No. 101960-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JUDITH ZIMMERLY, JERRY NUTTER, and NUTTER CORPORATION,

Petitioners-Appellants,

v.

COLUMBIA RIVER GORGE COMMISSION, CLARK COUNTY, FRIENDS OF THE COLUMBIA GORGE, JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN,

Respondents-Appellees.

ANSWER OF RESPONDENTS-APPELLEES FRIENDS OF THE COLUMBIA GORGE, JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING RESPONDENTS

Respondents-Appellees Jody Akers, Paul Akers, Danny Gaudren, Kathee Gaudren, Rachel Grice, Zachary Grice, Greg Misarti, Edmond Murrell, Kimberly Murrell, Richard J. Ross, Karen Streeter, Sean Streeter, and Eleanor Warren (collectively, "Neighbors") and Friends of the Columbia Gorge ("Friends") request that the Court deny review of the Court of Appeals decision.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek discretionary review of a unanimous, published decision of the Washington Court of Appeals, Division II, filed April 4, 2023. *Zimmerly v. Columbia River Gorge Comm'n*, ___ Wn. App. 2d ___, 527 P.3d 84 (2023).

III. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The Columbia River Gorge Commission ("Gorge Commission" or "Commission") had jurisdiction to hear and decide the administrative appeals below pursuant to federal,

interstate, and state authorities, including section 15(a)(2) of the Columbia River Gorge National Scenic Area Act ("Scenic Area Act" or "Act"), 16 U.S.C. § 544m(a)(2); the Columbia River Gorge Compact ("Compact") (codified at RCW 43.97.015 and ORS 196.150); the *Management Plan for the Columbia River Gorge National Scenic Area* ("Management Plan" or "Plan")[1]; Gorge Commission Rules Chapter 350, Division 60[2]; and the Land Use Petition Act ("LUPA"), RCW 36.70C.030(1)(a)(ii).

2. Because Clark County's final order in this matter was a "final action or order of a county relating to the implementation of" the Scenic Area Act, 16 U.S.C. § 544m(a)(2), the Commission had jurisdiction to hear the appeals of the County's final order.

3. Although Petitioner Judith Zimmerly ("Zimmerly") once had a vested right to mine the subject property pursuant to

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[1] The current version of the Plan, adopted in 2020, is available at <https://gorgecommission.org/management-plan/plan/>.

[2] The Commission Rules are available at <https://gorgecommission.org/about-crgc/legal-authorities/>.

the Gorge Commission's 1993 land use approval, that 1993 permit expired and was voided under its own terms long ago. Furthermore, this appeal has never involved numerous issues and claims raised for the first time in the Petition for Review, including the diminishing assets doctrine, the reclamation language of the *Columbia River Gorge National Scenic Area Final Interim Guidelines* ("Final Interim Guidelines" or "FIGS"), the unmistakability doctrine, the police powers of the State of Washington, and various constitutional challenges.

IV. COUNTERSTATEMENT OF THE CASE

Friends and Neighbors reject Petitioners' Statement of the Case, much of which inappropriately contains legal argument, misstates the facts and procedural history of the case, and raises new issues and claims not raised below—all of which violates RAP 10.3(a)(5).

Friends and Neighbors will respond throughout this Answer to the improperly included material. Otherwise, Friends and Neighbors rely on the Counterstatement of the Case in the

Commission's Answer, and on Friends and Neighbors' and the Commission's Statements of the Case in their briefing at the Court of Appeals.[3]

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Petition improperly seeks review of numerous new issues not raised below.

For more than five years of litigating this matter[4] at five different levels of review,[5] Petitioners have continually raised new issues in nearly every pleading and brief they have filed. Now, in their Petition for Review, they once again raise numerous new issues. Petitioners' approach of continually raising new issues on appeal is improper, and it constitutes sufficient basis to deny their Petition.

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[3] Friends and Neighbors also adopt all legal arguments and statements of fact in the Commission's Answer.

[4] Petitioners filed their first administrative appeal in this matter on April 10, 2018. (County Rec. 2316.)

[5] The Clark County Hearing Examiner, Gorge Commission, Clark County Superior Court, Washington Court of Appeals, and now, the Washington Supreme Court.

The newly raised issues, objections, claims, and arguments in the Petition for Review include the unmistakability doctrine,[6] an alleged usurpation by the Commission of the police powers of the State of Washington,[7] alleged failures by the decision makers below to apply the diminishing assets doctrine[8] and the reclamation language of the 1987 Final Interim Guidelines,[9] a constitutional void-for-vagueness challenge to the discontinuance language of the FIGs,[10] and other newly alleged violations of Petitioners' due process rights.[11]

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[6] Pet. for Review at 13–14.

[7] Pet. for Review at 4, 11–14, 18–19, 28.

[8] Pet. for Review at 2, 4, 19–20, 22–29. At the Court of Appeals, Petitioners mentioned the diminishing assets doctrine only in passing, without assigning error or otherwise asserting that the Commission erred in not applying it. (*See* Zimmerly & Nutter's Opening Br. at 45; Zimmerly's Reply Br. at 16, 19.)

[9] Pet. for Review at 2, 27. At the Court of Appeals, Nutter argued the exact opposite of this new claim, at that time contending that the Commission was *prohibited* from applying the FIGs in this matter. Nutter's Reply Br. at 10.

[10] Pet. for Review at 2, 19–22, 27, 29.

[11] Pet. for Review at 2, 19–29. Although Petitioners raised due process claims below, the specific due process claims raised in the Petition for Review are all new.

All of these items are new, and none of them should be entertained by this Court. *See Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 678, 343 P.3d 746 (2015) ("This court generally does not consider issues, even constitutional ones, raised first in a petition for review . . . ."); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 130–31, 847 P.2d 428 (1993) (review of issue was "precluded under RAP 2.5(a) as one raised for the first time on appeal") (footnote omitted).

To properly raise new constitutional issues, Petitioners must demonstrate a "manifest error affecting a constitutional right." RAP 2.5(a). Petitioners fail to make that required showing.

Specifically, Petitioners now argue that the Court of Appeals erred and violated Petitioners' due process rights by failing to (1) apply the diminishing assets doctrine, (2) apply the reclamation language of the 1987 FIGs, and (3) consider whether the discontinuance language of the FIGs was unconstitutionally

vague—even though Petitioners themselves did not ask the Court of Appeals to do these things. These newly invented claims do not involve any manifest error. Rather, these are (meritless) claims that Petitioners *could have* raised against Clark County's original land use enforcement order. In belatedly raising these claims now, Petitioners fail to demonstrate manifest error. *See In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) ("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.") (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

B. The Petition does not meet any of the criteria for discretionary review.

The Petition does not meet any of the criteria in RAP 13.4(b) for discretionary review.

1. The Court of Appeals decision does not conflict with any Washington appellate decision.

The Court of Appeals decision does not conflict with any prior Washington appellate decision.

a. The Court of Appeals decision is consistent with *Lauer* and *Phoenix Development*; those cases did not involve any of LUPA's jurisdictional exceptions, such as the exception involved here.

First, Petitioners assert that the Court of Appeals decision conflicts with *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011), and *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011). (Pet. for Review at 6–7.) But there is no conflict with these cases.

The instant case involves RCW 36.70C.030(1)(a)(ii), a provision of LUPA that was not involved in either *Lauer* or *Phoenix Development*. Although LUPA is generally the exclusive means of appealing local land use decisions in Washington, LUPA itself carves out a jurisdictional exception for "[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board." RCW 36.70C.030(1)(a)(ii).

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Here, the Gorge Commission, Superior Court, and Court of Appeals all correctly concluded that the Commission is such a quasi-judicial body, because it is created by both state law and federal law. CRGC Rec. 20–21; CP 1239–40; 527 P.3d at 95, 97. As pertinent here, the Commission was created by Washington law via the bistate Columbia River Gorge Compact, which is "declared to be the law of this state." RCW 43.97.015. Thus, the Commission is a quasi-judicial body created (in part) by state law whose jurisdiction is acknowledged within LUPA at RCW 36.70C.030(1)(a)(ii).[12]

In contrast with this appeal, *Lauer* and *Phoenix Development* merely allude to the general rule at RCW 36.70C.030(1) that LUPA is "the exclusive means of judicial review of land use decisions," without applying RCW

[12] Moreover, 16 U.S.C. § 544m(a)(2) gives the Commission appellate jurisdiction over county land use decisions in the National Scenic Area, and that statutory provision is incorporated into the Compact at article I(a). Thus, the Commission has jurisdiction under federal, interstate, and state law.

36.70C.030(1)(a)(ii) or any of LUPA's other jurisdictional exceptions. *See Lauer*, 173 Wn.2d at 252; *Phoenix Dev.*, 171 Wn.2d at 828.[13] Nor did either of those cases involve appellate review by an interstate body established by and acting under the authority of federal, interstate, and state law, as the Commission did here.

The Court of Appeals' determination that the Gorge Commission is a quasi-judicial appellate body that falls within the exception at RCW 36.70C.030(1)(a)(ii) is thus not in conflict with either *Lauer* or *Phoenix Development*.

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[13] *Phoenix Development* acknowledges the statutory exception at RCW 36.70C.030(1)(a)(ii), without applying it: "LUPA provides the exclusive means for judicial review of a land use decision *(with the exception of those decisions separately subject to review by bodies such as the growth management hearings boards)*."). 171 Wn.2d at 828 (emphasis added).

b. The Court of Appeals decision is consistent with *Hue*; the federal Scenic Area Act and its implementing rules preempt any contrary state and local law.

Petitioners assert that the Court of Appeals decision conflicts with the Supreme Court's decision in *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995), because, as Petitioners contend, the Court of Appeals decision "cedes police power" to the Commission to adopt the guiding land use standards for the National Scenic Area and to hear appeals of county decisions implementing those standards. (Pet. for Review at 11–19.)

Petitioners are wrong; there is no conflict with *Hue*. Similar to the ultimate outcome in *Hue*,[14] Congress intended for the federal Scenic Area Act and interstate Management Plan to preempt contrary state law, both substantively and procedurally.

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[14] In *Hue*, this Court held that in enacting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y, Congress preempted state regulations and state common law. *Hue*, 127 Wn.2d at 77–78, 81–85.

Moreover, by entering into the interstate Columbia River Gorge Compact, Washington expressly agreed to this preemption.

First, Congress specified in the Act itself that the Gorge Commission and U.S. Forest Service are responsible for adopting the land use standards for the National Scenic Area in the form of the Management Plan, and that county-adopted National Scenic Area ordinances must be "consistent with the management plan." 16 U.S.C. §§ 544d–544f.

In other words, the Commission and Forest Service establish the minimum standards and guidelines for land use regulation in the National Scenic Area. Accordingly, the Court of Appeals has held that these agencies, in the form of the Management Plan, may "provide a solution" to "resolve zoning disputes" in the National Scenic Area. *Skamania County v. Woodall*, 104 Wn. App. 525, 539–40, 16 P.3d 701 (2001), *review denied*, 144 Wn.2d 1021, 34 P.3d 1232 (2001), *cert. denied*, 535 U.S. 980 (2002). That is what the Commission did here, acting in direct response to *Woodall* by adding language to the

Management Plan in 2004 specifying that "[t]he laws of the states of Oregon and Washington concerning vested rights shall not apply in the National Scenic Area," that "[a] person has a vested right for as long as the land use approval does not expire," and that "[p]roof of intent to abandon is not required to determine that an existing use or use of an existing structure has been discontinued." 2020 Management Plan at 253, 356; *see also* Clark County Code ("CCC") § 40.240.170.E; County Rec. 29 (Hearing Examiner Conclusion F.5.b).

Not only do these provisions of the Plan and County Code apply here, they also provide the specificity and clarity that Petitioners now (for the first time in this litigation) contend is missing from the National Scenic Area rules. Yet Petitioners omit any mention of these applicable rules and standards in their Petition.

Congress intended that where the Management Plan provides a solution that will resolve a zoning dispute in the National Scenic Area, that solution applies and will preempt any

contrary state or local law. *Woodall*, 104 Wn. App. at 539–40.[15] The National Scenic Area rules regarding the discontinuance of uses, vested rights, and abandonment thus apply in this appeal and help solve the dispute.

Furthermore, with their arguments that the Commission has somehow usurped the police power of the State of Washington, Petitioners overlook the fact that the Commission (which was created by state, interstate, and federal law) has been provided with "police power regulatory authority," and that the Commission's "police power encompasses the authority to regulate land." *Miller v. Columbia River Gorge Comm'n*, 118 Or. App. 553, 555–56, 848 P.2d 629 (1993); *see also Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 78, 867 P.2d

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[15] Regional rules adopted pursuant to federal statutes and interstate compacts are, themselves, federal law. *See, e.g.*, *R.I. Fishermen's All. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42 (1st Cir. 2009); *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062, 1068 (E.D. Cal. 1998); *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988). Furthermore, such regional rules preempt state law. *Stephans*, 697 F. Supp. at 1152.

686 (1994) ("[T]he Commission . . . act[s] under authority of state law even though its authority extends beyond our state's borders by virtue of the interstate compact."). In other words, the two states' police power not only resides within state agencies and county governments, but also within the Commission.

Thus, the Commission's actions, and the National Scenic Area land use standards and rules involved in this appeal, are fully consistent with this Court's conclusions in *Hue* that state "common-law duties and state regulatory commands . . . may be . . . preempted by . . . federal . . . law [in order to] further[] the policies of uniformity." 127 Wn.2d at 85. Here, Washington's enactment of the Compact, its granting of powers to the bistate Commission, and the Commission's adoption of land use standards in the Management Plan all provide uniformity across the Washington-Oregon state line. The Court of Appeals decision does not conflict with *Hue*.

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Congress has also preempted any contrary *procedural* state or local law. As pertinent in this appeal, Congress specified the appeal procedures for land use decisions in the National Scenic Area by providing that "[a]ny person or entity adversely affected by any final action or order of a county relating to the implementation of [the Scenic Area Act] may appeal such action or order to the Commission." 16 U.S.C. § 544m(a)(2). The federal Act thus provides the Commission with appellate authority over land use disputes in the National Scenic Area, thus preempting any contrary state or county law.

Additionally, the Plan specifies that the Commission has jurisdiction to hear appeals like this one. 2020 Management Plan at 355 ("The Gorge Commission shall hear appeals of final enforcement actions relating to implementation of the Management Plan.") To the extent that state or county law says otherwise (and they do not),[16] the federal Scenic Area Act and

[16] As discussed above, *supra* § V.B.1.a, LUPA at RCW 36.70C.030(1)(a)(ii) acknowledges the Commission's appellate

interstate Management Plan would preempt such other authorities. The Court of Appeals decision in this matter is consistent with *Hue.*

c. The Court of Appeals decision is consistent with *McGuire*; pursuant to the National Scenic Area rules, Washington common law regarding vested rights, nonconforming uses, and abandonment of such uses does not apply here.

Petitioners assert that the Court of Appeals decision conflicts with *City of University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d 453, 455 (2001), because (according to Petitioners) the Court of Appeals was "required to analyze whether there was an 'intention to abandon'" and "fail[ed] to apply the diminishing asset test for demonstrating abandonment." (Pet. for Review at 19–20, 23, 25–26 (quoting *McGuire*, 144 Wn.2d at 652).) Petitioners are simply wrong here; the Court of Appeals was not required to apply those doctrines, and its decision therefore does not conflict with *McGuire*.

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jurisdiction, which makes LUPA consistent with the Act and Plan, rather than in conflict with them.

As discussed above (*supra* § V.B.1.b), in the National Scenic Area, "[p]roof of intent to abandon is not required to determine that an existing use or use of an existing structure has been discontinued." CCC § 40.240.170.E (cited by Court of Appeals at 527 P.3d at 93, 95); 2020 Management Plan at 256 (same language); County Rec. 29 (Hearing Examiner Conclusion F.5.b) ("Washington state common law requiring proof of intent to abandon is inapplicable to uses and activities within the Columbia River Gorge Scenic Area.").

Thus, contrary to what Petitioners now allege, the Court of Appeals was not required to determine whether there was proof of intent to abandon the mining rights bestowed by the 1993 permit.

Furthermore, under the applicable National Scenic Area rules, "[t]he laws of the states of Oregon and Washington concerning vested rights shall not apply in the National Scenic Area," and "[a] person has a vested right for as long as the land use approval does not expire." 2020 Management Plan at 253.

Thus, the Court of Appeals was not required to apply Washington common law regarding vested rights and nonconforming uses.[17]

Simply put, as Petitioners seemingly acknowledge,[18] the law on these issues is different in the National Scenic Area than in the rest of Washington. In deciding this appeal, the Court of Appeals was not bound by the doctrines articulated in *McGuire*, and its decision therefore does not conflict with *McGuire*.

d. The Court of Appeals decision does not conflict with any prior Court of Appeals decision.

Petitioners cite several Court of Appeals decisions in their Petition for Review, but do not allege that the instant Court of Appeals decision conflicts with any of them. Nor is there any such conflict.

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[17] Nor was the Court of Appeals required to apply the diminishing assets doctrine, which involves the geographic scope of a nonconforming use in an exhaustible resource. *See McGuire*, 144 Wn.2d at 649–51. The instant appeal involves whether the former mining use was discontinued, not the geographic scope of that use.

[18] *See* Pet. for Review at 4–5.

2. This appeal does not involve any significant constitutional question of law.

Petitioners allege that this appeal involves significant constitutional questions of law—specifically, due process and void-for-vagueness issues. (Pet. for Review at 2, 20–28.) Petitioners are wrong; there are no constitutional questions of law involved here, let alone significant ones.

First, as explained above, the void-for-vagueness and due process claims alleged in the Petition were not previously raised in more than five years of litigation, until now. (*See supra* § V.A.) Petitioners have invented these constitutional issues now in an attempt to shoehorn their appeal into the criteria for discretionary review under RAP 13.4(b). Their efforts should be rejected; the appeal does not fit into the criteria for discretionary review.

In asserting their newly raised due process and void-for-vagueness claims and arguments, Petitioners focus on the following language in the 1987 Final Interim Guidelines (as

implemented in the Commission's 1993 permit): "When a use or development is discontinued for more than one year, its replacement shall be subject to a consistency determination." FIGs at 4 (County Rec. 414).

Petitioners now allege that their due process rights were violated by this language of the 1987 FIGs, which they apparently argue "requires the doing of an act." (Pet. for Review at 21, 25, 27 (quoting *A.W.R. Constr., Inc. v. Wash. State Dep't of Labor & Indus.*, 152 Wn. App. 479, 489, 217 P.3d 349, 353 (2009).)

But when it was in effect, the identified language of the FIGs did not affirmatively require anything of Zimmerly. It neither compelled Zimmerly to keep mining, nor prohibited Zimmerly from continuing mining. Rather, under the terms of the 1993 permit, it was always up to Zimmerly whether to mine the site, and whether to continue or discontinue the mining use.

As was determined below, Zimmerly ceased mining activities on the property for much longer than one year, and

thereby discontinued the mining use. 527 P.3d at 89–92, 94–95, 100. But again, the 1987 FIGs did not compel that act or behavior; the discontinuance of mining was entirely up to Zimmerly. Because the cited language in the FIGs does not, and did not, compel or prohibit any act or behavior by Petitioners, the constitutional case law they cite in their Petition is inapposite. (*See* Pet. for Review at 20–22.)

In addition, in their new arguments that they could not have understood how to continue or discontinue a mining use in the National Scenic Area, Petitioners overlook the operative language of the National Scenic Area rules regarding vested rights, discontinuance, and abandonment,[19] all of which applies to any administrative or judicial determination of whether there are currently any vested rights in mining uses on the property.[20]

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[19] *See supra* §§ V.B.1.b, V.B.1.c.

[20] This rule language was adopted in 2004, in response to *Woodall*. (*See* County Rec. 29 (Hearing Examiner Conclusion F.5.b).) Despite the Hearing Examiner acknowledging this relevant authority years ago, Petitioners ignore it now.

Any claim that a specific rule is too vague cannot be decided without considering the full regulatory scheme.[21] Here, the regulatory scheme of the Scenic Area Act and its implementing rules provides the very clarity that Petitioners now contend is lacking. The rules are not vague, and the Commission and courts below all correctly concluded that Zimmerly discontinued the mining use under these rules.

In conclusion, this appeal does not involve any significant constitutional questions of law. The constitutional issues invoked in the Petition for Review are illusory, were not timely raised below, are not significant, and do not demonstrate manifest error.

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[21] *See Haley v. Wash. Med. Disciplinary Bd.*, 117 Wn.2d 720, 741, 818 P.2d 1062 (1991) ("In a vagueness challenge, we do not analyze portions of a statute in isolation from the context in which they appear. . . . If a statute can be interpreted so as to have as a whole the required degree of specificity, then it can withstand a vagueness challenge despite its use of a term which, when considered in isolation, has no determinate meaning."); *City of Seattle v. Huff*, 111 Wn.2d 923, 929, 767 P.2d 572 (1989) ("The language of a challenged statute will not be looked at in a vacuum, rather, the context of the entire statute is considered.").

3. The Petition for Review does not involve any issue of substantial public interest that should be determined by the Supreme Court.

The Petition for Review does not involve any issue of substantial public interest that should be determined by the Supreme Court. Petitioners fail to show that the Court of Appeals decision, which was decided under the National Scenic Area rules on the unique facts of this case and which involves a single unpermitted mining operation, will have far-reaching consequences for other cases in other parts of Washington. The issues cited by Petitioners are either not real or do not rise to the level of substantial public interest warranting review.

First, Petitioners assert that there is a "substantial public interest in the State courts' exclusive jurisdiction for the review of local land use decisions." (Pet. for Review at 6–10.) But as discussed above, *supra* § V.B.1.a, the Washington Legislature has expressly carved out exceptions to the general rule of jurisdiction under LUPA, including for National Scenic Area appeals, which are heard by the Commission. In other words,

despite the use of the word "exclusive" in RCW 36.70C.030(1), the exceptions in the subsections thereunder show that LUPA jurisdiction does not encompass every single type of land use appeal that can be filed in Washington. This appeal involves one of those statutory exceptions.

Moreover, the state courts do in fact have jurisdiction over National Scenic Area appeals, after such appeals are heard by the Commission. 16 U.S.C. §§ 544m(b)(4)(C), 544m(b)(6)(A). The appeal process for National Scenic Area land use decisions is straightforward, has been in place for decades, and does not warrant review by the Supreme Court.

Petitioners next argue that this appeal "impacts a substantial public interest in property." (Pet. for Review at 11.) Apparently, they are referring to their private property interests and desires to mine Zimmerly's property. But those are *private* interests, not any wide-reaching *public* interest as required by the criteria in RAP 13.4(b).

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This appeal ultimately involves Petitioners' desires to make further monetary profits by mining the subject property without first securing land use permits. These are purely private, commercial interests unique to Petitioners. The appeal does not involve any public interest—let alone any substantial public interest.

Petitioners also assert that this appeal "involves an issue of substantial public interest in Washington's retention of all inherent police power not otherwise clearly relinquished to the federal government." (Pet. for Review at 11–12.) Petitioners are forgetting that the Commission was created by an interstate compact voluntarily entered into by the State of Washington, RCW 43.97.015, that the Columbia River Gorge Compact is "declared to be the law of this state," *id.*, and that the Compact gives the Commission "police power regulatory authority," *Miller*, 118 Or. App. at 555–56, as agreed to by the States. (*See supra* § V.B.1.b.) Because there was no usurpation of police powers, these arguments are a non-issue.

Petitioners also assert that this appeal "presents an issue of substantial public interest in maintaining vested rights under Washington law." (Pet. for Review at 20.) However, more than twenty years ago, the Court of Appeals invited the Commission to "provide a solution" within the contents of the Management Plan to "resolve zoning disputes" in the National Scenic Area. *Woodall*, 104 Wn. App. at 540. The Commission did exactly that here by adopting language in the Plan regarding vested rights, discontinuance, abandonment, and related topics in order to provide interstate uniformity for land use and development activities throughout the National Scenic Area. (*See supra* §§ V.B.1.b, V.B.1.c.) The decisions below were consistent with *Woodall* and with the entire National Scenic Area regulatory scheme, including the Act, the Compact, and the implementing rules.

Finally, Petitioners imply that there is a significant public interest in the question of whether the Commission, an interstate compact agency, should "be allowed to operate outside

Washington law." (Pet. for Review at 2.) They also assert that the Commission and reviewing courts have "created a disparate system of land use review," that Washington citizens who own property in the National Scenic Area should not be "treat[ed] . . . differently" than other landowners in the State "just based upon the location of their property," and that "Zimmerly is entitled to have [the subject property] be treated the same as all other similarly situated Washington properties." (*Id.* at 4–5.)

The Ninth Circuit Court of Appeals rejected similar arguments more than thirty years ago and upheld the constitutionality of the Scenic Area Act:

> When Congress, acting within constitutional limits, creates federal law, state law is nullified to the extent that compliance with both the federal and the state law would be a physical impossibility. The equal protection clause, however, is not violated when a geographic area is singled out for different treatment. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985).
>
> The equal protection challenge lodged by the appellant is based upon geographic discrimination. Residents outside the Gorge area get to vote for their

> land-use planners, while those inside the Gorge area do not. The equal protection clause, however, is not violated when a geographic area is singled out for different treatment. The Supreme Court has held that "there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'" *Griffin v. Cnty. School Bd. of Prince Edward Cnty.*, 377 U.S. 218, 230, 84 S. Ct. 1226, 1233, 12 L. Ed. 2d 256 (1964) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551, 74 S. Ct. 280, 283, 98 L. Ed. 2d 281 (1954)). Different treatment of different areas is permissible, provided there are reasons for such treatment that do not reflect unconstitutional motivations. *Griffin*, 377 U.S. at 231, 84 S. Ct. at 1233. Preservation of the Columbia River Gorge Area is a permissible Congressional objective and a valid exercise of the power delegated to Congress under the Commerce Clause of the Constitution.

Columbia River Gorge United-Protecting People & Property v. Yeutter, 960 F.2d 110, 115 (9th Cir.), *cert. denied sub nom. Columbia Gorge United-Protecting People & Property v. Madigan*, 506 U.S. 863 (1992).

Petitioners would apparently prefer having different land use standards in the two states within the National Scenic Area, including on issues where the Commission and U.S. Forest

Service have already determined that specific uniform standards are necessary. Petitioners' preferred approach would undermine the regional uniformity of the National Scenic Area, which would be contrary to the public interest and would frustrate congressional intent.

In summary, the Petition does not involve any issue of substantial public interest that should be determined by the Supreme Court.

VI. CONCLUSION

Petitioners improperly raise numerous new issues in their Petition for Review. In addition, none of the criteria for discretionary review under RAP 13.4(b) are met. Friends and Neighbors respectfully request that the Court deny the Petition.

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT REQUIREMENTS

The undersigned certify that this Answer complies with the word-count limitation in RAP 18.17(c)(10), and that the word count of this Answer (as described in RAP 18.17(c)) is 4,999 words.

RESPECTFULLY SUBMITTED this 5th day of June, 2023.

FRIENDS OF THE COLUMBIA GORGE

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a copy of the foregoing ANSWER OF RESPONDENTS-APPELLEES FRIENDS OF THE COLUMBIA GORGE, JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN by email on the following persons:

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FRIENDS OF THE COLUMBIA GORGE

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