

No. 101330-2

SUPREME COURT
OF THE STATE OF WASHINGTON

CARMELLA DESEAN,

Petitioner/Appellant,

v.

ISAIAH SANGER,

Respondent.

AMICUS CURIAE BRIEF OF FAMILY VIOLENCE
APPELLATE PROJECT, ET AL, IN SUPPORT OF
APPELLANT

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I. INTRODUCTION

The decision in this case will shape civil protection order proceedings brought by survivors of sexual assault throughout the State of Washington. After the traumatic experience of assault, which is alarmingly pervasive and disproportionately impacts the most vulnerable members of our State, the stigma surrounding sexual assault prevents a significant majority of survivors from reporting the crime to law enforcement. Even when sexual assault is reported, institutional skepticism, anti-survivor bias, sexism, and other harmful misconceptions often prevent criminal prosecution of the perpetrator and amplify harms suffered by survivors.

The Washington State Legislature's primary goal in providing the civil remedy of a sexual assault protection order is to ensure the safety and well-being of

survivors¹ in a fast and efficient manner independent from the criminal process. As compared to myriad harms confronting sexual assault survivors, the potential harm to accused perpetrators from false reporting is relatively low. Adequate procedures exist to ensure that respondents in SAPO proceedings have notice and a meaningful opportunity to be heard.

Adding the affirmative defense of reasonable belief contained in the criminal code—a defense never

¹ The literature is divided on the important question whether it is more appropriate and respectful to refer to those who have suffered domestic and/or sexual violence as “victims” or “survivors.” As one prominent advocacy organization observes: “[F]or many of our organizations, ‘survivor’ speaks to the sense of empowerment our coordinated response aims to encourage in the people we serve.” Women Against Abuse, *The Language We Use*, www.womenagainstabuse.org/education-resources/the-language-we-use (last visited April 14, 2023). For purposes of this brief, amici will refer generally to those who have experienced domestic or sexual violence as survivors, except in direct quotations from other sources.

intended to be part of a special proceeding for obtaining a sexual assault protection order—will corrode the Legislature’s efforts to help sexual assault survivors. Rather than serving to ensure the safety and well-being of survivors, imposition of this affirmative defense would prevent survivors from coming forward to obtain the critical protection they deserve, perpetuate stereotypes and misconceptions against sexual assault survivors, and ultimately, increase harmful impacts of sexual assault on survivors.

II. IDENTITY AND INTEREST OF AMICI

Family Violence Appellate Project (“FVAP”), et al, submits this amicus curiae brief in support of Appellant Carmella DeSean. Amici are interested in the outcome of this appeal because it raises important public policy issues related to the purpose and availability of sexual assault protection orders for survivors of sexual assault.

The detailed interests of FVAP, along with the interests of other Amici, are set forth in the Motion for Leave to File Brief of Amicus Curiae.

III. STATEMENT OF THE CASE

Amici incorporate the facts set out in the Statement of the Case presented in DeSean’s Brief of Respondent filed before the Court of Appeals and in Appellant’s Petition for Discretionary Review and Supplemental Brief filed before the Supreme Court.

IV. ARGUMENT

A. Sexual Assault Protection Orders Are Civil Remedies Designed to Provide Expedient Relief Independent of the Criminal Process for the Safety and Well-Being of Sexual Assault Survivors.

In 2006, the Washington State Legislature (“Legislature”) created the sexual assault protection order (“SAPO”) to provide a civil remedy for survivors of

sexual assault who did not qualify for a domestic violence protection order. *See* RCW 7.90.005. From its inception, the SAPO was intended to fill a gap in the civil law to provide greater protection to sexual assault survivors. *See* H.B. Rep. No. 2576 (Wash. 2006). As set forth in testimony supporting adoption of the SAPO Act (former chapter RCW 7.90 *et seq.*):

When the victim of sexual assault isn't a family member or does not reside with the perpetrator, the only protective order the person can get is an antiharassment order. That person should be able to get the same protections as a domestic violence victim. This bill is needed because if there is no familial tie and it's not a dating relationship, only an antiharassment order is available. Those orders do not require mandatory arrest and a pattern of harassment must be shown. Also, antiharassment orders are not entitled to full faith and credit. No contact orders have their failings too. This legislation is meant to mirror domestic violence protection orders.

S.B. Rep. No. 6478 (Wash. 2006) (companion bill to HB 2576).

In recently enacting RCW 7.105 *et seq.*—which consolidated and harmonized SAPOs with laws governing domestic violence protection orders, stalking protection orders, anti-harassment protection orders, vulnerable adult protection orders, and extreme risk protection orders²—the Legislature has declared that “a victim [of sexual assault] should be able to expediently seek a civil remedy requiring that the perpetrator stay away from the victim, *independent of the criminal process* and regardless of whether related criminal charges are pending.” RCW 7.105.900(3)(b) (emphasis added); *see also* RCW 7.105.900(1) (civil protection orders “are intended to provide a fast, efficient means to obtain protection against perpetrators of harms”). Pursuant to RCW 7.105.225(1)(b), “[t]he court shall

² *See* H.B. Rep. No. 1320 (Wash. 2021); *see also* RCW 7.105.900(5).

issue a protection order if it finds by a preponderance of the evidence . . . that the petitioner has been subjected to nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent.” *See also* RCW 7.90.090(1)(a).

SAPO hearings are special proceedings which supersede inconsistent civil court rules. RCW 7.105.200(1); ER 1101(c)(4); CR 81. A SAPO is neither a criminal matter nor a civil tort where compensation is at stake. The court has flexibility to evaluate the needs and procedures best suited to each hearing “based on a consideration of the totality of the circumstances, including disparities that may be apparent in the parties’ resources and representation by counsel.” RCW 7.105.200(1). The court, however, may not deny or dismiss a petition for a SAPO because the relief sought by the petitioner may be available in a different action

or proceeding or because criminal charges are pending against the respondent. RCW 7.105.225(2)(d). The court is also prohibited from requiring any forensic evidence, including but not limited to proof of injury on the person of the petitioner. RCW 7.105.225(3).

As understood by the Legislature, the availability of such a civil remedy independent of the criminal process is necessary for three reasons. First, survivors who do not report rape may still need to seek safety and protection from future interactions with the perpetrator and have a right to such safety and protection. RCW 7.105.900(3)(b). Second, rape may be reported but not prosecuted. *Id.* Third, there are instances where rape is reported and prosecuted but there is no resulting conviction. *Id.* Under its second and third rationales, the Legislature acknowledges that a SAPO may be granted

when the evidence is insufficient for a rape conviction.

Id.

As civil remedies, the Legislature’s purpose for providing SAPOs is to ensure the safety and well-being of survivors of sexual assault. Underlying this purpose is the recognition—made with the interests of survivors first and foremost in mind—that sexual assault is (1) extremely harmful to survivors, (2) alarmingly pervasive, (3) staggeringly underreported, and (4) disproportionately impactful on the most vulnerable members of society. *See* RCW 7.105.900(3)(b); *see also* *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 151, 839 P.2d 324 (1992) (“the preamble or statement of intent can be crucial to interpretation of a statute”) (citing *Roy v. City of Everett*, 118 Wn.2d 352, 356, 823 P.2d 1084 (1992)).

a. Sexual Assault is Extremely Harmful to Survivors.

Sexual assault is “the most heinous crime against another person short of murder,” inflicting “humiliation, degradation, and terror on victims.” RCW 7.90.005; RCW 7.105.900(3)(b). “Experiencing sexual assault is itself a reasonable basis for ongoing fear.” *Id.* Following initial reactions such as intense fear of their rapists, fear of re-attack, and anxiety about disclosing the assault to others, survivors of rape frequently report low self-esteem, self-blame, panic episodes, disordered eating, sleep problems and nightmares, health problems and somatic complaints, sexual problems, and problems with work and social functioning. See Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome: Empirical Findings and State of the Literature*, 29 Clin. Psychol. Rev. 5, 431-48 (2009); see also Kathleen C. Basile & Sharon G. Smith, *Sexual*

Violence Victimization of Women: Prevalence, Characteristics, and the Role of Public Health and Prevention, 5 Am. J. Lifestyle Med. 5, 407-17 (2011).

While each survivor copes with the trauma of the assault in different ways, approximately one-third of women who have been raped experience post-traumatic stress disorder, a rate 6.2 times higher than those who have not. *Id.* Thirty percent of rape survivors have had a major depressive episode—three times greater than non-rape survivors. *Id.* Sexual assault survivors have three to ten times higher rates of substance abuse. *Id.* Thirty-three percent of rape survivors have contemplated, and 13 percent have attempted, suicide (versus 8 percent and 1 percent, respectively). *Id.*

b. Sexual Assault is Alarmingly Pervasive.

“One in six men, one in three women, and one in two nonbinary persons will experience sexual violence

in their lifetime.” RCW 7.105.900(3)(b). In the United States, one in four women (26.8 percent or 33.5 million) report completed or attempted rape victimization at some point in their lifetime. Ruth W. Leemis et al., *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*, at 6, Centers for Disease Control and Prevention (2022). Nearly one in five women in the United States (18.3 percent) have been raped. U.S. Dep’t of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, at 5 (2015).

c. Sexual Assault is Staggeringly Underreported.

“Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities.” RCW 7.105.900(3)(b) and RCW 7.90.005. “In adopting [the initial SAPO Act], the

legislature was specifically concerned by the large percentage of rapes and sexual assaults that go unreported or unprosecuted each year.” *Nelson v. Duvall*, 197 Wn. App. 441, 455, 387 P.3d 1158 (2017). One study from Washington State, for example, found that just 15 percent of women who were sexually assaulted reported their assault to the police and that only half of those reports resulted in charges filed. See Washington State Supreme Court Gender & Justice Commission, *Sexual Assault Bench Guide for Judicial Officers*, at 1-1 (Laura Jones & Hon. Dennis Yule eds., 2019) (citing Lucy Berliner et al., *Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women*, at 21-22 (Seattle: Harborview Medical Center 2001); see also Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future*

Directions for Research and Reform, 18 Violence Against Women 2, 157 (2012) (for every 100 forceable rapes committed: less than 20 are reported to police or other authority figures, less than 6 are prosecuted, less than 5 result in conviction, and less than 2.8 result in incarceration).

d. Sexual Assault is Disproportionately Impactful on the Most Vulnerable Members of Society.

“Individuals with disabilities; black and indigenous communities; and lesbian, gay, bisexual, transgender, queer, and other individuals experience a higher rate of sexual violence.” RCW 7.105.900(3)(b). Nearly 27 percent of Native women in the United States will experience rape in their lifetime. Andrea J. Ritchie, *Expanding our Frame: Deepening our Demands for Safety and Healing for Black Survivors of Sexual Violence*, at 7, National Black Women’s Justice Institute

(2019). More than one in four non-Hispanic Black women (29 percent) were raped in their lifetime. Leemis et al., at 5. Forty-seven percent of all transgender people have been sexually assaulted at some point in their lives, and 32.9 percent of adults with intellectual disabilities have experienced sexual violence. National Sexual Violence Resource Center, *Drawing Connections: Prevention Demands Equity*, www.nsvrc.org/saam/drawingconnections (last visited April 14, 2023).

The disproportionate impact of sexual assault on survivors from marginalized communities compounds problems with the reporting and conviction of rape. For example, one study indicates that for every Black woman who reports a rape, at least 15 Black women do not. See Timothy C. Hart & Callie Rennison, *Reporting Crime to the Police, 1999-2000*, Bureau of Justice

Studies: Special Report, U.S. Dept. of Justice (March 2003). Deep-rooted credibility discounting of people of color, the impoverished, and those suffering from mental illness and substance abuse contributes to diminished rape conviction rates. See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing their Experiences*, 167 U. Pa. L. Rev. 399, 432-38 (2019).

B. Respondent's Attempt to Highlight the Prevalence and Impact of False Reporting by Sexual Assault Survivors is a Red Herring.

The known harms to survivors of sexual assault greatly outweigh potential harm to respondents. Sexual assault survivors stand to confront considerable physical, psychological, emotional, and economic harm. As a fast and efficient means of obtaining protection, SAPOs provide for survivors' safety and enable them to heal. SAPOs also reduce individual and societal costs by

preventing further instances of sexual assault. A recent Center for Disease Control and Prevention study estimates that the lifetime cost of rape is \$122,461 per survivor, or a population economic burden of almost \$3.1 trillion (2014 U.S. dollars) over survivors' lifetimes, based on data indicating that more than 25 million U.S. adults have been raped. *See* Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 Am. J. Prev. Med. 6, 691-701 (2017).

In contrast, there is no known data on the effects of SAPOs on perpetrators nor the extent to which SAPOs detrimentally affect accused perpetrators. The Legislature's sole reference to "stigma" in the SAPO statutes is made with respect to *sexual assault survivors*, not accused perpetrators. *See* RCW 7.105.900(3)(b) ("Because of the stigma of a sexual assault and trauma, many victims are afraid or not

ready to report to law enforcement and go through the rigors of the criminal justice process”) (emphasis added). Contrary to the belief cited by Respondent (circa 1680),³ “[r]ape is a very difficult accusation to make, and it is relatively easy to defend, because there are a host of stereotypes and misconceptions that stand ready to assist.” Herb Tanner, *Start by Believing to Improve Responses to Sexual Assault and Preventing Gender Bias*, at 5, End Violence Against Women International (2022). The vast majority of sexual assaults are never reported to the police. RCW 7.105.900(3)(b) and RCW 7.90.005.

Sexual assault survivors face institutionalized skepticism, anti-victim bias, sexism, and harmful misconceptions reinforced by rape culture. They often do

³ See Respondent’s *Answer to Petition for Discretionary Review*, at 28.

not call the police because they have had past experiences (either directly or through acquaintances) where the incident is minimized, the survivor is blamed, or the police simply take no action. Donna Coker et al., *Responses from the Field: Sexual Assault, Domestic Violence and Policing*, at 16, American Civil Liberties Union (2015). In effect, calling the police and not receiving assistance is worse than not calling the police because it may embolden and enrage the abuser. *Id.*

Although there is no empirical data to prove that there are more false charges of rape than any other violent crime,⁴ inaccurate perceptions around the false reporting of sexual assault are commonly held by

⁴ See, e.g., Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1028 (1991). Respondent himself notes that “the statistical likelihood of false reporting may appear rather low” Respondent’s *Answer to Petition for Discretionary Review*, at 27.

members of the public, prosecutors, and police officers. Hanif Qureshi & Jee Yearn Kim, *Busting the Myth about Women and Sexual Assault*, 22 Sexual Assault Report 1, 1 (2018). Many inaccurately view false reports as common—perhaps as high as 30 percent to 40 percent. *Id.*

Common misconception about the false reporting of rape may be partially attributed to the fact that law enforcement agencies generally do not differentiate reports that are not pursued. *Id.* According to the FBI's Uniform Crime Report, the "unfounded" rate for rape is 8.4 percent, which includes reports that both do not meet the legal definition of sexual assault but are presumed truthful (i.e., "baseless") and are deliberately fabricated (i.e., false). *Id.* However, one recent study sponsored by the National Institute of Justice found that the rate of false reports, as separated from "baseless"

claims, among cases reported to the Los Angeles Police Department was 4.5 percent—much lower than commonly believed. See Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 *Law & Society Review* 1, 161-192 (2014).

More significantly, however, a host of deeply entrenched biases and stereotypes—including systemic racism, anti-victim bias, and sexism—play powerful roles in discrediting survivors and denying them relief. Sexual assault survivors and perpetrators are of all races, “[y]et the kind of rape that has been treated most seriously throughout this nation’s history has been the illegal forcible rape of a white woman by a Black man.” Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *Harv. Women’s L.J.* 103, 104-05 (1983). This legacy permeates thought about rape and race. *Id.* “A wide array of women

may be viewed as untrustworthy because of who they are—women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who are many or all of the above.” Epstein & Goodman, at 437-38; *see also* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 *Tulsa L. Rev.* 1, 2 (2017).

Gender bias—explicit or implicit, conscious or unconscious—may result in police officers misclassifying or underreporting sexual assault; inappropriately concluding that sexual assault cases are unfounded; failing to test sexual assault kits; and interrogating rather than interviewing survivors and witnesses. U.S. Dep’t of Justice, at 3. If gender bias influences the initial response or investigation of alleged sexual assault, it may compromise the ability of law

enforcement to ascertain critical facts, accurately determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable. *Id.*

These and other stereotypes and misconceptions surrounding sexual assault amplify its harmful effects. Among the factors playing a role in whether rape survivors experience post-traumatic stress disorder are negative or unsupportive reactions after disclosing the rape to others. Kathleen C. Basile & Sharon G. Smith, *Sexual Violence Victimization of Women: Prevalence, Characteristics, and the Role of Public Health and Prevention*, 5 *Am. J. Lifestyle Med.* 5, 407-417 (2011). Responses that blame survivors for their victimization increase the likelihood of substance abuse, anxiety, depression, PTSD, and suicidal ideation. Olivia Mann & Bridget Diamond-Welch, *Sharing Gender, Shifting*

Blame: The Effects of Victim Gender and Observer Sexuality on Victim Blame, 22 Sexual Assault Report 1, 1 (2018).

The potential harms faced by accused perpetrators are less significant compared to those confronting survivors of sexual assault. Accused perpetrators may face potential reputational harm, but reputation alone does not implicate a “liberty” or “property” interest sufficient to invoke the procedural protection of Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 712, 96 S. Ct. 115, 47 L. Ed. 2d 405 (1976); accord *Siegert v. Gilley*, 500 U.S. 226, 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (injury to reputation by itself is not a protected ‘liberty interest’). Further, the burden of being restrained by a SAPO is a “[r]easonable exercise of police power requiring one person’s freedom of movement to give way to another person’s freedom not to be

disturbed.” *Spence v. Kaminski*, 103 Wn. App. 325, 336, 12 P.3d 1030 (2000) (citing *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741 (1998)). As with stalking protection orders and domestic violence protection orders, a SAPO “curtails an abuser’s right to move about when such movement is harmful or illegal and interferes with the victim’s right to be free of invasive, oppressive and harmful behavior.” *Id.*

C. Washington Laws and Public Policy Support Civil Protection Order Proceedings Remaining Separate from Criminal Procedures.

Guided by separate policies, the laws governing SAPOs and the criminal code were not designed by the Legislature to be fully consistent and harmonious. Unlike the provisions governing criminal offenses, the general purposes underlying SAPOs do not include prescribing penalties to perpetrators. Instead, the

primary purpose governing SAPOs is to expediently provide a civil remedy for the safety and well-being of sexual assault survivors. *See* RCW 7.105.900(3)(b) and RCW 7.90.005. While a conviction of rape must be proved beyond a reasonable doubt, the court is required to issue a sexual assault protection order if it finds by a preponderance of the evidence that the petitioner has been subjected to nonconsensual sexual conduct or nonsexual penetration by the respondent. *See* RCW 7.105.225(1)(b). Nothing in Washington public policy or the law itself points to a heightened burden for survivor petitioners in SAPO proceedings. Imposing a criminal affirmative defense⁵ into the special SAPO civil

⁵ As set forth in RCW 9A.44.030(1):

In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the

proceedings would undermine the Legislature's intent that SAPOs provide fast, efficient protection for survivors of sexual assault.

Respondents, moreover, are provided with a meaningful opportunity to testify and provide their own evidence during SAPO hearings. *See* RCW 7.105.200(5). Respondents may explain their own version of events, including that no sexual contact occurred or that they believed the petitioner had the capacity to consent. The court would then weigh this evidence along with the other evidence in reaching a conclusion about whether the petitioner had capacity. *See* RCW 7.105.200(10) (“When a petitioner has alleged incapacity to consent to sexual conduct or sexual penetration due to intoxicants,

evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

alcohol, or other condition, the court must determine on the record whether the petitioner had the capacity to consent”); *accord Nelson*, 197 Wn. App. at 456. Respondents may also request to stay, continue, or delay a SAPO hearing if there is a pending and parallel criminal investigation or prosecution involving the respondent, notwithstanding that the court is required to “apply a rebuttable presumption against such delay and give due recognition to the purpose of [RCW 7.105 *et seq.*] to provide victims quick and effective relief.” RCW 7.105.200(4).

The Court of Appeals decision constructs a hurdle for obtaining a sexual assault protection order that is both unintended by the Legislature and contrary to its intent. *See Towle v. Dept. of Fish and Wildlife*, 94 Wn. App. 196, 207, 971 P.2d 591 (1999) (“Courts should adopt the interpretation which best advances the

legislative intent”) (citing *Rozner v. Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). Considering the multitude of obstacles already confronting sexual assault survivors, it would contradict the State’s sound public policy establishing the SAPO to create *additional barriers* for them (particularly those based in criminal procedure) when a respondent’s due process is fully satisfied.

In addition to discouraging survivors from seeking protection, those survivors who have no recollection of their assault because of intoxication—whether involuntary or voluntary—would necessarily be unable to prove the respondent’s intent. This would be devastating to many survivors, as a significant number of sexual assaults are alcohol and drug-related. *See, e.g.,* Laurie A. Richer et al., *Characterizing Drug-Facilitated Sexual Assault Subtypes and Treatment Engagement of*

Victims at a Hospital-Based Rape Treatment Center, 3 Journal of Interpersonal Violence 10, 1524-42 (2017) (in study of 390 sexual assault survivors who sought services at an urban rape center, 45.7 percent of cases with male survivors and 28.1 percent with female survivors involved the survivor being given drugs against their will or without consent, and 28.3 percent of sexual assault cases with male survivors and 21.8 percent of cases with female survivors involved the victim voluntarily using substances); *see also* Leemis et al., at 22 (indicating more than 12 percent of women in the United States have experienced alcohol or drug-facilitated rape). Allowing the affirmative defense from the criminal code in SAPO special proceedings would weaken the ability of survivors to obtain the protections to which they are rightly entitled under the SAPO statute.

V. CONCLUSION

For the reasons set forth above, the Supreme Court should determine that the sexual assault protection order statute comports with Washington public policy and does not incorporate criminal code defenses by implication. Doing so would create insurmountable barriers for survivors—particularly those who were incapacitated and those from marginalized communities who are disproportionately impacted by this “heinous” violation.

Pursuant to RAP 18.17, I certify that the foregoing contains 4,103 words.

DATED this 17th day of April, 2023.

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DECLARATION OF SERVICE

I am over the age of eighteen years, not a party to this action, and competent to be a witness herein. On April 17, 2023, I caused the foregoing document to be served as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

DATED this 17th day of April, 2023, at Bainbridge Island, Washington.

s/ Evangeline Stratton

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