No. 99564-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

AMICUS CURIAE MEMORANDUM OF THE SWINOMISH INDIAN TRIBAL COMMUNITY, QUINAULT INDIAN NATION, AND SUQUAMISH TRIBE SUPPORTING ACCEPTANCE OF DISCRETIONARY REVIEW

Wyatt Golding, WSBA #44412
Ziontz Chestnut
2101 4th Ave., Ste. 1230
Seattle, WA 98121
wgolding@ziontzchestnut.com
Attorney for Swinomish Indian Tribal Community

Weston LeMay, WSBA #51916
Emily Haley, WSBA #38284
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
wlemay@swinomish.nsn.us
ehaley@swinomish.nsn.us

Attorneys for Swinomish Indian Tribal Community

Maryanne Mohan, WSBA #47346
Tribal Attorney
Office of the Tribal Attorney
Suquamish Tribe
P.O. Box 498
Suquamish, WA 98392
Office: (360) 394-8489
Fax: (360) 598-4293
mmohan@suquamish.nsn.us
Attorney for the Suquamish Tribe

Karen Allston, WSBA # 25336
Senior Assistant Attorney General
Quinault Indian Nation
PO Box 613
136 Cuitan St.
Taholah, WA 98587
Office: 360.276.8211 ext 1404
Fax: 360.276.8127
kallston@quinault.org
Attorney for the Quinault Indian Nation

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I. Introduction

The Swinomish Indian Tribal Community, Suquamish Tribe, and Quinault Indian Nation (collectively, the "Tribes") support the request for discretionary review as appropriate under Rules of Appellate Procedure (RAP) 13.4(b)(1), (3), (4) and (h), to protect the Tribes' interest in a livable climate and to seek correction of troubling legal error below.

For the Tribes, climate change is a present-day crisis with devastating current and future impacts. The Tribes depend on the lands and waters of the Puget Sound region and Washington's coast for their economic, cultural, and religious survival. Each of the Tribes' reservations also abut marine waters. Environmental impacts caused by climate change—including rising sea levels, catastrophic wildfire, increased temperatures, and hydrologic and ecological changes to river systems and coastal shorelines—harm the Tribes and the Tribes' members. Harms to infrastructure and housing, including increased flooding, have already begun. Habitat degradation and changing climactic conditions are depressing the Tribes' harvest of fish, shellfish, and native plants. The accelerating degradation of traditional lands and waters that have sustained the Tribes' ancestors since time immemorial strike at the heart of what it means to be a tribe and tribal member. Tribal children face an uncertain future in which their individual choice to pursue their traditional

way of life is increasingly imperiled. When faced with threats to the fabric of society, the Court has historically played a key role in acknowledging and enforcing fundamental rights, and should do so here.

The Court of Appeals ruled that there is no fundamental right to a livable climate because "the right to a healthful environment—for better or worse—has not been embedded in our societal values such that it is considered a protected interest." *Aji P. v. State*, 16 Wn. App. 2d 177, 201 n.15, 480 P.3d 438, 453 (2021). This analysis misapplies United States' and State Supreme Court precedent and fails to account for tribal values—thereby excluding the values of native peoples from what Washington courts consider to be "our societ[y]" and the legal consideration of fundamental rights.

The Tribes respectfully request that this Court accept discretionary review to address the narrow and important questions of whether tribal values are considered in determining what constitutes a fundamental right under the Washington State Constitution, and whether the Washington Constitution guarantees a fundamental right to a livable climate—a right foundational to all other rights.

II. Identity and Interest of Amici Tribes

As detailed in the accompanying amicus motion, the Swinomish Indian Tribal Community, Suquamish Tribe, and Quinault Indian Nation

have reservations located in Western Washington. The Tribes are parties to treaties with the United States, and dependent on a livable climate for perpetuation of their economies and culture.

Since time immemorial, the Tribes and their predecessors have occupied and used certain lands and waters in Washington to fish, hunt, gather, and otherwise support their way of life. Pacific salmon and other marine resources have played central and enduring roles in the development and continuation of rich cultures, identities, and economies. Harvesting natural resources remains crucial to subsistence, employment, and as a way to teach younger generations traditional knowledge and the importance of preserving natural resources for future generations.[1]

As governments responsible for the safety and well-being of their communities, the Tribes have dedicated significant resources to the study of climate change and associated responses. Climate change adversely impacts nearly every aspect of life for the Tribes and their members.[2] These impacts are already occurring and, absent immediate and major changes in energy law and policy, will certainly increase in the future.[3]

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[1] Three of the named youth Plaintiffs are Quinault Tribal members. This amicus brief is filed on behalf of the Tribes, including the Quinault Indian Nation, and not on behalf of any individual tribal member.

[2] *See* "Climate Change and Our Natural Resources: A Report from the Treaty Tribes in Western Washington" (November 2016), p. 25-27, http://nwifc.org/w/wp-content/uploads/downloads/2017/01/CC_and_Our_NR_Report_2016-1.pdf;

[3] *See* "The Intergovernmental Panel on Climate Change's Special Report on the Ocean and Cryosphere and Implications for Washington State" (UW Climate Impacts Group

For the Tribes, the natural world is inextricably linked to education, family, and values. Salmon and shellfish are served at naming ceremonies, weddings, celebrations, and funerals. Parents bond with their children and teach them broader life lessons while catching, gathering, preserving, and preparing foods. The Tribes are sustained by their homelands and their connection to the water and lands where tribal ancestors have lived, fished, gathered, and hunted since time immemorial. These activities are central to the lives and identity of the Tribes and their members.[4]

III. Argument

A. Fundamental Constitutional Rights Analysis Must Consider American Societal Values—Including the Tribes'.

The Tribes and their predecessors have an enduring and essential bond to the natural world, from which tribal members derive their livelihoods, cultures, histories, identities, family values, and educations. As explained in the Tribes' amicus brief below, for the Tribes there is no question that the right to a livable climate—and the corresponding right to continue the way of life they have enjoyed since time immemorial—is

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2020), https://cig.uw.edu/wp-content/uploads/sites/2/2020/02/CIG_SnowlinesShorelinesReport_2020.pdf.

[4] The Tribes' arguments rest solely on state law. The Tribes reserve all arguments based on their federally reserved treaty rights, and any other rights arising under federal law. Because the Plaintiffs did not raise federal treaty rights, those rights are not at issue.

fundamental. *See*, *e.g.*, *United States v. Winans*, 198 U.S. 371, 381 (1905) (recognizing that at treaty time, as today, fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed[.]").

In the decision below, the Court of Appeals addressed the Tribe's amicus supporting the recognition of a fundamental right to a livable climate by concluding that "the right to a healthful environment—for better or worse—has not been embedded in our societal values such that it is considered a protected interest." *Aji P.*, 16 Wn. App. 2d at 201 n.15.[5] While the Court does not elaborate *whose* values it considered or the basis for its conclusion, in rejecting the Tribes' arguments the Court appears to have construed "our societal values" to exclude the values of the Tribes. This was error. The Court of Appeals' analysis departs from United States Supreme Court and State Supreme Court decisions that cast a broader net in consideration of fundamental rights, raises the important legal question of how Washington courts must consider the diversity of cultures in Washington State when evaluating fundamental rights, and concerns the

[5] The Court misconstrued the argument as pertaining to a "healthful environment." In addition to the quoted text, the Court distinguished choice of employment as a protected right. However, the Tribes' fishing and other interests in a livable climate directly relate to travel, family, education, subsistence, and protection of their homelands in addition to employment.

public health and wellbeing crisis of our era. Review is necessary pursuant to RAP 13.4(b)(1), (3), and (4).

To determine whether an unenumerated constitutional right exists, courts first consider whether such a right is implicit and necessary to the exercise of enumerated rights, and second, whether the right is deeply embedded in societal values. *E.g.*, *Eggert v. Seattle*, 81 Wn.2d 840, 841-44, 505 P.2d 801, 803 (1973); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534, (1925); *see also Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 438, 780 P.2d 1282, 1295 (1989) (citing the preamble to the Washington State Constitution and art. 1, § 32 to explain that the constitution contains unenumerated rights based on natural law) (Utter, J., concurring).

Because recognition of unenumerated rights develops through jurisprudence in an evolving society, such rights are often not explicitly described in historical documents. "The Court, like many institutions, has made assumptions defined by the world and time of which it is a part." *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015). Historical documents generally do not detail protection of abortion rights, same sex marriage, or climate change, but rather provide the basic principles underlying those rights that can be applied to the modern world. The correct analysis of fundamental rights, therefore, takes a purposeful view. "History and

tradition guide and discipline this inquiry but do not set its outer boundaries…That method respects our history and learns from it without allowing the past alone to rule the present." *Obergefell*, 576 U.S. at 664.

As to the first prong of the fundamental rights analysis, protection of a livable climate against State-caused climate change is essential to all other rights—there can be no commerce and no exercise of life, liberty, or property rights without a livable climate. *See Eggert*, 81 Wn.2d at 840. Indeed, for the sovereign Tribes, climate change results in harm to protected property interests in their homelands, among other deprivations. The Supreme Court has recognized that climate change threatens unique harms to sovereigns with maritime waters. *See Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) ("the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts."). The Court of Appeals' analysis does not appear to contest that a livable climate is essential to the exercise of enumerated rights.

Instead, the Court of Appeals' analysis turns entirely on the second prong of the fundamental rights analysis—whether the right is embedded in societal values. The Court relied on an undefined concept of "our societal values" and, without identifying a factual or evidentiary basis, invoked those "values" to reject the Tribes' contention that there is a fundamental constitutional right to a livable climate.

The Court of Appeals erred by improperly excluding the deeply held societal values of Washington tribes from its consideration of Washington's "societal values." United States' and Washington Supreme Court decisions make clear that the consideration of social values for fundamental rights analysis must consider values broadly to reflect all of society. In *Eggert*, this Court looked to principles derived from a range of sources—from the Magna Carta to the Universal Declaration of Human Rights—representing different viewpoints in time and society. *Eggert*, 81 Wn.2d at 841. In *Dulles*, the Supreme Court considered "Anglo-Saxon law," but expanded its analysis to the broader question of what values are quintessentially American. 357 U.S. at 126 ("Freedom of movement is basic in our scheme of values."). The *Obergefell* Court similarly recognized that for consideration of whether a fundamental right exists, the "Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties" writ large. 576 U.S. at 665. So, while the prevailing Euroamerican view may not have acknowledged the importance of same sex marriage, the Court found a fundamental right because it recognized the underlying principles of marriage were broadly important throughout

history, and thus should be recognized for a minority group given contemporary understanding.

The same purposive and inclusive analysis is required here, and Washington courts must therefore consider tribal values when determining whether "our societal values" include the right to a livable climate. After all, tribal governments, culture, and society preceded Statehood. Tribes have been an integral part of the State's society since the beginning, including as environmental stewards and natural resource co-managers. Tribal values must at the very least be considered.

For the Tribes, nothing is more fundamental to tribal history, culture, and heritage than access to natural resources in one's homeland, which relies upon a livable climate. The individual right to a livable climate is inextricably connected to protection of the family and the associated benefit to Tribal communities. Access to traditional foods is critical to knowledge transmission, community cohesion, ceremonies, and food security, activities that are all essential to familial and societal well-being. *See* Tribes' Motion to Submit Amicus at 4-12. The Tribes have demonstrated their fundamental commitment to protection of a livable climate by investing their limited resources in the study of climate effects and implementation of climate adaptation measures, including the Swinomish Tribe building climate resilient clam gardens to replace

inundated beaches and mitigate ocean acidification, the Quinault Nation moving the village of Taholah away from rising seas, and the Suquamish Tribe monitoring zooplankton to identify ocean acidification impacts. *Id.* at 6-11. Each of the Tribes provides climate education to its youth. *Id.*

For the sovereign Tribes and their members, the right to a livable climate is a fundamental "building block of…community." *Obergefell*, 576 U.S. at 669.[6] A livable climate, and associated bond to the natural world, is integral to core American principles including spirituality, self-expression, travel, and the ability to educate and raise a family according to one's cultural tradition. *See Obergefell*, 576 U.S. at 667-68.

The Court of Appeals erred by taking an impermissibly narrow and constrained view of what constitutes "our society." Left uncorrected, the decision may serve the dangerous purpose of constraining fundamental rights to an exclusionary and Euroamerican understanding of what constitutes "our societal values" in Washington. For all the reasons stated herein, the Tribes urge the Court to accept discretionary review, and to recognize the constitutional right to a livable climate.

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[6] United Nations treaty bodies have recognized that climate change poses disproportionate impacts to indigenous peoples, and that "[w]hen reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities..." https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/AboutClimateChangeHR.aspx; *Eggert v. Seattle*, 81 Wn.2d at 841 (relying on UN statements to identify fundamental rights).

Respectfully submitted this 23rd day of June, 2021.

s/ Wyatt Golding___
Wyatt Golding, WSBA #44412
Ziontz Chestnut
2101 4th Ave., Ste. 1230
Seattle, WA 98121
wgolding@ziontzchestnut.com
Attorney for Swinomish Indian Tribal Community

s/Weston LeMay
Weston LeMay, WSBA #51916
Emily Haley, WSBA #38284
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
wlemay@swinomish.nsn.us
ehaley@swinomish.nsn.us
Attorneys for Swinomish Indian Tribal Community

s/ Maryanne Mohan
Maryanne Mohan, WSBA #47346
Tribal Attorney
Office of the Tribal Attorney
Suquamish Tribe
P.O. Box 498
Suquamish, WA 98392
Office: (360) 394-8489
Fax: (360) 598-4293
mmohan@suquamish.nsn.us
Attorney for the Suquamish Tribe

s/ Karen Allston
Karen Allston, WSBA # 25336
Senior Assistant Attorney General
Quinault Indian Nation
PO Box 613
136 Cuitan St.

Taholah, WA 98587
Office: 360.276.8211 ext 1404
Fax: 360.276.8127
kallston@quinault.org
Attorney for the Quinault Indian Nation

DECLARATION OF SERVICE

Wyatt Golding declares as follows:

1. I am a resident of the State of Washington, residing or employed in Seattle, WA.
2. I am over 18 years of age, and not a party to the above entitled action.
3. I declare that on June 23, 2021, I caused the foregoing document to be filed with the Washington State Appellate Court's Secure Portal for Electronic Filing, which generates a transmittal letter to all active parties in the case; including a copy of all uploaded files.
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this June 23, 2021, at Seattle, Washington.

s/ Wyatt Golding
Wyatt Golding, WBSA #44412

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- leeme@seattleu.edu
- levinje@seattleu.edu
- sandra.adix@atg.wa.gov

Comments:

Tribes' proposed amicus curiae brief associated with motion for amicus filed on June 23, 2021.

Sender Name: Wyatt Golding - Email: wgolding@ziontzchestnut.com
Address:
2101 4TH AVENUE
SUITE 1230
SEATTLE, WA, 98121-2323
Phone: 206-448-1230

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