because not all of the Plaintiffs in this lawsuit were defendants in the 2011 Washington Supreme Court decision of *State v. Comenout*, 173 Wash. 2d 235, 267 P.3d 355 (2011). Plaintiffs' Response (Dkt. 13) at 21-22. *See also* Complaint (Dkt. 1) ¶ 51. But Plaintiffs fail to recognize that two of their own who were criminally convicted in 2016, Robert Comenout and Robert Comenout, Jr., were also defendants in the 2011 *Comenout* case. *See Comenout*, 273 P.3d at 237 ¶ 3; Complaint (Dkt. 1) ¶ 26. At a minimum, those two Plaintiffs cannot, consistent with *Rooker-Feldman*, obtain relief with respect to the 2011 decision.

More importantly, *Rooker-Feldman* applies more broadly than to simply preclude this Court's direct review of the 2011 *Comenout* case. *Rooker-Feldman* also applies to preclude this Court's direct review of the current 2016 criminal proceedings involving the four relevant Plaintiffs. *See Dubinka*, 23 F.3d at 221.[5]

The cases cited by Plaintiffs in their Complaint as to why *Rooker-Feldman* does not apply are distinguishable from this case. *See* Complaint (Dkt. 1) ¶ 51 (citing *Morrison v. Peterson*, 809 F.3d 1059, 1070 (9th Cir. 2015); *Skinner v. Switzer*, 562 U.S. 521, 532 (2011)). In *Morrison*, the Ninth Circuit held that a plaintiff was not barred from challenging the constitutionality of a state statute in federal court, because that challenge was not a de facto appeal of this earlier state court judgment, which decided whether the plaintiff was entitled to DNA testing under that statute. 809 F.3d at 1070. The *Morrison* Court relied on the Supreme Court's decision in *Skinner*, also cited by Plaintiffs in their Complaint, which concluded that the fact that the parties litigated "the same or related question" earlier in state court does not

[5] Plaintiffs clearly anticipated this argument by alleging in their Complaint that their current claims were not barred by the *Rooker-Feldman* doctrine. Complaint ¶ 51.

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preclude jurisdiction over an independent claim in federal court. *Id*. (citing *Skinner*, 562 U.S. at 531-32). But directly on point to this case, *Skinner* reiterates that *Rooker-Feldman* has always precluded "'state-court losers'" from "'inviting district court review and rejection of [the state court's] judgments.'" *Skinner*, 562 U.S. at 532 (quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005)). That is exactly what Plaintiffs are seeking in this lawsuit. Plaintiffs want this Court to review and reject the state court's judgments against them.

Plaintiffs' citation to *Vasquez v. Rackauckas*, 734 F.3d 1025 (9th Cir. 2013) for the proposition that *Rooker-Feldman* does not apply is also misplaced. *See* Plaintiffs' Response (Dkt. 13) at 22. The Court in *Vasquez* declined to apply *Rooker-Feldman* where the plaintiffs in the federal lawsuit were not parties in the underlying state case, *and* the plaintiffs were not suing the state court judges or the court, but instead seeking to stop the state prosecutors from enforcing an injunction that would adversely impact them. *Id*. at 1037. Here, unlike in *Vasquez*, Plaintiffs (or at least the four Plaintiffs who have standing to challenge the state court criminal proceedings and convictions) *were* defendants in the state court proceedings, and thus necessarily had the opportunity to raise their federal defenses in their underlying state case. Complaint (Dkt. 1), ¶ 26. Also unlike in *Vasquez*, the prosecutors are not currently enforcing an injunction against Plaintiffs. *Vasquez* is inapposite.

Under *Rooker-Feldman*, this Court should decline Plaintiffs' request to review their criminal convictions and underlying proceedings, or the earlier 2011 state *Comenout* decision.

B. The Anti-Injunction Act And *Younger Abstention* Also Warrant Dismissal.

For the reasons set forth in the Prosecutorial and Judicial Defendants' Motion to Dismiss, Plaintiffs' claims should also be dismissed pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, and the *Younger* abstention doctrine.

Plaintiffs seem to confuse Defendants' arguments regarding the Anti-Injunction Act, instead arguing against application of the *Tax* Anti-Injunction Act, 28 U.S.C. § 1341, which was not a basis offered for dismissal in the Motion to Dismiss. *See* Plaintiffs' Response (Dkt.

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13) at 20-21. The only case Plaintiffs rely on that applies to the Anti-Injunction Act, *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), held that the Anti-Injunction Act's prohibition against staying state court proceedings did not apply to administrative proceedings. 45 F.3d at 1271. The proceedings below in this case undoubtedly occurred in a state court, so *Bud Antle* does not apply.

Plaintiffs also misread the Supreme Court's decision in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) with respect to Defendants' *Younger* Abstention arguments. *See* Plaintiffs' Response (Dkt. 13) at 23. The Court in *Sprint Communications* found *Younger* inapplicable because the underlying state court proceedings did not fall under the three types of proceedings that *Younger* may apply: criminal, civil enforcement, or civil proceedings uniquely in furtherance of the state courts' ability to perform their judicial functions. 134 S. Ct. at 591. The proceedings below in this case are undoubtedly criminal, and thus precisely the type of case controlled by *Younger*.

Finally, unlike *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*, 70 F.3d 1361 (1st Cir. 1995), and *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), cited by Plaintiffs at pages 22-24 of their Response, federal preemption in this case is not "readily apparent," such that abstention is inapplicable. To the contrary, the United States Supreme Court and the Washington Supreme Court have already reviewed and affirmed the constitutionality of Washington's statute asserting criminal jurisdiction over crimes occurring on Indian Country pursuant to PL 280, including the very crimes at issue in this case. *Washington v. Confederated Bands and Tribes of Yakima*, 439 U.S. 463 (1979); *State v. Comenout*, 173 Wash. 2d 235, 267 P.3d 355 (2011).

The Anti-Injunction Act and the *Younger Abstention* doctrine apply in this case, and justify dismissal.

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C. Plaintiffs Mischaracterize The *State v. Jim* Case.

In purporting to refute the assertion that Washington's criminal jurisdiction is authorized by federal and state law, Plaintiffs also offer the case of *State v. Jim*, 173 Wash. 2d 672, 273 P.3d 434 (Wash. 2012). Plaintiffs' Response (Dkt. 13) at 6-7. They claim that the *Jim* case held that the State lacks jurisdiction over restricted allotments. *Id*. But what the Washington Supreme Court actually held in *Jim* was that the property at issue was an "established *reservation* held in trust for the benefit of tribes" under Washington Revised Code § 37.12.010, not an off-reservation allotment like the Comenouts'. *Jim*, 173 Wash. 2d at 680 (emphasis added). Under Washington Revised Code § 37.12.010, Washington assumed jurisdiction over acts committed by Indians on trust lands within their tribe's "established reservation" in only eight subject matter areas, which do not include the fish conservation laws that were at issue in *Jim*. Therefore, the *Jim* Court held that the State did not have jurisdiction under Washington Revised Code § 37.12.010 to prosecute Mr. Jim for taking undersized sturgeon at the Maryhill Treaty Fishing Access Site "reservation." 173 Wash. 2d at 680.

By contrast, the Comenout property is an off-reservation allotment where the State has full Wash. Rev. Code § 37.12.010 and PL 280 jurisdiction, as the Court held in *State v. Comenout*, 173 Wash. 2d at 238-40. It is not an "established reservation" within the meaning of Washington Revised Code § 37.12.010, and *State v. Jim* simply does not apply.

D. Plaintiffs' Arguments About Preemption Should Be Made in the State Criminal Proceeding.

Plaintiffs next claim is that even if Washington Revised Code § 37.12.010 and PL 280 conferred jurisdiction to the State for crimes occurring on non-reservation allotted lands, the State lacked jurisdiction to prosecute and try the specific crimes for which they were convicted. Plaintiffs assert that the violations are more civil/regulatory than criminal, and, therefore, not within PL 280's conferral of jurisdiction pursuant to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Plaintiffs' Response (Dkt. 13) at 8-11. These are

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exactly the type of arguments that should first be fully presented and considered in Plaintiffs' state court proceedings. *See* Section III.A, *supra. See also State v. Yallup*, 160 Wash. App. 500, 506, 248 P.3d 1095, 1098 (Wash. Ct. App. 2011) (considering *Cazabon* argument and concluding that PL 280 authorized jurisdiction with respect to implied consent). Only when they have exhausted their state court remedies should Plaintiffs be permitted to challenge their state court judgments through federal habeas or pursuant to 28 U.S.C. § 1257.

Moreover, the *Cabazon Band* Court struggled with whether the California statute at issue was civil/regulatory or criminal, noting that arguments "of some weight" could be made on both sides, and that there was no bright line test. The Court ultimately deferred to the Ninth Circuit's conclusion based on detailed legislative history that the nature and intent of the state law at issue was regulatory rather than prohibitory. 480 U.S. at 208-10. Should this Court reach the merits of Plaintiffs' claims regarding the State's jurisdiction *and* find *Cabazon Band* applicable, more thorough briefing of the nature and intent of the laws violated in this case will be required. But this only underscores why Plaintiffs should first make these arguments to the state courts, which have the full authority and capability to review Plaintiffs' preemption arguments in the course of reviewing their criminal convictions.[6]

E. Any Claims Against "The Superior Court of the State of Washington, County of Pierce," Should Be Dismissed Pursuant To The Eleventh Amendment.

Plaintiffs' claims against the "Superior Court of the State of Washington, County of Pierce," are additionally barred in their entirety by the Eleventh Amendment to the United States Constitution.[7] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984)

[6] Additionally, the State is not attempting to impose a tax on the Plaintiffs, so the cases they cite at pages 9-10 of their Response do not help their argument that PL 280 does not confer jurisdiction. Rather, this case is about conduct which the State has deemed unlawful—the possession and sale of contraband cigarettes.

Similarly, the language from the Ninth Circuit's decision in *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1088 (9th Cir. 2011), referenced by Plaintiffs at page 16 of their Response, does not apply because this case is not about the State's "collection effort" for the retailer's non-payment of tax.

[7] Eleventh Amendment immunity may be raised by any party or the court *sua sponte* at any time. *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999).

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(noting suit against "a State or one of its agencies or departments" is barred by the Eleventh Amendment, absent consent or proper congressional abrogation). This is the case "regardless of the nature of the relief sought." *Id.*; *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) ("But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."). An action against a Washington Superior Court is an action against the State of Washington. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (holding that Eleventh Amendment bars suit against the state superior court). Accordingly, the Pierce County Superior Court is entitled to immunity under the Eleventh Amendment and the claims against it should be dismissed. *Id*.

Likewise, Plaintiffs may not avoid the Eleventh Amendment by seeking declaratory relief against individual defendants if the result would compromise the State's Eleventh Amendment immunity. *See Green v. Mansour*, 474 U.S. 64, 73 (1985) ("[A] declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman v. Jordan*, 415 U.S. 651.").

F. Plaintiffs Have Adequate Remedies At Law To Address Their Claims.

Plaintiffs have no response to the Defendants' assertion that they have adequate remedies at law, and, additionally for that reason, are not entitled to equitable relief. *See Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009) ("[E]quitable relief is not appropriate where an adequate remedy exists at law."). Since as explained above, Plaintiffs can present their claims, including those regarding federal preemption, to the state Court of Appeals, and later to the Washington Supreme Court and the United States Supreme Court, they are not entitled to equitable relief against either the Assistant Attorneys General who prosecuted them or the state courts who convicted them.

Moreover, "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release

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or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). This principle applies to individuals like Plaintiffs who are on community custody. *See Maleng v. Cook*, 490 U.S. 488, 491 (1988) (citing *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)). Plaintiffs have not brought a federal habeas claim (and in any event would first be required to exhaust their state remedies).

Plaintiffs do not state a claim for equitable relief when they had and have a full opportunity to raise their federal preemption challenges in state court.

G. Comenout's Requests For Relief As To Future Uncharged Crimes Are Unripe.

Finally, federal courts established pursuant to Article III of the Constitution do not render advisory opinions. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947). The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

To the extent Plaintiffs seek relief as to any future state court proceedings, their claims are not ripe and should additionally be dismissed for that reason.

IV. CONCLUSION

For the foregoing reasons, the Judicial and Prosecutorial Defendants request that this Court enter an order dismissing all claims asserted against them with prejudice.

DATED this 26th day of August, 2016.

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PROOF OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of August, 2016, at Tumwater, WA.

s/ Julie Johnson
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