No. 76755-6

WASHINGTON STATE SUPREME COURT

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,

Respondent,

v.

NORTH AMERICAN FOREIGN TRADE ZONE INDUSTRIES, LLC,

Appellant/Petitioner.

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE WASHINGTON CHAPTER

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INTRODUCTION

Respondent Public Utility District No. 2 of Grant County (the "PUD") seeks to force Petitioner North American Foreign Trade Zone Industries, LLC ("NAFTZI") to bear the cost of the PUD's unsuccessful foray into commodities speculation. Because the PUD's actions are inconsistent with the "public use" requirement of article I, § 16 of the Washington Constitution and were undertaken without sufficient notice to NAFTZI, this Court should dismiss this condemnation.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute believes that "[i]ndividual freedom finds tangible expression in property rights," and that such rights are imperiled when the government uses eminent domain to acquire property that will not be put to a valid public use. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 61, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). The national office of the Institute for Justice has litigated property rights cases throughout the country and has filed *amicus curiae* briefs in important cases nationwide, including most of the major U.S. Supreme Court property cases of the last ten years. The Institute

regularly represents property owners fighting condemnation of their homes or businesses for the benefit of private parties. The Institute was the lead counsel for the property owners in *Kelo v. City of New London*, __ U.S. __, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), at the United States Supreme Court regarding the condemnation of private property for the benefit of private interests. In the wake of *Kelo*, the Institute has dedicated itself to ensuring that the state constitutional guarantees to possess one's property free from unfair governmental interference remain vibrant. *See Kelo*, 125 S. Ct. at 2668 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power"). In that regard, IJ-WA litigates the same issues as the national office, but places a special emphasis on vindicating those rights protected by the Washington Constitution.

The instant case involves two fundamental rights guaranteed by the Washington Constitution: (i) the guarantee of searching judicial review of the government's assertion of public use, and (ii) the guarantee of sufficient notice to property owners when the government seeks to condemn their property. As such, this case is of vital interest to *amicus* Institute for Justice.

STATEMENT OF THE CASE

The Institute adopts the Statement of the Case contained in the Petition for Review filed by NAFTZI.

ARGUMENT

The PUD seeks to undermine the constitutional protections for private property and the guarantee of judicial review contained in article I, § 16. This Court should therefore dismiss the condemnation action or, at the very least, remand it to the trial court.

A. This Court Must Make a Searching Inquiry Into Whether the Contemplated Use at Issue is Really Public

The PUD, the trial court, and the Court of Appeals all conflate the constitutional "public use" standard with the question of "public necessity." *See Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC,* 125 Wn. App. 622, 632, 105 P.3d 441 (2005). Specifically, the trial court, instead of undertaking a searching analysis of the evidence before it, simply assumed a public use and used the highly deferential standards applicable to "public necessity" determinations to uphold the condemnation. *See* RP 93-94 (applying statutory necessity "arbitrary and capricious" standard to the PUD's actions). Thus, no court has yet performed an independent, searching analysis of whether this condemnation was undertaken for a public use, as required by the

Washington Constitution. Compounding this problem, the Court of Appeals also accorded the PUD's determination of public use great weight, thus granting to the PUD an assumption of legitimacy its actions do not warrant. *Id.* Under the Washington Constitution, deference is not permitted.

These errors warrant dismissal of the condemnation action. The issue of necessity comes into play only <u>after</u> the government has established that the use actually will be public and no such use has been established here. Thus, there are two issues, not one, before this Court regarding public use: (i) whether the condemnation is for a public use, and (ii) whether such a taking is necessary for the public use. The first inquiry is constitutionally mandated and cannot be avoided. Once undertaken, however, the conclusion of the Court of Appeals that the condemnation in this case constitutes a legitimate public use is seriously undermined. Further, the deference granted the PUD's decision by the Court of Appeals is inconsistent with the plain words, history and purpose of our state constitution and should be rejected by this Court.

1. This Court Has an Independent Obligation to Determine Whether the Contemplated Use is Really Public

In adjudicating public use and necessity, a trial court must make three separate, but interrelated, findings: (i) the use in question is really

public; (ii) public interests require it; and (iii) "the property to be acquired is necessary to facilitate the public use." *In re Puget Sound Power & Light Co.,* 28 Wn. App. 615, 617, 625 P.2d 723 (1981). "The part of section 16, art. 1, of the state Constitution that covers this subject deals only with the first of those three things." *State ex rel. Puget Sound Power & Light Co. v. Superior Court,* 133 Wash. 308, 311, 233 Pac. 651 (1925).

The PUD assumes that the sole issue before the trial court was the third issue: public necessity. RP at 17; Brief of Respondent ("Resp. Br.") at 19. By focusing exclusively on the statutory third requirement, the PUD bypasses the constitutional requirement that the judiciary must ensure that the use in question really is public. But "by both the Constitution and the statute the primary question is that of public use." *Puget Power,* 133 Wash. at 312. This constitutional determination is solely a judicial one:

> Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . . .

WASH. CONST. art. I, § 16. Thus, the first issue before this Court — and one reserved exclusively for the judiciary's determination — is whether the use in question is actually public. This inquiry is constitutionally

mandated — indeed, it is not just a right of the individual, but a positive mandate for the courts.[1]

Other courts addressing nearly identical constitutional provisions have arrived at the same conclusion. In *Bailey v. Myers,* 206 Ariz. 224, 76 P.3d 898 (Ariz. Ct. App. 2003), the Arizona Court of Appeals addressed a condemnation for a private use under that state's takings provision — one that mirrors Washington's. The court began its analysis by noting that the third sentence of its provision "establishes that the determination of private-versus-public use is a judicial question, not a legislative determination." *Id.* at 901. Like the PUD here, the City of Mesa argued that the sole issue before the court was that of necessity, not public use, and this view prevailed at the trial court. *Id.* at 901-02 ("The standard of review mentioned in the trial court's order is the deferential standard of review for the statutory issue of 'necessity.' The order does not demonstrate that the court conducted the independent review required by [the constitution]."). The court rejected the City of Mesa's argument:

> The constitutional requirement of "public use" differs from the statutory requirement of "necessity." The requirement of necessity is derived from [statutes]. While both public use and necessity are required for the exercise of eminent domain, different standards of judicial review are applicable to each requirement. <u>An independent</u>

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[1] It is unclear whether a party can even waive this inquiry — article I, § 16 directs the courts to make such a determination without reservation. Waiver is not an issue in this case.

judicial review is required by our Constitution regarding public use, and a deferential standard of review is applied to the question of necessity.

Id. at 901 n.1 (emphasis added) (citations omitted).

The first question before this Court, therefore, is whether the condemnation of NAFTZI's property is for a public use.

2. The Framers of the Constitution Intended that the Judiciary Conduct a Searching Inquiry Into the Question of Public Use

The PUD's argument that this Court may simply assume a public use for all aspects of this condemnation and proceed directly to a determination of necessity undermines a key element in Washington's constitutional structure and one that is relatively unique — the right to have the judiciary determine whether the contemplated use is actually public. *See* James M. Dolliver, *Condemnation, Credit and Corporations in Washington: 100 Years of Judicial Decisions – Have the Framers' Views Been Followed?*, 12 U. Puget Sound L. Rev. 163, 175 n.52 (1989) (Washington's eminent domain clause is relatively unique in the United States — only four other states, including Arizona, have a substantially similar clause). However, the approach the PUD advocates here is inconsistent with the intent of the framers of our state constitution.

At the Convention, the original proposed language concerning eminent domain merely read, "Private property shall not be taken nor

damaged for public use without just compensation therefor [sic]." *The Journal of the Washington State Constitutional Convention* (1889) 504 (Beverly Paulik Rosenow ed., 1999) (1962) (hereinafter "*Journal*"). Subsequently, the Committee on Preamble and Declaration of Rights reported a clause that more closely matched the final version but did not contain an instruction to the judiciary to disregard any legislative assertion that the contemplated use is public. *Journal* at 155.

The Committee on the Judicial Department further expanded the proposal by altering the first sentence to read, "Private property shall not be taken for private use, except for private ways of necessity and for drains, flumes or ditches on or across the lands of others for agricultural domestic or sanitary purposes." *Journal* at 264. The Committee also added the following section: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." *Journal* at 264-65. This was the provision the framers adopted and the people ratified as article I, § 16 of the state constitution.

The expansion of the language of the provision from introduction to adoption demonstrates that the framers considered the protections of private property contained within the federal constitution to be

inadequate.[2] In that regard, the framers clearly intended that Washingtonians be as secure as possible in the enjoyment of their possessions while still recognizing the right of the state to use eminent domain for purely public uses. *See Manufactured Hous. Communities v. State,* 142 Wn.2d 347, 356-359, 13 P.3d 183 (2000). Thus, the framers directed the judiciary to disregard legislative assertions of public use, demonstrating a special desire for a searching judicial review of the use of eminent domain. Because this responsibility is a key component to the constitutional protection of private property, this Court should reject the PUD's invitation to jettison it.

3. A Legislative Assertion of Public Use is Entitled to No Weight

The Court of Appeals found that the PUD's determination of public use — such as it was — was entitled to "great weight." *Grant County,* 125 Wn. App. at 632; *see also Hogue v. Port of Seattle,* 54 Wn.2d

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[2] As Justice Utter has noted:

> It is reasonable to assume that the men who drafted the Washington Constitution, many of whom were lawyers, were well aware of these linguistic differences [between the federal and Washington State Constitutions] and their likely effect on the future legal interpretation of their work, and that they therefore intended to create such differences. Ordinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions . . . .

Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 515 (1984) (footnotes omitted).

799, 817, 341 P.2d 171 (1959) (stating that legislative declarations of public use are entitled to great weight). However, as noted above, article I, § 16 instructs the judiciary to determine whether the contemplated use at issue is really public "without regard to any legislative assertion" that it is public. *Hogue's* instruction, followed by the Court of Appeals, that the courts give "great weight" to legislative determinations of public use is therefore inconsistent with the plain language of the constitution.

The framers' clear intent was to preserve the judiciary as the last avenue of appeal for the property owner when the government takes his or her land for an ostensibly public use. The purpose of the mandate is to ensure complete, searching and independent judicial review, especially in those cases where the government attempts to insulate its actions with a declaration of public use. Granting declarations of the legislature "great weight" — or any weight at all — utterly defeats this purpose.

In *Bailey, supra,* the court was presented with this precise issue and correctly ruled that granting "great weight" to legislative assertions of public use is inconsistent with the plain language of the constitution:

> The City cites *Humphrey v. City of Phoenix* . . . for the proposition that legislative declarations of public use are not conclusive but are to be given "great weight" not only on the issue of necessity but also the constitutional issue of public use. Although the court in *Humphrey* did state that legislative declarations of public use are of "great weight," the court did not explain how this could be so in

> light of the constitutional mandate that public use must be determined by the court "without regard to any legislative assertion that the use is public." ARIZ. CONST. art. 2, § 17. In the more recent case of [*City of Phoenix v. Superior Court*], the supreme court recognized the distinction between the "public use" determination (made "without regard to any legislative assertion that the use is public") and the "necessity" determination ("great weight" given to legislative assertions). We believe that *Humphrey* has been clarified by *City of Phoenix*, and we follow the more recent case.

Bailey, 76 P.3d at 901 n.1 (citations omitted); *see also In re Seattle,* 96 Wn.2d 616, 635, 638 P.2d 549 (1981) (Stafford, J., concurring) ("The state constitution expressly prohibits the taking of any property for a project which is primarily private in nature. Legislative pronouncements to the contrary are meaningless . . . .").

The words of the Washington constitution are plain and unambiguous — "without regard to any legislative assertion" does not, and cannot, mean "legislative assertions are entitled to great weight." It is therefore high time for this Court to overrule or clarify *Hogue* to the extent that it is inconsistent with the plain words of our constitution. Under our constitution, legislative assertions of public use are to be ignored — nothing more, nothing less.

B. The PUD Has Not Carried its Burden of Demonstrating that the Anticipated Use is Public

At trial, NAFTZI presented considerable evidence that the PUD seeks to condemn this property not to devote it to a public use, but because it wishes to mitigate the financial damage it inflicted on itself with its ill-advised adventure in the wholesale power markets. *See* Brief of Appellant at 3-8. In that regard, the trial court found that the cost of removing the generators by itself satisfied the public use and necessity requirements for this condemnation. CP 581-83. However, this Court has never permitted the purely financial interests of the government to justify a serious infringement on constitutional rights. Thus, it is necessary that the independent judicial review mandated by article I, § 16 be undertaken to determine whether the PUD's justifications for this condemnation are legitimate or simply a ruse designed to force NAFTZI to bear the burden of the PUD's financial mistakes.

1. The PUD Has the Burden of Proving Public Use

In Washington, it is not the condemnee's burden to prove that the property sought to be condemned will not be put to a public use. Rather, it is the condemnor's burden to prove that the property will be put to a public use. *See In re Seattle,* 96 Wn.2d at 625. To satisfy this burden, the PUD must prove that the contemplated use actually will be public. Because no court has yet undertaken the searching independent review mandated by article I, § 16, this condemnation cannot proceed because the

public use that the PUD has identified appears to be little more than an afterthought to its reason for condemning the property in the first place.

2. Economic Justifications do not Constitute a Public Use

This Court has, in the past, strictly limited the government's ability to act solely in its financial interests to the detriment of others. For instance, in *City of Tukwila v. City of Seattle,* 68 Wn.2d 611, 414 P.2d 597 (1966), Tukwila granted non-exclusive franchises for electric service to both a private company and Seattle City Light. Tukwila then changed the franchises to create exclusive franchise zones in the city. Seattle City Light sued, arguing that Tukwila did not have the police power to enforce this restriction because there was no connection between the city's actions and public safety. Tukwila argued that its decision to create franchise zones was authorized by the police power because it would eliminate facility duplication and hazards of electrical distribution. This Court agreed with Seattle City Light and rejected the argument that the creation of exclusive zones would bring in greater tax revenue. This Court concluded, "we see no way in which the city of Tukwila can look to the economics of the matter in support of its exercise of the police power, and no authority has been shown in sustaining that proposition." *Id.* at 614.[3]

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[3] While the power of eminent domain and the police power are distinct aspects of governmental power, both are inherent powers of the state. *See Eggleston v. Pierce County,* 148 Wn.2d 760, 767, 64 P.3d 618 (2003). Despite the origin of the eminent domain power, courts are nonetheless obligated to "carefully monitor" its exercise. *Id.* In contrast, the police power vests in the Legislature "large discretion" to determine

Likewise, in *Carlstrom v. State,* 103 Wn.2d 391, 694 P.2d 1 (1985), this Court held that an economic emergency alone was not sufficient to permit the state to abrogate its own contract in violation of article I, § 23 of the Washington Constitution. This Court held, "Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." *Id.* at 396. Thus, the Court held that because the state only relied on financial considerations to justify its abrogation of its own contract, "its assertion of police power does not save the measure." *Id.* at 397.

Consistent with these holdings, a purely financial interest does not fit within the definition of a "public use." In one of the first cases to construe article I, § 16, *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681 (1903), this Court held that a "public use" under that provision must be "either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state." *Id.* at 509. Under this definition, the purely financial interest in the land sought to be condemned in this case does not constitute a "use" by the public or by a

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"what the public interest demands and what measures are necessary to secure and protect the same." *Shea v. Olson,* 185 Wash. 143, 153, 53 P.2d 615 (1936). Thus, the reasoning in *Tukwila* should apply all the more urgently in situations where the government attempts to use what has long been referred to as "the despotic power," *Vanhorne's Lessee v. Dorrance,* 2 U.S. 304, 312, 1 L. Ed. 391 (1795), for purely financial reasons.

governmental agency because the property is not actually being used by the public or the agency — it is simply being possessed because it is less expensive to own than to give up.

The PUD has simply not met its burden here because considerable evidence exists that the PUD's motivation in this condemnation is not to acquire property to put to a public use, but to mitigate the financial impact of its ill-fated investment in the generators that rest upon the land it seeks to condemn. This does not constitute a legitimate exercise of governmental power, nor does it meet the definition of a "public use." For these reasons, the condemnation should be dismissed.

3. The PUD May Not Condemn Property for a Mixed Public and Non-Public Use if the Non-Public Use Cannot be Separated from the Public Use

In *In re Seattle,* this Court held that if "a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." *In re Seattle,* 96 Wn.2d at 627. Thus, "where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use." *Id.* at 627-28.

While the case before this Court does not involve a private use, it does concern, as is discussed above, a use that is not public. Even viewing

the evidence in the deferential light applied by the trial court, that court found that the alleged public use here — using the generators for reserves — was at best tangential to the reason for the condemnation. *See* RP 94 ("And the court recognizes that's all it is is a possibility of reserves in the future and it might be a remote possibility, but it's there as part of the decision-making process that the PUD must make in its cost analysis, and the PUD has done that."). Likewise, the Court of Appeals found the anticipated use of these generators for reserves was "tentative" but nevertheless "real." *Grant County,* 125 Wn. App. at 633.

The findings of the trial court and the Court of Appeals make clear that the non-public use to which this property will be devoted cannot be separated from any contemplated public uses. Both the trial court and the Court of Appeals found the public use to which this property would be devoted to be "remote" or "tentative," even under the incorrect, highly deferential standards such courts employed. Under the standards set forth in *In re Seattle,* the non-public use contemplated by the PUD overwhelms any supposed public use to which this property may be devoted and the condemnation must therefore fail.

The PUD has not met its burden to demonstrate a public use and the condemnation should be dismissed. At the very least, this proceeding

should be remanded to the trial court for review of the facts of the case under the independent standard mandated by our state constitution.

C. To Avoid Due Process Infirmity, this Court Should Construe Statutory Notice Provisions as Applicable to PUDs

Notwithstanding the Legislature's command that a PUD's eminent domain power be "conducted in the same manner and by the same procedure as is provided for . . . cities and towns," RCW 54.16.020, the Court of Appeals held that there are "no specific requirements for . . . notice" prior to a PUD's adoption of a condemnation resolution — all the while acknowledging that cities and towns must follow certain statutory notice provisions. *See Grant County*, 125 Wn. App. at 629, 630. NAFTZI has demonstrated why, as a matter of statutory construction, that conclusion is wrong. *See* Supplemental Brief of Petitioner at 2-7. A related, but distinct, point also requires reversal: construing the statutory notice requirements applicable to cities and towns as inapplicable to PUDs would create serious due process problems. Because "it is this court's duty to construe statutes so as to avoid constitutional infirmities," *State v. Robinson*, 153 Wn.2d 689, 703, 107 P.3d 90 (2005) (emphasis added), the only appropriate construction is that which subjects PUDs to the same notice provisions applicable to cities and towns.

Under Washington law, due process requires that a governmental body provide notice before adopting a condemnation ordinance or resolution. In *In re Puget Sound Power & Light Co.*, the Court of Appeals held that a "governmental body exercising the power of eminent domain is required, either by the nature of the legislative process or by express statutory directive, to make its decision in a public forum where objections by affected citizens may be heard," and that an exercise of the power "without the semblance of notice and opportunity to be heard . . . does not conform to our concept of due process." 28 Wn. App. at 619-20 (emphasis added; footnote omitted).[4]

Although this Court appears not to have squarely addressed the due process minima attendant to adoption of a condemnation ordinance or resolution, it has provided a clear indication of how it would answer the question. In *State ex rel. Davies v. Superior Court of King County*, 102 Wash. 395, 173 Pac. 189 (1918), the Court held that a property owner cannot "have her property subjected to condemnation when" she "has failed to receive notice of the proceedings preliminary to the condemnation suit." *Id.* at 398. Although *Davies* did not expressly couch

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4 *See also Port of Edmonds v. N.W. Fur Breeders Cooperative, Inc.*, 63 Wn. App. 159, 169, 816 P.2d 1268 (1991) (holding due process satisfied by statutory provisions requiring port district "to give meaningful notice of its meetings to the public" because such notice "will give ample opportunity for involvement . . . before the judicial hearing stage").

its holding in terms of due process, there can be no doubt that it was the basis of the holding: the majority conceded that "[a]ll the preliminary acts" required by statute "ha[d] been done," *id.* at 397, and the dissent focused expressly on due process, *id.* at 398-400 (Parker, J., dissenting).

More recently, in *Apostle v. City of Seattle*, 70 Wn.2d 59, 422 P.2d 289 (1966), this Court implicitly held that notice was required before a city council enacted an ordinance declaring an area blighted under the Community Renewal Law. The Court held that the Law's notice provisions — which required newspaper and individual mail notice, but not a specification of property defects — satisfied due process because the blight determination "was concerned with an area concept and not with whether any particular property was standard or substandard." *Id.* at 62. The obvious implication is that some notice is constitutionally required and, at least where, as here, individual properties are targeted, the process due is substantial.

All of this is not to suggest that this Court must — or even should — resolve the question of what process is due a property owner prior to adoption of a condemnation ordinance or resolution. Rather, it is sound jurisprudence to construe statutes, when possible, "so as to avoid difficult constitutional questions." *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S. Ct. 1858, 146 L. Ed. 2d

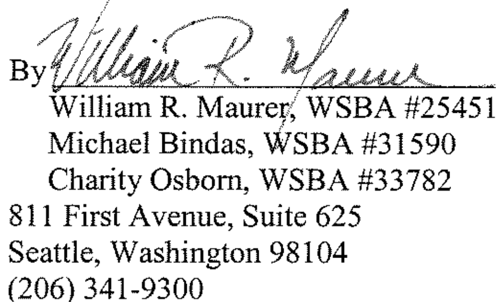
836 (2000). In this case, that means construing the statutory notice requirements applicable to cities and towns as applicable to PUDs as well. This is nothing remarkable. It is merely giving effect to plain language: "The right of eminent domain shall be . . . conducted in the same manner and by the same procedure as is provided for the exercise of that power by cities and towns . . . ." RCW 54.16.020.

CONCLUSION

This Court has an independent obligation to determine whether the property at issue here will be devoted to a public use. The PUD has not met its burden because the evidence shows that the reason for its condemnation is purely financial and that any anticipated public use is "remote" or "tentative" at best. This Court should therefore reverse the determination of public use and necessity, as well as the holding that there are no specific notice requirements applicable to a PUD.

RESPECTFULLY submitted this 30th day of August 2005.

INSTITUTE FOR JUSTICE
Washington Chapter



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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 August 30, 2005, a true copy of the foregoing *Amicus Curiae* Brief was placed in envelopes addressed to the following persons:

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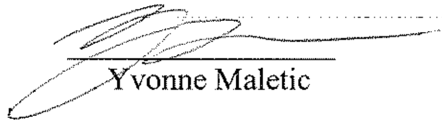
which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 30th day of August 2005 at Seattle, Washington.



Yvonne Maletic