THE HONORABLE KATHRYN J. NELSON
Noted for Hearing: August 7, 2013
10:30 a.m

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

SAMUEL RAMIREZ-RANGEL, LETICIA GONZALES-SANTIAGO, and JOSE SOLIS-LEON,

Plaintiffs,

v.

KITSAP COUNTY, JUSTIN T. CHILDS, in his official capacity as a Kitsap County Sheriff's Deputy, and SCOTT C. JENSEN, in his official capacity as a Kitsap County Sheriff's Deputy,

Defendants.

No. 12-2-09594-4

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants' Response to Plaintiffs' Cross-Motion for Summary Judgment ("Defendants' Response") actively avoids any in-depth discussion of the merits of Plaintiffs' claims, instead focusing almost exclusively on procedural issues. Those procedural arguments also fail, and Defendants cannot defeat the conclusion that the undisputed facts and law support the declaratory relief sought by Plaintiffs. Plaintiffs therefore request that the Court issue an order granting Plaintiffs' requested declaratory relief.

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A. No Genuine Issue of Material Fact Precludes Summary Judgment in Favor of Plaintiffs

To defeat Plaintiffs' motion for summary judgment, Defendants must produce evidence showing that there are material facts in dispute regarding Plaintiffs' constitutional claims. *See Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends." *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (citing *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997)). Defendants cannot rest upon the allegations in their pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See Young*, 112 Wn.2d at 225-26.

Defendants have failed to do so. While Defendants broadly assert that genuine issues of material fact preclude summary judgment, they fail to identify any of those alleged disputed facts. *See* Defendants' Response, pp. 5-7. In fact, Defendants suggest the contrary. Rather than identifying and discussing disputed material facts, Defendants assert that they "incorporate[their] factual basis for summary judgment by reference and will spare the Court another recitation." *Id.* at 6. Thus, Defendants acknowledge that there is no genuine issue of fact by relying entirely on the undisputed facts in their own motion for summary judgment.[1] Indeed, Defendants discuss in their Response only those facts they have characterized as undisputed. *See id.* at 6-7.

Defendants' entire argument that there are disputed issues of material fact is based on this Court's previous finding that there were "issues of material fact with respect to the timing of the identification questions." *Id.* at 5 (internal citation omitted). Since that finding, Plaintiffs have clearly outlined the timing of that questioning in their Cross-Motion, based upon Defendants

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[1] Defendants have also submitted a Proposed Order that would inappropriately dismiss Plaintiffs' claims simply upon denial of Plaintiffs' Motion for Summary Judgment. This further suggests that Defendants do not actually believe there is any issue of material fact that would warrant a trial, but instead believe that the remaining claims involve purely legal issues in light of the undisputed facts.

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Jensen's and Childs' own Declarations. *See* Plaintiffs' Opposition to Defendants' CR 56 Motion for Entry of Final Judgment and Plaintiffs' Cross-Motion for Summary Judgment ("Plaintiffs' Cross-Motion"), pp. 3-5. Regardless, that issue is not material to Plaintiffs' constitutional claims. Defendants do not dispute that – regardless of when they asked Plaintiffs for their identification – they held Plaintiffs for a period of time after they had fully resolved their suspicions regarding the defective headlight and the shellfish. *See id.* at 2-6. Nor do Defendants dispute that after the headlight and shellfish issues were resolved, Defendants detained and questioned Plaintiffs solely on the basis of their suspected immigration status. *See id.*

Defendants' argument that certain portions of the record should be stricken does not change the analysis. As detailed in Plaintiffs' Motion, the undisputed material facts relevant to Plaintiffs' constitutional claims are wholly supported by the declarations of Defendants Jensen and Childs.[2] *See id.*

No genuine issue of material fact remains to be tried in this case. Only legal issues remain, and those issues must be resolved in favor of Plaintiffs.

B. Plaintiffs Are Entitled to Judgment as a Matter of Law

The undisputed facts demonstrate that Plaintiffs are entitled to summary judgment on their remaining claims. Defendants side-step the merits of Plaintiffs' constitutional claims, raising only the general argument that dismissal of Plaintiffs' false arrest tort claims should automatically result in the dismissal of their constitutional claims. *See* Defendants' Response, p. 7. Plaintiffs addressed that issue at length in their Cross-Motion and their initial Opposition to Defendants' Motion for Entry of Final Judgment. *See* Plaintiffs' Cross-Motion, pp. 8-10, Plaintiffs' Opposition to Defendants' Motion for Entry of Final Judgment (filed 05/29/13)

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[2] Notably, in granting Defendants' Motion for Reconsideration and Partial Motion for Summary Judgment Dismissal of False Arrest Claim, the Court relied upon all the declarations in the record, including the evidence Defendants argue should be stricken. *See* Order Granting Defendants' Motion for Reconsideration and Partial Motion for Summary Judgment Dismissal of False Arrest Claim (issued 04/19/13).

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("Plaintiffs' Initial Opposition"), pp. 8-13. Defendants' discovery, three years after the fact, of alleged shellfish harvesting violations does not excuse their disregard of the Constitution on February 2, 2010. Reasonable suspicion or probable cause supporting the initial traffic stop does not bear on Plaintiffs' constitutional claims, which arise from Defendants' conduct after any purportedly legitimate bases for the stop were resolved and all reasonable suspicion or probable cause that allegedly justified the detention had dissipated. *See id.*

Defendants' general assertion – unsupported by any legal authority whatsoever – that Plaintiffs' constitutional claims are precluded by "probable cause" do not withstand scrutiny. Defendants appear to recognize that fact, as the majority of their opposition to Plaintiffs' Cross-Motion is focused on procedural issues unrelated to the merits of Plaintiffs' legitimate claims. But Defendants' procedural arguments also fall flat, as discussed below.

C. Plaintiffs' Complaint Was Sufficient and Does Not Justify Dismissal of Plaintiffs' Claims as a Matter of Law

As an initial matter, Defendants assert that Plaintiffs' constitutional claims should be dismissed as a matter of law because of purported technicalities regarding the manner in which Plaintiffs' claims were pled in their Complaint. *See* Defendants' Response, pp. 3-5. Specifically, Defendants assert that Plaintiffs' constitutional claims, for which Plaintiffs seek declaratory relief, should be dismissed as a matter of law because "[i]n the Complaint, the word 'declaratory' appears only in the caption and the word 'declaration' first appears in the prayer for relief," rather than as a separate cause of action. *Id.* at 3-4.

Defendants cite to no authority for the extreme proposition that Plaintiffs should be precluded from seeking declaratory relief simply because of its location in the complaint. "Washington follows notice pleading rules and simply requires 'a concise statement of the claim and the relief sought.'" *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (quoting *Pacific NW Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); CR 8(a)). To meet "the liberal bounds of the notice pleading standard," the complaint

need only "give the opposing party 'fair notice,'" of the plaintiffs' claims. *Id.* at 84-85 (quoting *Pacific NW Shooting Park Ass'n*, 158 Wn.2d at 352). In *Champagne*, the Washington Supreme Court clarified that the court must look to "the totality of the complaint" when determining whether "fair notice" has been provided. *Id.* (holding, under circumstances where plaintiff failed to include in his prayer for relief a request for money damages under the MWA and WPA, that "the entirety of Champagne's complaint supplies direct allegations sufficient to give notice to both the court and the County that Champagne sought relief under the MWA [and] WPA . . ..").

The Complaint in this matter placed Defendants on clear notice that Plaintiffs were seeking declaratory relief – as set forth in the caption and prayer for relief – and explained in detail the bases for that relief: Defendants' violations of the Washington State Constitution. It is unclear why this purported procedural issue is being raised by Defendants for the first time eighteen months into this litigation and after Defendants have clearly been apprised in detail of Plaintiffs' claimed relief, both through the discovery process and the parties' extensive motion practice. At this late juncture, Defendants can hardly claim surprise at Defendants' request for declaratory relief. Nor does an alleged technicality that does not prejudice Defendants and that did not deprive Defendants of the requisite "fair notice" support dismissal of Plaintiffs' claims as a matter of law. *See id.*

D. Declaratory Relief is an Appropriate Remedy for Plaintiffs' Constitutional Claims

The bulk of Plaintiffs' opposition to Defendants' Cross-Motion is the assertion that declaratory relief is not available here. *See* Defendants' Response, pp. 7-19. As discussed at length in Plaintiffs' prior briefing, Plaintiffs' claims soundly satisfy all four elements of a justiciable controversy under the Uniform Declaratory Judgments Act ("UDJA"):

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical,

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> abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-15, 514 P.2d 137, 139 (1973); *see* Plaintiffs' Cross-Motion, pp. 10-13; Plaintiffs' Initial Opposition, pp. 13-16. Defendants' attempts to argue otherwise miss their mark.

1. Plaintiffs' Claims Involve a Justiciable Controversy

a. The Court's Ruling on Plaintiffs' False Arrest Claims Did Not Render Plaintiffs' Constitutional Claims Moot

Defendants argue that the "question of authority to prolong detention of a detained non-citizen has become academic as to each of these plaintiffs" because the Court has ruled in their favor on the false arrest tort claim. Defendants' Response, p. 13. However, Defendants once again inaccurately conflate Plaintiffs' constitutional and tort claims. Even if the initial detention was justified by law (i.e., if the false arrest tort claims fail), Plaintiffs still have a viable constitutional claim that their detention was unconstitutionally prolonged. *See Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("While the seizures of the [individuals] based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality[, and] [u]nlawful presence is not criminal."); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) ("Our disagreement with the Court of Appeals is not over the initial interference with petitioner's freedom. . . . It is the intensity and scope of the intrusion [that] we find improper."); *State v. Santacruz*, 132 Wn. App. 615, 619, 133 P.3d 484 (2009) ("To detain beyond what the initial stop demanded, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity.") (internal quotation marks and citation omitted).

Defendants continue to be unwilling to recognize this distinction. Plaintiffs' false arrest and constitutional claims are predicated upon different facts and standards of law—for instance,

unlike the tort of false arrest, initial probable cause is not an absolute defense to a claim that a stop was unlawfully prolonged in violation of the Constitution. Therefore, an adjudication of Plaintiffs' constitutional rights has yet to occur in this Court, and it is hardly "academic."

Defendants cite *Brown v. Vail*, in which the Washington Supreme Court dismissed the plaintiff's claims as moot, to suggest that this case must be moot as well. Defendants' Response, p. 14 (citing *Brown*, 169 Wn.2d 318, 337–38, 237 P.3d 263 (2010)). However, the plaintiff's claims in *Brown* were only rendered moot because the State changed its policy after litigation commenced from the policy the plaintiff had challenged. In this case, Defendants have not indicated any intent to change their policies or practices. Worse, Defendants continue to contend that their past actions were lawful. Plaintiffs' claims are far from moot where Defendants continue to follow a practice that directly violates the Constitution and that can continue to impact Plaintiffs and other members of the public within Kitsap County.

b. Plaintiffs Are Not Required to Demonstrate Future Harm in Order to Demonstrate Justiciabilty Under the UDJA

Defendants argue that, "[h]ere, each plaintiff has alleged a past constitutional injury. . . . Thus, to the extent that these plaintiffs contend that future contacts with KCSO will have an adverse impact upon any one of them beyond the alleged harm from the February 2, 2010 incident, each plaintiff has failed to show that his interests are 'direct and substantial, rather than contingent and inconsequential.'" Defendants' Response, pp. 12–13.

This is a classic straw-man argument. Plaintiffs have standing precisely because they have alleged a past constitutional injury affecting their direct interests. A need to show future harm is not necessary for standing under the UDJA. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 653, 278 P.3d 632 (2012) (explaining that standing under the UDJA requires that "the challenged action must have caused the challenger an injury in fact, economic or otherwise") (citing *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)) (emphasis added); *Am. Traffic Solutions, Inc. v. City of Bellingham*,

163 Wn. App. 427, 432–33, 260 P.3d 245 (2011) (holding that declaratory judgment standing requires showing that plaintiff "has or will suffer an injury in fact" from action) (emphasis added).

The use of the past tense in the case law clearly indicates that a past injury is sufficient to establish standing for a declaratory judgment action. *See Ass'n for Substance Abuse*, 174 Wn.2d at 653 (finding appellant had standing because government terminated his lease, a past action); *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008) (finding appellant had standing because government cited him for noncompliance under the act challenged, a past action). Indeed, the Defendants themselves cite to the fact that a case is ripe for review under the UDJA "if the challenged action is final." Defendants' Response, p. 13 (quoting *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 760, 63 P.3d 142 (2002)) (emphasis added). Therefore, Defendants' musings about the unlikelihood of future injuries to Plaintiffs are wholly irrelevant.

c. ***This Court's Decision Will Be Final and Conclusive as to the Parties***

Defendants further argue that this Court cannot issue a final and conclusive decision because "this case presents undeveloped questions of facts about the detention." Defendants' Response, p. 13. Once again, Defendants fail to identify what those "undeveloped questions of fact" may be. *See id.* To the contrary, the Declarations of Defendants Jensen and Childs clearly set forth the undisputed material facts supporting the declaratory relief Plaintiffs seek. *See* Plaintiffs' Cross-Motion, pp. 2-6.

It is clear that any declaratory judgment issued by the Court will be final and conclusive as to the parties to this action.[3] *See* RCW 7.24.010 (providing that declaratory judgments "shall have the force and effect of a final judgment or decree"). Defendants' repeated assertion that

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[3] To the extent Defendants argue that a declaratory judgment will somehow not be sufficient to conclude this matter, the UDJA explicitly provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper" upon application to the Court. RCW 7.24.080.

declaratory relief is somehow less final and conclusive because it will not directly bind non-parties is not logical. If Defendants' argument were accepted, then declaratory judgment would never be available, because a judgment can only ever bind the parties to the action.[4] Here, Plaintiffs filed suit against the only parties who violated their constitutional rights: Defendants. Unless the Court enters the order requested by Plaintiffs, those same Defendants will likely continue to engage in the same unlawful behavior.

Neither is a declaratory judgment somehow rendered inappropriate in this instance because the United States Border Patrol is not a party. *See* Defendants' Response, pp. 18-19. Defendants assert that the declaratory judgment sought by Plaintiffs would prejudice the Border Patrol because "the U.S. Border Patrol would surely claim interest in an action to declare the ability of a local law enforcement agency to cooperate with its administration of federal immigration law." *Id.* at 18.

Once again, Defendants mischaracterize Plaintiffs' action. Plaintiffs have never contended that local law enforcement officers, including Defendants, are prohibited from communicating with, consulting with, or providing information to the Border Patrol, actions that are clearly permitted under federal law. Rather, Plaintiffs claim that local law enforcement officers are prohibited from enforcing federal immigration law.

Defendants assert that "8 U.S.C. § 1357(g)(9) and (10) authorize and encourage federal-local cooperation," but it does not authorize enforcement of federal immigration law, including questioning and detaining individuals under the federal immigration statutes. *See* Defendants' Response, p. 18 (emphasis added); 8 U.S.C. § 1357(g). Local law enforcement's authority to enforce federal immigration law flows only from a written agreement entered into between the U.S. Attorney General and the local law enforcement agency, pursuant to 8 U.S.C. § 1357(g)(8). Such an agreement requires, among other things, "a written certification that the officers or

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[4] Notably, however, the declaratory judgment requested by Plaintiffs would serve as guidance for other parties throughout the State.

employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws." 8 U.S.C. § 1357(g)(2). Defendants do not dispute that no such agreement exists here. Section 1357(g)(10) clarifies that the only actions not requiring such an agreement involve "communication" and "cooperation." 8 U.S.C. § 1357(g)(10). It does not provide immunity from liability for local law enforcement officers' detention of individuals. Indeed, as previously briefed by Plaintiffs, the Supreme Court's recent holding in *Arizona v. United States* rejects the notion that local law enforcement may prolong detention for purposes of verifying immigration status. *Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012). The Border Patrol will not be prejudiced or impacted by the requested declaratory relief because it is in full accord with existing federal case law and the federal immigration statutes.[5]

2. Even if Plaintiffs' Claims Did Not Present a Justiciable Controversy, Important Public Interests Support Declaratory Relief

The four elements of a justiciable controversy are easily met here. But even if they were not, "[t]he presence of issues of 'broad overriding import'" justifies "a court['s ...] exercise [of] its discretion in favor of reaching an issue which is otherwise not justiciable." *Snohomish Cnty. v. Anderson,* 124 Wn.2d 834, 840–41, 881 P.2d 240 (1994). The following factors are relevant to a determination of whether an issue is of "continuing and substantial public interest:"

> (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

Hart v. Dep't of Social & Health Servs., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). This case presents just such a "continuing and substantial public interest." *Id.*

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[5] Indeed, contrary to Defendants' assertion, the Border Patrol has not claimed any interest, seeking neither to intervene nor to file an *amicus curiae* brief in support of Defendants' farfetched theory that Defendants should be permitted to detain people without restraints based on civil immigration law in which Defendants are untrained. This is yet another argument presented by Defendants without any supporting authority or supporting facts.

Defendants argue that "Plaintiffs' evidence of one single incident does not demonstrate need for guidance of law enforcement officers' authority to act under federal immigration law." Defendants' Response, p. 17. The fact that this case flows from the single incident that impacted Plaintiffs does not render it any less important for purposes of providing guidance to public officers. *See, e.g., Purchase v. Meyer*, 108 Wn.2d 220, 737 P.2d 661 (1987) (applying public interest exception in moot case already settled by the parties that flowed from a single incident of sale of alcohol to a minor). Indeed, the Washington Supreme Court has noted that constitutional cases "tend to present issues which are more public in nature and are more likely to arise again" and that "decisions involving the constitution . . . generally help to guide public officials." *Hart*, 111 Wn.2d at 449. Significantly, Defendants have never indicated any intention of changing their policies or practices in response to Plaintiffs' claims, nor have they acknowledged that their conduct was unlawful. Absent guidance from this Court, there is every indication that this conduct is likely to recur and could impact any member of the public present in Kitsap County.

3. Plaintiffs' Request for Declaratory Relief Comports with the Purpose of the UDJA

Plaintiffs' requested relief does not, as Defendants contend, "forge new ground." Defendants' Response, p. 8. Defendants acknowledge that the Washington courts have regularly issued declaratory judgments regarding the constitutionality of an actor's current practices. *See* Defendants' Response, pp. 8-9. Washington courts also utilize declaratory judgments to determine the constitutionality of a party's actions. *See In re Bond Issuance of Greater Wenatchee Reg'l Events Ctr. Public Facilities Dist.*, 175 Wn.2d 788, 287 P.3d 567 (2012) (declaring that city's entrance into a loan agreement would violate state constitutional limits on municipal debt); *McNabb v. Dep't of Corrections*, 163 Wn.2d 393, 180 P.3d 1257 (declaratory judgment used to determine constitutionality of subjecting an inmate to forced feeding); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) (declaring sobriety checkpoints unconstitutional); *ee also*, *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 180 P.3d 893

("hold[ing] that the trial court erred when it refused to consider the County's request for declaratory judgment on the Privacy Act's application to Smith's conduct").[6]

As noted above, absent this Court's guidance, Defendants may continue to engage in the unlawful conduct at issue with respect to members of the public in Kitsap County, which is precisely why this Court's guidance is imperative. Regardless, as discussed above, declaratory relief is entirely appropriate where the conduct has already occurred. *See Wash. Ass'n for Substance Abuse & Violence Prevention*, 174 Wn.2d at 653 (holding that "the challenged action must have caused the challenger an injury in fact, economic or otherwise") (citing *Save a Valuable Env't*, 89 Wn.2d at 866) (emphasis added); *Am. Traffic Solutions, Inc.*, 163 Wn. App. at 432–33 (holding that declaratory judgment requires showing that plaintiff "has or will suffer an injury in fact" from action) (emphasis added).

Furthermore, CR 57 expressly provides that the availability of alternative remedies does not bar a claim for declaratory relief: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." CR 57; *see also Wagers v. Goodwin*, 92 Wn. App. 876-869-80, 964 P.2d 1214, 1216 (1998) (holding that "declaratory relief may be 'appropriate' . . . notwithstanding the availability of another remedy"); *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005) (upholding the plaintiff's standing to seek declaratory relief, as well as class certification for monetary damages). As the UDJA provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for.

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[6] Defendants correctly note that the well-settled and undisputed proposition that declaratory judgments are "peculiarly well suited to the judicial determination of controversies concerning constitutional rights" is not properly attributed to *Kitsap County v. Smith,* but rather to other cases. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 417, 27 P.3d 1149 (2001); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978).

RCW 7.24.010 (emphasis added).

E. Conclusion

For the reasons set forth above and in Plaintiffs' prior briefing, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment and issue the declaratory judgments sought by Plaintiffs.

DATED: August 2, 2013.

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CERTIFICATION OF SERVICE

I, Melissa Wood, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct. I am employed by the law firm of Stoel Rives LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, and over the age of 18 years, not a party to the above-entitled action, and competent to be a witness herein.

I hereby certify that on August 2, 2013, I caused a true and correct copy of the foregoing document to be served on the following individuals as indicated below:

Neil R. Wachter
Ione S. George
Kitsap County Prosecutor's Office
614 Division Street, MS-35A
Port Orchard, WA 98366
Via Email

DATED: August 2, 2013, at Seattle, Washington.

/s/ Melissa Wood
Melissa Wood, Legal Practice Assistant