No. 34585-8-III

THE COURT OF APPEALS - DIVISION III
OF THE STATE OF WASHINGTON

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,

vs.

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,

Respondent.

PETITION FOR REVIEW IN THE SUPREME COURT OF THE DECISION OF THE COURT OF APPEALS, DIV. III

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PETITION FOR SUPREME COURT REVIEW

I IDENTITY OF PETITIONERS:

Coalition of Chiliwist Residents and Friends, an Association of concerned residents of the Chiliwist Valley; Ruth Hall, Roger Clark, William Ingram, and Loren Dolge, Chiliwist Valley residents or property owners. Jason Butler, a party below, is not participating in this petition.

II DECISION SUBJECT TO REVIEW:

Coalition of Chiliwist Residents and Friends, et al v. Okanogan County et al., Court of Appeals No. 34585-8-III: Appendix A hereto.

III ISSUES PRESENTED FOR REVIEW:

1. Is the Court of Appeals decision below inconsistent with *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982) which held county road vacation is properly reviewed by *certiorari* and confined to the hearing record; as well as inconsistent with *Federal Way v. King County,* 62 Wn. App. 530, 815 P.2d 790 (1991) and *DeWeese v. Port Townsend*, 39 Wash. App. 369, 372, 693 P.2d 726 (1984), which instruct that "certiorari is proper method to initiate review of a road vacation ordinance claimed to be contrary to existing law."

2. Is the Court of Appeals decision below inconsistent with *Raynes v.*

Leavenworth, 118 Wn.2d 237, 821 P.2d 1204 (1992), which holds that quasi judicial processes include actions of local legislative bodies which determine the legal rights, duties, or privileges of specific owners of specific parcels of land on application of such landowners, as determined in a contested hearing?

3. Does the statute governing county road vacation, including a) posting notice to all regular non-abutting users, RCW 36.87.050; b) invitation to voice objections at hearing based on use (RCW 36.87.060); c) specific required findings of non-usefulness (id) and conclusions of public benefit (id.), grant standing to those users who so testify and express objection?

4. Was the commissioners' determination of public benefit from vacation of Three Devils Road arbitrary, capricious and irrational, when the county has no statutory duty to maintain it (RCW 36.75.300), the county engineer's report finds no public benefit to the vacation, the Hearing Examiner after a full's day testimony determined that there was no public benefit, over 200 persons petitioned to keep the road open, and dozens testified in writing and or in person that they regularly used it for lawful purposes and most considered it a vital emergency link to and from the Chiliwist Valley?

5. Does Article VIII, § 7 of the Washington Constitution forbid vacation of a public road when such vacation provides no public benefit?

6. Does a well supported allegation of peril to life and property posed by the

vacation of a public road state a sufficient constitutional interest in such life and property Under the 5th and 14th Amendments to the U.S. Constitution, 1) to grant standing to petitioners to challenge such vacation, whether legislatively or quasi judicially decided; and 2) grant standing to maintain an action under 42 USC §1982 and §1988?

7. If the county commissioners follow professional advice that a road vacation decision is quasi-judicial and are cautioned that issues of appearance of fairness under Chapter 42.36 RCW apply; and relying on such advice they direct all inquiries to the public hearing process before a Hearing Examiner, does the fact of both undisclosed *ex parte* contact with the applicant and undisclosed close personal and business ties between the applicant and at least one commissioner create an appearance of fairness violation?

IV STATEMENT OF THE CASE:

This is a county road vacation case where Gamble Land and Timber Ltd. applied to Okanogan County under Chapter 36.87 RCW to vacate and disencumber its property of a public road, known as Three Devils Road.

The Road's eastern terminus is at the west end of the Chiliwist Valley, which is surrounded by mountainous terrain and except for one road to the South and the main road through the valley floor, all other roads are narrow primitive dirt roads through the mountains. CP 802.

We will not do an exhaustive statement of the case here. The case was originally filed in this court and facts have been set forth in detail previously.

The Court of Appeals however made a few statements that should be corrected. The road in question was not built by the Wagner Family in 1950. It has existed for a century at least and perhaps for millennia according to multiple published accounts. CP 387 and see CP 483 et seq. The fact that its precise course has changed over the years is both a universal phenomenon of primitive roads and has no legal significance. RCW 36.75.100.

It is also, not true as the appeals court states, Slip op. at 13-14, that all citizens had private access to the County Commissioners, as a legislative body, to provide input and influence.

On March 17, planning and development Director Perry Huston issued a memorandum (CP 430 et seq.) that explained the appearance of fairness doctrine, instructed that the road vacation hearing was quasi judicial and explained the ability of the Commissioners to avoid any possible violation of improper appearance under Chapt.42.36 RCW by "remand[ing] the petition to the Office of Hearing Examiner to conduct the public hearing. The final decision would still be made by the Commissioners ***based on consideration of the record and recommendation*** of the Hearing Examiner."CP 431-32. (***Emphasis added***)

Thereafter the applicant disclosed in an email for the record *ex parte* private meetings with all three commissioners expecting that would cure the legal violation, which of course it did not because the Commissioners did not disclose. See RCW 42.36.060.

At hearing and in the submitted written record for hearing dozens of people testified about their use of the road for recreation, access to public lands, and most importantly as an escape route and emergency vehicle access route to and from the Valley. Over two hundred persons signed petitions to the Commissioners urging denial of vacation. CP 542-568. One person testified that she had observed emergency vehicles accessing the Valley to fight a wildfire that consumed many homes in the Chiliwist and three people testified that its existence had saved their own or family members lives. 365-72;383-391;685-695;712-714; 739-740.

The Hearing Examiner found both that the road was useful and that vacation provided no public benefit.

Only the Applicant or its agents testified in favor of vacation.

The Commissioners thereafter disregarded the Hearings Examiners' findings and conclusions and voted to vacate.

V ARGUMENT: REASONS FOR GRANTING REVIEW (RAP 13.4(B))

1. **The Decision of the Court of Appeals below Is in Conflict with Multiple Published Decisions of the Court of Appeals.**

The starting point of the Court of Appeals' multiple alleged errors is that it held that a decision by the County Commissioners on a private party's road vacation petition is purely legislative in nature. No court has held that a county road vacation is purely legislative.

In fact, the opposite is true: Multiple courts have held explicitly that review of such decisions is, except in rare instances, had by writ of review. *Federal Way v. King County,* 62 Wn. App. 530, 815 P.2d 790 (1991) at 534: "certiorari is proper method to initiate review of a road vacation ordinance claimed to be contrary to existing law."; *citing DeWeese v. Port Townsend*, 39 Wash. App. 369, 372, 693 P.2d 726 (1984) at 371-372; and *see, Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982):

> Because superior court review was by writ of certiorari, RCW 7.16.120, the court was limited to review of the record before the Board and to a determination of whether the Board's action was arbitrary and capricious or contrary to law.

33 Wn.App at 240-241,

This last is important for two reasons: 1) *Bay Industry* concerns a *county* road vacation action based on Chapter 36.87 RCW, and instructs review by certiorari. Most of Respondents' cases are city street vacation cases based on wholly different statutes; and 2) It further instructs that

review of such cases is confined to the record before the Commissioners, and the lower courts here went far afield of that record to make their decision.

The legislature, and this court, and all divisions of the court of appeals have held that a writ of review is reserved exclusively for review of quasi-judicial decisions. RCW 7.16.040; *Saldin Securities Inc. v. Snohomish County*, 134 Wn.2d 288, 379-380, 949 P.2d 370 (1998); *Foster v. King County*, 83 Wn.App. 339, 346, 921 P.2d 552 (Div I, 1996); *Harris v. Pierce County*, 84 Wn.App. 222, 228, 928 P.2d 1111 (Div II, 1996); *Coballes v. Spokane County*, 167 Wn. App. 857, 274 P.3d 1102 (Div. III, 2012).

The Court of Appeals below noted this point but failed to reconcile it with its holding. Instead, the court below gleaned its conclusion from several cases that explained that road management decisions, including vacation decisions are a matter of discretion for city county authorities and generally are not overturned absent major irregularity, citing *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 368, 324 P.2d 1113 (1958) (city street); *Fry v. O'Leary,* 141 Wash. 465, 469, 252 P. 111 (1927) (city street); *Thayer v. King County*, 46 Wn.App. 734, 738, 731 P.2d 1167 (1987) (county road); *Banchero v. City Council of City of Seattle*, 2 Wn.App. 519, 523, 468 P.2d 724 (1970) (city street).

All of these cases except *Thayer* involve city streets, and *Thayer* does

not state anywhere that vacation is a legislative function. (*Fry* does not mention legislative function either). The foundation of this court's legislative classification applies only to city streets. Both *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 P. 316 (1906), and *Mottman v. Olympia,* 45 Wash. 361, 88 P. 579 (1907), citing *Ponischil,* base this conclusion on the fact that decisions concerning city streets including platting and vacation were at formerly a function of the State Legislature and that function was delegated to ***cities*** by chapter 84 of the Laws of 1901. *Mottman* at 364, citing *Ponischil* [at 305]. This is a crucial distinction because as far as we are aware, the State Legislature did not "plat" county roads, nor vacate them. As we pointed out in earlier briefing, rural county roads such as Three Devils were almost universally established by public use and at some time simply recognized for their public character by, as here, placing them on the county roster. §10, Chapter 187, laws of 1937; RCW 36.75.070. The implication that the reasoning of *Ponischil* might apply to County roads is not justified.

Insofar as such implication exists, the plain conflict with those cases that explicitly instruct review of road vacation by writ of review, on the hearing record, can only be resolved by this court. Insofar as the "legislative" classification in the early cases would forbid review of <u>city</u> street vacation by writ of review as instructed by Federal Way, supra, and

DeWeese, supra, that too must be resolved by this court. *House v. Erwin*, 81 Wn. 2d 345, 348, 501 P.2d 1221 (1972).

2 **The Decision of the Court of Appeals Is in Conflict with a Decision of the Supreme Court**

a) Raynes v. Leavenworth, 118 Wn.2d 237, 821 P.2d 1204 (1992), quoting RCW 42.36.010, instructs that cases such as the one at bench represent the essence of quasi-judicial actions for the purpose of application of the appearance of fairness principles.

After setting out the 4-part test for determining what constitutes quasi-judicial action (which we believe the Court of Appeals misapplied, see *infra*), the *Raynes* court summed up the principle guiding its holding by quotation to the appearance of fairness statute:

> The statute [RCW 42.36.010] defines quasi judicial to include actions of local legislative bodies 'which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.'

118 Wn2d at 247 (*emphasis added*)

Here Gamble Land, a specific party, requested specific relief disencumbering a specific defined parcel of property of a discrete public property interest. It was required to follow a process that mandated a hearing, requiring specific findings. RCW 36.87.060 ("If 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 benefitted by the vacation, the county

legislative authority may vacate the road") (*Empahsis added.*)

Although the *Raynes* quotation above, when applied to the facts of this case would appear conclusive as to the quasi-judicial nature of road vacations such as the one here, the *Raynes* court emphasized the same point again on the following page:

> There is a distinction between rezoning a specific site and amendments which modify the text of a zoning ordinance. [citation omitted.] Actions of a city council are rezones [and thus quasi-judicial in nature] when there are "specific parties requesting a classification change for a specific tract."

Raynes at 248, quoting *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981).

Although the Court of Appeals recognized the existence of *Raynes*, it ignored the foundation reasoning that was crucial to the case holding.

b) <u>The Court of Appeals below misapplied the 4-part test in *Raynes* in a manner directly contrary to the actual *Raynes* holding.</u>

The *Raynes* court sets out the four-part test for distinguishing between legislative and quasi-judicial acts, as follows:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Raynes, at 244-245, quoting *Standow v. Spokane*, 88 Wn.2d 624, 631, 564

P.2d 1145 *appeal dismissed,* 434 U.S. 992 (1977).

Using this test, the Court of Appeals below reasoned that, (1) courts are not authorized to vacate roads, only municipal authorities can do that; and, (2) courts have not historically performed such duties.

The point of this test in *Raynes*, however, was to distinguish zoning code text amendments (*held* legislative) from rezones of individual parcels (*held* quasi-judicial). If we apply the test as the court below did to the facts of *Raynes* itself, we must note that courts do not rezone property; and courts are not authorized to do so, and courts have not historically rezoned individual properties. Only local legislative authorities have ever had such power. The *Raynes* court could not have held as is did under this reasoning.

We must look to the *Raynes* court's own exegesis of the test in the paragraphs following its presentation to properly apply it. When we do so we see that the *Raynes* emphasis was whether the action was basically a policy function performed on behalf of the whole city or, to the contrary, the determination of specific competing rights with respect to individual parcels of property, which is the ordinary work of the courts. *Raynes* at 245.

In the case at bench, as in *Raynes,* the guiding principle is that deciding private petitions by determining the competing public and private rights to specific properties, according to explicit statutory and constitutional

guidelines, is precisely the ordinary and historic business of the courts.

Insofar as the literal language of the standard four-part test set forth in *Raynes* can reasonably be interpreted to mean that statutory functions reserved to a legislative authority can never be considered quasi-judicial, this court should correct or clarify it to avoid confusion in future cases.

3. **A Significant Question of Law under the Constitution of the State of Washington or of the United States Is Involved.**

a) Washington Constitution, Article VIII section 7.

Article VIII section 7 of our state constitution states as follows:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

The *county* vacation statutes controlling this case appear to explicitly carry out this provision: RCW 36.87.060 states,

> If 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 benefitted by the vacation, the county legislative authority may vacate the road or any portion thereof.

RCW 36.87.010 is even less equivocal and requires the commissioners to find the road "useless" before they can vacate it for the benefit of the private-party feeholder.

It is hard to read these statutes except, at least in part, as an expression of Article VIII sec. 7. The point made by RCW 36.87.060 is of sufficient constitutional significance that this court has extended the required finding of public benefit to apply to the vacation of city streets – whose statutes at Chapter 35.79 RCW do *not* contain the public benefit requirement. See the explanation of this extension at *Puget Sound Alumni of Kappa Sigma Inc. v. City of Seattle,* 70 Wn.2d 222, 226-227, 422 P.2d 799 (1967) and cases cited therein.

In 1929, this court explained the necessity of finding public benefit from a city street vacation, even though no statute required a showing public benefit for street vacations.

> To illustrate [the power of a city to vacate streets], it may change a street from its use as a highway to a use for another public purpose, when it is determined' that the change will better serve the public good; it may vacate a street when it is no longer required for public use, ***or when its use as a street is of such little public benefit as not to justify the cost of maintaining it;*** or when it is desired to substitute a new and different way more useful to the public; and, of course, it is within the power of a city to vacate a street where all of the property owners adversely affected[1] consent to the vacation. ***But in all instances, the order of vacation must have within it some element of public use,*** and even where the order serves a public use, it cannot be exercised against the will of abutting property owners

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[1] Note that the language here is not "all abutting landowners consent," but all "property owners adversely affected."

adversely affected, unless the damages they suffer thereby are in some way compensated.

Young v. Nichols, 152 Wash. 306, 308, 278 Pac. 159 (1929). (***emphasis added***)

Petitioners before this court point out the following:

A. The county engineer's report on the road (per RCW 36.87.040) stated that there was no benefit to closing the public road and the cost of maintaining it was minimal. CP136

B. The hearing examiner who actually heard the evidence at an open public hearing, at which the Applicant was represented and testified, found no public benefit, and even the applicant provided little or no evidence of public benefit to disencumbering his property. CP 742.

C. The county is not required to maintain primitive roads. RCW 36.75.300.

D. Dozens of persons testified in writing and/or in person on the public record that they regularly used the road in question for recreation, access to the National Forest, and, most important, that it was vital for emergency vehicle access and as an escape route during wild fire and other emergencies. Several testified that it had already been responsible for saving their or family members' lives. CP 365-72;383-391;685-695;712-714; 739-740. Over 200 residents petitioned

the Commissioners to keep it open, almost the entire Chiliwist Valley. CP 542-568. The hearing examiner found the evidence of usefulness overwhelming. CP 742.

E. The forest service road supervisor provided written testimony, that Three Devils Road had always provided access to the National Forest for the public, and as such would remain open at the Forest Service end unless closed by the Commissioners. CP 698-99

We believe that, given these facts, which are not controverted, the Commissioners' decision on public benefit and lack of utility in favor of vacation was arbitrary, capricious and irrational.

b. <u>The Due Process Clauses of the 5th and 14th Amendments to the Federal Constitution create a federally protected interest in the safety of life and property which was violated here. The Court of Appeals failed to consider this issue although squarely raised.</u>

The Court of Appeals found that Petitioners had no protectable constitutional interest in keeping the road open. It failed to address the Petitioners' interest in their lives and property which are facially protected by the Due Process clauses of Federal Constitution, and the safety of which would allegedly be imperilled by this road closure, according to substantial evidence. (See Opening Brief before the Supreme Court at page 42.)

This is certainly a significant Contitutional interest that the court of

Appeals failed to analyze at all. This court should address this significant constitutional issue.

4 **The Petition Involves Issues of Substantial Public Interest That Should Be Determined by the Supreme Court.**

a. Those imperilled by a Commissioner decision, regardless of the nature of that decision, deserve their day in court, and that includes the right of appeal.

The Court of Appeals here disenfranchised plaintiffs by refusing to even decide whether they had standing; holding, erroneously, that the court's decision on the alleged legislative nature of the decision rendered it moot. Slip op. at 8. The standing issue and the superior court's ruling on it were raised by all parties to this appeal. The case is only half done.

The superior court ruled that, regardless of the nature of the commissioner decision, petitioners *did* have standing to bring an action because they pled – and the record justified – the fact that closing Three Devils Road posed a threat to their health, safety and property. The category of actual peril creates an interest in the vacation separate and distinct from the general public and thus confers standing. RP 44-45, 9/18/15. See *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 365-367, 324 P.2d 1113 (1958)

The peril issue is even more significant here than it was in *Capitol*

Hill Methodist for two reasons, one factual and one jurisprudential:

First, a back country enclosed valley in Okanogan County is not downtown Seattle where emergency response is only briefly delayed by detour around a closed street. (See *Mottman v. Olympia*, 45 Wash. 361, 364, 88 P. 579 (1907)). All alternate mountain roads for either escape or emergency response are many miles long through rugged terrain. CP 802.

Second, the city in that case was not required to find that the street to be vacated was "not useful." But that is the standard that Okanogan County must meet RWC 36.87.060. Petitioners claim the Commissioners did not meet that standard on this record. The Superior Court disagreed. Petitioners had the right to appellate review of that decision. In the future those imperilled by decisions of this nature should also have that right.

This is both a matter of great importance to the citizens of the rural parts of this state, but it is also a matter basic jurisprudence and of the orderly administration of justice, such that cases are not left half-done.

b. <u>The Legislature appears to have explicitly conferred standing on the regular users of the road.</u>

In no instance in the law does a statute call out a specific class of stakeholders in a decision, require that such class members have actual notice of hearing on that decision, and invite them to express objections to the

action, unless that combination confers actual standing.

All regular users of the road are given notice. Notice of vacation hearing must be posted at "each [sic] termini" of the road to be vacated. This evidences a clear intent that all those who regularly use the road be made aware of a hearing on its closure. RCW 36.87.050. The users are invited to express their objections to closure at hearing (RCW 36.87.060). For the legislature to identify the stakeholders, give them notice, encourage them to testify, and then have the courts allow the local authorities to ignore that testimony without recourse would defy the plain intent of the legislature.

If this is not an instance where the legislature has conferred participation standing, this court should clarify why it is not. See e.g., *Sterling v. County of Spokane*, 31 Wn. App. 467, 642 P.2d 1255 (1982)

c. The necessity for basic faith that the people must have in the fairness of democratic institutions is at issue here. It is no less important in Okanogan County in 2017 than it was in Skagit County in 1969.

We assert here that the appeals court erroneously reasoned from its own conclusion to infer the facts necessary to support it. The actual facts are otherwise.

The court of appeals correctly determined that the essence of an appearance of fairness violation as set forth in the foundation case of *Smith v. Skagit County,* 75 Wn.2d 715, 453 P.2d 832 (1969) is the limitation of the

public to the open public hearing process while the decision-maker excluded the public, going behind closed doors with the applicant, to be privately influenced. Slip op. at 14-15. It is undisputed that the applicant went behind closed doors with the commissioners after the vacation application was filed. CP 392.

The court below reasoned that because *it* had determined that the action was legislative, everyone could have had access to the commissioners. Slip op at 12-13. This inference – necessary by the court's own reasoning to avoid an appearance of fairness violation – was false.

Until our action was filed, County Commissioner respondents and all parties accepted the fact that a road vacation on application of the benefitted landowner was and is a quasi-judicial function. They were told this, in writing, (CP 430 et seq.) by their own development director, Mr. Huston. Mr Huston stated that they could avoid the appearance of impropriety under Chapter 42.36 RCW by giving it to a hearing examiner and should be "based on consideration of the record and recommendation of the Hearing Examiner." CP 431-32. They followed his advice.

The Hearing Examiner treated his commission as an entirely judicial exercise: He opened the decision record, accepted legal briefing, made rulings on that legal briefing, heard evidence, made findings and conclusions therein,

and closed the record, except for asking for additional briefing to clarify a specific point of law. He was invited to extend the record on motion for reconsideration by the applicant and refused.

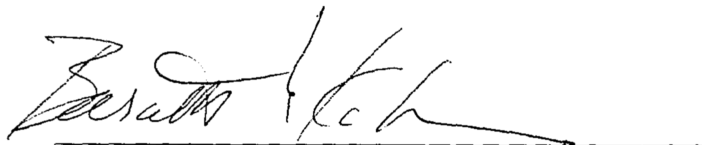
It is a fine point whether the actual facts constitute a waiver of the County's assertion that the Chapter 42.36 RCW rules on appearance of fairness do not apply. Regardless, neither the appeals court's reasoning on the issue, nor its conclusions survive the actual facts.

VI CONCLUSION

Not until this action was filed, did counsel come up with the novel theory that a county road vacation – especially under these circumstances – is purely legislative and not subject to the rules of fairness and due process, and rational determinations based on the record accorded to such hearings and decisions. The Court of Appeals should be reversed, the writ Granted and the decision of the Commissioners overturned.

Respctfully Submitted,
April 13, 2017

KALIKOW LAW OFFICE



Barnett N. Kalikow, WSBA #16907
Attorney for Petitioners

Barnett N. Kalikow hereby declares under penalty of perjury according to the laws of the State of Washington that she/he is of legal age and competence and that on April 13, 2017, he deposited in the U.S. Mail, first class postage prepaid and sent by electronic mail the following item:

PETITION FOR SUPREME COURT REVIEW

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April 13, 2017

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