IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of, JOHN PAUL EPLER, Petitioner-Respondent, and, ANDREA MICHELLE EPLER, Aka, Andrea Michelle Walker, Respondent-Appellant, And, KIMBERLEY SUE GRAUNITZ, Third Party Respondent-Respondent.	)	Supreme Court No. S061818 Court of Appeals No. A148643 Marion County Circuit Court No. 04C33678

BRIEF OF AMICI CURIAE LEGAL AID SERVICES OF OREGON AND OREGON LAW CENTER IN SUPPORT OF PETITION FOR REVIEW

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Marion County Circuit Court
The Honorable Dennis J. Graves, Judge

Opinion filed: September 11, 2013
Author of Opinion: Honorable Rex Armstrong

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DECEMBER 2013

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I. INTRODUCTION

For decades, legal aid programs in Oregon have represented parents in legal disputes with third parties seeking custody orders over their children. In these cases, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC) have asserted, consistently and vigorously, their clients' rights under the Due Process Clause of the Fourteenth Amendment to the care, custody, and control of their children. Legal aid attorneys have represented or advised hundreds of parents in cases filed by nonparents to establish initial custody orders and in proceedings to modify those custody orders. LASO and OLC also have been involved in legislative efforts to shape statutes regarding the ability of nonparents to seek legal custody orders. The goal of such work is to ensure to the greatest degree possible, that Oregon's statutory framework is consistent with the constitutional rights of parents.

Epler and Epler, 258 Or App 464, 469-70, 309 P3rd 1122 (2013), raises significant statutory and constitutional questions regarding the weight accorded parents' due process rights to the care, custody, and control of their children when seeking to modify a stipulated judgment awarding custody to a nonparent. The Court of Appeals' decision means that in modification proceedings parents' constitutional rights are given no weight whatsoever and that parents have no more rights than nonparents. The holding in *Epler* is inconsistent with the rights of parents under the United States Constitution and United States Supreme

Court decisions construing those rights. In modification proceedings, the fundamental, due process rights of parents to custody of their children must be recognized.

If allowed to stand, this case will have a profoundly negative impact on parents, particularly the low-income parents that LASO and OLC frequently represent. The Court of Appeals articulates a standard that ignores the rights of parents, particularly disadvantaging low income parents in disputes against wealthier nonparents. Of equal concern are the many poor parents legal aid is unable to represent or advise who face these decisions without the benefit of legal advice.

LASO and OLC urge this court to grant review to announce the framework for deciding parental requests to modify orders awarding custody of their children to nonparents and to determine the proper weight that must be accorded the fundamental right of parents to custody of their children as guaranteed by the United States Constitution.

II. SUMMARY OF FACTS

This is an appeal by a mother of a judgment denying her motion to modify custody of her daughter. In 2005, mother consented to an order contained in a dissolution judgment that awarded custody of her daughter to paternal grandmother. At the modification trial, mother testified that in 2005, "she had had mental and emotional problems, was unemployed, and had been

drinking heavily." *Epler,* 258 Or App at 469-70. She moved to modify the stipulated dissolution judgment in September 2006, but eventually withdrew her request. She filed a second motion to modify the stipulated dissolution judgment in May 2008. The trial court denied her motion on March 28, 2011 and mother appealed that decision.

III. REASONS FOR GRANTING REVIEW

A. This case raises important constitutional questions and involves the interpretation of statutory schemes.

The fundamental rights of parents are at issue. This decision implicates the body of United States Supreme Court jurisprudence establishing the fundamental right of parents to the care, custody and control of their children.[1] The most recent of these cases is *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). In a dispute between a parent and grandparents over visitation of a minor child, the Supreme Court held the Due Process Clause "protects the fundamental right of parents to make decisions concerning

[1] A long line of United States Supreme Court cases have established the fundamental right of fit parents to determine the care, custody, and control of their children. *Reno v. Flores,* 507 US 292, 304, 113 S Ct 1439, 123 L Ed 2d 1 (1993)(children will not be removed from adequate care of their parents to nonparents even if nonparents could provide better care); *Stanley v. Illinois*, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 (1972) (unwed father had constitutionally protected rights to the "companionship, care, custody, and management" of his biological child); *Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925)(Oregon's law prohibiting parents from enrolling their children in private schools unconstitutional); *Meyer v. Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042 (1923)(right to teach language other than English).

the care, custody and control of their children." *Troxel,* 530 US at 66. The Supreme Court found that a Washington statute permitting a court to award visitation rights to any nonparent if the visitation served the best interest of the child, was unconstitutional and infringed on this right. *Id.* at 73. The court also concluded that "at least some special weight" must be given to a fit parent's determination of whether such visitation is in the child's best interest. *Id.* at 70. The Court of Appeals failed to properly consider *Troxel*'s holding.

Also relevant to the questions raised by the Court of Appeal's decision is this court's previous consideration of *Troxel* and ORS 109.119, Oregon's third party custody statute, in a case that involved nonparents' initial request to establish a custody order. *O'Donnell-Lamont and Lamont*, 337 Or 86, 91 P3d 721 (2004), *cert den*, 543 US 1050, 125 S Ct 867, 160 L Ed 2d 770 (2005). In *O'Donnell-Lamont,* this court allowed review in a child custody proceeding to examine the "appropriate application of the changes that the legislature made" in 2001 to ORS 109.119[2]. *O'Donnell-Lamont,* 337 Or at 89. In doing so, this court closely analyzed *Troxel* and rejected father's arguments that ORS 109.119 was unconstitutional in its application. If review is granted, the *Epler* decision provides the Supreme Court with the opportunity to examine these same issues in the modification context. Further, review in this case is a

[2] The intention of the 2001 legislature in substantially amending ORS 109.119 was to make Oregon's third party custody statute consistent with federal due process as articulated in *Troxel v. Granville*. *O'Donnell-Lamont*, 337 Or at 105.

logical progression in the development of Oregon law regarding the rights of parents in third party custody claims.

The Court of Appeals held that ORS 107.135 applies in a custody modification proceeding between a parent and a third party, because the award of custody to grandmother was embedded in a dissolution judgment.[3] ORS 107.135 and the case law that flows from this statute have nothing to do with claims by nonparents and are inapplicable. The Court of Appeals also erroneously determined that ORS 109.119 did not apply to mother's modification claim. *Epler,* 258 Or App at 478. The court's reliance on ORS 107.135 and rejection of ORS 109.119 is mistaken. It creates an arbitrary situation in that parents may be treated differently depending on whether these claims are initiated as a ORS 109.119 or chapter 125 guardianship case, or by intervention in a dissolution matter. While ORS 109.119 permits intervention in other types of proceedings involving custody of children, it remains the governing statute in custody and visitation disputes between parents and nonparents. *Burk v. Hall,* 186 Or App 113, 62 P3d 394 (2003), supports the principle that irrespective of the type of case in which third parties state their claim, ORS 109.119 procedures and standards govern third party custody

[3] Neither case the Court of Appeals cited for that proposition involve a custody dispute between a parent and a third party. *See State ex rel Johnson v. Bail,* 325 Or 392, 396-97, 938 P2d 209 (1997); *Merges v. Merges,* 94 Or 246, 257-58, 186 P 36 (1919). The former involved unmarried parents, the latter, a husband and wife.

disputes.

The *Burk* court determined that ORS 109.119 "provides substantive requirements for actions in which a nonparent seeks *custody* or guardianship of a minor child over the objection of a legal parent." *Burk*, 186 Or App at 119-20 (emphasis added). Analyzing the statute and legislative history, the court held that nonparents cannot evade these requirements by proceeding under ORS chapter 125, explaining "[i]t makes no sense to assume that the legislature intended to create such a loophole." *Id*. at 120. Likewise, a nonparent cannot avoid the application of ORS 109.119 in a modification case by choosing to incorporate a third party custody order in a dissolution judgment. The Court of Appeal's conclusion in *Epler* that the "trial court did not err by failing to apply ORS 109.119" cannot be squared with the holding in *Burk. Epler,* 258 Or App at 478.

In cases controlled by ORS 107.135, case law establishes that parents seeking modification of an award of custody to the other parent must show first a substantial change of circumstances and second that modification is in the best interests of the child. *See Boldt and Boldt*, 344 Or 1, 9, 176 P3rd 388, *cert den*, 555 US 814 (2008). This standard for modifications was considered and rejected by the legislature when amending ORS 109.119 in 2001 in response to the United States Supreme Court's decision in *Troxel. Compare* House Bill

(HB) 2427 (2001)(as introduced) and HB 2427 (enrolled).[4] By applying ORS 107.135, the Court of Appeals gives no weight to parents' due process rights under the Fourteenth Amendment to the care, custody, and control of their child, a holding of great concern.

Although ORS 109.119 (2)(c) states that the statutory presumption that legal parents act in the best interests of their child does not apply in modification cases, the statute fails to establish what standard does apply.[5] Further, *amici* assert that the presumption contained in ORS 109.119(2)(a) should apply to cases where a parent has stipulated to custody. The Court of Appeals' conclusion that mother exercised her presumption when she agreed to grandmother's custody and that the circuit court judge who signed the judgment gave her special weight when doing so is flawed. *Epler,* 258 Or App at 481.

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[4] The original version of HB 2427 stated in relevant part: "(5)(b) When custody of a child has been granted to a person with a child-parent relationship in an order entered under this section, the order may be modified only upon a showing that there has been a change in circumstances relating to the legal parent, . . .In the modification proceeding, to retain custody the person with custody is not required to make the showing described in subsection (2)(a) and (b) of this section." HB 2427(as introduced). The legal sufficiency of subsection (5) as introduced in HB 2427 was questioned by then LASO attorney Maureen McKnight (now a Multnomah County Judge) and the provisions were removed. Testimony, House Judiciary Committee, Civil Law Subcommittee, HB 2427, Feb. 26, 2001, Ex G (statement of Maureen McKnight).

[5] ORS 109.119(2) provides: "(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child" and "(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section."

Because Mother consented, the presumption in ORS 109.119(2)(a) "that the legal parent acts in the best interests of the child" was never applied. Neither did a court ever determine or make findings that the presumption had been rebutted.[6] By stipulating to custody, mother's parental rights were not extinguished nor did she waive her rights. Nothing in the record establishes that mother was aware or apprised of her constitutional rights.

This court should grant review to decide 1) what statutory scheme applies to proceedings to modify judgments awarding custody of children to third parties; 2) whether parents must first prove a substantial change in circumstances when requesting modification of a judgment awarding custody of their children to nonparents; and 3) whether, when requesting modification of judgments awarding custody to third parties, parents are entitled to a presumption that they act in the best interests of their children under the Due Process Clause.

B. This case broadly impacts Oregon families and raises public policy and access to justice concerns.

This case affects the many Oregon parents facing myriad challenges that may temporarily impinge on their present ability to care for their children.

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[6] The original stipulated judgment in this case did not make written findings rebutting the presumption in ORS 109.119 (2)(a) that a parent acts in the best interest of her child. Such findings are required by ORS 109.119 (2)(b) which states: "In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection."

Based on the experience of LASO and OLC, these parents are likely suffering the effects of poverty and may be unable to access legal assistance to help them understand the implications of consenting to third party custody awards or to mount a legal case against nonparents who typically have far great financial resources. Many legal aid clients are young, impoverished, and poorly educated. Others are single mothers escaping domestic violence with little by way of resources or support. Others may be dealing with mental or physical health crises or drug and alcohol issues.

Like the mother in this case, these parents frequently make decisions, premised on their assessment of the best interests of their children, to consent to judgments awarding custody to trusted third parties. These decisions are agonizing but made with the hope that their children will be well cared for while they address the barriers that preclude them from maintaining custody of their children in the short run.

If this decision stands, parents who are aware of the legal consequences will be reluctant to make decisions that will render their parental rights meaningless in relation to third parties. In light of *Epler*, attorneys will be obligated to advise parents of the dangers of consenting to custody or guardianship by nonparents, i.e., that they will be on equal footing with nonparents when seeking to modify a judgment. Consequently, parents may not rely on family or other third parties and will be caught between what is best for

their children at the time and the threat of being unable to regain custody. This may result in unnecessary and less appropriate state intervention.

The government has an interest as *parens patriae* in the welfare and safety of children. *Epler* undercuts this interest by potentially discouraging parents from making decisions in the best interests of their children to temporarily place them with third parties. Instead, parents who are facing instability or problems affecting their parenting abilities should be encouraged to make decisions protecting their children, even if this means temporarily separating the family.

The majority and concurring opinions point out that parents could, with thoughtful drafting, include in a judgment provisions that relieve them from showing a substantial change in circumstances and preserve their constitutional presumption. *Epler,* 258 Or App at 485 (majority), 491 n 2 (Duncan, J., concurring). Whether or not this approach is legally tenable, it fails to recognize that poor parents often have little knowledge of the law and rarely have access to attorneys.

The barriers to accessing legal assistance in family-related matters in Oregon are daunting. A recent report of the Oregon Judicial Department (OJD)/Oregon State Bar (OSB) Task Force noted that 67-86 percent of family law cases involved at least one self-represented party.[7] In Oregon, the number

[7] Report from the OJD/OSB Task Force on Family Law Forms and Services,

of litigants representing themselves in family law-related cases is so great that for well over a decade - even while struggling with recession-related budget issues - OJD has created and maintained forms and other resources devoted to their needs.[8] While LASO and OLC have provided advice in hundreds of nonparent custody and guardianship cases and full representation to many parents, the programs serve only 15 percent of the people who qualify for their services.[9] Consequently, LASO and OLC estimate that the vast majority of low-income parents involved in third party custody cases cannot afford to retain counsel and have no legal assistance in determining or asserting their legal rights.[10] Parents with no access to legal assistance and no information about the

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page ii. February 2011. http://courts.oregon.gov/Multnomah/docs/FamilyCourt.

[8] The OJD Family Law Home page does not provide forms for third party custody cases. The basis for their absence is unknown but perhaps could be related to the procedural and legal complexity of these cases.

[9] LASO and OLC generally serve only those clients whose income is up to 125% of the poverty level. For 2013, that amount is $1,197 per month for an individual, $2453 per month for a family of four.

[10] A further consideration is how these self-represented litigants are likely to fare in court. The "best interest of the child standard" the Court of Appeals would apply here is highly subjective. "Wide discretion under the best interest factors raises the specter of cultural, class, life-style and other types of prejudice. The very subtle ramifications of social bias often invade custody and visitation decisions. Poorer, less educated parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources. Social bias against fit, but single, parents will also affect decision makers." Brief of the Domestic Violence Project Inc./Safe House (Michigan) et al. as Amici Curiae Supporting Respondent at 21, *Troxel v. Granville*, 530 US 57. For example, a trial court ordered temporary guardianship in part based on a mother living with men with

legal ramifications of such choices may consent to custody awards to nonparents without any knowledge or awareness of the rights that they are relinquishing. The far-reaching consequences of their decisions will become clear only when seeking the return of their children in modification cases. Alternatively, parents with some understanding of the law may be reluctant to consent.

Scenarios frequently encountered by legal aid attorneys involve a parent, usually a mother, who may be escaping an abusive partner, experiencing homelessness, seeking assistance for physical problems and mental health issues relating to the abuse, and/or lacking financial resources and job skills. Often relatives have already been involved in caring for the children but pursue legal custody in order to provide health insurance, enroll children in school, and authorize medical care. Mother, recognizing that a relative can provide in the short run what she cannot, agrees to custody. Her agreement is likely based on assurances that the third party will return the children as soon as she is back on her feet. She consents to legal custody and is successful in getting her life back in order. When mother seeks the return of her children, the nonparent refuses. As the dissent suggests in *Epler,* it would be ironic to deny mother's best interest presumption because of a previous decision she made in her daughter's best interest. *See* 258 Or App at 500 n 5 (Egan, J., dissenting).

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no visible means of support. *In the Matter of the Guardianship of S.H*., 2012 Ark 245, 409 SW 307 (2012).

ORS 109.119 (4)(b)(D) provides that one factor to consider in rebutting the parental presumption is whether the "legal parent has fostered, encouraged or consented to the relationship between the child and the [nonparent]." As this court noted in *O'Donnell-Lamont* when analyzing that rebuttal factor "we agree with father that this factor should not be accorded any weight in rebutting the presumption in this case, because the fact that father consented to the grandparents serving as primary caregivers and otherwise having a close relationship with the child does not indicate in any way that he does not act in the best interests of the children." 337 Or at 116. While that case involved a contested custody case, the *Epler* decision arguably contravenes the spirit of *O'Donnell-Lamont.*

C. The Court of Appeals en banc decision was divided and produced three divergent opinions.

The Court of Appeals issued a majority opinion drafted by Judge Armstrong joined by four judges, a concurring opinion by Judge Duncan joined by one judge, and a dissenting opinion by Judge Egan joined by two judges. The majority opinion requires a parent, who consented to a custody award to a nonparent, to show a substantial change in circumstances before having an opportunity to challenge the current custody order. *Epler,* 258 Or App at 475. If the parent successfully overcomes that initial hurdle, he or she must prove next that a change in custody is in the best interests of the child. *Epler,* 258 Or App at 480.

Judge Duncan, in her concurring opinion, agreed that a previously consenting parent must show a substantial change in circumstances in order to modify the custody judgment. She declined, however, to decide "whether the trial court was required to presume that mother's requested modification was in child's best interests," because mother failed to make the initial showing. *Epler,* 258 Or App at 491.

Judge Egan concluded that previously consenting parents are not required to show a substantial change in circumstances in order to challenge custody and that parents who have never been deemed unfit retain the constitutional presumption that they act in the best interest of their child. *Epler,* 258 Or App at 492.

O'Donnell-Lamont, this Court's only decision analyzing and providing significant guidance on the current version of ORS 109.119, also arose out of a divided en banc Court of Appeals decision.

As highlighted by the diversity of opinion and approach among the Court of Appeals, this area of law is nuanced and complex.[11] Review by this court will provide much needed clarity and guidance to the bench, the bar, and the litigants involved in these challenging cases.

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[11] In a case involving similar issues the Court of Appeals described these questions of law as "complex and difficult" ultimately declining to rule on them based on lack of preservation. *Underwood v. Mallory*, 255 Or App 183, 192, 297 P3d 508 (2013).

D. This case involves issues of first impression for the Supreme Court.

This court has not considered what weight a parent's constitutional rights should be accorded in a modification proceeding and, as such, this is a case of first impression. In addition, only two Court of Appeals cases other than *Epler* have touched on this issue. *Underwood v. Mallory*, 255 Or App 183, 192, 297 P3d 508 (2013); *Meader v. Meader* 194 Or App 31, 94 P.3d 123 (2004). Review by the Supreme Court is particularly warranted when little Oregon jurisprudence on the issue is available.

Courts throughout the country are considering modification of custody by parents, mainly in the context of guardianship cases. The Supreme Court of Arkansas noted a split in how states are dealing with this subject with the majority of state courts finding that parent's constitutional rights must be given some weight. *In the Matter of the Guardianship of S.H.*, 2012 Ark 245, 409 SW 307 (2012). In a guardianship termination case, the Maine Supreme Court held that the third party must show by a preponderance of the evidence that the parent is unfit to retain custody. *In re guardianship of David C.,* 2010 Me 136, P4, 10 A3d 684 (Me 2010). That court stated:

> "[b]ecause of the fundamental parental rights at issue, we recently held that a court must address parental fitness in guardianship termination proceedings, recognizing that "any decision . . . limiting the right of a parent to physical custody of his child also affects his constitutionally protected liberty interest in maintaining his familial relationship with the child." *Guardianship of Jeremiah T.*, 2009 ME 74, PP26-28, 976 A.2d 955, 962-63."

In re guardianship of David C., 2010 Me at 112.

The New Hampshire Supreme Court, in a similar proceeding, stated:

> "[w]e first examine whether the *Troxel* presumption applies in a proceeding to terminate a guardianship established by consent. Most courts that have examined the issue since *Troxel* have held that it does. *See* *In re D.I.S.*, 249 P.3d 775, 783, 784 (Colo. 2011) (citing cases); *In re Guardianship of David C.*, 2010 ME 136, 10 A.3d 684, 686 (Me. 2010); *In re Guardianship of D.J.*, 682 N.W.2d 238, 246, 268 Neb. 239 (Neb. 2004); *In re Guardianship of Barros*, 701 N.W.2d 402, 407, 2005 ND 122 (N.D. 2005); *Boisvert v. Harrington*, 173 Vt. 285, 796 A.2d 1102, 1108 (Vt. 2002); *In re SRB-M*, 2009 WY 22, 201 P.3d 1115, 1119-20 (Wyo. 2009). These courts reason that a parent of a child in a guardianship established by consent is presumptively fit and, thus, the parent's decision to terminate the guardianship is entitled to due regard. *See* *In re D.I.S.*, 249 P.3d at 784."

In re Guardianship of Reena D., 163 NH 107, 112, 35 A 3d 509 (2011).

The Court goes on to explain that "[a] minority of jurisdictions disagree, holding that a parent who voluntarily relinquishes the care, custody and control of his child by consenting to a guardianship also relinquishes his entitlement to the *Troxel* presumption."[12] *In re Guardianship of Reena D.*, at 113. The court

[12] Cases cited by the New Hampshire Supreme Court include *In re Guardianship of L.V.*, 136 Cal App 4th 481, 38 Cal Rptr 3d 894, 896, 902 (Ct App 2006)(*Troxel* inapplicable in a case involving a guardianship established by consent "because they dealt with judicial interference in the day-to-day child rearing decisions of a fit, *custodial* parent." *Id.* at 38 Cal Rptr 3d at 903 (emphasis omitted); and *Grant v. Martin*, 757 So2d 264, 266 (Miss 2000) (Stability of child is of great importance over a parent who relinquished custody thereby forfeiting their right to the presumption they act in best interest of child.)

declined, however, to join those jurisdictions. *Id.*

Given the complexity of the constitutional and procedural issues at play in this case, the need for guidance from the Supreme Court is great.

IV. CONCLUSION

LASO and OLC urge this court to allow review to ensure that the rights of parents under the Due Process Clause of the Fourteenth Amendment are safeguarded. If review is allowed, LASO and OLC expect to file a brief on the merits.

Respectfully submitted this 13th day of December, 2013.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,419.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Respectfully submitted, this 13th day of December, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 13, 2013, I filed the foregoing **BRIEF OF AMICI CURIAE LEGAL AID SERVICES OF OREGON AND OREGON LAW CENTER IN SUPPORT OF PETITION FOR REVIEW** with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

BY FIRST-CLASS MAIL: For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be deposited in the United States mail at Portland, Oregon, with first-class postage thereon fully prepaid and addressed to the postal address(es) indicated below:

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