No. 76590-1

WASHINGTON STATE SUPREME COURT

GREGORY K. AMUNRUD

Appellant,

v.

BOARD OF APPEALS AND DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON,

Respondent.

BRIEF OF *AMICI CURIAE* JOSEF VENTENBERGS, KENDALL TRUCKING, INC., RONALD HAIDER, AND HAIDER CONSTRUCTION, INC.

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INTRODUCTION

Amici Curiae Josef Ventenbergs, Kendall Trucking, Inc., Ronald Haider, and Haider Construction, Inc. (together "Ventenbergs") submit this brief to provide additional considerations regarding the right to earn a living. The Court of Appeals here found it dispositive that the Supreme Court has never held that the right to pursue a profession is a fundamental right. *Amunrud v. Bd. of Appeals*, 124 Wn. App. 884, 887, 103 P.3d 257 (2004). This does not tell the entire story, however. While federal courts have not applied "strict scrutiny" to regulations that affect this right, the United States Supreme Court and numerous state courts have repeatedly described the important and essential nature of one's ability to earn an honest living under the U.S. Constitution. Judicial recognition of this right is both well-established and consistent with common sense; the Court of Appeals' analysis, such as it is, does little to illuminate its importance. Ventenbergs therefore wishes to provide this Court with additional authority on the essential nature of the right at issue.

Ventenbergs also submits this brief to urge this Court to carefully limit its analysis of this right to its protections under the U.S. Constitution because that is the sole basis urged by Mr. Amunrud. By order dated November 29, 2005, this Court deferred consideration of Ventenbergs' petition for review in Case No. 76594-1 during the pendency of this

Court's consideration of Mr. Amunrud's appeal. In No. 76594-1, Ventenbergs argued that the City of Seattle's restriction of the market for construction, demolition and land-clearing waste violated article I, section 12 of the Washington Constitution because it deprived Mr. Ventenbergs of his right to earn an honest living. Both cases thus address the level of judicial protection afforded the right to earn a living. However, Mr. Amunrud makes his claim solely pursuant to the federal constitution, while Ventenbergs' claim is limited solely to the state constitution. Ventenbergs urges this Court to clearly indicate that resolution of this case does not affect how the right to earn a living is treated under the state constitution and other sources of state law.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Joe Ventenbergs is the founder and owner of Kendall Trucking, Inc. Mr. Ventenbergs began working as a hauler of construction, demolition and landclearing waste (CDL) in 1993 and started his own CDL-hauling business in 1994. Over the next decade, he built Kendall Trucking into a successful business by offering timely and efficient service. Mr. Ventenbergs wishes to earn a living conducting a useful business hauling CDL in Seattle while conforming to environmental and safety requirements. The City of Seattle (the "City"), however, passed

[1] Ventenbergs also wishes to note that this brief takes no position on whether the regulations at issue in this case are constitutional.

ordinances restricting the CDL market to two large companies. Because the ordinances make it illegal to pursue his chosen profession, Ventenbergs brought suit against the City claiming, among other things, that the City's ordinances were an unconstitutional grant of privileges under article I, section 12 of the Washington Constitution. Both the trial court and the Court of Appeals upheld the City's ordinances. If this Court denies review, his means of earning a living will be destroyed.

One of Mr. Ventenbergs' best customers is Ron Haider, who prefers using Mr. Ventenbergs because the service he receives is less expensive and more responsive than the companies chosen by the City to provide CDL services.

Because this case also concerns the limits on the government's ability to interfere with one's ability to pursue common occupations, both Mr. Ventenbergs and Mr. Haider have a significant interest in its outcome.

STATEMENT OF THE CASE

Ventenbergs adopts the Statements of the Case contained in the Briefs of Appellant and Respondent.

ARGUMENT

Mr. Amunrud argued that strict scrutiny is the appropriate test for consideration of the right at issue. Relying on a footnote from a Ninth Circuit decision, both the State and the Court of Appeals reject this argument, concluding that the right to earn a living is not a fundamental right because the United States Supreme Court "has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny." Resp. Br. at 12 (quoting *Dittman v. California*, 191 F.3d 1020, 1031 n. 5 (9th Cir. 1999)); *Amunrud*, 124 Wn. App. at 887-88 (same). While this conclusion accurately reflects that current federal law does not apply strict scrutiny, it does not appreciate that the right to earn a living is just that – a right guaranteed by the U.S. Constitution. While the United States Supreme Court has not applied "strict scrutiny," the Court, and numerous state courts, have repeatedly described the essential nature of this right under the U.S. Constitution and held that it is an important right deserving of judicial protection because of its importance to the economic and personal well-being of Americans.

The Court of Appeals' conclusion thus does little to provide understanding of this right and this brief wishes to provide this Court with that background so that it may consider Mr. Amunrud's claims in light of

judicial authority concerning this right. In contrast to the summary conclusion of the Court of Appeals, judicial discussions of the right have reflected a common sense recognition that the ability to earn a living is vitally important to many Americans. It is self-evident that employment secures one's ability to pursue the essentials of life, such as food, clothing, shelter, and medical care, and the pursuit of an occupation – not just a job, but a means of consistently earning a living – is an essential component to the American Dream. The right thus deserves more than the backhanded dismissal given it by the Court of Appeals.

The federal and state cases described in this brief only address the protection of this right afforded by the U.S. Constitution, however; they do not address whether the Washington Constitution provides independent protections for the right to earn a living. Nor do they address whether other independent protections exist for the right under Washington law. Because Mr. Amunrud makes no claim that his state constitutional rights were violated, this Court's decision should be restricted solely to the U.S. Constitution and this Court should reserve any discussion of the protections afforded this right under the Washington Constitution for another day.

A. The Right To Earn A Living Is An Important Right Protected By The Privileges and Immunities Clause And The Fifth And Fourteenth Amendments

1. Federal Courts Are Clear That The Right Is Protected By The United States Constitution

The Supreme Court has made clear in a variety of contexts that the right to earn a living is a significant constitutional right, finding protection in the Privileges and Immunities Clause of Article IV, § 2 and the Fifth and Fourteenth Amendments: "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor*, 465 U.S. 208, 219, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984) (citations omitted); *see also United States v. Robel*, 389 U.S. 258, 263, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967) ("It is true that the specific disability imposed [in the law] is to limit the employment opportunities of those who fall within its coverage, and such a limitation is not without serious constitutional implications."); *id.* at 265 n.11 ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.") (internal quotation marks and citations omitted); *id.* at 270 (Brennan, J., concurring) ("That right is therefore also included among the

[i]ndividual liberties fundamental to American institutions [which] are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers.") (alterations in original; internal quotation marks and citations omitted); *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . . ."); *Peters v. Hobby*, 349 U.S. 331, 352, 75 S. Ct. 790, 99 L. Ed. 2d 1129 (1955) (Douglas, J., concurring) ("[The government's action] deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work."); *Local Loan Co. v. Hunt*, 292 U.S. 234, 245, 54 S. Ct. 695, 78 L. Ed. 2d 1230 (1934) ("The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern."); *Powell v. Pennsylvania*, 127 U.S. 678, 684, 8 S. Ct. 992, 32 L. Ed. 2d 253 (1888) ("The main proposition advanced by the defendants is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or

trade, and of acquiring, holding, and selling property is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) ("For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.").

Specifically, the Fourteenth Amendment protects this right from infringement by state and local governments because it is part of the "liberty" protected by that amendment. *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (noting that the Fourteenth Amendment includes a generalized right to choose one's field of private employment, albeit subject to reasonable governmental regulation); *Examining Bd. of Eng'rs, Architects and Surveyors v. Otero*, 426 U.S. 572, 604, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976) (noting that protection of the right to work for a living in a common occupation was a purpose of the Fourteenth Amendment). As the Court has stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity

> that it was the purpose of the [Fourteenth] Amendment to secure.

Truax v. Raich, 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131 (1915). It was thus held that the right is one of the liberties "without doubt" protected by the Fourteenth Amendment:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 2d 1042 (1923); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (adopting *Meyer* definition of "liberty" and noting that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed").[2]

[2] *Meyer* notes that the right was well-established under the common law. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 207, 209-17 (2003) (citing 1 William Blackstone, *Commentaries* *427 ("At common law every man might use what trade he pleased.")). Thus, the Ninth Amendment also protects this unenumerated right, pre-existing at common law, from being denied or disparaged. U.S. Const. amend. 9.

The Court's recognition that this right is protected by the Fourteenth Amendment and capable of application against actions by the states is consistent with the view of the author of the amendment itself:

> Liberty, our own American constitutional liberty, is the right "to know, to argue, and to utter freely according to conscience." It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow men, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give every man his due.

Cong. Globe, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. Bingham).

The Court of Appeals' decision thus ignored both Supreme Court precedent and constitutional history regarding this right. While the Supreme Court has not applied strict scrutiny, it has nonetheless made clear that the right is important and deserving of some level of judicial protection. This Court should therefore address Mr. Amunrud's claim in light of these authorities and recognize that the United States Constitution provides some substantive level of protection for this essential right.

2. State Courts Have Also Recognized The Importance Of This Right Under The Federal Constitution

Like the United States Supreme Court, numerous state courts, including the Washington Court of Appeals and the California Supreme

Court (the state in which *Dittman* originated), have clearly indicated that the right to earn a living is an essential right under the U.S. Constitution. The Court of Appeals simply ignored these decisions, however.

As Mr. Amunrud correctly points out, numerous Washington cases interpreting the federal constitution make clear that this is an important right protected from unreasonable governmental interference. *See* App. Br. at 12-13; *AK-WA, Inc. v. Dear*, 66 Wn. App. 484, 492, 832 P.2d 877 (1992); *Plumbers and Steamfitters Union Local 598 v. Wash. Pub. Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986) ("The right to hold specific private employment and follow a chosen profession free from *unreasonable* government interference is a fundamental right which comes within the liberty and property concepts of the Fifth Amendment") (citing *Greene*, 360 U.S. at 492); *Duranceau v. City of Tacoma*, 27 Wn. App. 777, 780, 620 P.2d 533 (1980) ("This fundamental right is protected against state interference by the Fourteenth Amendment."). Nonetheless, the Court of Appeals did not see fit to distinguish, or even mention, any of these cases.

Other state courts have reached similar conclusions with regard to the existence of the right under the Federal Constitution:

California: "Protection against the arbitrary foreclosing of employment opportunities lies close to the heart of the protection against

'second-class citizenship' which the equal protection clause was intended to guarantee. An individual's freedom of opportunity to work and earn a living has long been recognized as one of the fundamental and most cherished liberties enjoyed by members of our society . . . ." *Gay Law Students Ass'n v. Pac. Tel. and Tel. Co.*, 24 Cal. 3d 458, 470, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). "The instant case compels the application of the strict scrutiny standard of review . . . because the statute limits the fundamental right of one class of persons to pursue a lawful profession . . . . The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. . . . Limitations on this right may be sustained only after the most careful scrutiny." *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *see also Bixby v. Pierno*, 4 Cal. 3d 130, 143, 481 P.2d 242, 93 Cal. Rptr. 234 (1971) (noting the right to earn a living is fundamental, protected by the California courts against "untoward intrusions by the massive apparatus of government").

Florida: "The right to work, earn a living and acquire and possess property from the fruits of one's labor is an inalienable right." *Lee v. Delmar*, 66 So. 2d 252, 255 (Fla. 1953).

Georgia: "The right to earn a living by pursuing an ordinary occupation is protected by the constitution. This right is fundamental,

natural, inherent, and is one of the most sacred and valuable rights of a citizen." *Deberry v. City of LaGrange*, 62 Ga. App. 74, 8 S.E.2d 146, 150 (1940).

Indiana: "[T]he right to pursue any proper vocation . . . is regarded as an unalienable right and a privilege not to be restricted except perhaps by a proper exercise of the police power of the state." *Kirtley v. State*, 227 Ind. 175, 179, 84 N.E.2d 712 (1949).

Iowa: "The cases, from which we have quoted, clearly announce fundamental principles, essential to the life of a free people living under a republican form of government. The right to earn a living is among the greatest of human rights and, when lawfully pursued, cannot be denied. It is the common right of every citizen to engage in any honest employment he may choose, subject only to such reasonable regulations as are necessary for the public good. Due process of law is satisfied only by such safeguards as will adequately protect these fundamental, constitutional rights of the citizen." *Gilchrist v. Bierring*, 234 Iowa 899, 914-15, 14 N.W.2d 724 (1944).

Massachusetts: "It is certainly true that the opportunity to earn a living is a fundamental right in our society." *Town of Milton v. Civil Serv. Comm'n*, 365 Mass. 368, 372, 312 N.E.2d 188 (1974).

Missouri: "The Fourteenth Amendment has been construed as including within the fundamental rights conferred by it an individual's right to earn a livelihood at any common occupation." *Heath v. Motion Picture Mach. Operators Union No. 170*, 365 Mo. 934, 942, 290 S.W.2d 152 (1956).

New York: "An individual's freedom of opportunity to work and earn a living has been recognized as a fundamental liberty." *Under 21 v. City of New York*, 126 Misc. 2d 629, 630, 481 N.Y.S.2d 632 (Sup. Ct. 1984). "The importance ascribed to the right to travel and to pursue a livelihood or to otherwise engage in trade and commerce is seen from the juxtaposition of these rights with the 'privileges and immunities of free citizens'. For 'privileges and immunities of free citizens' embraced no less than those 'natural rights' thought to inhere in the very concept of civilized government, such as the right to 'enjoyment of life and liberty' and the pursuit of 'happiness and safety', the denial of which by any of the States would have been unthinkable to the revolutionary theoreticians." *Salla v. County of Monroe*, 48 N.Y.2d 514, 520-21, 399 N.E.2d 909, 423 N.Y.S.2d 878 (N.Y. 1979).

Ohio: "The denial of the fundamental right to earn a living and to work, reasonably, on the same basis, and to participate, reasonably, in the same benefits as one's fellow citizens requires a close scrutiny by our

courts, and any deprivation of rights based upon unreasonable classifications or categories should not be upheld." *Roth v. Pub. Employment Retirement Bd. of Ohio*, 44 Ohio App. 2d 155, 160, 336 N.E.2d 448 (1975).

Virginia: "Our concept of 'liberty,' as that word is used in the Constitution of the United States and the Constitution of Virginia, embraces the right to work and earn a living as well as the right to speak freely. Each of these fundamental rights has its limitations, and the abuse of each is subject to legislative restraint under the State's police power." *McWhorter v. Commonwealth*, 191 Va. 857, 866, 63 S.E.2d 20 (1951) (citations omitted).

These cases make clear that, while this right is subject to some degree of regulation under a state's police power, the inherent right to earn a living exists under the U.S. Constitution and is inalienable and essential to American liberty. That is, while it can be regulated, it cannot be completely derogated without, at a minimum, a sufficiently important governmental justification and a regulation that actually achieves the government's goal. The Court of Appeals, however, did not consult or even consider the holdings of these cases, much less attempt to distinguish or contradict the reasoning underlying such holdings.

3. The Right Protects Actions Vitally Important To Most Americans

The courts' recognition of the essential nature of this right derives from a commonsense and self-evident fact: without the ability to earn a living, a person is unable to secure life's necessities or fully participate in society and economic activity. Taken to its logical conclusion, derogation of the right can bring destitution, illness, homelessness and alienation. As the Montana Supreme Court put it when considering the protections accorded the right in the Montana Constitution:

> As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care. We conclude that without the right to the opportunity to pursue employment, the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right.

Wadsworth v. State, 275 Mont. 287, 299, 911 P.2d 1165 (1996); *see also Bixby*, 4 Cal. 3d at 144 ("In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life

situation.").[3] In human terms, then, the ability to earn a living and to pursue an occupation can mean the difference between health and sickness, comfort and penury, sleeping in a shelter or in one's home.

B. Washington Law Provides Independent Protections For The Right To Earn A Living

As noted above, Mr. Amunrud claims only that the State has violated his rights under the Federal Constitution. Independent protections for the right to earn a living exist in Washington statutes and the Washington Enabling Act, and, specifically, the Washington Constitution provides greater and independent protections than those in the Fifth and Fourteenth Amendment when the issue involves governmental favoritism to established interests. Resolution of Mr. Amunrud's claims should not affect these independent protections.

For instance, RCW 18.118.010 specifically states, with emphasis added, that the Washington Legislature "believes that all individuals should be permitted to enter into a business profession unless there is an

[3] While the State posits that "fundamental rights" are limited to those in the Bill of Rights, familial relations, or decisions regarding procreation, Resp. Br. at 12, the ability to fully exercise many of these rights is dependent, to a large extent, on one's financial ability to pay the expenses incurred in exercising these rights. For instance, a woman's ability to exercise her fundamental right to decide whether to procreate is substantially impaired if she does not have the money to actually buy birth control or pay for an abortion. Because our government does not fund the exercise of fundamental rights, an individual's ability to fully realize those rights will therefore continue to be inextricably linked to her ability to earn a living. *Cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507-10, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (no Due Process violation exists when the government refuses to fund abortion services).

overwhelming need for the state to protect the interests of the public by restricting entry into the profession. Where such a need is identified, the regulation adopted by the state should be set at the least restrictive level consistent with the public interest to be protected." The Legislature has thus made clear that entry into a profession may only be restricted if the government can show an "overwhelming" need for it and even then, the regulation must be "the least restrictive" method for achieving the need. This standard is not implicated by Mr. Amunrud's case because he is not entering into the profession of driving a cab, but rather is attempting to remain in it.

Similarly, Washington's Enabling Act also provides an independent source for judicial protection of the right to earn a living. The Enabling Act provides that the Washington Constitution "shall . . . not be repugnant to . . . the principles of the Declaration of Independence." Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (1889). Under the Declaration, "[t]he right to follow any of the common occupations of life is an inalienable right, [which] was formulated . . . under the phrase 'pursuit of happiness.'" *Butchers' Union Slaughter-house & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-house Co.*, 111 U.S. 746, 762, 4 S. Ct. 652, 28 L. Ed. 585 (1884) (Bradley, J., concurring); *see also VanZandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953) ("The right to life,

liberty, and the pursuit of happiness, includes the right to work and earn an honest living . . . ."). Mr. Amunrud's case does not raise an issue regarding the Enabling Act.

Most importantly, this Court has already determined that article I, section 12 of the Washington Constitution provides greater protections than those existing in the Fifth and Fourteenth Amendments when the issue concerns governmental favoritism toward wealthy interests. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004). This Court has made clear that this clause protects "fundamental" rights such as those protected by the Privileges and Immunities Clause of Art. IV, § 2 of the U.S. Constitution. *Id.* at 812. As noted above, the Supreme Court has specifically held that the right to earn a living is protected by the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council*, 465 U.S. at 219; *see also State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (paraphrasing the classic statement of the scope of the privileges and immunities guaranteed by Article IV, § 2 in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230) and describing those rights as protected by article I, section 12). Mr. Amunrud makes no claim under the state constitution and this Court should leave any discussion of to what extent this right is protected under article I, section 12 to another day.

Ventenbergs therefore respectfully requests that this Court's conclusions be carefully crafted to not undermine any protections for the right to earn a living under Washington's statutes, its Enabling Act, and the state constitution.

CONCLUSION

It is clear that the courts of this country view the right to earn a living as an inalienable and essential right deserving of more careful consideration than it was given by the Court of Appeals. This Court's consideration of the issue should proceed with the substantive importance of the right in mind, regardless of what test is applied to the regulations at issue. This Court should also carefully limit any resulting decision to avoid implicating protections for this right existing in Washington law.

RESPECTFULLY submitted this ____ day of March 2006.

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DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On March __, 2006, I caused to be served a true copy of the foregoing *Amici Curiae* Brief upon the following:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this __th day of March 2006 at Seattle, Washington.

_____
Yvonne Maletic