

NO. 87198-1

SUPREME COURT OF THE STATE OF WASHINGTON

ADORA SVITAK, a minor child, by and through her guardian, JOYCE SVITAK; TALLYN LORD, a minor child, by and through his guardians, JUSTIN LORD and SARA WETSTONE; HARPER LORD, a minor child, by and through his guardians, JUSTIN LORD and SARA WETSTONE; ANNA IGLITZIN, a minor child, by and through her guardians, DMITRI IGLITZIN and EILEEN QUIGLEY; JACOB IGLITZIN, a minor child, by and through his guardians, DMITRI IGLITZIN and EILEEN QUIGLEY; COLIN SACKETT, a minor child, by and through his guardians, BJ CUMMINGS and TOM SACKETT,

Plaintiffs/Petitioners,

v.

STATE OF WASHINGTON; CHRISTINE GRÉGOIRE, in her official capacity as Governor of Washington State; TED STURDEVANT, in his official capacity as Director of the Department of Ecology; PETER GOLDMARK, in his official capacity as Commissioner of Public Lands; PHIL ANDERSON, in his official capacity as Director of the Department of Fish & Wildlife,

Defendants/Respondents.

**STATE'S ANSWER TO AMICI BRIEF OF BISHOPS
BOERGER, HOFSTAD, AND WELLS, ET AL.**

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I. INTRODUCTION

Amici argue that this case meets the standard for direct review because international human rights principles support Petitioners' desire to secure more aggressive action on global climate change. Like those of Petitioners, Amici's arguments miss the mark. The case does not meet the standard for direct review simply because it relates to a topic (global climate change) that is important to members of the public, including members of various faith-based communities. Indeed, as described in the State's Answer to Statement of Grounds for Direct Review (Answer), the State takes climate change seriously and is taking steps to address it. Answer at 1, 3 n.3.

As explained in the State's Answer, Petitioners' novel legal theory does not meet the standard for direct Supreme Court review because it lacks support in Washington's constitution, statutes, and case law. None of Amici's arguments show otherwise. First, assuming that the international human rights principles Amici cite in fact support action on climate change, Amici do not offer any legal authority for relying on such principles to cure the defects in Petitioners' public trust doctrine theory. Second, the issues Amici raise were not raised by Petitioners at the trial

court or in their appeal. Third, international human rights principles do not inform the Court's interpretation of Washington's public trust doctrine.

II. ARGUMENT

A. **International Human Rights Principles Do Not Provide Support For Petitioners' Novel Claim That The Public Trust Doctrine Applies To The Atmosphere Nor Do They In Any Other Way Overcome The Fatal Defects In Petitioners' Case**

The issue before the Court is whether the legal issues presented by Petitioners raise fundamental and urgent issues of broad public import which require prompt and ultimate determination by the Court under RAP 4.2(a)(4). In opposing direct review, State Respondents argued this case does not meet the standard because the public trust doctrine does not support Petitioners' cause of action, Petitioners' claims violate the separation of powers doctrine, and Petitioners' claims are not actionable under the Uniform Declaratory Judgment Act (UDJA). Amici argue that this case meets the standard because, they contend, international human rights principles support aggressive action on climate change. Amici further argue that laws of the United States should be construed consistent with international human rights principles and that such principles offer

persuasive authority for interpreting state law. None of Amici's arguments overcome the fundamental defects in Petitioners' case.

Amici focus solely on international human rights principles by arguing that such principles call for action on climate change. For example, Amici cite the Universal Declaration of Human Rights (UDHR) principle that everyone has the right to life, liberty, and security of person and contend that these rights are threatened by increases in heat-related mortality projected to result from global climate change. Accepting for the sake of argument that the referenced human rights encompass some form of protection from global climate change-caused impacts, Amici's argument is nevertheless irrelevant to the issues before the Court. The human rights principles cited by Amici do not address or even mention the public trust doctrine let alone support Petitioners' theory that Washington's public trust doctrine applies to the atmosphere. Moreover, Amici offer no explanation regarding how the international principles they cite might cure the separation of powers and UDJA defects in Petitioners' case. For these reasons, Amici's arguments do not support a finding that this case meets the standard for direct review under RAP 4.2(a)(4).

B. The Court Should Not Consider Arguments Regarding International Human Rights Principles Because These Issues Were Not Raised At The Trial Court Or By Petitioners In Their Appeal

The Court's determination whether this case meets the standard for direct review should be based on the issues raised by the parties in the appeal, not by a new issue raised for the first time by Amici. The Court normally does not consider issues raised solely by amici curiae. *See Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 272 n.1, 943 P.2d 1378 (1997). *See also* RAP 2.4(a); RAP 2.5(a) (appellate review limited to issues raised by party in the trial court). *Cf.* RAP 13.7(a), (b); *Shumway v. Payne*, 136 Wn.2d 383, 392–93, 964 P.2d 349 (1998) (Supreme Court will normally review only those questions raised by parties in the pleadings). Petitioners did not cite or rely upon international human rights principles in their Statement of Grounds for Direct Review. Instead, they relied on the public trust doctrine. Because Amici raise arguments based on human rights principles for the first time that were not raised in the trial court or in Petitioners' Statement of Grounds for Direct Review, the Court should refuse to consider Amici's argument.

C. International Human Rights Principles Play No Role In The Interpretation Of Washington's State-Specific Public Trust Doctrine

International principles should not inform the Court's interpretation of Washington's public trust doctrine to determine whether this case meets the standard for direct review. Amici cite various human rights related international declarations, resolutions, and unratified treaty provisions. They concede that the principles in those sources do not bind Washington courts. They argue that the UDHR can be binding customary international law but they do not argue it is binding in the interpretation of a state-specific common law principle such as the public trust doctrine. Amici Mem. in Supp. of Pet. for Direct Review (Amici Mem.) at 4–5 (asserting generally that the *laws of the United States* should be construed to be consistent with international human rights law, and that many scholars consider the UDHR to be binding customary international law).

Amici also assert that international principles can be persuasive authority but, for this principle, they rely on cases that are distinguishable from the present case. For example Amici cite *Eggert v. City of Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973), as support for their argument that the Court should rely on the UDHR as persuasive authority here. Amici

Mem. at 5. *Eggert* does not, however, support Amici's argument. *Eggert* addressed whether a one-year residency requirement for city jobs infringed upon federal constitutional rights to travel and equal protection guarantees. In finding the city charter unconstitutional, the Court relied on years of court precedent dating from 1823 to 1972, while making only a passing reference to the UDHR. *Eggert*, 81 Wn.2d at 841.

Eggert is distinct from this case because it involved a historically recognized constitutional right¹ interpreted primarily by reference to directly applicable constitutional law. Here, Petitioners' claim that the public trust doctrine applies to the atmosphere is not recognized in Washington common law, constitution, or statute.

Finally, the two-part test for applying the public trust doctrine is unambiguously set forth in *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987), making the Court's resort to anything outside the judicially-delineated doctrine unnecessary.

¹ Amici cite two other out-of-state cases including *Sterling v. Cupp*, 290 Or. 611, 622 n.21, 625 P.2d 123 (Or. 1981) (en banc) and *Simmons v. Roper*, 112 S.W. 3d 397, 411 (Mo. 2003). These are also distinct from this case because those cases involved interpretation of well-established constitutional rights, and, international law principles were merely cited in support. Amici also cite *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S. 2d 461 (N.Y. Sup. 1950), a trial court decision with no precedential or persuasive value in Washington.

None of the international human rights principles cited by Amici cure the fundamental defect in Petitioners' case. Thus, Amici's argument fails to support direct review.

III. CONCLUSION

State Respondents respectfully request that the Court deny Petitioners' request for direct review and order that Petitioners' appeal be heard by the Court of Appeals.

RESPECTFULLY SUBMITTED this 13th day of July 2012.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 16th day of July 2012, I caused to be served State's Answer to Amici Brief of Bishops Boerger, Hofstad, and Wells, et al. in the above-captioned matter upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of July 2012 in Olympia, Washington.



TERESA L. TRIPPEL, Legal Assistant