THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 99564-8

AJI P. *et al.,*

Petitioners,

vs.

STATE OF WASHINGTON *et al.,*

Respondents

BRIEF OF AMICI CURIAE ENVIRONMENTAL GROUPS

Dan J. Von Seggern, WSBA No. 39239
Center for Environmental Law & Policy
85 S. Washington St, Suite 301
Seattle, WA 98104
T: (206) 829-8299
Email: dvonseggern@celp.org

Attorney for Amici Environmental Groups

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I. INTRODUCTION

Pursuant to RAP 10.6, *amici* Center for Environmental Law & Policy, Cascadia Climate Action, Climate Action Bainbridge, East Shore Unitarian Church, Earth Law Center, Friends of Toppenish Creek, Kitsap Environmental Coalition, NoMethanol360, Olympic Climate Action, Puget Soundkeeper, Sierra Club, South Seattle Climate Action Network, 350 Eastside, 350 Seattle, 350 Tacoma, and 350 Wenatchee (collectively, "Environmental Groups") respectfully offer the following information and argument to assist the court in its decision as to whether to accept review in this important constitutional case.

Environmental Groups offer the long-standing recognition in Washington law of a fundamental right to a healthful and pleasant environment which includes a stable climate system that sustains human life and liberty, and that in turn supports the more specific rights enumerated in the State and Federal Constitutions and elucidated by the courts. Environmental Groups concur with Petitioners' arguments that the important constitutional issues raised in this case deserve the attention of the state's highest court.

II. IDENTITY AND INTERESTS OF THE AMICI

Environmental Groups hereby incorporate by reference their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae, filed concurrently with this brief.

III. STATEMENT OF THE CASE

Environmental Groups adopt the statement of the case as set forth in Petitioners' Petition for Review, filed in this matter March 10th, 2021.

IV. ARGUMENT

A. A healthful and pleasant environment which includes a stable climate system that sustains human life and liberty is fundamental to American guarantees of life, liberty, and the pursuit of happiness.

The American concept of inalienable rights to "life, liberty, and the pursuit of happiness"[1] allows every person to choose his or her own path in life.[2] Our ideals of freedom, opportunity, and individualism implicitly encompass a belief that the natural environment, the ecological foundation of our democracy, will continue to support these individual choices for generations to come.[3]

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[1] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[2] The "inalienable right" to "follow any of the common occupations of life" is protected by the Fourteenth Amendment's guarantee of rights to "life, liberty, and property." *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90, 17 S. Ct. 427, 41 L. Ed. 832 (1897).

[3] For example, the right to farm or fish would be hollow indeed if the climate could no longer support crops, or if the ocean became too warm and acidic to support fish and shellfish. See also *United States v. Washington*, 853 F. 3d 946, 965 (2017) (recognizing Tribal fishing rights are worthless if the environment does not support habitat for fish).

Put another way, the right to a healthful and pleasant environment underlies our continued ability to claim our explicitly-guaranteed rights to life and liberty.[4] Precisely *because* the right to a healthful and pleasant environment is so fundamental, it should be no surprise it is not enumerated in the State or the Federal Constitution, which were written at a time when the country's and state's resources would have appeared to be limitless.[5]

Inclusion of the specific rights that *were* enumerated in the Federal Constitution (and later the Washington document) was based on concrete and immediate concerns; the 17th Century, when the New England colonies were being established, was a time of political and religious turmoil that included the English Civil War. Freedoms of religion, speech, and assembly had been under attack by governments[6] and the need to protect the citizenry against such government intrusions would have been readily apparent.[7] In contrast to these familiar threats, it would have been simply unthinkable that

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[4] *See* Gov. Elisha P. Ferry's Inaugural Message (Nov. 11, 1889) (connecting citizens' "prosperity, health and happiness" to the state's "climate which commend itself to all who experience it . . .."). BARTON'S LEGISLATIVE HAND-BOOK AND MANUAL OF THE STATE OF WASHINGTON 126 (C.M. Bartlett, ed. 1889) available at http://leg.wa.gov/LIC/Documents/Historical/Legislative%20Manuals/1889-1890%20Legislative%20Manual.pdf (last visited June 18, 2021).

[5] Wash. Const. art. I, § 30 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.").

[6] See Steve Bachmann, *Starting Again with the Mayflower … England's Civil War and America's Bill of Rights*, 20 Quinnipiac L. Rev. 193, 215-59 (2000).

[7] So too the founding of Washington. As this Court has noted, those rights "such as the history and experience of our people had shown were most frequently invaded by arbitrary power" were "defined and asserted affirmatively" in drafting the State Constitution and the Bill of Rights. *State of Wash. v. Clark*, 30 Wash. 439, 444 (1902).

government action could imperil the vast resources of North America and of Washington, or that the environment might be unable to support our way of life.[8] But climate change now poses precisely that existential threat.

B. Washington law recognizes the right to a healthful and pleasant environment.

RCW 43.21A.010 (part of the Department of Ecology's enabling statute) "recognizes and declares" a "policy of this state" that a fundamental right to a healthy environment exists. The Court of Appeals incorrectly reads this language as a non-binding policy statement, while ignoring the constitutional import of failing to acknowledge an existing, natural right.[9]

The opinion below is also at odds with this Court's State Environmental Policy Act (SEPA) precedents affirming a "fundamental right." *Leschi Improvement Council v. Wash. State. Hwy. Comm'n.*, 84 Wn.2d 271, 280 (1974), explained that:

> The right of petitioners affected to a "healthful environment" is expressly recognized as a "fundamental and inalienable right" by the language of SEPA. The choice of this language in SEPA indicates

[8] Sadly, we now face the reality of a changing climate which threatens the very foundation of our way of life. *See* SNOVER, A.K, G.S. MAUGER, L.C. WHITELY BINDER, M. KROSBY, AND I. TOHVER, CLIMATE IMPACTS GROUP, UNIVERSITY OF WASHINGTON, SEATTLE, CLIMATE CHANGE IMPACTS AND ADAPTATION IN WASHINGTON STATE: TECHNICAL SUMMARIES FOR DECISION MAKERS. STATE OF KNOWLEDGE REPORT PREPARED FOR THE WASHINGTON STATE DEPARTMENT OF ECOLOGY (2013).

[9] The Court of Appeals' conclusion that the right to a healthful environment is merely a "policy" depends on flawed and circular logic. If a "policy" cannot confer a right, then it can only recognize a right that has some other basis. But if the right to a healthful environment has no other basis, then there would be nothing for the "policy" to recognize and the language of RCW 43.21A.010 on this point (as well as SEPA and MTCA) is so much meaningless verbiage.

> in the strongest possible terms the basic importance of environmental concerns to the people of this state.

Leschi's plain language, and that of decisions following it,[10] simply cannot be squared with a view that SEPA merely states a "policy" that is of no relevance when evaluating whether the right is embedded in our societal values. The Court of Appeals' analysis would make sense if Petitioners had brought a statutory claim to enforce RCW 43.21C.020 or RCW 70A.305.010. But here Petitioners brought a constitutional substantive due process claim and cite to these statutory provisions in support of judicial recognition of a right the legislature and voting public recognize to exist.

C. The Federal cases on which the Court of Appeals relied are inapposite.

The Court of Appeals relied on several Federal decisions for its view that there was no "fundamental right to a healthful environment." But these cases are inapposite for two reasons. First, none of them analyzes whether a fundamental right exists to enjoy a healthful and pleasant environment that supports other enumerated rights to life and liberty. Second, as Federal

[10] *Leschi* further noted that SEPA is more strongly worded than the National Environmental Policy Act ("[t]he Congress recognizes that each person *should* enjoy a healthful environment . . ."), and that approval under SEPA "impliedly, if not expressly, determines that the project is consistent with the citizen's fundamental right to a healthful environment." *Id.* at 280; *Id*. at 285. (*Emphasis added*). See also *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 91-2 (2017) (SEPA recognizes fundamental right to healthful environment); *Olympic Stewardship Found. v. Envtl & Land Use Hr'gs Office*, 199 Wn. App. 668, 689 (2017) (state laws interpreted in accordance with SEPA's recognition of "fundamental and inalienable right to a healthful environment"); *accord*, *Puget Soundkeeper All. v. Poll. Cont. Hr'gs Bd.*, 189 Wn. App. 127, 148, (2015).

cases, they cannot dictate whether this fundamental right is protected by the Washington Constitution.

1. The cited Federal cases address specific, narrow issues.

Clean Air Council v. United States, 362 F. Supp. 3d 237, 250 (2019) is cited for the proposition that there is no "fundamental right to a life-sustaining climate system." But *Clean Air Council* cannot carry this burden; it undertakes no analysis of whether a right to a healthful and pleasant climate exists and cites to no other authority which does.[11]

The Court of Appeals also cites *SF Chapter of A. Philip Randolph Inst. v. U.S. EPA*, 2008 U.S. District LEXIS 27794 at *7, as holding that "the right to be free from climate change pollution is not a fundamental right under the Fourteenth Amendment." *Randolph* too fails to address the right as it is framed in Washington law.[12] Nor does *Concerned Citizens of Nebraska v. U.S. Nuclear Regulatory Commission*, 970 F.2d 421 (8th Cir.

[11] On this point, *Clean Air Council* cites to *National Sea Clammers Assn. v. New York*, 616 F.2d 1222, 1238 (3d Cir. 1980), which concerned local sewage discharges. For the proposition that there is "no constitutional right to a clean environment," *Sea Clammers* then cites to *Long Beach v. New York*, 445 F. Supp. 1203, 1212 (1978), also addressing only local discharges (sewage sludge) into water. And *Long Beach* cites only to cases involving local environmental impacts, including *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971)(siting a correctional facility); *Hagedorn v. Union Carbide Corp*., 363 F. Supp. 1061, 1064-65 (N.D.W.Va.1973)(air pollution from industrial plant); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 579 (E.D.Va.1972) (emissions and noise from airport).

[12] *Randolph* relies solely on *Pinckney v. Ohio EPA*, 375 F. Supp. 305, 309-10 (N.D. Ohio 1974), addressing local air pollution that would have resulted from construction of a shopping mall (and in fact *never* mentions the overall climate system).

1992); there, the plaintiffs claimed a right to be free from *local* exposure to low-level radiation from a nuclear waste dump.

Each of these decisions dealt whether there is a right to be free from a *particular* pollutant or annoyance, which is vastly different from a right to a healthful and pleasant environment that supports, and is necessary for exercise of, the explicitly recognized constitutional rights to life and liberty.

One Federal case *has* squarely addressed the right to a healthful climate. In *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (*rev'd on other grounds by Juliana v. U.S.*, 947 F.3d 1159, 1175 (9th Cir. 2020)) the U.S. Court for the District of Oregon considered a very similar claim and found that due process rights were implicated when government causes dangerous climate change:

> "where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. . . . Plaintiffs have adequately alleged infringement of a fundamental right.
>
> *Juliana*, 217 F. Supp. 3d at 1250.

Unlike the cases cited by the Court of Appeals, *Juliana* addresses the right to a stable climate system which supports our very lives and

liberties,[13] and is far more persuasive than the factually distinguishable Federal cases cited in the Court of Appeals' opinion.[14]

2. Federal court decisions are not controlling precedent for interpreting the Washington Constitution.

Federal courts cannot dictate whether a fundamental right is guaranteed by Washington's Constitution.[15, 16] The U.S. Supreme Court has emphasized that it is "fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. National Tea Co*., 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940)); *accord, Florida v. Powell*, 559 U.S. 50, 56, 130 S. Ct. 1195, 175 L. Ed. 2d 1009 (2010). The Federal decisions cited by the Court of Appeals cannot be used to trump the legislature's and voting public's declarations[17] of what rights are "fundamental and inalienable" in Washington society.

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[13] The 9th Circuit's eventual reversal of *Juliana* on redressability grounds assumed the right existed. *Juliana v. United States*, 947 F.3d at 1175. Further, the panel's redressability holding is now in question in light of the Supreme Court's decision in *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 798 (2021) (nominal damages, a form of declaratory relief, suffices for redressability).

[14] Each of the cited Federal cases dealt with harms that, while they might reduce quality of life, fell far short of an existential magnitude. In contrast, the Youth Petitioners' claims here deal with threats to humanity's very ability to continue to live on this planet.

[15] This principle is especially relevant here, as the Washington Constitution is more protective than the Federal Constitution of some individual rights. For example, our Constitution, unlike the Federal document, contains an explicit right to privacy: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. 1 § 7.

[16] *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this court reads the Federal Constitution . . . .").

[17] Both the Legislature, in enacting SEPA, and the People, in passing MTCA by initiative, have recognized the right to a healthful climate as "fundamental and inalienable."

D. Denial of the right to a healthful and pleasant environment would position Washington as the exception rather than the rule.

The vast majority of nations have recognized the importance of the right to a healthful environment. Of the UN's 193 members, 177 recognize this right either through their constitutions, statutory or decisional law, or ratification of international agreements.[18]

The laws of other nations also provide persuasive authority on another critical aspect of personal liberty. Interpreting the Eighth Amendment's prohibition on cruel and unusual punishment, the U.S. Supreme Court discussed the international consensus against imposing the death penalty for offenses committed as a minor. *Roper v. Simmons*, 543 US 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The *Roper* Court noted that "[i]t does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id*. Five years after *Roper*, the Court explained that "the laws and practices of other nations and international agreements" were relevant to its analysis "not because those norms are binding or controlling but because the judgment of the world's

[18] David Boyd, *The Constitutional Right to a Healthy Environment*, 54(4) Environment: Science and Policy for Sustainable Development 3, 4 (2012).

nations . . . demonstrates that the Court's rationale has respected reasoning to support it." *Graham v. Florida*, 560 US 48, 82, 103 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The rationale for considering other nations' law is even stronger in the arena of climate change. *Amici* submit that standing alone against the international consensus regarding the role of the courts in declaring and upholding a the right to a healthful and pleasant environment is no longer a tenable position.

V. CONCLUSION

The fundamental right to a healthful and pleasant environment underlies the enjoyment of the unique rights of our people and is recognized by both statute and decisional law in Washington. Environmental Groups respectfully urge this Court to accept review of this case and reverse the Court of Appeals, so that Washingtonians may continue to enjoy the essential rights to life, liberty, and the pursuit of happiness.

Respectfully submitted this 23d day of June, 2021.

/s/ Dan J. Von Seggern

Dan J. Von Seggern, WSBA #39239
Center for Environmental Law & Policy
85 S. Washington St., Suite 301
Seattle, WA 98104
Attorney for Amici Environmental Groups

Telephone: (206) 829-8299
Email: dvonseggern@celp.org

DECLARATION OF SERVICE

I, Dan J. Von Seggern, certify that I am a resident of the State of Washington, residing in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on June 23, 2021, I caused true and correct copies of the following documents to be served on the following via the Washington Appellate Courts secure portal and via electronic mail pursuant to the parties' email service agreement:

Environmental Groups' Motion for Leave to File Amicus Curiae Brief; Brief of Amici Curiae Environmental Groups.

Robert W. Ferguson
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100
judyg@atg.wa.gov

Wyatt Foster Golding
2101 4th Avenue
Suite 1230
Seattle, WA 98121-2323
wgolding@ziontzchestnut.com

Sandra Christine Adix
PO Box 40109
Olympia, WA 98504-0109
sandraa@atg.wa.gov

Jack Warren Fiander
5808 Summitview Ave #97
Yakima, WA 98908-3095
towtnuklaw@msn.com

Richard Kirk Eichstaedt
721 N Cincinnati St
Spokane, WA 99202-2021
eichstaedt@gonzaga.edu

Matthew D. Huot
PO Box 40113
Olympia, WA 98504-0113
MattH4@atg.wa.gov

Charles Marshall Tebbutt
941 Lawrence St
Eugene, OR 97401-2815
charlie@tebbuttlaw.com

Oliver Stiefel
3141 E Burnside St
Portland, OR 97214-1951
oliver@crag.org

Christopher Huriaux Reitz
PO Box 40117
2425 Bristol Ct SW
Olympia, WA 98504-0117
chris.reitz@atg.wa.gov

Daniel James Von Seggern
85 S Washington St Ste 301
Seattle, WA 98104-3404
dvonseggern@celp.org

Ecology Div A.G. Office
2425 Bristol Court SW Second Fl.
P O Box 40117
Olympia, WA 98504-0117
ECYolyEF@atg.wa.gov

Signed and certified on this 23d day of June, 2021,

/s/ Dan J. Von Seggern

Dan J. Von Seggern

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