No. 90355-7

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

S.J.C.,

Respondent.

AMICI CURIAE BRIEF OF THE CENTER FOR CHILDREN & YOUTH JUSTICE AND JUVENILE LAW CENTER

IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici curiae* are set forth in the accompanying Motion for Leave to File an *Amici Curiae* Brief.

INTRODUCTION

This Court has repeatedly held that juvenile court records may be sealed, and has rejected the argument that Article I, Section 10 of the Washington Constitution applies to juvenile records. *In re Lewis,* 51 Wn.2d 193, 198, 316 P.2d 907 (1957); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (en banc) [hereinafter *Ishikawa*]. The unique status of adolescents, and the unique rehabilitative purposes of the juvenile justice system, weigh in favor of protecting juvenile records. *Lewis,* 51 Wn.2d at 198. The parties have presented the arguments under Washington law.

Amici write separately to emphasize that this Court's recognition of the distinct characteristics of youth, and the importance of sealing juvenile records, is further supported by the United States Supreme Court jurisprudence on children and national research on the importance of confidentiality of juvenile court records.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth by Respondent S.J.C.

ARGUMENT

I. Washington's Recognition that Youth Deserve Special Protections, and Thus That Their Juvenile Court Records Should Be Sealed, is Consistent with United States Supreme Court Precedent Requiring Deferential and Protective Treatment of Youth

The State asks this Court to apply Article I, Section 10 of the Washington Constitution, and the *Ishikawa* factors, to the analysis of the sealing of a young person's juvenile records, and thus to create the same sealing standard for children and adults. The State argues that permitting the sealing of juvenile records "seems starkly at odds with the last few decades of precedent from the United States Supreme Court." Court of Appeals Appellant's Reply Br. at 1. In fact, the opposite is true. The U.S. Supreme Court's decisions over the past decade have repeatedly emphasized that the distinctions between teenagers and adults must be taken into account in applying constitutional principles and that children deserve special protection under the law.

Over the last decade, the U.S. Supreme Court has issued four decisions emphasizing that adolescent development is constitutionally relevant. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding that a mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the imposition of life without the possibility of parole for non-homicide crimes violates the Eighth Amendment); *J.D.B. v. North Carolina*, 131 S. Ct., 2394, 2402-03 (2011) (holding that age is a significant factor in determining whether a youth is "in custody" for *Miranda* purposes); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the imposition of the death penalty on juvenile offenders violates the Eighth Amendment).

These decisions emphasize that teenagers are different and require protective treatment under the law. As the U.S. Supreme Court has explained, a youth's age "is far more than a chronological fact"; "[i]t is a fact that generates commonsense conclusions about behavior and perception" that are "self-evident to anyone who was a child once himself...." *J.D.B.*, 131 S. Ct. at 2403 (citations and internal quotation marks omitted). They are "what any parent knows—indeed, what any person knows—about children generally." *Id.* (citations and internal quotations omitted). The U.S. Supreme Court's decisions about

adolescents don't rest on common sense alone; they are supported by a significant body of developmental research and neuroscience demonstrating psychological and physiological differences between youth and adults. *See, e.g., Graham,* 560 U.S. at 48, 68 ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

The Court's decisions, and the underlying science, emphasize three categorical distinctions between youth and adults to explain why children must be treated differently under the law: youth are more impulsive, more susceptible to outside pressure, and more capable of change than adults. These distinctions all support the sealing of juvenile records.

The U.S. Supreme Court has underscored that "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (internal citations and quotation marks omitted); *Accord Graham,* 560 U.S. at 67; *Roper*, 543 U.S. at 569. Psychological research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) ("Considerable evidence supports the conclusion that children and

adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."). This may stem from the fact that changes in brain structure that occur "around puberty" are likely to increase reward seeking behavior." Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010) [hereinafter "Steinberg, *A Dual Systems Model*"]. Greater levels of impulsivity during adolescence may also stem from adolescents' weak future orientation and their related failure to anticipate the consequences of decisions. Laurence Steinberg *et al.*, *Age Differences in Future Orientation and Delay Discou*nting, 80 CHILD. DEV. 28, 29-30 (2009). Richard J. Bonnie *et al.*, eds. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH at 91, 97 (2013) [hereinafter "Bonnie, REFORMING JUVENILE JUSTICE"].

Neuroscience confirms the weaker decision-making capacities of youth as compared to adults. The parts of the brain controlling higher-order functions— such as reasoning, judgment, inhibitory control (the brain's "CEO") —develop after other parts of the brain controlling more basic functions (*e.g.*, vision, movement), and do not fully develop until individuals are in their early- to mid-20s. Nitin Gogtay *et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8177 (2004);

Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND, 24, 141 (2002); *see also* B.J. Casey *et al., Imaging the Developing Brain: What Have We Learned about Cognitive Development?,* 9 TRENDS IN COGNITIVE SCIENCES, 104, 106-107 (2005). Because these higher order functions are not developed, adolescents lack complex reasoning and decision making abilities that may influence their undesirable behavior – risk-taking, impulsivity, and poor judgment. Steinberg, *A Dual Systems Model* at 216-217; Bonnie, REFORMING JUVENILE JUSTICE at 97.

The U.S. Supreme Court has also recognized that youth are distinct from adults because of their susceptibility to outside pressures. As the Court explained, "children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464 (citation and internal quotation marks omitted). *Accord Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569. That teenagers are more susceptible than adults to peer pressure is widely confirmed in social science literature. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1,

4 (2003) [hereinafter "Steinberg & Scott, *Less Guilty by Reason of Adolescence*"]; Bonnie, REFORMING JUVENILE JUSTICE at 91. Even without direct coercion, adolescents' desire for peer approval – and fear of rejection – affect their choices indirectly. Steinberg & Scott, *Less Guilty by Reason of Adolescence* at 4.

Recent brain imaging studies confirm the observation that adolescent behavior is greatly affected by peer influences. For example, researchers using brain imaging techniques to study risky driving decisions by teenagers have shown that when peers are present, teenagers, unlike adults, show heightened activity in the parts of the brain associated with rewards. Bonnie, REFORMING JUVENILE JUSTICE at 98. This means that in the presence of peers, reward centers of the brain may hijack less mature control systems in adolescents, causing teens to make decisions based on peer approval as opposed to logic. *Id.*

Finally, the U.S. Supreme Court has recognized that children are different from adults because adolescence is a transitional phase. "[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Miller*, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 570). As a result, "a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

Developmental research reaches the same conclusions. It is well known that "[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships." Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE, 31 (2008) [hereinafter "Scott & Steinberg, RETHINKING JUVENILE JUSTICE"]. The research confirms that "many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature." Marsha Levick *et al.*, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 297 (2012) (citations omitted). "[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood." Bonnie, REFORMING JUVENILE JUSTICE at 90 (citations omitted). *See also* Scott & Steinberg, RETHINKING JUVENILE JUSTICE at 53 (explaining that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment."). "Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults." Br. of the Am.

Psych. Ass'n., *et al.* as *Amici Curiae* in Supp. of Pet'ers at 22, 24, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646).

These three characteristics – the immaturity of youth, their susceptibility to outside pressures, and the transience of adolescence – all support sealing juvenile records.[1] Adolescents are both less culpable and more likely to grow out of offending behavior than adults. Allowing a young person to seal his or her juvenile record, without adding extra barriers or hurdles, supports the rehabilitative goals of the juvenile system and responds to the reality that teenagers are not simply "miniature adults." *J.D.B. v. N. Carolina*, 131 S. Ct. at 2394, 2397. The juvenile court must remain a court of second chances, allowing youthful offenders the opportunity to put their delinquent misconduct behind them.

This Court's conclusions in both *Lewis* and *Ishikawa* recognize that juvenile records deserve distinct protections, and thus comport with U.S. Supreme Court jurisprudence. As Professor Martin Guggenheim has

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[1] While recent United States Supreme Court cases brought a new scientific lens and a heightened attention to protections for youth, they also built upon the Court's long history of recognizing that constitutional standards must be distinctly applied to protect youth in a wide variety of legal contexts. The Court has identified the importance of protecting youth's unique needs in cases regarding criminal and juvenile procedure. *See, e.g.*, *Haley v. Ohio,* 332 U.S. 596 (1948) (holding unconstitutional the statement of a fifteen-year old defendant); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding a juvenile statement inadmissible because a teenager "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.... Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had."); *In re Gault*, 387 U.S. 1, 36 (1967) (a child has a particular need for the "'guiding hand of counsel at every step in the proceedings against him.'" (quoting *Powell v. Alaska*, 287 U.S. 45, 69 (1932))).

explained, "[s]tates are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults." Martin Guggenheim, *Graham v. Florida and Juveniles Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. REV. 457, 490 (2012). Instead, states must consider the particular attributes and nature of youth when they assess their statutory schemes. Moreover, a state's consideration of youth in its laws and policies need not be limited to sentencing or criminal procedures. The U.S. Supreme Court has long held, in a variety of civil contexts, that youth deserve more protections than adults.[2] That developmentally-appropriate treatment of youth is precisely what this Court applied in *Lewis*, and should continue to apply today.[3]

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[2] The U.S. Supreme Court has held, as a matter of First Amendment law, that different obscenity standards apply to children than to adults, *Ginsburg v. New York,* 390 U.S. 629, 637 (1968), and that the state has a compelling interest in protecting children from images that are harmful to minors. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,* 518 U.S. 727, 743 (1996). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). The developmental status of youth has played a role as well in the Supreme Court's school prayer cases. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court recognized developmental research relating to youth susceptibility to pressure, and observed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools." *Lee v. Weissman*, 505 U.S. 577, 593-94 (1992). Similarly, the U.S. Supreme Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

[3] That the Court of Appeals has applied a different test to *adults* in *State v. Waldon*, 148 Wash.App. 952 (2009) should have no bearing on this Court's treatment of juveniles.

II. The Sealing of Juvenile Records Comports with the Rehabilitative Purpose of the Juvenile Justice System

The confidentiality of records is central to the rehabilitative purpose of the juvenile justice system; this centrality of confidentiality has been recognized by this Court and it is further supported by United States Supreme Court precedent.

The juvenile court system was founded upon the belief that children are particularly capable of rehabilitation and, though they should be held accountable for their misdeeds, they should receive care and treatment rather than punishment. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction, in* A CENTURY OF JUVENILE JUSTICE at 42 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002). The U.S. Supreme Court has clearly recognized the importance of procedures that support the rehabilitative purposes of state juvenile justice systems. In *McKeiver v. Pennsylvania,* for example, the Court declined to find a right to jury trial in juvenile court, holding that this would "remake" the juvenile court into an adversarial proceeding. 403 U.S. 528, 547 (1971). The Court emphasized the importance of protecting the juvenile justice system's "rehabilitative goals" and its focus on "fairness," "concern," and "sympathy." *McKeiver*

at 547, 550. *See also Gault,* 387 U.S. at 38 n.64 (1967) (noting that the provision of counsel for juveniles "can play an important role in the process of rehabilitation").

From the inception of the juvenile justice system, confidentiality has been a key element of the rehabilitative model. Keeping records confidential shields youth from the stigma that ordinarily accompanies the publicity of criminal proceedings and allows them a chance at rehabilitation and growth. Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 368-69 (1996). *See also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring) (without confidentiality, the public would brand a child as a criminal and reject him for his behavior, making a healthy readjustment to society difficult); David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction, in* A CENTURY OF JUVENILE JUSTICE at 65 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002); Kara E. Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1101-02 (1998) (identifying confidentiality as one of central goals of traditional juvenile justice systems); Stephan E. Oestreicher, Jr., *Toward*

Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings, 54 VAND. L. REV. 1751, 1776 (2001) (noting the tradition of closed juvenile proceedings).

Sealing juvenile records supports teenagers who have made mistakes when they try to return to school, look for a job, seek housing, and productively reintegrate into their communities following involvement with the juvenile justice system. In contrast, when records are left open to the public or burdens are placed on youths' ability to seal their records, young people are put at risk of being stigmatized and excluded. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 526-527 (2004). Records of juvenile adjudications can limit access to financial aid for college,[4] interfere with a young person's efforts to obtain employment or housing,[5] and result in ineligibility for public benefits, including Temporary Assistance for Needy Families (TANF) and

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[4] Judge Kim Clark, *What Happens in Juvenile Court, Doesn't Always Stay in Juvenile Court - The Myths and Realities About Juvenile Records and Expungements*, MODELS FOR CHANGE (July 15, 2010), *available at* http://www.modelsforchange.net/newsroom/152.

[5] *See* Robert Shepard, Collateral Consequences of Juvenile Proceedings: Part II, 15 CRIM. JUST. MAG. (Fall 2000), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Collateral%20Effects%20-%20Criminal%20Justice%20Magazine.pdf

food stamps.[6] Moreover, youth are more likely to recidivate if they are unable to obtain employment, pursue their educational objectives, or secure housing. *See* The Sentencing Project, State Recidivism Studies (2010) at http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf.

Ensuring that records are sealed is particularly important as youth approach adulthood. At this pivotal time, young people make decisions about their education, careers, life style, and values that will likely shape the course of their adult lives. *See, e.g.*, D. Wayne Osgood *et al.*, *Vulnerable Populations and the Transition to Adulthood,* 20 THE FUTURE OF CHILDREN 209 (Spring 2010). The obstacles posed by juvenile records can be especially damaging at this age.

The commitment to juvenile rehabilitation has led almost all states to provide protections for juvenile records that are not available for adults[7] and has led many states to ensure that juvenile delinquency information

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[6] Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

[7] Riya Shah, *et al.*, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 1, 7 (forthcoming September 2014) (on file with authors)

can never be disclosed. [8] Moreover, in recent years the legal community has given heightened attention to the problem of collateral consequences of juvenile adjudications. *See, e.g.*, Report to the House of Delegates, Am. Bar Ass'n, Criminal Justice Section, Committee on Homelessness and Poverty, Standing Committee on Legal Aid and Indigent Defense (2010) at 14, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102a.authcheckdam.pdf (recognizing U.S. Supreme Court jurisprudence holding that children are different from adults under the law and recommending that states enact laws and policies to limit reliance on juvenile records by schools and employers).

Protecting the rehabilitative nature of juvenile procedings, *Lewis*, 51 Wn.2d at 198, this Court's determination that juvenile records should be eligible to be sealed without applying further burdens or barriers is in keeping with the purpose of the juvenile justice system, with U.S. Supreme Court precedent, and with national trends to allow juvenile offenders the opportunity to overcome their youthful mistakes.

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[8] *See, e.g.,* California (Cal. Rules of Court, Rule 5.552); New Mexico (N.M. Stat. § 32A-2-32); North Carolina (N.C. Gen. Stat. § 7B-3000); North Dakota (N.D. Cent. Code § 27-20-52); Ohio (Ohio Rev. Code Ann. § 2151.18; Ohio Rev. Code Ann. § 2151.356; Ohio Rev. Code Ann. § 2151.357; Ohio Rev. Code Ann. § 2151.358); Rhode Island (R.I. Gen. Laws § 14-1-64; R.I. Gen. Laws § 14-1-30); Vermont (Vt. Stat. tit. 33 § 5117).

Finally, the State argues that sealing records actually places youth at risk of harm by allowing judicial corruption to go unchecked. Court of Appeals Appellant Br. at 18-19. This argument is specious.[9] Keeping a juvenile record open for all purposes or creating further burdens to seal erects barriers for youth seeking employment, education, housing and other opportunities and is not how the system protects youth from corruption. Indeed, in the Pennsylvania judicial corruption scandal highlighted by the State, the young plaintiffs fought successfully to have their records expunged as a key remedy to redressing the harms they suffered. *See* Exhibit A, *In re J.V.R.*, No. 81 MM, at 2 (Pa Mar. 26, 2009) (per curiam) (ordering the court-appointed Special Master to identify and correct "miscarriages of justice in the underlying criminal consent decrees and adjudications as quickly as possible" and promptly enter "orders of vacatur and expungement"); *see also* Exihibit B, *In re J.V.R.*, No. 81 MM, at 7 (Pa Oct. 29, 2009) (per curiam) ("[t]his [c]ourt approves of [the investigating special master's] further recommendation that adjudications of delinquency and consent decrees be reversed and dismissed with prejudice, and that expungement of records proceed"). It wasn't public access to the juvenile records of the youth involved in these matters that

[9] There are ample mechanisms to address incidences of judicial misconduct: parties have the right to appeal; the Judicial Conduct Commission investigates complaints and takes disciplinary action when appropriate; and counsel, community groups, and/or the media conducts investigations that can reveal misdeeds.

brought the atrocities to light. Pennsylvania's expungement process actually assisted these young people in erasing their records and giving them the opportunity to move on without their past being used against them. The State has cynically converted a tragedy for many of Pennsylvania's youth into a justification for inflicting other harms on youth in Washington State.

CONCLUSION

We respectfully urge this Court to reinforce its own precedent, abide by United States Supreme Court jurisprudence providing for more generous protection of youth's rights, and continue to follow sound public policy, which all recognize the unique vulnerabilities of youth and the importance of the rehabilitative mission of the juvenile justice system. Therefore, we request that the Court distinguish the sealing of juvenile records from the sealing of adult criminal records and hold that Article I, Section 10 of the Washington Constitution does not apply to juvenile records.

Respectfully submitted, this 11th day of August, 2014.

By: 

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, Serena E. Holthe, declare that on the 11th day of August, 2014, I caused the original ***AMICI CURIAE*** **BRIEF OF THE CENTER FOR CHILDREN & YOUTH JUSTICE AND THE JUVENILE LAW CENTER** to be filed by email in the Supreme Court of the State of Washington, and a true copy of the same to be served by email on the following:

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Signed in Seattle, Washington this 11th day of August, 2014.

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