Supreme Court No. 91827-9

(Court of Appeals, No. 45034-8)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,
Plaintiff-Respondent,

v.

ROBERT WILLIS,
Defendant-Petitioner.

AMICUS CURIAE BRIEF OF COLUMBIA LEGAL SERVICES ON BEHALF OF THE SEATTLE/KING COUNTY COALITION ON HOMELESSNESS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTEREST OF *AMICUS CURIAE*

The Seattle/King County Coalition on Homelessness ("Coalition") is a membership organization founded in 1979 that works to ensure safety and survival for people while they are homeless. The Coalition's work is informed by the realities of homelessness and extreme poverty and is driven by the imperative to find an end to both.

One of these realities has been the recent trend toward criminalization and exclusion of visible poverty from public spaces in Washington. To the Coalition, such laws are not only bad policy, but also raise serious constitutional concerns. Based on its work, the Coalition offers the court its perspective on the social landscape involved in this case and places the City of Lakewood ("Lakewood") ordinance in the greater context of the tendency to punish, rather than assist, those who are less fortunate for engaging in activities that society has no legitimate interest in criminalizing.

II. ISSUES ADDRESSED BY *AMICUS*

1. Whether convicting Robert Willis under Lakewood Municipal Code ("LMC") 09A.4.020A, which makes it unlawful to beg in certain public places, violates the Eighth Amendment of the United States Constitution.

2. Whether LMC 09A.4.020A exceeds the scope of the police power of the state because the ordinance does not bear a real or significant connection to a legitimate government interest.

III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in Petitioner's Supplemental Brief.

IV. ARGUMENT

> *"'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" Griffin v. Illinois*, 351 U.S. 12, 23, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (quoting Anatole France's ironic comment) (Frankfurter, J., concurring in the judgment).

Lakewood Municipal Code ("LMC") 09A.4.020A makes it a misdemeanor to beg "at on and off ramps leading to and from state intersections from any City roadway or overpass," among other places. LMC 09A.4.020A. The effect of such anti-begging ordinances is to criminalize evidence of "visible poverty." *See* Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 392–93 (2015). This is because these laws do not make an effort to address the plight of those reduced to begging and/or homelessness, but instead seek to displace or incarcerate the destitute. *Id.*; *see also* National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (Jul. 2014), http:// nlchp.org/documents/No

_Safe_Place. Though interactions with extreme poverty in public spaces may be jarring and inconvenient to the more affluent, criminalizing begging and other symptomatic behaviors extends beyond legitimate societal interests. Because of this, Petitioner Robert Willis's conviction under LMC 09A.4.020A tests what can be criminalized under the Eighth Amendment and the extent of Lakewood's police power.

A. LMC 09A.4.020A Should Be Viewed Against The Backdrop Of Increased Criminalization Of Visible Poverty.

Before engaging with the relevant legal doctrines, it is important to paint a picture of the social context within which this case arises.

A recent survey of the codes of 72 Washington cities revealed that laws criminalizing poverty are prevalent and on the rise in our state. *See* Justin Olson and Scott MacDonald, *Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcements* (May 2015), at 2-5, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602318. About 78-percent of surveyed Washington jurisdictions criminalize sitting or standing in public spaces and an equal percentage criminalize sleeping in public. And, like Lakewood, over 60-percent of jurisdictions outlaw "aggressive" panhandling or begging and over 30-percent of cities make begging illegal in particular public places. *Id.* The majority of these laws have been enacted since the year 2000. *Id.*

This trend toward criminalization is particularly troubling given the rate of homelessness and extreme poverty in Washington. According to a Department of Housing and Urban Development point-in-time count, there were more than 19,400 homeless individuals in Washington. *See* Department of Housing and Urban Development, *The 2015 Annual Homeless Assessment Report to Congress*, (Nov. 2015), at 12, https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf. This represents an increase of nearly 1,000 individuals from the previous year. *Id.* Further, 6.2-percent of all Washington households earn less than $10,000 per year and 10.4-percent earn less than $15,000. *See* 2010-2014 *American Community Survey 5-Year Estimates, Table S1901: Income in the Past 12 Months*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1901/0400000US53. The landscape in Lakewood is even more grim—9-percent of households earn less than $10,000 and 15-percent, less than $15,000. *Id.*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1901/1600000US5338038.

All of this comes on the heels of devastating cuts to various cash assistance and other benefit programs in Washington. For example, monthly Temporary Assistance to Needy Families benefits have been reduced from $546 per month for a single-parent family of three in 1996

to $521 per month in 2015. *See* Ife Floyd and Liz Schott, Center on Budget and Policy Priorities, *TANF Cash Benefits Have Fallen by More than 20 Percent in Most States and Continue to Erode*, (Oct. 2015), http://www.cbpp.org/sites/default/files/atoms/files/10-30-14tanf.pdf. And, as of 2011, there are no longer any state funded cash assistance programs available to temporarily disabled single adult males. *See* RCW 74.62.020 ("Effective October 31, 2011, the disability lifeline program, as defined under chapter 74.04 RCW, is terminated and all benefits provided under that program shall expire and cease to exist.").

This backdrop should inform the court in its review of this case. Many thousands of Washingtonians do not receive sufficient income to cover basic necessities. Understandably, some of these individuals, such as Mr. Willis, may resort to pleading for the charity of others in visible, highly trafficked areas. Such appeals may not be welcome by all or even a majority of passers-by, but criminalizing begging is not only socially counterproductive, it is constitutionally impermissible.

B. The Eighth Amendment Is An Appropriate Framework For Analyzing LMC 09A.4.020A.

The Eighth Amendment "limits the kind of punishment that can be imposed . . . proscribes punishment grossly disproportionate to the severity of the crime . . . [and] imposes substantive limits on what can be

made criminal and punished." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S. Ct. 1401, 51 L. Ed.2d 711 (1977). It is true that the third limitation should be used sparingly. *Id.* But, it remains an important check on criminalization of status and activities that society has an insufficient interest in criminalizing. *See Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 8 L. Ed.2d 758 (1962). Here, LMC 09A.4.020A, which implicates both an activity that society has an insufficient interest in criminalizing and imposes a disproportionate punishment, should be found unconstitutional based on the Eighth Amendment's limitations on what can be made criminal.[1]

1. Courts Have Skipped Threshold Determinations When Analyzing Laws Criminalizing Visible Poverty Under The *Robinson* Doctrine.

The Supreme Court first established the prohibition against the criminalization of status in *Robinson v. California*, 370 U.S. at 667. There, the Court struck down a California statute that made it illegal for a person to be addicted to narcotics. *Id* at 666-67. Though the Court recognized a state's right to punish the use, sale, or possession of narcotics, it reasoned

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[1] *Amicus* notes that the Court could use article I, section 14 for this analysis. It is well established that the state constitutional provision is more protective than its federal counterpart. *See State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). But, because Washington courts have not yet applied the state constitution to laws criminalizing homelessness or visible poverty and because the ordinance at issue violates the less protective federal provision, *Amicus* relies on federal precedent and Washington cases interpreting federal law.

that "a state law which imprisons a person . . . even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts cruel and unusual punishment." *Id.*

This doctrine was revisited six years later in *Powell v. Texas*, where a fractured Supreme Court held that a conviction for public intoxication of a chronic alcoholic did not violate the Eighth Amendment despite the *Robinson* decision. 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed.2d 1254 (1968). Justice White's controlling concurrence distinguished the *Robinson* case by reasoning that while the compulsion to drink was not punishable, there was no analogous protection afforded for someone who chose, and was not compelled, to be drunk in public. *Id.* at 548-54. This focus on compulsion was echoed by the four dissenting justices, who believed that the conviction should be overturned because the appellant was "'a chronic alcoholic' who, according to the trier of fact, [could not] resist the 'constant excessive consumption of alcohol' and [did] not appear in public by his own volition but under a compulsion which is part of his condition." *Id.* at 570 (Fortas, J., dissenting).

Since *Powell*, there have been a number of *Robinson*-based challenges to statutes that criminalize visible poverty. Overwhelmingly, these cases have tended to focus on whether the proscribed activity, such as sleeping or camping in public spaces, was voluntary. *See, e.g., Jones v.*

City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (opinion withdrawn on other grounds); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fl. 1992); *Anderson v. City of Portland*, 2009 WL 2386056 (D. Or. 2009) (unreported); *but, see Joel v. City of Orlando,* 232 F.3d 1353 (11th Cir. 2000). Given that few choose to beg and/or sleep unsheltered, such a tendency is understandable. But, the focus on whether or not the activity is voluntary (and the attendant complex social, psychological, and philosophical questions regarding the root causes of poverty and homelessness and the power of circumstantial compulsion) has resulted in an overly narrow application of *Robinson* and *Powell.* This limited inquiry disregards two important threshold determinations: whether there is sufficient societal interest in criminally sanctioning the broader category at issue and, if so, whether the criminal sanction is proportional given culpability of the prohibited conduct.[2]

Here, a focus on voluntariness would steer the analysis into murky waters. It is possible to argue that Mr. Willis did not suffer from an involuntary compulsion to beg at the end of an off-ramp. On the other hand, it is just as likely that Mr. Willis had no other means to survive, and

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[2] Such a threshold inquiry is supported by this Court's interpretation of the *Robinson* doctrine. *See State v. Manussier*, 129 Wn.2d 652, 679 n. 111, 921 P.2d 473 (1996) (Stating that "*Robinson* does allow imposition of criminal penalties for commission of some *act* which society has an interest in preventing" in the context of discussing the proportionality of a life sentence under Washington's Initiative 593.).

no other place where he could reach those willing to assist. But because the ordinance at issue does not pass either of the two threshold determinations and these are factual issues that have not been sufficiently developed in this case, it is not necessary for the court to consider whether his actions were voluntary.

2. Mr. Willis's Conviction Violates The Eighth Amendment Because There Is No Sufficient Societal Interest In Criminalizing Begging At the Ends Of Off Ramps.

Making a threshold inquiry of societal interest is well rooted in both *Robinson* and *Powell*. Indeed, prior to any discussion of whether it was lawful to criminalize the status of being an addict, the *Robinson* Court dedicated a paragraph to establishing the state's interest in criminalizing narcotics in general. *Robinson*, 370 U.S. at 664.[3] Similarly, in *Powell*, Justice Marshall's plurality opinion, Justice Black's concurrence, and Justice Fortas's dissent all examined the social interest in prosecuting public drunkenness before determining whether defendant's actions were voluntary and whether the conviction violated the Eighth Amendment. *See* 392 U.S. at 526-31; 538-39; 560-65.

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[3] "There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit forming drugs. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.'" *Robinson*, 370 U.S. at 664 (quoting *Whipple v. Martinson*, 256 U.S. 41, 45, 41 S.Ct. 425, 65 L. Ed. 819 (1921)).

Unlike in the regulation of narcotics and in the regulation of public intoxication, there is an insufficient societal interest in criminalizing begging here.[4] The stated reason for the enactment of the LMC 09A.4.020A is pretext, and does not mask the law's true, and impermissible, purpose: to rid Lakewood of evidence of visible poverty.

Lakewood enacted LMC 09A.4.020A by Ordinance No. 532 as part of a larger amendment to title 9A.4 of its code. *See* City of Lakewood Ordinance No. 532 (Apr. 18, 2011), available at *https://www.digitalarchives.wa.gov/DigitalObject/View/1F31119D0FB612A4942143806253F64E/1*. The City Council cited a single justification for the relevant portion of the ordinance: to address "[t]he danger of collision or injury to motorists or pedestrians . . . created when distracted drivers attempt to make contributions to people requesting assistance at highway on and off ramps leading to and from City roadways or overpasses or at major/principal arterial intersections of City streets or island located on major arterials." *Id.*

This public safety concern is a thin veil. The distraction to motorists caused by someone holding a sign pleading charity cannot be more significant than that caused by a political rally or strike, a

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[4] Indeed, as argued in Petitioner's Supplemental Brief, begging is speech protected under the First Amendment.

fundraising effort by a fire department or high school sports team, a marketer twirling an advertisement, or a flashy billboard (though, of course, Lakewood does not limit, much less criminalize, these activities). *See* Supp. Br. of Petitioner at 11-16 for a more complete discussion. Also, numerous laws and regulations already exist to ensure that drivers and pedestrians alike act in ways that promote public safety. *See, e.g.*, RCW 46.61.255(4) (prohibiting pedestrians from standing in a roadway for purposes of soliciting business from the occupant of any vehicle). Indeed, as the press coverage surrounding the enactment of the ordinance identified, the law was "intended to burnish Lakewood's image, aid in business recruitment and remove blight from the neighborhoods." Christian Hill, *Lakewood aims to crack down on tagging, begging in some locations*, The News Tribune, http://blog.thenewstribune.com/street/2011/04/11/lakewood-aims-to-crack-down-on-tagging-begging-in-some-locations/.

Lakewood may very well prefer ridding its streets of the often jarring visual realities of poverty. But, criminalizing begging is an impermissible solution. The traffic safety threat posed by begging, without some other action such as stepping into traffic, is not any more significant than many other types of stimuli that drivers regularly encounter on the roadway. Understood properly in its breadth, the ordinance merely

punishes those who beg for their visibility, which is why it is applied to on and off-ramps and the most travelled roadways and intersections. This may not be criminalized, because "[p]overty and immorality are not synonymous." *Edwards v. People of State of California*, 314 U.S. 160, 177, 62 S. Ct. 164, 86 L. Ed. 119 (1941). It is also important to remember that "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005).

Accordingly, the court should reverse Mr. Willis's conviction. Lakewood does not have a sufficient interest in imposing criminal punishment on Mr. Willis simply because its citizens do not want to view the effects of extreme poverty on another human being.

3. Mr. Willis's Conviction Violates The Eighth Amendment Because The Imposed Punishment Is Disproportionate When Compared To Those Imposed For Violating Other, More Serious Traffic Safety Related Laws.

Further, even if the court finds there is an interest in applying some punishment to the challenged conduct, "the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Id.* at 560-61 (reaffirming that proportionality inquiry must be in reference to "'the evolving standards of decency that mark the progress of a maturing society.'" (internal citation omitted)). Notably, *Robinson* has been

properly read as requiring proportionality in criminal punishment. *See Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed.2d 637 (1983) ("[N]o penalty is *per se* constitutional. As the Court noted in *Robinson* . . . a single day in prison may be unconstitutional in some circumstances."). This is because the Court reasoned, "[t]o be sure, imprisonment for ninety days is not, in the abstract a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson*, 370 U.S. at 667.

When a sentence is reviewed under the Eighth Amendment for proportionality, the Supreme Court identified three objective factors that courts should consider (1) the gravity of the offense and the harshness of the penalty, (2) a comparison the sentences imposed for other crimes in the same jurisdiction; and (3), if helpful, a comparison of the sentences imposed for the same crime in different jurisdiction. *Solem*, 463 U.S. at 291 (citations omitted).[5]

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[5] This is also nearly identical to the factors that this Court established for such an inquiry under article I, section 14. *See State v. Fain*, 94 Wn.2d at 397 (Establishing "(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction" as relevant factors for disproportionate punishment inquiry.)

Here, a violation of LMC 09A.4.020A is a misdemeanor "punishable by a fine up to $1000 or by a jail sentence of up to 90 days, or by both such fine and jail time." LMC 09A.4.030. In the present case, the municipal court sentenced Mr. Willis to a 90-day suspended sentence and $375 in various fines and fees. Even if the court were to accept the stated public safety justification for LMC 09A.4.020A, this is an excessive penalty given the seriousness of the offense.

Further, the punishment for "begging at an on or off ramp" is grossly disproportional to the punishments for other, more serious traffic and public safety violations. For instance, Lakewood has authorized the use of automated traffic safety cameras for stoplight, rail road crossing, and school speed zone violations. LMC 10.4.040. These moving violations are processed in the same manner as parking infractions and the imposed fine may not exceed $250. LMC 10.4.050. The disparity in consequences between such an offense and begging at an off ramp is concerning. It is indisputable that someone running a red light or speeding through a school zone when children may be present creates a much greater, concrete, and realized danger (*e.g.* the person actually sped or ran the light in a manner deemed unsafe) than the abstract danger posed by begging (*e.g.* Lakewood passing the law because a car may suddenly stop to give money to someone begging).

Even more egregious, an individual who "operates a motor vehicle in a way that is both negligent and endangers or is likely to endanger any person or property" within Lakewood can only be given a traffic infraction, a non-criminal sanction, and subject to a penalty of $250. *See* RCW 46.61.525. This makes the penalties imposed for begging on a sidewalk at the end of the off-ramp, up to 90 days in jail and a $1,000 fine, magnitudes more severe than the relatively small price paid for driving negligently.

Finally, given that the first two factors compel a finding that the punishment for LMC 09A.4.050 is patently disproportionate, a review of laws in other local jurisdictions is not necessary. But, if a comparison were to be made, the court should note the glaring disparities between how Washington penalizes conduct that threatens traffic safety and how Lakewood has chosen to penalize begging under the same rubric. *Compare generally* ch. 46.61 RCW *with* LMC 09A.4.050.

Regardless of the true reasons for Lakewood's ordinance, the Eighth Amendment does not allow Lakewood to impose the type of criminal punishment prescribed by LMC 09A.4.050 given the way other traffic offenses are treated. The punishment Mr. Willis received is overly harsh, grossly disproportional, and unconstitutional.

C. *LMC 09A.4.020A Oversteps The Limits Of The Police Power Authority Of The Government Because It Does Not Have A Real And Substantial Relationship To The Government's Interest.*

At its root, this case asks the court to determine what can and cannot be made criminal. This provides additional grounds on which the court could resolve this matter. After all, "[f]or the exercise of the police power to be valid, the area of regulation must be within the government's scope of authority and the particular ordinance must be a reasonable regulatory measure in support of the area of concern." *City of Seattle v. Pullman*, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973) (citing *Markham Advertising Co. v. State*, 73 Wn.2d 405, 420-22, 439 P.2d 248 (1968); *Ragan v. City of Seattle*, 58 Wn.2d 779, 364 P.2d 916 (1961)).

Practically speaking, this means that "[i]f the regulated area exceeds the scope of the police power authority, or if the ordinance's prohibitions do not have a real and substantial relationship to the government's interest, the ordinance is unconstitutional." *Id.* at 799-800. And "[a]n ordinance that makes no distinction between conduct calculated to harm and conduct which is essentially innocent is an unreasonable exercise of the government's police power." *City of Seattle v. Webster*, 115 Wn.2d 635, 645, 802 P.2d 1333 (1990) (citing *Pullman*, 82 Wn.2d at 800).

LMC 09A.4.020A does not pass muster under these legal standards. Not only does it lack a real and substantial relationship to Lakewood's stated interest in traffic safety, but also it makes no distinction between conduct calculated to harm and conduct which is innocent.

As discussed above, Lakewood's believes a traffic safety risk is created when distracted drivers suddenly stop to make contributions to those begging. *See* City of Lakewood Ordinance No. 532 (Apr. 18, 2011). Beyond the illogic of distracted drivers noticing and stopping for people asking for charity, the traffic danger is ostensibly created by the sudden stopping and not by the person holding the sign. Unless drivers are unable to resist the urge to stop, the person standing on the sidewalk holding a sign, without more, cannot be deemed to have created the hazardous condition. This and the disproportionate magnitude of the punishment relative to the conduct undermine any argument that a real and substantial relationship exists.

Given the nature of this disconnect between the ordinance and the government interest, it also cannot be said that LMC 09A.4.020A punishes conduct calculated to harm. In *Webster*, this court upheld a Seattle ordinance that forbade interfering with the flow of pedestrian or vehicular traffic. 115 Wn.2d at 645. This was because "[t]he ordinance

distinguishe[d] between conduct calculated to harm—*intentionally* interfering with pedestrian or vehicular traffic—and conduct which [was] essentially innocent—*unintentionally* interfering with traffic by merely being present upon a public sidewalk." *Id.* In *Pullman*, this court invalidated a Seattle curfew ordinance precisely because minors being out on the streets after a certain hour, without more, did not make such a distinction. 82 Wn.2d at 800-02.

Here, LMC 09A.4.020A does not differentiate between standing on a sidewalk at the end of an off ramp with a sign asking for charity and other harmful conduct such as intentionally impeding traffic while asking for charity. Thus, like the ordinance in *Pullman*, it makes no differentiation between conduct calculated to harm and innocent conduct. Without more, begging, regardless of where it occurs, does not interfere with the rights and welfare of others in a way that warrants criminalization. While it may be unsightly and make passers-by feel uncomfortable, it is not calculated to harm.

So too, for this reason, the court should reverse Mr. Willis's conviction because Lakewood exceeded its police power in enacting LMC 09A.4.040A.

V. CONCLUSION

Indisputably, there are serious First Amendment concerns raised by this case. But on a deeper level, this case touches on bigger issues: whether Lakewood can criminalize visibly poverty and the legitimate extent of its police power. Because the conduct of the offense here is not one that society has sufficient interest in criminalizing, because the punishment is disproportionate, and because the ordinance does not distinguish between innocent and harmful conduct, *amicus* respectfully requests the court to overturn Mr. Willis's conviction on these and First Amendment grounds.

DATED this 30th day of December, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Annabell Joya, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Amicus Curiae Brief of Columbia Legal Services on Behalf of the Seattle/King County Coalition on Homelessness to be served by first-class mail, postage prepaid, upon the following counsel of record:

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DATED this 30th day of December, 2015.

Annabell Joya

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- *Amicus Curiae* Brief of Columbia Legal Services on Behalf of the Seattle/King County Coalition on Homelessness

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Thank you.

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