

Case No. 94357-5

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an  
Association of multiple concerned residents of the Chiliwist Valley, RUTH  
HALL, ROGER CLARK, WILLIAM INGRAM, LOREN DOLGE,  
residents and property owners in the Chiliwist Valley,

Petitioners,

v.

OKANOGAN COUNTY, a Municipal Corporation and Political  
Subdivision of the State of Washington; RAYMOND CAMPBELL,  
SHEILAH KENNEDY, and JAMES DETRO, Okanogan County  
Commissioners; JOSHUA THOMPSON, Okanogan County Engineer; and  
GAMBLELAND & TIMBER LTD., a Washington Limited Partnership,

Respondents.

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THE METHOW VALLEY CITIZENS COUNCIL'S AND  
FUTUREWISE'S *AMICI CURIAE* MEMORANDUM IN SUPPORT  
OF THE PETITION FOR REVIEW

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## I. INTRODUCTION

This case raises important questions as to how closely the courts should review road vacations that affect the safety of residents and property owners during wildfires. The court of appeals believed it should apply precedents requiring a high level of deference to Okanogan County's decision to vacate the road.<sup>1</sup> But increasing wildfire danger and the fundamental right to health and safety call this decision into question. The Washington State Supreme Court should review the court of appeals decision and answer the important legal questions this case raises.

## II. IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Methow Valley Citizens Council (MVCC) is a Washington nonprofit corporation. The mission of the MVCC is to raise a strong community voice for protection of the Methow Valley's natural environment and rural character. The Methow Valley is in Okanogan County and suffered great losses in the 2014 Carlton Complex Fire and the 2015 Okanogan Complex Fire. The MVCC has many members in the county.

Futurewise is a Washington nonprofit corporation. Futurewise works throughout Washington State to support land-use policies that

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<sup>1</sup> *Coal. of Chilliwist v. Okanogan Cty.*, No. 34585-8-III Slip Op. pp. 9 – 10 (March 16, 2017).

encourage healthy, equitable, and opportunity-rich communities, and that protect our most valuable farmlands, forests and water resources.

### III. STATEMENT OF THE CASE

*Amici Curiae* rely on the statement of the case in the Coalition of Chiliwist Residents and Friends *et al.* Petition For Review.

### IV. ARGUMENT

- A. The Chiliwist Residents and Friends petition (petition) involves issues of substantial public interest the Supreme Court should determine including whether safety is a fundamental right that justifies closer scrutiny of road vacations particularly in a rural area with limited road access that has experienced a dramatic increase in major wildfires.**

The Washington appellate courts have applied the Constitution's guarantee of equal protection under the laws to conditions imposed as part of a county road vacation.<sup>2</sup> This Court should extend this holding to the review of road vacations in this and similar cases.

Health and safety are fundamental rights.<sup>3</sup> "Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12 ...."<sup>4</sup> Substantive due process also protects

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<sup>2</sup> *Bay Indus., Inc. v. Jefferson Cty., Bd. of Comm'rs of Jefferson Cty.*, 33 Wn. App. 239, 243, 653 P.2d 1355, 1358 (1982).

<sup>3</sup> *In re Dependency of R.H.*, 129 Wn. App. 83, 88, 117 P.3d 1179, 1181 (2005).

<sup>4</sup> *In re Hegney*, 138 Wn. App. 511, 529, 158 P.3d 1193, 1202 (2007) *review denied State v. Hegney*, 152 Wn.2d 1034, 103 P.3d 202 (2004).

fundamental rights “against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.”<sup>5</sup> Fundamental rights are reviewed under the strict scrutiny test.<sup>6</sup> Where a road vacation would create a danger of a loss of life or materially reduced safety it should be closely scrutinized by the courts.

Here, the evidence shows the vacation of the Three Devils Road will increase dangers to, and materially reduce the safety of, Chiliwist Valley residents and property owners due to a reduction in escape routes during wildfires and floods.<sup>7</sup> The road vacation should be reviewed under the strict scrutiny test, as road vacations in one area may deprive area residents of the equal protection of laws compared to residents of other areas. Alternatively, strict scrutiny should be applied under substantive due process.

**B. The petition involves issues of substantial public interest the Court should determine including whether the appearance of fairness doctrine applies to county road vacations.**

The Chiliwist Residents have ably argued that the Supreme Court should hold that county road vacations are quasi-judicial and that the

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<sup>5</sup> *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218 – 19, 143 P.3d 571, 576 (2006) *citing Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1994).

<sup>6</sup> *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334, 340–41 (2006); *Amunrud*, 158 Wn.2d at 220, 143 P.3d at 576.

<sup>7</sup> CP 996 – 97, 1002 – 04, 1006 – 07, 1029 – 30, 1029 – 32, Public Hearing Transcript pp. 81 – 82, pp. 87 – 88, pp. 91 – 92, pp. 94 – 95, pp. 114 – 17 (April 9, 2015).

appearance of fairness doctrine should apply to road vacations.<sup>8</sup> The doctrine and the reasons for it support this argument.

RCW 36.87.060(1) requires a public hearing at which the “county legislative authority shall proceed to consider the report of the engineer, together with any evidence for or objection against such vacation and abandonment.” RCW 36.87.060(2) authorizes as “an alternative, the county legislative authority may appoint a hearing officer to conduct a public hearing to consider the report of the engineer and to take testimony and evidence relating to the proposed vacation.”

The appearance of fairness doctrine, first enunciated *Smith v. Skagit County*, applies to quasi-judicial public hearings. In a plurality opinion in *Smith*, the Court held that “[i]t is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well. A public hearing, if the public is entitled by law to participate, means then a fair and impartial hearing.”<sup>9</sup> The Supreme Courts’ *Smith* holding has been cited repeatedly.<sup>10</sup>

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<sup>8</sup> *Chiliwist Residents et al. Petition For Review* pp. 9 – 12 (April 13, 2017).

<sup>9</sup> *Smith v. Skagit Cty.*, 75 Wn.2d 715, 739, 453 P.2d 832, 846 (1969) *holding modified by State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992).

<sup>10</sup> *Chrobuck v. Snohomish Cty.*, 78 Wn.2d 858, 869, 480 P.2d 489, 496 (1971); *Anderson v. Island Cty.*, 81 Wn.2d 312, 326, 501 P.2d 594, 602 (1972); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 246, 821 P.2d 1204, 1208 (1992).



The appearance of fairness doctrine “has been developed to preserve the highest public confidence in those governmental processes which bring about zoning changes or which formulate property use and land planning measures.”<sup>11</sup> Preserving the public confidence in the disposition of important public assets such as county roads is also important, especially in our current era where the public lacks confidence in government at all levels. Streets and roads are “held in trust for the public ....”<sup>12</sup> While their “primary purpose” is “the convenience of public travel,” the public rights of way may be used for other purposes such as watermains and telephone lines.<sup>13</sup> Maintaining public confidence in their management and disposition calls for the application of the appearance of fairness doctrine to road vacations.

The *Smith* Court wrote that “[t]he right to be heard implies a reasonable hope of being heeded.”<sup>14</sup> The *Chrobuck* Court wrote that a public hearing “must be capable of hearing the weak voices as well as the strong.”<sup>15</sup> The *Smith* Court recognized that while the decision may “draw upon all kinds and sources of information including the opinions of

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<sup>11</sup> *Swift v. Island Cty.*, 87 Wn.2d 348, 361, 552 P.2d 175, 183 (1976).

<sup>12</sup> *State ex rel. York v. Bd. of Comm'rs of Walla Walla Cty.*, 28 Wn.2d 891, 898, 184 P.2d 577, 582 (1947).

<sup>13</sup> *Id.*

<sup>14</sup> *Smith*, 75 Wn.2d at 741, 453 P.2d at 847.

<sup>15</sup> *Chrobuck*, 78 Wn.2d at 869, 480 P.2d at 495–96.

experts, the hearing must be conducted as to be ... open-minded and fair ...”<sup>16</sup> Road vacations require a report from the county road engineer, an expert, and a public hearing on that report.<sup>17</sup> So that hearing should be open-minded, fair, and hear all voices.

While the legislature limited the application of the appearance of fairness doctrine in the context of “local land use decisions” to the “quasi-judicial actions of local decision-making bodies ...,”<sup>18</sup> nothing in chapter 42.36 RCW prevents the appearance of fairness doctrine from being applied to road vacations, since they are not local land use decisions. The reasons for applying the appearance of fairness doctrine to quasi-judicial land use decisions apply equally to road vacations.

**C. The petition involves issues of substantial public interest the Supreme Court should determine including whether precedents holding that a road vacation is not judicially reviewable absent fraud, collusion, or interference with a vested right should apply if serious public safety threats are created by the road vacation.**

“The doctrine of stare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’”<sup>19</sup> RCW 36.87.040 requires a report from the county road engineer on a road vacation considering “whether it will be advisable to preserve it for the

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<sup>16</sup> *Smith*, 75 Wn.2d at 741, 453 P.2d at 847.

<sup>17</sup> RCW 36.87.040; RCW 36.87.050; RCW 36.87.060.

<sup>18</sup> RCW 42.36.010.

<sup>19</sup> *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004).

county road system in the future [and] whether the public will be benefited by the vacation and abandonment ....” RCW 36.87.060 provides in part that “[i]f the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefited by the vacation, the county legislative authority may vacate the road or any portion thereof.” In this case, the Court of Appeals upheld Okanogan County’s vacation of the Three Devils Road based on the “long-standing rule in Washington [] that [a] road vacation is a political function that belongs to municipal authorities, and is not judicially reviewable absent fraud, collusion, or interference with a vested right.”<sup>20</sup> But the rule that a vacation is not “reviewable” is inconsistent with the requirement for the county road engineer’s report and RCW 36.87.060’s command that “[i]f the county road is found useful as a part of the county road system it shall not be vacated ....”

In the *Capitol Hill Methodist Church* decision, the Supreme Court would have reviewed the case under the arbitrary and capricious standard if the appellants had alleged the city arbitrarily and capriciously created a fire hazard.<sup>21</sup> That is exactly what the Chiliwist Residents argue here.<sup>22</sup>

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<sup>20</sup> *Coal. of Chiliwist v. Okanogan Cty.*, No. 34585-8-III Slip Op. pp. 9 – 10 (March 16, 2017).

<sup>21</sup> *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 366 – 67, 324 P.2d 1113, 1118 – 19 (1958).

<sup>22</sup> *Chiliwist Residents et al.* No. 34585-8-III Appellants Opening Brief pp. 27 – 29.

There are significant differences between the requirements for city street and county road vacations. Unlike county road vacations, city street vacations do not require a report from an engineer and do not include RCW 36.87.060's prohibition on vacations "[i]f the county road is found useful as a part of the county road system ...."<sup>23</sup> But city street vacations are prohibited "if fifty percent of the abutting property owners file written objection[s] to the proposed vacation ..."<sup>24</sup> These differences may mean that city street vacations are a political question. In contrast, county road vacations are fact-based processes in which decision makers apply the law to the facts, and thus are susceptible to review by the courts. If a city street vacation is reviewable when the creation of a fire hazard is alleged, then there is even less of a question when it is a county decision creating a fire hazard.

Multiple routes out of an area protect the safety of property owners, residents, and firefighters. The three firefighters who died in the Twisp River Fire in Okanogan County in 2015, died in a crash on a short dead end road serving six houses.<sup>25</sup> A fourth firefighter in the truck was

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<sup>23</sup> Chapter 35.79 RCW.

<sup>24</sup> RCW 35.79.020.

<sup>25</sup> Washington State Department of Natural Resources, *Twisp River Fire Fatalities and Entrapments Interagency Learning Review Status Report* pp. 8 –9 & pp. 15 – 18 of 24 (18 November 2015) accessed on June 6, 2017 at: [http://wildfiretoday.com/documents/Twisp\\_River\\_Fire\\_Status\\_Report.pdf](http://wildfiretoday.com/documents/Twisp_River_Fire_Status_Report.pdf).

severely injured by fire.<sup>26</sup> If the area had multiple ways out, the firefighters might have had an alternative to driving down a narrow road in zero visibility.<sup>27</sup>

Health and safety are fundamental rights.<sup>28</sup> In this case, there is evidence that the Three Devils Road provides an important escape route during fires and floods.<sup>29</sup> In 2014, Okanogan County experienced the Carlton Complex, the largest fire in state history.<sup>30</sup> In 2015, the Okanogan Complex Fire surpassed the Carlton Complex to become the largest fire in state history.<sup>31</sup> “The large number of houses in the urban/rural fringe compared to twenty years ago ... has produced a significant increase in threats to life and property from fires and has pushed existing fire protection systems beyond original or current design or capability.”<sup>32</sup> Due to global warming, the area burned by wildfires each year in the Pacific Northwest is predicted to increase significantly.<sup>33</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at p. 15 of 24.

<sup>28</sup> *In re Dependency of R.H.*, 129 Wn. App. 83, 88, 117 P.3d 1179, 1181 (2005).

<sup>29</sup> CP 996 – 97, 1002 – 04, 1006 – 07, 1029 – 30, 1029 – 32, Public Hearing Transcript pp. 81 – 82, pp. 87 – 88, pp. 91 – 92, pp. 94 – 95, pp. 114 – 17 (April 9, 2015).

<sup>30</sup> Gary DeVon, *Largest Fire in State History* *Gazette-Tribune* (Aug. 26, 2015) accessed on June 6, 2017 at: <http://www.gazette-tribune.com/news/largest-fire-in-state-history/70863/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Okanogan County, Washington Community Wildfire Protection Plan* p. 88 (2013) accessed on June 6, 2017 at: [http://file.dnr.wa.gov/publications/rp\\_burn\\_okanogan\\_cwpp\\_2013update.pdf](http://file.dnr.wa.gov/publications/rp_burn_okanogan_cwpp_2013update.pdf).

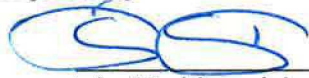
<sup>33</sup> Jeremy S. Littell, Jeffrey A. Hicke, Sarah L. Shafer, Susan M. Capalbo, Laurie L. Houston, Patty Glick, Chapter 5 Forest Ecosystems: Vegetation, Disturbance, and

The rule that road vacations are not judicially reviewable absent fraud, collusion, or interference with a vested right is an incorrect interpretation of RCW 36.87.040 and RCW 36.87.060 and it is harmful when it allows roads that provide escape routes during wildfires, floods, or other natural disasters to be vacated. This Court should take review of this case and build on the *Capitol Hill Methodist Church* decision to hold that the courts will review decisions to vacate county roads that provide wildfire, flood, or other escape routes to determine if the road is useful as a part of the county road system as RCW 36.87.060 requires.

#### V. CONCLUSION

For the reasons set out above, the MVCC and Futurewise urge the Washington State Supreme Court to take review of the important legal questions in *Coalition of Chiliwist Residents and Friends v. Okanogan County*, No. 34585-8-III (March 16, 2017).

Respectfully submitted this 9<sup>th</sup> day of June 2017.



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Tim Trohimovich, WSBA No. 22367, Counsel for *Amici*

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Economics pp. 121 – 122 in Dalton, M.M., P.W. Mote, and A.K. Snover [Eds.], *Climate Change in the Northwest: Implications for Our Landscapes, Waters, and Communities* (Island Press, Washington, DC: 2013) accessed on June 6, 2016 at: <https://cig.uw.edu/resources/special-reports/>.

**CERTIFICATE OF SERVICE**

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on June 9, 2015, I caused PDF files of the original and true and correct copies of the following documents to be served on the persons listed below in the manner shown: The Methow Valley Citizens Council's and Futurewise's Motion For Leave to File Memorandum of *Amici Curiae* in Support of Petition For Review and the *Amici Curiae* Memorandum in Support of the Petition For Review both in Case No. 94357-5.

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Dated this 9<sup>th</sup> day of June 2017.



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Tim Trohimovich, WSBA No. 22367

# FUTUREWISE

June 09, 2017 - 9:35 AM

## Transmittal Information

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