

July 5, 2019

Via CM/ECF

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Kelsey Cascadia Rose Juliana, et al. v. United States, et al.*,
No. 18-36082

Dear Ms. Dwyer,

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28-6, Plaintiffs-Appellees submit *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), as supplemental authority relevant to interlocutory review in the above-captioned matter. Plaintiffs' claims are distinguishable from those in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 1 (1976), cited by Defendants during oral argument for the proposition that Congress has exclusive, unreviewable authority to adjust "economic benefits and burdens."

In *Usery*, mining operators claimed amendments to the Coal Mine Health & Safety Act unconstitutionally imposed retrospective liability upon them. *Id.* at 2. The Supreme Court upheld Congress' authority to readjust economic burdens and benefits, even when doing so "upsets otherwise settled expectations." *Id.* at 16. Applying a presumption of constitutionality to laws that adjust burdens and benefits of economic life, the Court was "unwilling to assess the wisdom of Congress' chosen scheme" because "the Act approaches the problem of cost spreading rationally." *Id.* at 15, 19.

Unlike *Usery*, here Plaintiffs allege their fundamental rights to life and liberties (not economic benefits) are being infringed by Defendants' *affirmative actions*, which triggers strict scrutiny, not rational basis, review. ER 58, 91-92. Furthermore, Plaintiffs' requested injunctive relief, including a remedial plan created by Defendants, would not "repeat the sins of the *Lochner* case" because it would not require the Court to readjust economic burdens. Oral Argument at 1:01:45,

https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015795.

According to the Court in *Barnette*, “[t]he very purpose” of fundamental rights “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” 319 U.S. at 638. “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” *Id.* Therefore, *Usery* does not support Defendants’ contention that Plaintiffs’ claims are not justiciable. Children’s lives, personal security, and family autonomy, all unalienable, are at stake in this case.

Respectfully submitted,

s/ Philip L. Gregory
PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Wild Earth Advocates
1216 Lincoln Street
Eugene, OR 97401

ANDREA K. RODGERS
(OSB No. 041029)
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117

Attorneys for Plaintiffs-Appellees

cc: All Counsel of Record (via CM/ECF)