99564-8

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals: No. 80007-8-I

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER AND DECISION BELOW

Thirteen Washington youth petition for discretionary review of the Published Opinion of Division I of the Court of Appeals, *Aji P. v. State*, No. 80007-8-I (Wash. Ct. App. Feb. 8, 2021) (App. A).[1]

II. ISSUES PRESENTED FOR REVIEW

1. Is declaratory relief regarding the constitutionality of government conduct final and conclusive under the Uniform Declaratory Judgment Act?

2. Did the Court of Appeals err in expanding the political question doctrine beyond its narrow scope to preclude review of a constitutional controversy involving government conduct that causes climate change?

3. Did the Court of Appeals err in holding the right to a healthful and pleasant environment, which has been recognized by vote of the people and the legislature as "fundamental and inalienable," is not a fundamental right?

III. STATEMENT OF THE CASE

This case presents a constitutional challenge to the State's energy and transportation policies and practices that result in high levels of greenhouse gas ("GHG") emissions that directly harm children. For over a decade the State has had a statutory mandate to reduce its GHG emissions, *see* RCW 70A.45.020 (formerly RCW 70.235.020 (2008)), and has spent

[1] The Youths' names are set forth on the caption of the Court of Appeals' decision. App. A at 1.

four decades studying the climate crisis, App. B ¶¶ 115–42. Yet Respondents persist in a systemic course of conduct that causes climate change.[2] The crux of this case is whether courts have the power to declare rights and wrongs under the constitution. Specifically, have Respondents "overstepped [their] authority under the constitution"[3] by causing climate change in a manner that infringes upon Petitioners' negative constitutional rights?[4] The Complaint details how Respondents control the State's energy and transportation system, the GHG emissions that result therefrom, and how Respondents' systemic affirmative actions in operating the State's energy and transportation system cause climate change. App. B ¶¶ 29–47, 143–48. The Complaint alleges how the youth are harmed by Respondents' conduct, such as Petitioners James and Kylie of the Quinault Indian Nation, who must relocate from their Taholah home because of climate change-

[2] Respondents recognize they are not on track to meet the 2020 GHG emissions reductions mandate, and according to the latest State-published data, emissions have steadily increased. App. B ¶ 142. Between 1990 and 2018, Washington GHGs increased from 90.49 MMT CO_2e to 99.57 MMT CO_2e. Dep't of Ecology, Pub. No. 20-02-020, *Wash. State Greenhouse Gas Emissions Inventory 1990–2018* at 13 (Jan. 2021), available at https://apps.ecology.wa.gov/publications/documents/2002020.pdf.

[3] *McCleary v. State*, 173 Wn.2d 477, 518–19, 269 P.3d 227 (2012) (the court's role is "to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries").

[4] Petitioners allege violations of enumerated due process rights to life, liberty, and property and unenumerated rights to reasonable safety, personal security, and bodily integrity under Wash. Const. art I, § 3 (claims 1, 2); and to a healthful and pleasant environment that includes a stable climate system that sustains human life and liberty under Wash. Const. art. I, §§ 3, 30 (claim 3). App. B ¶¶ 149–73. Petitioners alleged violation of rights under the public trust doctrine (claim 4), and to equal protection under Wash. Const. art. I, § 12 (claim 5). App. B ¶¶ 174–95. While the appeal was pending, Petitioners voluntarily dismissed claim 6, challenging the constitutionality of RCW 70.235. App. C.

induced flooding and sea level rise, and Petitioner India who evacuated her farm in Eastern Washington multiple times due to wildfires, the smoke from which exacerbates her asthma. *Id.* ¶¶ 12–28. The complaint also details how Respondents' conduct violates Petitioners' constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment which includes a stable climate system that sustains human life and liberty. *Id.* ¶¶ 143–95. While this case involves matters of weighty public importance, the need for review is much narrower—to address legal errors with broad jurisprudential implications.

First and foremost, Petitioners seek declarations of law pursuant to RCW 7.24.010 to resolve the controversy that Respondents' have violated and continue to violate their constitutional rights. App. B pp. 70–71; RCW 7.24.050 (declaratory relief intended to "terminate the controversy or remove an uncertainty."). Petitioners seek further relief in the form of an injunction to constrain Respondents "from acting pursuant to policies, practices, or customs that violate" Petitioners' constitutional rights consistent with RCW 7.24.080. App. B p. 71. Lastly, Petitioners seek an order requiring Respondents to prepare an inventory of GHG emissions and a remedial plan of their own devising "to implement and achieve science-based numeric reductions of GHG emissions." *Id.* at p. 72.

After filing an answer disputing that Petitioners have constitutional

rights infringed by Respondents' conduct, Respondents filed a Rule 12(c) motion for judgment on the pleadings. Without affording Petitioners an opportunity to present evidence in accordance with RCW 7.24.090 or leave to amend, the Superior Court dismissed the case with prejudice. App. D. The parties submitted briefing on appeal, App. E, and a number of Indian tribes and organizations filed seven *amicus curiae* briefs supporting Petitioners.[5] On February 8, 2021, the Washington Court of Appeals affirmed by published opinion erroneously finding the claims nonjusticiable political questions and ruling that declaratory relief was unavailable solely because Petitioners requested potential further relief. App. A at 19. Compounding its errors, the panel improperly proceeded to and rejected the merits of some of the claims without applying strict, or any other level of, scrutiny and without factual evidence. *Id*. at 20.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

A. The Panel's Decision Contradicts Seattle Sch. Dist. and the UDJA

Over forty years ago, this Court affirmed the long-standing principle that "[d]eclaratory procedure is peculiarly well suited to the judicial determination of controversies concerning constitutional rights[.]" *Seattle*

[5] (1) Sauk-Suiattle Indian Tribe; (2) the faith community; (3) the League of Women's Voters; (4) environmental groups; (5) Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish Tribe; (6) public health officials, public health organizations, and medical doctors; and (7) Washington businesses. App. F
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Sch. Dist. v. State, 90 Wn.2d 476, 490, 585 P.2d 71 (1978). Though the plaintiffs' requests for injunctive relief and to retain jurisdiction were ultimately rejected, this Court confirmed that claims for "a declaratory judgment to resolve a question of constitutional interpretation" are justiciable. *Id*. at 490. This Court's recognition that declaratory relief alone resolves systemic constitutional controversies aligns with the plain language of the UDJA and long-standing Washington precedent. RCW 7.24.010 (allowing declaratory relief "whether or not further relief is or could be claimed"); RCW 7.24.080; Wash. Sup. Ct. Civ. R. 8(a) ("Relief in the alternative or of several different types may be demanded.").

Here, the panel found that "declaratory relief would be final," which should have been sufficient under the UDJA.[6] App. A at 19. However, contrary to this Court's precedent and the plain language of RCW 7.24.010, the panel rejected declaratory relief as "inextricably tied to the retention of jurisdiction and to the order to implement the climate recovery plan*." Id.* In essence, Petitioners were punished with a finding of nonjusticiability for seeking "further relief," even though such relief is authorized by RCW

[6] On appeal, Respondents did not contest that there is an actual controversy under the UDJA, they only argued that the Court cannot provide a final and conclusive remedy through *injunctive* relief. App. E (State's Resp. Br. at 20). As such, this Court need not address the other UDJA requirements. *Wash. State Housing Finance Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 711 n.4, 445 P.3d 533 (2019). Declaratory relief would not constitute an advisory opinion because it would resolve the admitted controversy. *Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341 (1937).

7.24.080. The panel's finding directly conflicts with *Seattle School District*, which confirms declaratory relief alone can finally and conclusively resolve constitutional controversies, even if further relief is requested. 90 Wn.2d at 538. Here, a declaration would be final and conclusive because it would end the dispute that Respondents admit exists: whether their energy and transportation policies and practices keep GHG emissions at dangerous levels, infringing Petitioners' fundamental rights and causing immediate and long-lasting harms to their physical and mental wellbeing. If Petitioners can show this conduct violates their fundamental rights, such a declaration would be a final and conclusive determination of the controversy irrespective of whether any other relief is requested or granted.[7] *Id.*; *Ronken v. Bd. of Cty. Comm'rs of Snohomish Cty.*, 89 Wn.2d 304, 311, 572 P.2d 1 (1977); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 556–58, 496 P.2d 512 (1972); RCW 7.24.010.

This Court and the U.S. Supreme Court have long acknowledged the important role of declaratory relief in resolving constitutional controversies, *e.g.*, *Seattle Sch. Dist.*, 90 Wn.2d at 490 (collecting cases); *McCleary*, 173 Wn.2d at 539; *League of Educ. Voters v. State*, 176 Wn.2d 808, 816–18,

[7] *Found. on Economic Trends v. Watkins*, 731 F. Supp. 530, 531 (D.D.C. 1990) ("Although this Court may not be able to provide all the relief that the Plaintiffs request, a fair reading of the Complaint amply demonstrates that the Plaintiffs are challenging specific programs and projects upon which this Court can act . . . .").

295 P.3d 743 (2013), particularly in cases involving negative fundamental rights.[8] *See, e.g., First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (en banc) (controversy is justiciable because "the Court can reach a conclusive determination on the constitutionality of the" challenged ordinance). For purposes of justiciability, declaratory relief can stand on its own. *McCleary*, 173 Wn.2d at 540 ("[i]n *Seattle School District*, we deferred to ongoing legislative reforms and simply declared the funding system [unconstitutional]."); *Ronken*, 89 Wn.2d at 311 ("we find the declaratory aspect of the order declaring the rights and liabilities of the parties under applicable law is final."); *Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (court has a "duty to decide the appropriateness and the merits of [a] declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction.").[9]

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[8] *See also Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (declaratory relief changes the legal status of the challenged conduct); *Evers v. Dwyer*, 358 U.S. 202, 202–04 (1958) (ongoing governmental enforcement of segregation laws create actual controversy for declaratory judgment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("the consideration of appropriate relief was necessarily subordinated to the primary question – the constitutionality of segregation in public education."); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 Duke L. Journal 1091, 1120 (2014) ("Many of the most momentous and controversial decisions of constitutional law over the last century have been declaratory judgments, including *Powell v. McCormack*, *Roe v. Wade*, *Buckley v. Valeo*, *Bowers v. Hardwick*, *U.S. Term Limits, Inc v. Thornton*, and most recently *National Federation of Independent Business v. Sebelius*. No critic of any of these decisions has ever contended that it had less effect because it took the form of a declaratory judgment.")

[9] *See also* Harvard L. Rev. Ass'n, *Substantive Limits on Liability and Relief*, 90 Harv. L. Rev. 1190, 1248–49 (1977) (in systemic constitutional cases, "[t]he court's first step should be to issue a form of declaratory judgment, placing the defendants on notice of the

As a freestanding remedy, a declaratory judgment is effective relief because it terminates the controversy and carries an expectation that government officials will abide by the Court's interpretation of the constitution. *Seattle Sch. Dist.*, 90 Wn.2d at 506, 538 (court assumes "the other branches" will "carry out their defined constitutional duties" in response to declaratory relief); *Ronken*, 89 Wn.2d at 311–12; *Wash. State Coal. for the Homeless v. Dep.t of Soc. & Health Servs.*, 133 Wn.2d 894, 918, 949 P.2d 1291 (1997) ("a judicial determination [of] the authority and responsibility of the Department and of the juvenile court when involved with homeless children will be final and conclusive[.]").[10]

The panel mischaracterized Petitioners' justiciability burden by stating that the trial court would need to "stabilize the future global climate" to establish a final and conclusive remedy. App. A at 19. This is an absurd conclusion that is contrary to countless cases resolving fundamental rights. *See e.g. Brown v. Bd. of Educ.*, 347 U.S. at 495 (declaring school segregation unconstitutional even though such an order could not resolve issues of racism in schools). The panel's reasoning would lead to disastrous

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constitutional violation" so they can "remed[y] the violations on their own initiative;" further relief should only be considered if defendants fail to abide by declaratory relief).

[10] *Brown v. Vail* is not to the contrary. 169 Wn.2d 318, 237 P.3d 263 (2010) (declaration that lethal injection protocol violated *statute* would not bind Department of Corrections because agencies not before the Court had prosecutorial discretion whether to enforce violations of statute, even if declared). Here, it is presumed Respondents will comply with a declaration their conduct violates the *constitution*. *Seattle Sch. Dist.*, 90 Wn.2d at 506.

results for children where elimination of all contributing sources of injury is impossible. For example, courts cannot wholly eliminate child sexual abuse imagery online, but declare it illegal where found, just as courts cannot wholly eliminate racism against children in schools or child homelessness, but declare government conduct unconstitutional where found. The panel's reasoning disregards the court's "core function" "to safeguard the individual liberties . . . in our constitution's Declaration of Rights," which by their nature prevent *government* from harming individuals, irrespective of whether parties not bound by Washington's Constitution also cause harm.[11] Petitioners' do not ask Respondents to *solve* climate change; nor is that their burden. *See Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (a mere reduction in GHG emissions satisfies redressability even if requested relief "will not by itself *reverse* global warming"); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (Staton, J., dissenting). Petitioners have a right to be free from harms caused and exacerbated by *their* state government. This decision, if left standing, insulates any government conduct from review when full redress is not possible and ignores U.S. Supreme Court precedent that "the ability 'to effectuate a

[11] Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U. L. Rev. 695, 699 (Winter 1999).

partial remedy' satisfies the redressability[12] requirement." *Uzuegbunam v. Preczewski*, ___ U.S. ___, 2021 WL 850106 (Mar. 8, 2021) at *6 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

Underlying the panel's flawed justiciability analysis is a presumption that Petitioners' request for injunctive relief is somehow extraordinary or improper. Even aside from its mischaracterization of the requested injunctive relief as requiring new legislation,[13] without the benefit of evidence establishing the scope of the constitutional violation, it is impossible to predict what injunctive relief, if any, may ultimately be appropriate. *Baker v. Carr*, 369 U.S. 186, 198 (1963) ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate . . . ."); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation"). As in

[12] "The requirements for standing often overlap with the requirement that the lawsuit present a justiciable controversy." *Wash. State Housing Fin. Comm'n*, 193 Wn.2d at 711 n.4.

[13] The panel's reliance on *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 242 P.3d 891 (2010), and *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), is misplaced. Both asked the court to criminalize conduct deemed lawful by the legislature, which is not requested here. Furthermore, no new legislation is required for Respondents to develop a remedial plan. Respondents already have ample statutory authority, both express and implied. RCW 70A.45.020(b); RCW 43.21F.010; *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124–25, 864 P.2d 1382 (1994); App. B ¶¶ 29–45. Moreover, no additional statutory authority is needed for the Court to declare Petitioners' rights or to enjoin Respondents' ongoing unconstitutional conduct.

Seattle School District, the trial court may opt to order declaratory relief and leave it to Respondents to comply. *McCleary*, 173 Wn.2d at 547–48 (Madsen, C.J., concurring/dissenting) (court's job is to interpret the constitution, order compliance, and defer to the government for implementation). Even so, "[t]rial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it," including remedial plans and orders to reform unconstitutional state systems. *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174 (2015); *McCleary*, 173 Wn.2d at 546. This Court must grant review to correct the panel's legal error and clarify for all Washington courts that declaring what is right and wrong under the constitution "will be final and conclusive." *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157 (2016); *Acme Finance Co.*, 192 Wash. at 107.

B. The Panel Erroneously Expands the Political Question Doctrine

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid'" and the political question doctrine is a "narrow exception to that rule[.]" *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012). "[T]here should be no dismissal" on political question grounds unless one of the factors identified in *Baker v. Carr* is "inextricable from the case at bar." 369 U.S. at 217; *Seattle Sch. Dist.*, 90 Wn.2d at 507 (applying *Baker* factors); *Brown v. Owen*, 165 Wn.2d 706, 718–19, 722,

206 P.3d 310 (2009) (same). "The political question cases in Washington have fallen into several broad categories: initiatives, recall, political organizations, and gambling," none of which are presented here.[14] The panel's analysis turns the political question doctrine on its head, broadly forecloses constitutional claims and creates a conflict with U.S. and Washington Supreme Court case law.[15]

Looking under the first *Baker* factor to whether there is an exclusive and "textually demonstrable constitutional commitment of the issue" to another branch, 369 U.S. at 217, the panel egregiously found the general dedication of legislative authority to the legislature sufficient to foreclose Petitioners' constitutional claims. App. A at 9 (citing Wash. Const. art. II, § 1). To rule that this provision implicates the first *Baker* factor would broadly bar constitutional challenges to *all* legislation, eviscerating Article IV authority and the separation of powers. *Contra Rousso*, 170 Wn.2d at 75 (recognizing that while "[i]t is not the role of the judiciary to second-guess the wisdom of the legislature," the Court must still decide whether

[14] Talmadge, *supra* n. 11, at 713–14; *but see Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010) (reviewing the constitutionality of legislative ban on gambling and suggesting gambling is no longer a political question category).

[15] The panel cherry picked allegations to improperly focus its political question analysis on a concocted mischaracterization of the requested injunctive relief, *see Baker*, 369 U.S. at 198, while disregarding Petitioners' request for declaratory relief, which would suffice on its own. *Compare* App. A at 9 (citing App. B ¶ 114 alleging what experts opine is feasible with respect to decarbonizing Washington's energy and transportation systems, an essential allegation for a strict scrutiny analysis, not Petitioners' requested relief) *with* App. B pp. 70–72 (actual relief requested).

legislation violates the constitution). Moreover, the constitution contains no clear reference to the issue in this case: whether Respondents, by contributing to climate change through their energy and transportation policies and practices violate Petitioners' constitutional rights. As the panel itself acknowledged, "'our state constitution does not address state responsibility for climate change.'" *Id.* at 19 (quoting *Svitak v. State*, 178 Wn. App. 1020, 2013 WL 6632124 (2013) (unpublished)).[16]

Under the second *Baker* factor, the panel ruled there is no judicially manageable standard to resolve Petitioners' claims because "scientific expertise is required to make a determination regarding appropriate GHG emissions reductions[.]" App. A at 10. However, "the judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution," *Seattle Sch. Dist.*, 90 Wn.2d at 87; *Wyatt v. Aderholdt*, 503 F.2d 1305, 1314 (5th Cir. 1974) (the judiciary can formulate "workable standards" to declare systemic due process violations), and cannot avoid claims because they are complex or involve science. *Alperin v. Vatican Bank*, 410 F.3d 532, 555 (9th Cir. 2005);

[16] The panel reframed the legal issue to "whether the State's current GHG emissions statutes and regulations sufficiently address climate change." App. A at 8. This improper alteration is important because Petitioners framed their constitutional claims directly in response to *Svitak*'s admonition that a failure to act claim is nonjusticiable and that, as alleged here, there must be an "allegation of violation of a specific statute or constitution" for a claim to be justiciable. 2013 WL 6632124 at *1. GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) (en banc).[17] Moreover, the Court need only look to the standards the legislature set in RCW 70A.45 defining mandatory GHG emission reductions; standards to which Respondents' conduct is not aligned. App. B ¶¶ 44, 132, 142; App. G at 11 (Transcript of Ct. App. Oral Argument, "The Court: What about the argument that now there is a statute against which we can measure [Respondents' conduct]?").

Addressing the third *Baker* factor, the panel barred Petitioners' claims because "respondents have already made an initial policy determination" on GHG emissions through Ecology's Clean Air Rule. App. A at 10–11 (citing WAC Ch. 173-442).[18] Again the panel gets it backward: the third *Baker* factor is only applicable "in the *absence of a yet-unmade* policy determination," because courts review policy, not set it in the first instance. *Zivotovsky*, 566 U.S. at 204 (Sotomayor, J. concurring) (emphasis added); *Rousso*, 170 Wn.2d at 75. By the panel's reasoning, no challenge to any law would be justiciable, since each involves an "initial policy determination" the state "already made." In RCW 70A.45, the

[17] *See also*, Breyer, J., *Science in the Courtroom*, Issues in Science and Technology (2000) ("Scientific issues permeate the law . . . . [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm[.]")

[18] The panel omitted that this Court invalidated portions of the rule. *Ass'n of Wash. Bus. v. Ecology*, 195 Wn.2d 1, 455 P.3d 1126 (2020).

legislature mandated emissions reductions, yet emissions are increasing and exacerbating Petitioners' injuries, and determining whether Respondents' ongoing causation of climate change, contrary to that statutory directive, violates Petitioners' constitutional rights is consistent with the court's proper role. *Baker*, 369 U.S. at 217; *Seattle Sch. Dist.*, 90 Wn.2d at 496.

Under the fourth *Baker* factor, focusing only on Petitioners' request to retain jurisdiction—further relief that may never be ordered, as in *Seattle School District*—the panel held resolving Petitioners' claims[19] would disrespect coordinate branches because it "involves policing the legislative and executive branches' policymaking decisions." App. A at 11. Again, the panel's reasoning inverts Washington's separation of powers:

> [Constitutional] [i]nterpretation and construction . . . are traditional judicial functions and involve no disregard for or lack of respect due a coordinate branch of government. While the judiciary occasionally may find it necessary to interpret the State Constitution in a manner at variance with a construction given it by another branch, the cry of alleged 'conflict' cannot justify courts avoiding their constitutional responsibility.

Seattle Sch. Dist., 90 Wn.2d at 508. Here, the legislature recognized the

[19] Petitioners do not ask the court to determine "what policy approach to take" and "how to balance all implicated interests to achieve the most beneficial outcome[.]" *Contra* App A. at 12. They ask the court to use established frameworks for resolving constitutional challenges to review Respondents' existing energy and transportation policies and practices to determine whether they exceed constitutional limits. *Yim v. City of Seattle*, 194 Wn.2d 682, 688–90, 451 P.3d 694 (2019) (articulating "the proper standard to analyze a substantive due process claim under the Washington Constitution"); *In re Detention of Morgan*, 180 Wn.2d 312, 324 (2014) (detailing tiers of scrutiny).

right to a healthful and pleasant environment as "fundamental and inalienable" and mandated emissions reductions consistent with preserving a safe climate. RCW 43.21A.010; 70A.45. Determining whether, contrary to the Legislature's direction, Respondents are violating Petitioners' rights by exacerbating climate change is not only the courts' duty, it fully respects existing legislative policy. The *Baker* factors confirm that Petitioners' claims present no political question.[20] The panel's analysis to the contrary upends separation of powers and would broadly foreclose review of *all* constitutional claims in Washington.

C. This Case Raises A Significant Question of Washington Constitutional Law

After finding Petitioners' claims nonjusticiable, instead of putting their pens down, the panel erroneously dismissed "the merits" of two of Petitioners' three substantive due process claims without assuming the truth of Petitioners' allegations or affording Petitioners an opportunity to present evidence.[21] Ignoring Petitioners' alleged infringements of explicitly

[20] The panel's reliance on *Juliana v. United States*, which explicitly found that similar claims did not raise a political question, further highlights how its analysis conflicts with *Baker*. 947 F.3d at 1174 n.9. Indeed, all five judges (Federal Magistrate, District Court, and the three Court of Appeals judges) who considered whether the *Juliana* claims implicated the political question doctrine rejected its applicability.

[21] The panel's improper foray into the merits further highlights its erroneous conception of justiciability: if a case is nonjusticiable, it violates separation of powers to reach the merits, particularly without an evidentiary record. *See, e.g., In re Elliot*, 74 Wn.2d 600, 610, 446 P.2d 347 (1968) (there "cannot be decisional law on the question"); *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (declining to reach merits of nonjusticiable declaratory judgment action).

enumerated rights and recognized unenumerated liberty interests,[22] the panel summarily and erroneously concluded there is no fundamental right to a "healthful and pleasant[23] environment, which includes a stable climate system that sustains life and liberty." App A. at 20–27; App. B at 70.

The right to a healthful and pleasant environment is the *only* right the legislature and the electorate have enshrined as "fundamental and inalienable[,]" a status the Governor does not dispute here. *See* RCW 43.21A.010 ("it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment"); RCW 70A.305.010 (approved by citizen initiative Nov. 8, 1988, stating "[e]ach person has a fundamental and inalienable right to a healthful environment"); App. E (Governor declined to join sections of brief arguing there is no fundamental constitutional right to a stable climate). While this does not act as the final word on the right—only this Court's declaratory judgment will do that—it shows it has been subject to "public debate and legislative action," and is a vital part of Washington's social fabric.[24] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The people's

[22] *See* note 4, *supra*.

[23] For reasons unknown, the panel correctly identified the right in the beginning of its analysis, but later mischaracterized it as one to a "healthful and peaceful environment." App. A at 21, 23–27.

[24] Whether a constitutional right is "true" or "positive or negative" does not dictate whether the right exists or is justiciable, *contra* App. A at 22, it simply "informs the proper orientation for determining whether the State" violated the Constitution (i.e. the standard of review, such as strict scrutiny or rational basis). *See McCleary*, 173 Wn.2d at 518–19;

and legislature's enshrinement of the right assuages the concern that recognition "would transform substantive due process rights into the policy preferences of the court." App. A at 24. Furthermore, the use of the terms "fundamental and inalienable" is of constitutional import.[25] *See Leschi Imp. Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 280, 525 P.2d 7774 (1974) (en banc) (reference to the fundamental and inalienable right to a healthful and pleasant environment "indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state.").

Against this backdrop, it is legal error to assume, without affording Petitioners an opportunity to present evidence, that there is "no legal or social history" supporting the right to a healthful and pleasant environment. App. A at 25. Ecology, "the first agency in the country dedicated to environmental protection and improvement," recently celebrated "50 years of protecting Washington's land, air, and water."[26] Washington, and the

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Seattle Sch. Dist., 90 Wn.2d at 513 n.13. The panel's grave constitutional error on this point wrongly suggests that only "true," positive constitutional rights are protected and the State can run roughshod over negative constitutional rights.

[25] Black's Law Dictionary 674 (6th ed. 1990) (defining "fundamental law" as "the law which determines the constitution of government in states and prescribes and regulates the manner of its exercise; the organic law of a state; the constitution."); Black's Law Dictionary 903 (4th ed. 1957) (defining "inalienable" as "not subject to alienation; the characteristic of those things which cannot be bought or sold or transferred from one person to another, such as rivers and public highways, and certain personal rights; e.g. liberty.").

[26] Dep't of Ecology, *Ecology's first 50 years - a celebration*, https://ecology.wa.gov/About-us/Our-role-in-the-community/50-years [https://perma.cc/UN7R-KMR8] (last visited Jan. 17, 2021).

Indian tribes who have co-managed natural resources in the state from time immemorial, have a long legal tradition of protecting the environment.[27] *See State v. Dexter*, 32 Wn.2d 551, 556 202 P.2d 906 (1949) (state must not "stand idly by while its natural resources are depleted" and "where natural resources can be utilized and at the same time perpetuated for future generations, what has been called 'constitutional morality' requires that we do so."); *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 117, 508 P.2d 166 (1973) (SEPA "recogniz[es] the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environment and biosphere" and "promote[s] the welfare of humans."); *SAVE v. City of Bothell*, 89 Wn.2d 862, 871, 576 P.2d 401 (1978) (en banc) (connecting the right to a healthful environment with the welfare of people). The right's social history must be assessed on the basis of expert evidence, not judicial assumptions and citations to cases interpreting federal, not Washington, law. App. A at 23.

A proper and thorough fundamental rights analysis involves an empirical inquiry, decided on a full factual record. *See, e.g., Braam v. State*, 150 Wn.2d 689, 704, 81 P.3d 851 (2003) (affirming fundamental right after

[27] *See, e.g.*, Rachael Paschal Osborn, *From Loon Lake to Chuckanut Creek*: *The Rise and Fall of Environmental Values in Washington's Water Resources Act* ("1971 was a major year for environmental law in Washington State."); Rodgers, et al, *The Si'lailo Way: Indians, Salmon and Law on the Columbia River* (Carolina Academic Press 2006) (describing the long legal history of tribal efforts to protect salmon on the Columbia River).

trial and acknowledging courts must undertake "an exact analysis of circumstances"); *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 600–01, 192 P.3d 306 (2008) (finding no fundamental right to smoke based on factual summary judgment record); *Brown v. Bd. of Educ.*, 347 U.S. at 486 n.1 (four district court records); *Obergefell*, 576 U.S. 644 (2015) (three merits decisions and one preliminary injunction ruling). Given that this case concerns state conduct that "may hasten an environmental apocalypse," "an existential crisis to the country's perpetuity" that harms the lives and liberties of these children,[28] Petitioners should be permitted to present evidence supporting their constitutional claims.

V. CONCLUSION

Youth have now brought three cases to Washington courts seeking to protect their fundamental rights from Respondents' conduct. App. E (Appellants' Op. Br. at 6–10). At this late moment in our youths' struggle to slow the hastening of the environmental apocalypse and seek a judicial declaration of the constitutional wrongs against them, it is time this Court join the high courts around the world to hear this case and reverse the panel's legal errors that will not stand the test of time. For the foregoing reasons, this Court should accept review and reverse the panel's decision

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[28] *See Juliana*, 947 F.3d at 1164; *id.* at 1177 (Staton, J., dissenting).

Respectfully submitted this 10th day of March, 2021,

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I hereby certify that on the 10th day of March, 2021, I served one true and correct copy of the foregoing on the following individuals using electronic mail in accordance with the parties' electronic service agreement:

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APPENDIX A

Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I)

FILED
2/8/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AJI P., a minor child by and through his guardian HELAINA PIPER; ADONIS W., a minor child, by and through his guardian HELAINA PIPER; WREN W., a minor child by and through her guardian MIKE WAGENBACH; LARA F. & ATHENA F., minor children by and through their guardian MONIQUE DINH; GABRIEL M., a minor child by and through his guardians VALERY and RANDY MANDELL; JAMIE M., a minor child by and through her guardians MARK and JANETH MARGOLIN; INDIA B., a minor child by and through her guardians, JIM BRIGGS and MELISSA BATES; JAMES CHARLES D., a minor child by and through his guardian DAWNEEN DELACRUZ; KYLIE JOANN D., a minor child, by and through her guardian DAWNEEN DELACRUZ; KAILANI S., a minor child, by and through her guardian, JOHN SIROIS; DANIEL M., a minor child, by and through his guardian, FAWN SHARP; and BODHI K., a minor child, by and through his guardian MARIS ABELSON,

Appellants,

v.

STATE OF WASHINGTON; JAY INSLEE, in his official capacity as Governor of Washington; WASHINGTON DEPARTMENT

No. 80007-8-I

DIVISION ONE

PUBLISHED OPINION

OF ECOLOGY; MAIA BELLON, in her official capacity as Director of the WASHINGTON DEPARTMENT OF ECOLOGY; WASHINGTON DEPARTMENT OF COMMERCE; BRIAN BONLENDER, in his official capacity as Director of the WASHINGTON DEPARTMENT OF COMMERCE; WASHINGTON STATE TRANSPORTATION COMMISSION; WASHINGTON DEPARTMENT OF TRANSPORTATION; and ROGER MILLER, in his official capacity as Secretary of the WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondents.

SMITH, J. – The appellants are 13 youths (the Youths) between the ages of 8 and 18 who sued the State of Washington, Governor Jay Inslee, and various state agencies and their secretaries or directors (collectively the State) seeking declaratory and injunctive relief. The Youths alleged that the State "injured and continue[s] to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that [the State] knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm." To this end, the Youths asserted substantive due process, equal protection, and public trust doctrine claims, among others. They asked the trial court to declare that they have "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and

liberty." They further requested that the court "[o]rder [the State] to develop and submit to the Court . . . an enforceable state climate recovery plan," and that it "[r]etain jurisdiction over this action to approve, monitor and enforce compliance" therewith.

We firmly believe that the right to a stable environment should be fundamental. In addition, we recognize the extreme harm that greenhouse gas emissions inflict on the environment and its future stability. However, it would be a violation of the separation of powers doctrine for the court to resolve the Youths' claims. Therefore, we affirm the superior court's order dismissing the complaint.

BACKGROUND

Climate change poses a very serious threat to the future stability of our environment. Washington experienced the hottest year on record in 2020, and "'climate extremes like floods, droughts, fires and landslides are . . . affecting Washington's economy and environment.'" The parties to this case and this court readily acknowledge the fact that the federal and state governments must act now to address climate change. The Washington State Department of Ecology (Ecology) said in December 2014, "Climate change is not a far off-risk. It is happening now globally[,] and the impacts are worse than previously predicted, and are forecast to worsen."[1] It concluded that "[i]f we delay action by

[1] WASH. DEP'T OF ECOLOGY, WASHINGTON GREENHOUSE GAS EMISSION REDUCTION LIMITS: PREPARED UNDER RCW 70.235.040, at vi (Dec. 2014), https://apps.ecology.wa.gov/publications/documents/1401006.pdf [https://perma.cc/VYA3-GT3E].

even a few years, the rate of reduction needed to stabilize the global climate would be beyond anything achieved historically and would be more costly."[2] According to the *Joint Statement on "Human Rights and Climate Change"* (Joint Statement) signed by five United Nations human rights bodies, "[t]he adverse impacts identified in the [2018 Intergovernmental Panel on Climate Change (IPCC)] report[ ] threaten, among others, the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights."[3] "The risk of harm is particularly high for those segments of the population already [marginalized] or in vulnerable situations[,] . . . such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas."[4] "The IPCC report makes it clear that to avoid the risk of irreversible and large-scale systemic impacts, urgent and decisive climate action is required."[5] Prompted by this knowledge, groups of determined youths around the United States have sought dramatic and necessary climate change action from their executive and legislative branches. When unsatisfied with the results, they have sought redress in the courts.

FACTS

In February 2018, the Youths filed a complaint against the State, Governor

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[2] Id.

[3] Comm. on Elimination of Discrimination Against Women et al., Joint Statement on "Human Rights and Climate Change," UNITED NATIONS HUM. RTS. OFF. OF HIGH COMMISSIONER (Sept. 16, 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E [https://perma.cc/C23Q-TJYZ].

[4] Id.

[5] Id.

Inslee, Ecology, the Washington State Department of Commerce, the Washington State Department of Transportation, and the agencies' directors and secretaries. The Youths detailed the harmful and dire effects of climate change, including serious threats to India B.'s [6] family farm, to salmon populations that Wren W. considers "a source of spiritual and recreational beauty," and to James Charles D. and Kylie JoAnn D.'s home in the Taholah lower village of the Quinault Indian Nation.

The Youths presented six claims for relief: (1) violation of their substantive due process rights to "[a] stable climate system, . . . an essential component to [their] rights to life, liberty, and property," (2) violation of their substantive due process rights under the state-created danger doctrine, (3) violation of their "[f]undamental [r]ight to a [h]ealthful and [p]leasant [e]nvironment" under RCW 43.21A.010 and article I, section 30 of the state constitution, (4) violation of the public trust doctrine by "substantial impairment to essential Public Trust Resources" through "[h]arm to the atmosphere[, which] negatively affects water, wildlife, and fish resources," (5) violation of their right to equal protection under article I, section 12 of the state constitution "as young people under the age of 18," who the Youths contend "are a separate suspect and/or quasi-suspect class," and (6) challenges to the constitutionality of RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c).[7]

[6] Consistent with the parties' briefing at the trial court and on appeal, we refer to the Youths by their first name and the initial of their last name.

[7] The Youths withdrew the appeal of their sixth claim for relief following recent legislative amendments.

The Youths asked the court to declare that they "have fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." They alleged that the State placed them "in a position of danger with deliberate indifference to their safety in a manner that . . . violates [their] fundamental and inalienable constitutional rights to life, liberty, and property." Additionally, the Youths requested that the court

> [o]rder Defendants to develop and submit to the Court by a date certain an enforceable state climate recovery plan, which includes a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend;
>
> . . . [and r]etain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court.

While acknowledging that the threats of climate change are serious, the State moved for judgment on the pleadings under CR 12(c), contending that the Youths' claims and requested relief violated the separation of powers doctrine, were nonjusticiable under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and should have been brought under the Administrative Procedure Act (APA), chapter 34.05 RCW.

In its detailed order granting the State's motion, the superior court held that the Youths' claims were nonjusticiable, that there is no fundamental constitutional right to "a clean" or "'healthful and pleasant environment,'" that the Youths did not present a cognizable claim under the equal protection clause, and that, "[f]or the reasons stated in [the State's] motion and reply memorandum, all

of [the Youths'] other claims must be dismissed." The Youths appeal.

ANALYSIS

Standard of Review

We review a CR 12(c) motion for judgment on the pleadings de novo and "'identically to a CR 12(b)(6) motion'" to dismiss. Wash. Trucking Ass'ns v. Emp't Sec. Dep't, 188 Wn.2d 198, 207, 393 P.3d 761 (2017) (quoting P.E., Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012)). "Dismissal under either subsection is 'appropriate only when it appears beyond doubt' that the plaintiff cannot prove any set of facts that 'would justify recovery.'" Wash. Trucking, 188 Wn.2d at 207 (quoting San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)). To this end, "[a]ll facts alleged in the complaint are taken as true, and we may consider hypothetical facts supporting the plaintiff's claim." FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). In addition, "[c]onstitutional questions are questions of law and are subject to de novo review." In re Det. of Morgan, 180 Wn.2d 312, 319, 330 P.3d 774 (2014).

Separation of Powers Doctrine

The Youths contend that the trial court erred in concluding that their claims presented nonjusticiable political questions. Because the Youths' claims inevitably involve resolution of questions reserved for the legislative and executive branches of government, we disagree.

"The nonjusticiability of a political question is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L.

Ed. 2d 663 (1962). "Separation of powers create[s] a clear division of functions among each branch of government, and the power to interfere with the exercise of another's functions [is] very limited." Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). "The judicial branch violates the doctrine when it assumes 'tasks that are more properly accomplished by [other] branches.'" Id. at 506 (alteration in original) (internal quotation marks omitted) (quoting Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994)).

"Prominent on the surface of any case held to involve a political question is" (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving it," (3) "the impossibility of" resolving a claim "without an initial policy determination of a kind clearly for nonjudicial discretion," or (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" through, for example, failing to attribute "finality to the action of the political departments." Baker, 369 U.S. at 217, 210. In our review of these factors, we must complete a "discriminating inquiry into the precise facts and posture of the particular case." Id. at 217.

Here, the Youths' claims ask us to address whether the State's current GHG emissions statutes and regulations sufficiently address climate change.[8]

[8] The Youths "do not claim that any *individual* agency action exceeds statutory authorization or, *taken alone*, is arbitrary and capricious." See Juliana v. United States (Juliana II), 947 F.3d 1159, 1167 (9th Cir. 2020) (emphasis added). Rather, the Youths' claims for relief challenge "the affirmative aggregate acts of" the State and its agencies. Therefore, contrary to the State's contention,

The Youths request that the State be required to achieve a 96 percent reduction of carbon dioxide (CO_2) emissions by 2050, "transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years," and "generate 90% of its electricity from carbon-free sources by 2030." We assume—for this section's analysis only—that the Youths have a fundamental right to a healthy and pleasant environment. See, e.g., Juliana v. United States (Juliana II), 947 F.3d 1159, 1169-70 (9th Cir. 2020) (assuming that the plaintiffs' asserted constitutional rights existed for the purpose of analyzing redressability). However, even assuming there is such a right, the Baker factors lead to the conclusion that the question posed inevitably requires determination of a nonjusticiable political question.

First, the resolution of the Youths' claims is constitutionally committed to the legislative and executive branches. "'Article 2, section 1, of the Washington State Constitution vests all legislative authority in the legislature and in the people,' through the power of initiative and referendum." Nw. Animal Rights Network v. State, 158 Wn. App. 237, 245, 242 P.3d 891 (2010) (quoting In re Chi-Dooh Li, 79 Wn.2d 561, 577, 488 P.2d 259 (1971)). To provide the Youths' requested relief, we would be required to order the executive branch, through the power vested in it by the legislature, and the legislative branch to create and implement legislation, or, as the Youths call it, a "climate recovery plan." For all intents and purposes, we would be writing legislation and requiring the legislature to enact it. But we cannot force the legislature to legislate, and we cannot

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the Youths were not required to bring their claims under the APA.

legislate ourselves. In short, resolving the Youth's claims would require the judiciary to legislate, in contravention of the textually demonstrable constitutional commitment of the legislative power to the legislative branch and to the people.

Second, there is no judicially manageable standard by which we can resolve the Youths' claims. The Youths' climate recovery plan includes "a carbon budget[ ] to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system." But as the Youths acknowledge, scientific expertise is required to make a determination regarding appropriate GHG emission reductions, and the determination necessarily involves including all stakeholders and balancing the many implicated and varied interests affected by any GHG emission reduction policies. To this end, the agencies employ and retain climate scientists from the University of Washington to assist with their policy determinations. Were we to make these determinations, we would decide matters beyond the scope of our authority with resources not available to the judiciary. Accordingly, we cannot imagine a judicially manageable standard available to create and enforce the Youths' asserted right, the related claims, or the extension of the public trust doctrine to the atmosphere.

Third, the legislature and the agency respondents have already made an initial policy determination concerning the Youths' claims, pursuant to their constitutionally and statutorily prescribed authority, and they created a regulatory regime on that basis. The Youths ask us to discern and provide the State with "the maximum safe level of CO_2 concentrations and the timeframe in which that

level must be achieved – and leave to Respondents the specifics of developing and implementing a compliant plan." But the political branches have already made this policy determination: Ecology recently enacted its final clear air rule, chapter 173-442 WAC, which regulates GHG emissions, following an extensive analysis and utilizing all of the resources available to it, including public comment and the work of renowned climate scientists. And despite the Youths' assertions to the contrary,[9] we cannot create a regulatory regime to replace one already enacted by the legislature and state agencies without an initial policy determination of a kind clearly for nonjudicial discretion.

Finally, resolution of any of the Youths' claims involves disrespecting the coordinate branches. In particular, the Youths asked the trial court to "[r]etain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court." Such action by the court necessarily involves policing the legislative and executive branches' policymaking decisions and, thus, inherently usurps those

[9] The Youths assert both that they did not request that we impose a regulatory regime and that we can impose one. As to the latter assertion, case law says otherwise. See, e.g., Nw. Animal Rights Network, 158 Wn. App. at 245 (declining to disturb the legislature's determination that certain activities are not abhorrent to our society and therefore legal); Nw. Greyhound Kennel Ass'n, Inc. v. State, 8 Wn. App. 314, 319, 321, 506 P.2d 878 (1973) (declining to rule on whether a statutory scheme forbidding parimutuel dog racing violates the equal protection clause because doing so would require resolution of "a political question in an area of almost complete legislative discretion"); Rousso v. State, 170 Wn.2d 70, 87-88, 239 P.3d 1084 (2010) (dealing with a dormant commerce clause issue pertaining to online gambling, but finding that Rousso's suggestion that "the court force the legislature to trust in the regulatory systems of other countries" and dismantle the State's current regulatory scheme "bulldozes any notion of a separation of powers between the judiciary and the legislature"). And with regard to the former, the Youths' complaint says otherwise.

branches' legislative authority. This is particularly true where, as is the case here, the political branches already made an initial policy determination. Accordingly, the relief and resolution of the Youths' claims would require the court to "bulldoze[ ] any notion of a separation of powers." Rousso v. State, 170 Wn.2d 70, 87, 239 P.3d 1084 (2010).

Ultimately, by wading into the waters of what policy approach to take, what economic and technological constraints exist, and how to balance all implicated interests to achieve the most beneficial outcome, the court would not merely "'serve[ ] as a check on the activities of another branch.'" Cf. McCleary v. State, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (finding it necessary to check the legislative branch's compliance with the explicit constitutional duty of the State to provide children an adequate education) (internal quotation marks omitted) (quoting In re Salary of Juvenile Dir., 87 Wn.2d 232, 241, 552 P.2d 163 (1976)). Rather, the judiciary would usurp the authority and responsibility of the other branches. Furthermore, it would be inappropriate for the judiciary to assume it can discern the appropriate GHG emissions reduction standard, "given the scale and complexity of the climate challenge," where "States must ensure an inclusive multi-stakeholder approach, which harnesses the ideas, energy and ingenuity of all stakeholders."[10] Therefore, we conclude that the Youths' claims present a political question to be determined by the people and their elected representatives, not the judiciary.

This conclusion is supported by Juliana II. There, 21 youths sought "an

[10] Joint Statement on "Human Rights and Climate Change," supra.

order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2." Juliana II, 947 F.3d at 1164-65. They asserted substantive due process rights, equal protection violations, rights under the Ninth Amendment, and a violation of the public trust doctrine. Id. The Ninth Circuit assumed that the "broad constitutional right" to "'a climate system capable of sustaining human life'" existed. Id. at 1164. Nevertheless, it concluded that the United States Constitution article III requirement for redressability was not satisfied: the plaintiffs' request for an order to promulgate a GHG emissions reduction plan "ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right." Id. at 1173. The court doubted "that any such plan can be supervised or enforced by an Article III court," and noted, "in the end, any plan is only as good as the court's power to enforce it." Id. at 1173.

Similarly, in 2011, a group of youths (collectively Svitak) sued Washington State, then Governor Christine Gregoire, and state agency directors alleging that the defendants violated the public trust doctrine. Svitak ex rel. Svitak v. State, No. 69710-2-I, slip op. at 1-2 (Wash. Ct. App. Dec. 16, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/697102.pdf. Svitak argued that the State "failed to accelerate the pace and extent of [GHG] reduction." Id. at 2. Svitak sought declaratory judgment asking "th[e] court to create a new regulatory program." Id. at 5. On appeal, we held that the issue was a political question because Svitak did "not point to any constitutional provision violated by state

inaction regarding the atmosphere, [did] not challenge any state statute as unconstitutional, and, absent such unconstitutionality, cannot obtain a remedy under the [UDJA]." Id. at 2, 4-6. We concluded, "Because our state constitution does not address state responsibility for climate change, it is up to the legislature, not the judiciary, to decide whether[—and to what extent—]to act as a matter of public policy." Id. at 5. And as was the case then, "[t]his is particularly true here, where the legislature has already acted." Id. at 5-6.

Like in Juliana II and Svitak, we are without power "to order, design, supervise, or implement the plaintiffs' requested remedial plan" because such a plan "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." Juliana II, 947 F.3d at 1171. And we are "not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can we determine which risks are acceptable and which are not. . . . [W]e lack the tools." Rousso, 170 Wn.2d at 88. For these reasons, we conclude that resolving the Youths' claims would violate the separation of powers doctrine; the issues that the Youths' claims present and the implementation and monitoring of the requested climate action plan require us to resolve political questions reserved for the executive and legislative branches.

The Youths disagree and rely on Seattle School District No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978), and McCleary for the proposition that they are merely asking the court "to engage in its traditional and core duty to interpret and enforce Washington's Constitution." In Seattle School District, the District sued

the State, alleging that the State failed to discharge its constitutional duty under article IX, sections 1 and 2 of the state constitution to provide ample funding for education. 90 Wn.2d at 481-82. On appeal, our Supreme Court determined that article IX, section 1 imposes a mandatory affirmative duty on the State, which creates a "jural correlative" right in children to receive an adequate education. Id. at 500-01, 511-12. In concluding that the court's interpretation and construction of article IX, sections 1 and 2 do not violate the separation of powers doctrine, the court reasoned "that the judiciary has ample power to protect constitutional provisions that look to protection of personal 'guarantees.'" Id. at 502, 510. However, the court declined to specify standards for program requirements, concluding that "the general authority to select the *means* of discharging [the constitutional] duty should be left to the Legislature." Id. at 520.

Applying Seattle School District, in McCleary, our Supreme Court revisited the issue of whether the State was adequately discharging its affirmative, constitutionally prescribed duty to provide for children's education. McCleary, 173 Wn.2d at 512. In concluding that the State was not adequately discharging its duty, the court highlighted two aspects of article IX, section 1. First, because article IX, section 1 imposes a duty on the "*State*," the court concluded that it "contemplates a sharing of powers and responsibilities among all three branches of government." Id. at 515. Second, because article IX, section 1 creates a "true right" in children to receive education, the "federal limit on judicial review such as the political question doctrine or rationality review are inappropriate." Id. at 519. The court reasoned that in the context of a positive right, "we must ask whether

the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'" Id. (quoting Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1137 (1999)). Our Supreme Court noted:

> While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.

Id. at 546.

This case is distinguishable from Seattle School District and McCleary because, in both cases, the court found that the State has an affirmative, *constitutionally prescribed* duty to provide—and that children have a corresponding true right to receive—an adequate education. Accordingly, there was a judicially appropriate question concerning what satisfied that explicit duty. But "our state constitution does not address state responsibility for climate change," Svitak, No. 69710-2-I, slip op. at 5, and, in particular, provides no true right to a healthful and pleasant environment. Thus, neither case is persuasive.

The Youths disagree and cite Brown v. Plata, 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011), contending that "[a]s in Plata, the Superior Court can set the constitutional floor necessary for preservation of the Youth's rights." The Youths' reliance on Plata is misplaced. In Plata, the United States Supreme Court relied on the Prison Litigation Reform Act of 1995 in determining that a three-judge panel had authority to order California to reduce its prison population. Plata, 563 U.S. at 512. Here, we have no similar statute empowering the court's

review of the legislative and executive actions at issue. Accordingly, Plata does not control.

The Youths also contend that "it is entirely premature at this early stage to speculate as to the propriety of any relief that may ultimately be awarded." If the Youths' assertion were true, courts would consistently resolve political questions only to find out after considerable expenditure of court resources that the case must be dismissed or the court will violate the political question doctrine. Thus, we are not persuaded by the Youths' assertion.

Similarly, the Youths cite Martinez-Cuevas v. Deruyter Bros. Dairy, Inc., __ Wn.2d __, 475 P.3d 164 (2020), to support their assertion that their "constitutional claims should be decided on a full factual record as opposed to a motion to dismiss." Because Martinez-Cuevas does not discuss the standard of review on CR 12(c) motions or the propriety of developing a factual record thereunder, we disagree. Moreover, this is not the standard on a CR 12(c) motion to dismiss,[11] and factual development is not required to dismiss a political question. Accordingly, the Youths' assertion fails.

Finally, the Youths rely on a number of dissimilar cases for their position that the court may resolve their claims without violating the separation of powers doctrine. Because those cases concern distinct and distinguishable constitutional issues, we are not persuaded. See Milliken v. Bradley, 433 U.S. 267, 279-80, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977) (addressing whether a court can order, as an equitable remedy, education programs in a desegregation

[11] Wash. Trucking, 188 Wn.2d at 207.

decree and holding that "the nature of the *desegregation* remedy is to be determined by the nature and scope of the constitutional violation" (emphasis added)); Rousso, 170 Wn.2d at 92 (addressing whether a statute violated the dormant commerce clause); In re Flint Water Cases, 960 F.3d 303, 324 (6th Cir. 2020) (addressing the substantive due process right to bodily integrity); Martinez-Cuevas, 475 P.3d at 167 (addressing a statute's provision "exempting agricultural workers from the overtime pay requirement set out in the Washington Minimum Wage Act, ch. 49.46 RCW" and concluding it violates article I, section 12 of our state constitution).

The Uniform Declaratory Judgments Act

The Youths contend that their claims are justiciable under the UDJA. Because the court's resolution of this case would not be final or conclusive, we disagree.

The UDJA provides a means by which a party may bring a claim for declaratory relief. It states that "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. But "'before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy.'" To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). A justiciable controversy is one which presents

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant,

> hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

To-Ro Trade Shows, 144 Wn.2d at 411 (alteration in original) (quoting Diversified Indus. Dev. Corp., 82 Wn.2d at 815).

Here, at the very least, the fourth element is lacking. Specifically, the Youths requested that the trial court retain jurisdiction over the matter to monitor and enforce the State's implementation of a climate recovery plan. This would include ensuring that the defendant agencies enact rules in accordance with legislation the court deems satisfactory. Such a remedy is necessarily provisional and ongoing, not final or conclusive. While the declaratory relief would be final, it is inextricably tied to the retention of jurisdiction and to the order to implement the climate recovery plan. And a trial court order would not result in the atmospheric carbon levels required to either stabilize the future global climate or to protect the Youths' asserted right because the world must act collectively in order to stabilize the climate.[12] See Juliana II, 947 F.3d at 1173. Therefore, the Youths' claims are not justiciable under the UDJA.

The Youths assert that "[n]o new laws are necessary to remedy past and ongoing constitutional violations," and that, therefore, their claims are justiciable under the UDJA. However, in their complaint, and throughout this appeal, the

[12] We recognize that this is not a reason to resist the opportunity to implement advanced climate change policies. It does, however, provide evidence that judicial resolution would not be final or conclusive and, therefore, inappropriate.

Youths requested that the court order the State to create a climate plan, i.e., new legislation regarding the reduction of GHG emissions, and that we determine the appropriate GHG emission reductions. Therefore, the Youths' assertion is implausible and unpersuasive.

In short, the separation of powers doctrine and the lack of justiciability under the UDJA are dispositive with regard to all of the Youths' claims. Therefore, the trial court did not err by dismissing them. We next address the merits of the Youths' various claims to foreclose any assertion that their resolution should alter our conclusion.

Substantive Due Process

The Youths assert that the trial court erred when it concluded that there is no fundamental right "to a healthful and pleasant environment," which includes "the right to a stable climate system that sustains human life and liberty." Because the Youths fail to provide a basis for the court to find the unenumerated right to a healthful environment and because we must exercise the utmost care in extending the liberties protected by the due process clause, we disagree.

"An individual seeking the procedural protection of the Fourteenth Amendment's due process clause must establish that [their] interest in life, liberty, or property is at stake." In re Pers. Restraint of McCarthy, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007). But "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997) (quoting Collins v. Harker

Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992)). "Modern substantive due process jurisprudence requires a 'careful description of the asserted fundamental liberty interest.'" Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (internal quotation marks omitted) (quoting Glucksberg, 521 U.S. at 721). But "[t]he identification and protection of fundamental rights . . . 'has not been reduced to any formula.'" Obergefell v. Hodges, 576 U.S. 644, 663-64, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting)). "[I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect," and "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." Id. at 664.

As an initial matter, it is important to articulate the Youths' claimed right and legal bases. The Youths assert a fundamental right to "a healthful and peaceful environment, which includes a stable climate system." In support of this alleged right, the Youths cite Washington Constitution article I, section 3 and section 30, and RCW 43.21A.010.[13] These provisions do not provide for the

[13] The Youths also cite the United Nations *Joint Statement on "Human Rights and Climate Change*" as evidence of their substantive due process right to a peaceful environment. However, they failed to provide authority to support the proposition that a UN joint statement may be used as a basis for substantive due process rights. We therefore do not address it as such a basis. See City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962))), review denied, 195 Wn.2d 1031 (2020).

asserted right. In particular, unlike the constitutional mandate creating an affirmative duty in Seattle School District and McCleary, none of these provisions provide a true right, created by a positive constitutional grant, which the State cannot invade or impair.

Article I, section 3 of the state constitution states that "[n]o person shall be deprived of life, liberty, or property, without due process of law," mimicking the Fourteenth Amendment. "The types of interests that constitute 'liberty' and 'property' for Fourteenth Amendment purposes are both broad and limited[:] The interest must rise to more than 'an abstract need or desire'" "and must be based on more than 'a unilateral hope.'" In re Pers. Restraint of Lain, 179 Wn.2d 1, 14, 315 P.3d 455 (2013) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Conn. Bd. of Pardons v. Dumschat 452 U.S. 458, 465, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981)). The court should expand substantive due process protections in very limited circumstances "'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" Glucksberg, 521 U.S. at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). And in "extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." Id. Therefore, the court must "'exercise the utmost care whenever we are asked to break new ground in this field,' . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [judiciary]." Id. (quoting Collins,

503 U.S. at 125).

An examination of "our Nation's history, legal traditions, and practices"[14] presents no evidence of a liberty interest in a healthful and peaceful environment. In particular, only one court has ever held that there exists a fundamental right to a climate system capable of sustaining life. See Juliana v. United States (Juliana I), 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (holding that there is a fundamental right to a climate system capable of sustaining life), rev'd and remanded, 947 F.3d 1159 (9th Cir. 2020); cf. Clean Air Council v. United States, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019) (holding that there is no "fundamental right to a life-sustaining climate system"); SF Chapter of A. Philip Randolph Inst. v. U.S. EPA, No. C07-04936 CRB, 2008 WL 859985, at *7 (N.D. Cal. Mar. 28, 2008) (court order) (holding that the right to be free from climate change pollution is not a fundamental right under the Fourteenth Amendment); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1238 (3d Cir. 1980) (holding that "there is no constitutional right to a pollution-free environment"), vacated on other grounds sub nom. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981); Concerned Citizens of Neb. (CCN) v. U.S. Nuclear Regulatory Comm'n (NRC), 970 F.2d 421, 427 (8th Cir. 1992) (holding that under the Ninth Amendment and the equal protection clause, CCN does "not have a fundamental right to be free from non-natural radiation").[15] While the lack of a historical and legal tradition

[14] See Glucksberg, 521 U.S. at 710.

[15] The Swinomish Indian Tribal Community, Suquamish Tribe, and Quinault Indian Nation assert that the right to a healthful environment is

protecting the environment for future generations almost certainly led us to the position we are in now, there simply is no historical basis for the determination that a right to a healthful or stable environment exists. Moreover, were we to create such an interest, we would transform substantive due process rights into the policy preferences of the court. Therefore, we conclude that article I, section 3 does not provide a fundamental right to a healthful and peaceful environment.

Article I, section 30 provides that "[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." More specifically, article I, section 30 is a declaration that the statement of "certain fundamental rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others" that the

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fundamental because it is the "prerequisite to the free exercise of specific, enumerated rights," specifically, life and liberty. To this end, they liken the Youths' alleged right and the rights to life and liberty to the right to municipality employment and the right to travel. They cite Eggert v. City of Seattle, 81 Wn.2d 840, 841-44, 505 P.2d 801 (1973), for the proposition that a court looks to "whether [the asserted] right is implicit and necessary to the exercise of enumerated rights, and whether the right is deeply embedded in societal values." In Eggert, the court held that the city of Seattle's one year residency requirement for employment violated the constitutionally protected right to travel. Id. at 848. The court chose not to address whether the right to employment was fundamental. Id. While the right to life and liberty may be connected to the right to a healthful and pleasant environment, as discussed, we must be weary of extending due process liberty interests into new arenas. More importantly, the right to employment or to one's chosen occupation has historically been viewed as a protected interest. See Fields v. Dep't of Early Learning, 193 Wn.2d 36, 46, 434 P.3d 999 (2019) (noting that the plaintiff had a "protected interest, but not a fundamental right, to pursue her chosen, lawful occupation"). However, 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. Accordingly, we are not persuaded.

constitution does not express but that "inherently exist in all civilized and free states." State v. Clark, 30 Wash. 439, 443-44, 71 P. 20 (1902).

As noted above, the Youths point to no legal or social history to support their asserted right, and the State is not required to "disprove the existence of [the asserted] right" under article I, section 30. Halquist v. Dep't of Corr., 113 Wn.2d 818, 820, 783 P.2d 1065 (1989). Without a showing of how the asserted right inherently exists and has existed in civilized states, the Youths' contention fails. Accordingly, we conclude that article I, section 30 does not provide the right to a healthful and peaceful environment or to a stable climate system.

RCW 43.21A.010 provides:

> The legislature recognizes and declares it to be the *policy* of this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources. The legislature further recognizes that as the population of our state grows, the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic and other needs will place an increasing responsibility on all segments of our society to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.

(Emphasis added). RCW 43.21A.010 is merely a policy declaration "explain[ing] goals, or designat[ing] objectives to be accomplished." Cf. Seattle School Dist., 90 Wn.2d at 499 (holding that because article IX, section 1 explicitly provides a constitutionally mandated duty and a correlative right for children to receive an adequate education, it is not merely a policy declaration). While the statute articulates the policy of the legislature, it does not provide an interest and cannot provide for a fundamental right. Therefore, RCW 43.21.010 does not provide a

basis for the asserted right.

The Youths disagree and contend that the trial court failed to "undertake the proper analysis for identifying unenumerated fundamental rights." Specifically, they assert that the trial court failed to recognize that an unenumerated fundamental right may be created by statute. While this is true, the relied on statutory provision cannot be a policy statement. See, e.g., State v. Hand, 192 Wn.2d 289, 302, 429 P.3d 502 (2018) (Madsen, J., concurring) (holding that where the statute established "only aspirational timelines" and procedures, the asserted fundamental right did not exist). As discussed, RCW 63.21A.010 is a policy statement. Therefore, we are not persuaded.

As a final matter, to the extent that the amici curiae focus on the right to a stable climate system, that focus is not entirely aligned with the Youths' claim. Specifically, the Youths' claim is much broader, and in their opposition to the State's motion to dismiss, the Youths discuss only the right to a healthful and peaceful environment. Nonetheless, even if the Youths asserted the narrow right to a stable climate system, their reliance on Juliana I, 217 F. Supp. 3d at 1250, which concluded that a fundamental right to "a stable climate system" exists, is unpersuasive for three reasons. First, Juliana I was reversed based on the nonjusticiability of the question presented and therefore is not a final order with persuasive authority. See Juliana II, 947 F.3d at 1175. While the Ninth Circuit did not address whether there exists a constitutional right, we are not persuaded by Juliana I's conclusion. Second, Juliana I is an outlier in finding that the right

exists.[16] Finally, Juliana I's and the Youths' reliance on Obergefell is misplaced because Obergefell dealt with a right it described as a "keystone of our social order" and a liberty interest deeply rooted in our Nation's and the judiciary's history and traditions. Obergefell, 576 U.S. at 669. Because the Youths fail to proffer similar history with regard to a healthful environment *or* a stable climate system, neither Obergefell nor Juliana I is persuasive. See, e.g., Lake v. City of Southgate, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (court order) (concluding that the plaintiff did not have a fundamental right "in health or freedom from bodily harm" because she failed to provide a "'careful description'" as required under Glucksberg and provided no "evidence that [the] alleged right is rooted in our nation's traditions or implicit in the concept of ordered liberty" (quoting Glucksberg, 521 U.S. at 720-21)).

Equal Protection Claim

The Youths contend that the State violated their right to equal protection of the law under article I, section 12.[17] Because the Youths failed to establish that a fundamental right has been implicated or that they received disparate treatment because of their membership in a suspect or quasi-suspect class with immutable characteristics, we disagree.

"The Equal Protection clause of the Washington State Constitution, article I, section 12 . . . require[s] that 'persons similarly situated . . .' receive like

[16] See supra note 9.

[17] They further assert that the trial court erred because it did not address their equal protection claim pertaining to discrimination with regard to a fundamental right. But because we conclude that no fundamental right to a peaceful and stable environment exists, we do not address this contention.

treatment."[18] Kustura v. Dep't of Labor & Indus., 142 Wn. App. 655, 684, 175 P.3d 1117 (2008) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)), aff'd on other grounds, 169 Wn.2d 81, 233 P.3d 853 (2010). To assert an equal protection claim, the Youths must first establish that a fundamental right has been implicated or that the Youths "received disparate treatment because of membership in a class of similarly situated individuals, and that the disparate treatment was the result of intentional or purposeful discrimination." Thornock v. Lambo, 14 Wn. App. 2d 25, 33, 468 P.3d 1074 (2020). Stated differently, the State must have implicated "a fundamental right" in taking discriminatory action or drawn a "suspect or semisuspect classification." Kustura, 142 Wn. App. at 684.

The Youths contend that "[t]he affirmative aggregate acts of Defendants reflect a *de facto* policy choice to favor the present generation's interests to the long-term detriment of" the Youths. The Youths' contention is unpersuasive. First, "[a] suspect class 'must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class.'" Kustura, 142 Wn. App. at 685 (quoting Andersen v. King County, 158 Wn.2d 1, 19, 138 P.3d 963 (2006) (plurality opinion), abrogated by Obergefell, 576 U.S. 644 (2015)). Here, youth is not an

[18] "The equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington State Constitution are 'substantially identical and subject to the same analysis.'" Thornock v. Lambo, 14 Wn. App. 2d 25, 33, 468 P.3d 1074 (2020) (quoting State v. Osman, 157 Wn.2d 474, 483 n.11, 139 P.3d 334 (2006)).

immutable characteristic. "[I]mmutable" is defined as "not capable or susceptible of change." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (2002). As the superior court correctly noted, "each [Youth], like every human, will grow older." And while children are "socially, emotionally, physically, and psychologically vulnerable and different from adults in manners beyond their control," this status does not last forever and inevitably changes. Accordingly, the Youths are not a suspect class.

Second, the Youths contend that they will be disparately affected in the future, not that they are suffering a discriminatory deprivation of their right to a healthful or stable environment today. But case law does not support the proposition that an equal protection claim can be premised on a future deprivation, and the Youths provide no persuasive authority to convince us to conclude otherwise.

Lastly, the aggregate acts of the State do not show any discrimination or discriminatory intent. Accordingly, the Youths fail to establish that the State has treated them disparately. For these reasons, we conclude that, as a matter of law, the Youths failed to present a valid equal protection claim.

The Youths disagree and assert that they are a suspect class. The Youths assert that they are suspect or semisuspect because they will be the most affected by climate change, they are unable to vote, and they "do not have economic power to influence the state's energy and transportation system." To this end, they cite Miller v. Alabama, which states, "'[Y]outh is more than a chronological fact.' It is a time of immaturity, irresponsibility, 'impetuousness[,]

and recklessness.' It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" 567 U.S. 460, 476, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (second alteration in original) (citations omitted) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Johnson v. Texas, 509 U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). The Miller court did not address age in the context of equal protection or youths' statuses as a suspect class. Id. at 479 (concluding that mandatory life sentences without the possibility of parole for juvenile offenders are unconstitutional pursuant to the Eighth Amendment). Accordingly, Miller is not persuasive.

The Youths also rely on Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2832, 72 L. Ed. 2d 786 (1982), to support their contention that they are a suspect class. In Plyler, the United States Supreme Court applied heightened scrutiny to Texas laws that withheld funding for public education where the school allowed undocumented children to attend. Id. at 220. In applying heightened scrutiny, the Court reasoned that while undocumented status is not "an absolutely immutable characteristic," laws discriminating against undocumented children place a "discriminatory burden on the basis of a legal characteristic over which children can have little control." Id. But here, the characteristic at issue is age only, not undocumented status as a child. Furthermore, the children in Plyler provided evidence that Texas was discriminating based on this status characteristic. Therefore, Plyler does not control.

State-Created Danger Claim

The Youths claim that the trial court erred in dismissing their state-created danger claim. Because the Youths fail to show that the State's actions put them in a worse position, we disagree.

To succeed on a state-created danger claim, the Youths "must show not only that the [State] acted 'affirmatively,' but also that the affirmative conduct placed [them] in a 'worse position than that in which [they] would have been had [the state] not acted at all.'" Pauluk v. Savage, 836 F.3d 1117, 1124 (9th Cir. 2016) (some alterations in original) (quoting Johnson v. City of Seattle, 474 F.3d 634, 641 (9th Cir. 2007)).

Here, the Youths cannot show that the State acted affirmatively to create the danger. Rather, despite their contentions to the contrary, the Youths alleged injuries stemming from the State's failure to act more aggressively with regard to regulating GHG emissions.[19] Nonetheless, any affirmative actions by the State did not put the Youths in a worse position than that in which they would have been without the State's action: the State's regulation of GHG emissions, although it fails to provide for the reductions that the Youths claim are necessary

[19] In their complaint, the Youths contended that the State pursued and implemented policies "that result in dangerous levels of GHG emissions." They went on to explain, however, that the State "placed [them] in a position of danger with deliberate indifference to [the Youths] safety" by its "ongoing act of *omission* in not reducing Washington's GHG emissions consistent with rates that would avoid dangerous climate interference." (Emphasis added.) The Youths further asserted that the State failed to implement its "own laws, plans, policies, and recommendations for climate stabilization or any other comprehensive remedial measures." In short, the Youths' claims, despite their characterization below and on appeal, revolve around omissions or actions, which the Youths perceive are not adequate to remedy climate change.

to protect the environment, still places the Youths in a position of lesser danger than that which they would be in if the State chose not to regulate GHG emissions at all. Accordingly, the state-created danger exception does not apply, and the Youths' claim fails.

The Youths disagree and inappropriately rely on Pauluk and Munger v. City of Glasgow Police Dep't, 227 F.3d 1082 (9th Cir. 2000), for the proposition that the State has a duty to protect the Youths from climate change. In Pauluk, the court held that Daniel Pauluk's family established a valid state-created danger claim where Pauluk died from exposure to toxic mold in a county health office after county officials transferred Pauluk, over his objections, to a building known to contain toxic mold. 836 F.3d at 1119, 1125. In Munger, the Ninth Circuit held that summary judgment was improper for a state-created danger claim where Lance Munger died after police officers ejected him from a Montana bar at night when the outside temperatures were subfreezing. 227 F.3d at 1087, 1090. In both cases, state actors affirmatively placed the individuals in known danger, which resulted in the individuals' deaths. Here, the State has not affirmatively placed the Youths in a worse position or injured them.

In addition, the Youths' reliance on Braam is misplaced because, there, the State acted affirmatively as "the custodian and caretaker" of children in the foster care system. Braam, 150 Wn.2d at 703-04. Despite the Youths' contentions, the State's role as a custodian and caretaker of foster children is not analogous to "the State's role in energy and transportation system[s]." Therefore, these cases are not persuasive.

Public Trust Doctrine

The Youths contend that they alleged valid public trust doctrine claims. Because the Youths' complaint alleges a violation of the public trust doctrine in relation to the climate system as a whole, including the atmosphere, and because Washington has not yet expanded the public trust doctrine to encompass the atmosphere, we disagree.

The public trust doctrine is based on the common law, but article XVII of our constitution "partially encapsulate[s]" the public trust doctrine. Rettkowski v. Dep't of Ecology, 122 Wn.2d 219, 232, 858 P.2d 232 (1993). Specifically, article XVII, section 1 asserts state ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

The public trust doctrine has never been applied to the atmosphere. To this end, Rettkowski is instructive. There, a group of cattle ranchers brought a claim against Ecology based on Ecology's failure to prevent the depletion of a creek that the ranchers used to water their cattle. Rettkowski, 122 Wn.2d at 221-22. The ranchers contended and, after performing studies, Ecology discovered that groundwater withdrawals from irrigation farmers negatively affected the creek's flow. Id. at 221. In dicta, the court discussed the application of the public trust doctrine to groundwater, noting that one problem with applying the doctrine to the ranchers' claim was that Washington has "never previously interpreted the doctrine to extend to non-navigable waters or groundwater." Id. at 232. It

therefore declined to extend the doctrine thereto. Id. Similarly, Washington courts have never extended the public trust doctrine to the atmosphere, and we decline to do so now.

The Youths contend that, in Rettkowski, our Supreme Court "intentionally avoided delineating the scope of the" public trust doctrine. The court stated, "We similarly do not need to address the scope of the doctrine today." Id. at 232 n.5. The Youths contend that this avoidance amounts to an implicit statement that the public trust doctrine applies to the atmosphere. But it is a legal fallacy to rely on the court declining to address an issue to prove the existence of the principle not addressed, i.e., what resources fall under the public trust doctrine. Therefore, the Youths' reliance on Rettkowski is misplaced.

More generally, the Youths contend that "'the navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical.'" To this end, the Youths cite the Code of Justinian from 6th Century Rome as the basis for the public trust doctrine's application to the air. However, "the interconnectedness of natural resources . . . does not mean that all natural resources, including the atmosphere, must be considered public trust resources under . . . [the] public trust doctrine." Chernaik v. Brown, 367 Or. 143, 165, 475 P.3d 68 (2020). And we decline "to expand the resources included in the public trust doctrine well beyond its current scope" to include the atmosphere. Id. at 166.

The Youths and amici rely heavily on the superior court's order in Foster v. Department of Ecology, affirming the Department of Ecology's Denial of Petition

for Rulemaking. No. 14-2-25295-1 SEA (King County Super. Ct., Wash. Nov. 19, 2015). There, the court declared that the public trust doctrine applies to the atmosphere. Id. But we are not bound by a trial court's decision,[20] and our analysis does not lead us to the conclusion that the public trust doctrine applies to the atmosphere. Accordingly, we are not persuaded.

Finally, the Youth assert that they "alleged impairment to traditional Public Trust Resources such as navigable waters and submerged lands." But in their complaint, the Youths asserted that "[t]he overarching public trust resource is the climate system, which encompasses the atmosphere, waters, oceans, and biosphere." They explained, "The dangerous levels of [GHG] emissions that Defendants have allowed into the *atmosphere* have a scientifically demonstrable effect on the public's ability to use, access, enjoy and navigate the state's tidelands, shorelands, and navigable waters and other Public Trust Resources." Therefore, we are not persuaded by the Youths' attempt to recharacterize their allegation.[21]

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[20] See In re Estate of Jones, 170 Wn. App. 594, 605, 287 P.3d 610 (2012) ("Stare decisis is not applicable to a trial court decision because 'the findings of fact and conclusions of law of a superior court are not legal authority and have no precedential value.'" (quoting Bauman v. Turpen, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007))).

[21] The Sauk-Suiattle Indian Tribe contends that the Quinault youth, as members of the Quinault Indian Nation, have constitutionally protected treaty rights under the Quinault Treaty.[21] But the Youths did not raise this argument. Therefore, we do not address it. City of Seattle v. Evans, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) (A court "'will not address arguments raised only by amicus.'") (quoting Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003)).

CONCLUSION

The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths may establish and enforce their policy goals. Because resolution of the Youths' claims would require this court to violate the separation of powers doctrine, we affirm.

WE CONCUR:

APPENDIX B

Complaint, *Aji P. v. State*, No. 18-2-04448-1 SEA (King Cty. Super. Ct. Aug. 14, 2018) (filed Feb. 16, 2016)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

AJI P., a minor child by and through his guardian HELAINA PIPER; ADONIS W., a minor child, by and through his guardian HELAINA PIPER; WREN W., a minor child by and through her guardian MIKE WAGENBACH; LARA F. & ATHENA F., minor children by and through their guardian MONIQUE DINH; GABRIEL M., a minor child by and through his guardians VALERY and RANDY MANDELL; JAMIE M., a minor child by and through her guardians MARK and JANETH MARGOLIN; INDIA B., a minor child by and through her guardians, JIM BRIGGS and MELISSA BATES; JAMES CHARLES D., a minor child by and through his guardian DAWNEEN DELACRUZ; KYLIE JOANN D., a minor child, by and through her guardian DAWNEEN DELACRUZ; KAILANI S., a minor child, by and through her guardian, JOHN SIROIS; DANIEL M., a minor child, by and through his guardian, FAWN SHARP; and BODHI K., a minor child, by and through his guardian MARIS ABELSON,

Plaintiffs,

v.

STATE OF WASHINGTON; JAY INSLEE, in his official capacity as Governor of Washington; WASHINGTON DEPARTMENT OF ECOLOGY; MAIA BELLON, in her official capacity as Director of the

No.

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

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Seattle, WA 98117

WASHINGTON DEPARTMENT OF ECOLOGY; WASHINGTON DEPARTMENT OF COMMERCE; BRIAN BONLENDER, in his official capacity as Director of the WASHINGTON DEPARTMENT OF COMMERCE; WASHINGTON STATE TRANSPORTATION COMMISSION; WASHINGTON DEPARTMENT OF TRANSPORTATION; and ROGER MILLER, in his official capacity as Secretary of the WASHINGTON DEPARTMENT OF TRANSPORTATION,

Defendants.

INTRODUCTION

1. Plaintiffs are twelve young Washingtonians, under the age of 18, who have serious ongoing injuries because of Defendants' deliberate indifference to their rights to life, liberty, property, and a healthful and pleasant environment, including a stable climate system, in violation of Washington's Constitution and the Public Trust Doctrine. They bring this action on behalf of themselves because the fossil fuel-based energy and transportation system created, supported, and operated by the Defendants, and the systematic, affirmative aggregate actions which make up and support that system, severely endangers Plaintiffs and their ability to grow to adulthood safely and enjoy the rights, benefits, and privileges of past generations of Washingtonians due to the resulting climate change.

2. Defendants have created, operate and maintain a fossil fuel-based energy and transportation system that has caused and is causing widespread harm to the Plaintiffs in violation of the constitution and Public Trust Doctrine. Although Washington law grants explicit responsibility and authority to the state entities and officials sued herein to develop and

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promulgate energy and transportation policy, these Defendants have implemented this responsibility in a way that violates Plaintiffs' constitutional rights.

3. Because the Defendants have long known that Plaintiffs would and currently are living under dangerous climatic conditions that create an unreasonable risk of present and future harm as a result of greenhouse gas emissions resulting from the fossil fuel-based energy and transportation system they have created, operate, and maintain, but have not responded reasonably to this urgent crisis and instead have affirmatively acted to exacerbate the climate crisis and delay meaningful science-based action, Plaintiffs seek an injunction compelling Defendants to develop and implement a comprehensive plan targeted to achieving Washington's obligation to stabilize the climate system and protect the vital natural resources on which Plaintiffs now and in the future will depend.

4. Pursuant to Revised Code of Washington ("RCW") 7.24 (the Uniform Declaratory Judgment Act), RCW 34.05 (Administrative Procedure Act), the Washington State Constitution, and the Public Trust Doctrine, Aji P., Adonis W., Wren W., Lara and Athena F., Gabriel M., Jamie M., India B., James Charles D., Kylie Joann D., Kailani S., Daniel M., and Bodhi K., all minor children by and through their respective guardians (collectively, "Plaintiffs") hereby ask this Court to declare and enforce the State of Washington's constitutional and Public Trust obligations to protect their inalienable and fundamental common law and constitutional rights to life, liberty, property, public trust resources, and a healthful and pleasant environment, rights that include a stable climate system that sustains human life and liberty.

5. Plaintiffs are and will continue to be mutually and adversely impacted by excessive human-caused atmospheric carbon dioxide ("CO_2") concentrations that now exceed 403 parts per million ("ppm"), as compared to the natural pre-industrial levels of 280 ppm. These

unconstitutional conditions, which Defendants have created and exacerbated in part through their creation and management of a fossil fuel-based energy and transportation system, have caused substantial impairment to the vital natural resources on which Plaintiffs and both current and future generations of Washingtonians depend, in the exercise of their inherent rights.

6. CO_2 and other greenhouse gas pollutants (collectively, "GHGs") in Washington are causing dangerously increasing temperatures, changing precipitation patterns, heatwaves, rising seas and storm-surge flooding, increasing droughts and violent storms, ocean acidification and warming, beach and farmland soil erosion, freshwater degradation, increased wildfires, resource and species extinctions, increased pestilence with resultant diseases and other adverse health risks, and other adverse impacts (collectively, "Climate Change Impacts"), all of which threaten the habitability of Washington and the life, liberty and property of these Plaintiffs.

7. The viability of all of Washington's Public Trust resources, including the atmosphere (air), tidelands and shorelands, navigable waters, lakes, rivers, beaches, forests, and wild flora and fauna (each individually, a "Public Trust Resource," and collectively, "Public Trust Resources"), and access to and use of such resources, including but not limited to public access, fishing, navigation, and environmental quality, are essential rights secured by the Constitution and common law of Washington.

8. The Defendants have common-law fiduciary and constitutional duties to refrain from actions that exacerbate Climate Change Impacts. The Defendants, through their actions and inactions as public officials who create and manage Washington's fossil fuel-based energy and transportation system and are responsible for responding to the threat of climate change, are materially causing and contributing to the increasing injurious effects of Climate Change

Impacts. Defendants' systemic course of conduct with respect to CO_2 and GHG emissions has exacerbated the dangerous situation Youth Plaintiffs presently face.

9. The Defendants have common-law fiduciary and constitutional duties to take action on behalf of the Youth Plaintiffs and the State of Washington to reduce and mitigate the adverse effects of Climate Change Impacts. Defendants have not used their authority, or fulfilled their duty, to mitigate Washington's GHG emissions and safeguard Plaintiffs' fundamental and inalienable rights.

10. Defendants have had decades of knowledge and opportunity to address the catastrophic harms the Plaintiffs face and have acted with shocking deliberate indifference and abdication of duty to address this crisis, which threatens to destroy vast areas of Washington State that are essential to the lives, liberties, and property of Plaintiffs.

11. Plaintiffs bring this lawsuit so the Court can declare and enforce their rights under the Public Trust Doctrine, sections 3, 12, and 30 of Article I, and section 1 of Article XVII of the Washington State Constitution, before it is too late.

PARTIES

Plaintiffs

12. Plaintiff Aji P., by and through his guardian and mother Helaina Piper, is a 17- year-old citizen of the U.S. and a resident of West Seattle, Washington. Aji is experiencing Climate Change Impacts caused by Defendants, and has been harmed by the increasing severity of such impacts. Aji's health and wellbeing has been harmed by the increasing number of wildfires in the Cascade Mountains and the smoke and ash-filled skies of Seattle, where air quality is dangerous. Aji's physical outdoor activities are limited by the increasing summer temperatures and days over 90 degrees F. Aji's ability to recreate in and enjoy the Puget Sound is harmed by

Climate Change Impacts, which are causing dead zones to occur in Puget Sound and ocean acidification that is killing fish and shellfish. Climate Change Impacts are also harming Aji's recreational and aesthetic interests in the forests in the west where Aji visits and plans to continue visiting, including forests that have been decimated by pine beetles. Aji's ability to snowboard has been limited by the reduced snow in the mountains where he recreates during the winter months.

13. Plaintiff India B., by and through her natural guardians Jim Briggs and Melissa Bates, is a 16-year old who lives with her mother and father on a small farm in Cle Elum, Washington, on the east slopes of the Cascades in an important agricultural community. India has lived her whole life on the same small, family farm, raising sheep for wool and meat, dairy goats, horses, and chickens. India is terrified, and experiences emotional and mental distress, knowing that she could lose her family farm, which is becoming increasingly threatened by Climate Change Impacts. Already, India's family has had to sell off much of their flock of sheep and many of the horses due to the rising costs of feed, which is largely due to Climate Change Impacts. India's brother grew up on horseback, helping her father train horses, but now horses have become a luxury instead of a way of life. Their animals ordinarily would graze off the land and feed on hay in the winter, but with climate change-induced drought, wildfires, and extreme weather events, India's family struggles to feed animals year-round. Even though India's family has water rights that are more than 100 years old, two years ago, because of drought, her family was only able to access half the water needed to provide for their farm. The Climate Change Impacts harming India's family farm and the economic vitality of the whole farming region are projected to worsen, according to experts, and the prognosis will not change without action from Defendants on climate recovery. India has already been repeatedly harmed and her life and farm

threatened by wildfires made worse by climate change. Severe wildfires have burned forests near India's farm and forced her family to make evacuation plans for them and their animals. India has had to evacuate to escape the terrible asthma attacks she suffers because of the smoke, and which threaten her health and personal safety. India has suffered from asthma since she was a child and her symptoms get much worse when air quality is diminished due to the smoke from the increasing number of climate change-induced and exacerbated wildfires near her home. In the summer of 2017, India also lost days of school and extracurricular activities from the hazardous air quality from wildfires.

14. Plaintiff James Charles D., by and through his natural guardian, Dawneen DeLaCruz, is a 17-year-old member of the Quinault Indian Nation, who lives with his family and attends school in Taholah, on the Washington coast. Taholah is the lower village of the Quinault Indian Nation that must be relocated because of sea level rise caused by Climate Change Impacts. James enjoys traditional cultural activities such as digging for clams both on and off the Reservation, but his ability to do so has been, and continues to be, limited because of algal blooms, ocean acidification, and warmer ocean temperatures, all Climate Change Impacts. James' personal security and property interests in his home are injured and threatened because his home of Taholah now floods every winter. James' educational interests are also harmed because his school has to close when there is flooding because his teachers cannot make it into town to teach. As he has grown up, James has been harmed by increasingly severe storms along the Washington coast. James and his family lose their power supply every year and had to purchase a backup generator as a result. He has lived in his home in Taholah for about 11 years, over half of his life, but will be forced to leave his home when the village is relocated as a result of Climate Change Impacts. All of the Quinault Indian Nation's essential services for young people are in

Taholah and will have to be relocated, even though there is very little funding to do that. This forced relocation from Climate Change Impacts injures James' cultural, spiritual, familial, property and recreational interests. This critical loss of his place-based heritage, a heritage that dates back to time immemorial, is irreplaceable and permanent. This loss affects James' ability to practice his religion, to choose how and where to raise family, to continue his subsistence and medicinal harvest, and to choose a career path based on his Nation's traditions and culture. These losses cause James emotional and mental distress. Climate Change Impacts are already harming James' practice of his native cultural traditions and these harms will only worsen over time absent meaningful action from governments to stop climate change.

15. Plaintiff Kylie JoAnn D., by and through her natural guardian, Dawneen DeLaCruz, is a 12-year-old member of the Quinault Indian Nation, who lives with her family and attends school in Taholah, Washington. Like her brother, Kylie will have to leave her home in Tahola when the village is relocated to higher ground, leaving the only home in which she has ever lived. Also like her brother, Kylie enjoys participating in traditional cultural activities, including the canoe journey, digging for clams, and fishing, but her ability to access and enjoy all of these activities is lessened due to Climate Change Impacts.

16. Plaintiff Kailani S., by and through her natural guardian John Sirois, is a 13-year old who lives with her family in Spokane, Washington. Kailani is an enrolled member of the Confederated Tribes of the Colville Reservation, which is located in the North-Central part of Washington State. Kailani just recently moved to Spokane, Washington from the Colville Reservation, but she returns regularly to visit her grandmother and to participate in cultural activities. Kailani is being harmed by the diminishing snowpack in Washington compared to the snow that used to exist in her Tribe's history. Kailani loves to go fishing with her family and has

been harmed by the devastating Climate Change Impacts on fisheries for Chinook and sockeye in recent years, including high water temperatures and decreased instream flows. Her ability to enjoy the Spokane River, the Colville Indian Reservation, the Okanogan River, the Columbia River, and the Icicle River of the Wenatchi people has been harmed because climate change has contributed to the extremely low flows in the rivers in recent years. The Icicle River area, which is traditional for her Wenatchi people, is especially important to Kailani for exercising her traditional cultural and spiritual practices, recreating, and harvesting food. Kailani also gathers and fishes on and around the Okanogan and Columbia Rivers as well. Kailani loves to camp near the Icicle River. All of these practices are being harmed by Climate Change Impacts on the river, the fishery and the surrounding terrestrial ecosystem, including drought conditions. Kailani also digs for Camas and bitterroot and picks berries with her grandmother and other relatives on the Colville Reservation, where she spends much of her time. The increasing wildfires have harmed Kailani's interests by burning a substantial part of the Reservation, including homes and large tracts of fish, wildlife, and subsistence harvest habitat. Climate change is harming traditional tribal foods like deer, elk and huckleberries, which further harms Kailani's interests.

17. Plaintiff Adonis W., by and through his natural guardian Helaina Piper, is a 12-year old student in the City of Seattle. Adonis spends a significant amount of time in the outdoors, enjoying activities like sitting on a rock outcropping in the Puget Sound and staring off into the beautiful Sound that is in his backyard. These activities are important for Adonis's physical, mental, and emotional wellbeing. Ocean heating and acidification is harming the waters and marine life that are important to Adonis' wellbeing. Adonis experiences fear and traumatic reactions to seeing Climate Change Impacts and knowing climate change will ruin the natural places that he loves to visit and the animals he adores seeing in the wild. Already, knowing how

ocean acidification is affecting marine life significantly diminishes Adonis' enjoyment of the beach. Adonis is also deeply and emotionally impacted by the death and destruction of other wildlife and living creatures. Adonis finds it hard to think about, imagine, and plan for his future when that future is constantly and quickly being destroyed by ocean acidification, droughts, wildfires, and other Climate Change Impacts.

18. Plaintiff Gabriel M., by and through his natural guardians, Valery and Randy Mandell, is a 16-year-old high school student who lives in Seattle, Washington. Gabriel's ability to enjoy the sandy beaches of the Puget Sound, the natural tides, tidal marshes, the lush forests and wildlife of the Pacific Northwest are being harmed by Climate Change Impacts, which will worsen with time. Gabriel's formative experiences of his youth have been tarnished by greenhouse gas pollution, ocean acidification, temperature increases, and other Climate Change Impacts. Gabriel's mental and emotional health are deeply impacted by the fact that Climate Change Impacts threaten all the living things and places that Gabriel values and that Defendants have spent decades blaring alarms about the "climate emergency," while simultaneously making it worsen. Defendants have been either labeling feasible and necessary responses to the climate crisis as impossible, or mischaracterizing the state's meager and insufficient proposals as groundbreaking or amazing, thereby misleading the public. Having Washington's government officials, who are charged with protecting his wellbeing, publicly praise his rights to a safe and healthy climate while quietly taking actions that cause perilously high CO_2 concentrations and levels of GHG pollution, causes Gabriel emotional distress and anxiety about the future. Without urgent government action to reduce emissions at scientifically necessary rates, Gabriel suffers profound distress knowing that he and his entire generation have no hope to a future that will be

livable, sustainable, or in any way protected from the ecological disasters and Climate Change Impacts his state is already experiencing.

19. Plaintiff Wren W., by and through her natural guardians, Mike Wagenbach and Linda Wordeman, is a 17-year old from Seattle, Washington. Wren frequently visits the Ballard Locks that are in her neighborhood to see the salmon in the fish ladder and is already being harmed by seeing fewer salmon returning each year because of Climate Change Impacts. If current trends continue, she will forever lose her ability to see running salmon, losing a source of spiritual and recreational beauty. Wren wants to be a nature photographer and protect endangered species. Her ability to photograph wildlife and enjoy the species that live today is being harmed by Climate Change Impacts, injuring not only her present enjoyment, but also her future career plans.

20. Plaintiff Lara F., by and through her natural guardian, Monique Dinh, is a 15-year old student living in Seattle, Washington. Lara is harmed by the drought conditions plaguing Washington with less winter precipitation. Lara enjoys skiing in the winter, but her ability to participate in this activity has been harmed by warmer early season conditions that persist all ski-season long, diminishing snow cover. As a result, Lara is no longer able to ski as much as she used to or as much as she would like to and knows that in the future she may lose her ability to ski all together absent a stable snowpack as temperatures continue to warm. Lara is a pescatarian, and the availability of the seafood Lara eats is threatened by Climate Change Impacts. Lara's hometown of Seattle is also threatened with additional sea level rise, which will harm her ability to access coastal areas in her city, making transit, recreation, and other basic life functions difficult. Lara's identity as a Washingtonian is based on the health of the Puget Sound,

the health of the Cascades and the health of her city, all of which are threatened by Climate Change Impacts.

21. Plaintiff Athena F., by and through her natural guardian, Monique Dinh, is a 14-year old student living in Seattle, Washington. Natural places, like Carkeek Park and its surrounding forests, are Athena's safe haven and provide physical, spiritual, and emotional benefits. The physical, emotional, mental, and spiritual enjoyment she derives from animals and from natural places is lost to her when the trees and the birds she loves are threatened by Climate Change Impacts. Athena experiences emotional harm and mental distress knowing that if government does not act to prevent the disastrous climate crisis into which she was born, she will not be able to visit and enjoy the natural places that mean so much to her.

22. Plaintiff Jamie M., by and through her natural guardians, Mark and Janeth Margolin, is a 16-year old from Seattle, Washington. During September 2017, Jamie was harmed by the smoke that shrouded the city of Seattle due to wildfires in the Cascade Mountains, which were caused or exacerbated by climate change. The thick and hot air made her throat hurt and made breathing outside difficult. Ash covered many parts of the city she calls home. She was unable to take the long walks that she usually enjoys during the summer or otherwise enjoy being safely outside because of the hazardous air quality. Absent reductions in GHG emissions and concentrations, Jamie will continue to experience more and more frequent and severe days of poor air quality, thick and hot smoke, and ash covering her home city, as temperatures continue to rise and the wildfire season continues to lengthen with more wildfires affecting the Pacific Northwest. Jamie's injuries from climate change-induced and exacerbated wildfires will worsen into the future if her government continues the same or similar fossil fuel energy and transportation system. Jamie enjoys playing in the snow, watching it fall, seeing the snow-

covered peaks of the Cascades, and knowing that the snowpack will feed the summer and fall runs of salmon in Pacific Northwest rivers, but these interests are all being harmed by the diminishing snowpack from Climate Change Impacts. Since she was a young child, Jamie has enjoyed visiting and spending time on Alki Beach, which is close to her home. Her interests in these special coastal areas, and the marine life they support, are harmed by the acidifying and rising waters. Jamie is also emotionally and mentally distressed that climate change is causing and will cause drought, famine, and water shortage -- which is projected to fuel more instability, violence, and wars over resources, profoundly impacting the most disadvantaged communities and creating millions of climate refugees. Jamie has deep empathy for, and is emotionally and mentally distressed about, the millions of refugees who have already been displaced by the climate crisis, and those who have been killed as a result of Climate Change Impacts. With the direction the climate crisis is heading, Jamie experiences emotional distress and anxiety that her future and those of other generations will likely be full of violence and instability.

23. Plaintiff Daniel M., by and through his natural guardian and mother Fawn Sharp, is a 13-year-old member of the Quinault Indian Nation, who lives with his family on the Quinault Indian Reservation at the confluence of the Quinault River and Lake Quinault. Daniel enjoys fishing for salmon, including King salmon and Blueback, a species of salmon that is found only in the Quinault River, both species which are of traditional cultural importance to Daniel and the Quinault Indian Nation. Daniel has witnessed the decline of instream flows in the Quinault River by his home, as the River was once fed by the Anderson Glacier, but the glacier no longer exists. The Anderson Glacier disappeared during Daniel's lifetime because of climate change. Because of decreased streamflows and increased temperatures in the Quinault River, Daniel has seen reduced runs of salmon, which negatively affects his ability to fish, an important recreational

and cultural activity for him. One of his favorite classes involves going to the Washington Coast and working with scientists to monitor and collect seabirds, which are increasingly dying because of changing ocean and weather conditions due to climate change. Daniel consumes mussels and razor clams, but his ability to do so is more limited due to ocean acidification and other Climate Change Impacts. When he was younger, Daniel created his own tribally-licensed business, where he collects wood from nearby forest lands and creates kindling for tribal elders. A healthy forest ecosystem is important for Daniel to continue these activities, but the forests at Quinault are already experiencing the negative effects of climate change. Even though they live 30-40 miles away from the Washington coast, in recent years, Daniel has experienced flooding events at his home due to high rains and high tides, both of which are being made more significant due to climate change. He and his family have been told that they need to start preparing for more flooding events and are investing in trying to make their home safe from future flooding events.

24. Plaintiff Bodhi K., by and through his natural guardian and mother, Maris Abelson, is a 7-year-old resident of the state of Washington who lives with his family and attends school in the Seattle area. Bodhi has been working to fight climate change since he was 4 years old because he wants a healthy environment for himself, the next generation and the animals. Bodhi was brought up as a vegetarian because it is one way he can take steps to protect the animals that he loves. Bodhi loves to be outside and to visit parks because he appreciates trees. But in his lifetime he has seen how climate change, caused by an unbalanced atmospheric system, is negatively effecting evergreen trees throughout Washington state. Bodhi believes that much needs to be done to protect the trees because they help sequester CO_2 and clean the air. During the summer of 2017, Bodhi was not able to do family activities such as take bike rides as a family because

of the unhealthy air quality caused by the smoke from nearby wildfires that shrouded his community. Bodhi is afraid that if steps aren't taken to reduce CO_2 emissions and transition to renewable energy, many of the plants and animals he loves will not survive the warmer temperatures that climate change will bring to the Pacific Northwest.

25. All Plaintiffs are residents of the State of Washington and beneficiaries of the essential Public Trust Resources managed by Defendants. Plaintiffs are currently, and will increasingly be, harmed and injured from anthropogenic Climate Change Impacts to Washington's Public Trust Resources, which are essential to Youth Plaintiffs' rights to life, liberty, property, and a healthful and pleasant environment.

26. Plaintiffs all have knowledge of how climate change will impair their ability to pursue their hopes, dreams, and enjoyment of the natural resources on which they depend and with which they have grown up. They also know that Defendants, by and through their actions relative to fossil fuels and GHG emissions, are continuing to facilitate harms that threaten their lives and wellbeing. Defendants have caused and continue to cause psychological, and emotional, and mental health harm to Plaintiffs through their role in causing and contributing to Climate Change Impacts that threaten Plaintiffs' lives and wellbeing. Additionally, Plaintiffs' personal security, health, recreational, cultural, spiritual, subsistence, educational, aesthetic, economic, property, and other interests are being, and will continue to be, adversely and irreparably injured by Defendants' fossil fuel-based energy and transportation system and the aggregate actions making up that system. As a result of the affirmative aggregate acts of Defendants, Plaintiffs will not be able to continue to engage in many of the activities they currently enjoy and depend upon, nor will they be able to share those experiences with their children and grandchildren, without a remedy from this Court.

27. The harms that Plaintiffs are experiencing are not just threatened future harms, but present harms as well as has been acknowledged by officials within Washington State government. On June 23, 2017, Commissioner of Public Lands Hilary Franz acknowledged the severity of the climate crisis in Washington state and that the impacts are being experienced by Washingtonians *today*. Commissioner Franz admitted that Climate Change Impacts are seen every day, "from the wildfires we fight in ailing forests, to the drying soils of our farm lands, to our changing shorelines. Across the state, climate change threatens the families and communities who rely on the bounty of our farms, the production of our forests, and the shells of our oysters. These climate change impacts are happening now and are affecting communities across Washington."

28. Plaintiffs have taken on the burden at very young ages of trying to protect their lives and the lives of future generations and other species. Many of the Plaintiffs have spent much of their young lives trying to educate the public and government officials and advocate for their climate rights. While they attempt to use their voices to influence elected officials, they cannot vote for those officials and they do not have money to compete with the lobbying power of the industries that profit from the status quo energy and transportation system that the government supports and keeps in place. The adults in power are not responding to their pleas for help. Much like the children of the civil rights movement seeking equal education free from discrimination, or the children of Washington today seeking adequate funding for education, this Court is their last resort to protect their fundamental rights to the natural systems that support life on Earth.

Defendants

29. Defendant State of Washington is the sovereign trustee over Public Trust Resources within its domain, including air, water, the sea, shores of the sea, and fish and wildlife, and it

maintains control over those and other Public Trust Resources and must protect them from substantial impairment, waste, and alienation, for the benefit of present and future generations of Washingtonians. Defendant State of Washington must exercise a duty of care over Public Trust Resources and a duty of loyalty and impartiality to the citizen beneficiaries of Washington's Public Trust, including Youth Plaintiffs and future generations.

30. Defendant State of Washington has asserted "primary jurisdiction over the management of coastal and ocean natural resources within three miles of the coastline." RCW 43.143.005(4). Even though the federal government has primary jurisdiction "[f]rom three miles seaward to the boundary of the two hundred mile exclusive economic zone," the State has found that "[s]ince protection, conservation, and development of the natural resources in the exclusive economic zone directly affect Washington's economy and environment, the state has an inherent interest in how these resources are managed." *Id.*

31. Notwithstanding its trustee obligations, Defendant State of Washington has explicitly authorized dangerous levels of fossil fuel use and has exempted some activities from compliance with statutory greenhouse gas reduction measures through its adoption of RCW 70.235.020. RCW 70.235.020(1)(a) requires only 25 and 50 percent overall state GHG emissions reductions by 2035 and 2050 respectively from 1990 emissions levels. RCW 70.235.050(1)(a)-(c) requires only 15, 36, and 57.5 percent reductions in GHG emissions by state agencies from 2005 levels by 2020, 2035, and 2050, respectively. Those statewide reductions, including by state agencies, if achieved, would still allow GHG emissions far greater than the reductions required to achieve Washington's part of its responsibility to stabilize the climate system and to avert the worst and most severe Climate Change Impacts. GHG emissions that would continue under full compliance with RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) would continue to cause and

exacerbate dangerous Climate Change Impacts described herein. Defendant State of Washington also creates and directs the state's energy and transportation system, which is responsible for producing and under which Defendants' have authorized and continue to authorize dangerous levels of GHG emissions.

32. Defendant Jay Inslee is the Governor of Washington and is sued in his official capacity. The Governor has a constitutional obligation to "see that the laws are faithfully executed." Wash. Const. art. III, § 5. The Governor must approve bills passed by the legislature before they become law and has the authority to veto legislation. Wash. Const. art. III, § 12.

33. The Governor is the head of the executive branch of government, including the Departments of Ecology, Commerce, Transportation, and is responsible for appointing heads of departments and agencies and ensuring that the agencies comply with their legal responsibilities. The Governor holds cabinet meetings, communicates with other state officers, oversees budget expenditures, serves as an ex-officio member on a number of boards and commissions, and has the authority to issue executive orders. The Governor has the authority to approve, reject or condition proposed sites for energy facilities in the state of Washington. The Governor is statutorily required to provide the legislature with policy recommendations on how the state can achieve greenhouse gas reductions. The Governor is required to designate a person as the single point of accountability for all energy and climate change initiatives within state agencies to ensure that the State complies with RCW 70.235. The Governor, along with Defendants Commerce and Washington State Department of Transportation ("WSDOT"), create and implement the energy and transportation policy of Washington state.

34. Governor Inslee, adding to the dangerous acts of his predecessors, has used his expansive authority and directed Ecology, Commerce, WSDOT and other state agencies under his control,

to encourage, allow, and authorize the emission of dangerous levels of CO_2 and GHGs in Washington, thus causing, contributing and exacerbating the climate crisis. For example, he has pursued, endorsed and implemented policies that allow high levels of GHG emissions and deliberately defer emissions reductions through 2050, which will knowingly cause and contribute to dangerous Climate Change Impacts. He has taken these actions while simultaneously telling the public that "the full responsibility of climate action [falls] on states and cities throughout our nation." Similarly, Governor Inslee has not used his authority, nor directed Ecology, Commerce, WSDOT and other state agencies to implement their authority, to prevent and reduce Washington's emissions of dangerous levels of GHGs and CO_2, and protect its biologic carbon sinks.

35. Defendant Washington State Department of Ecology ("Ecology"), P.O. Box 47600, Olympia, WA 98504-7600, is responsible for protecting the state's air quality and water resources, preventing flooding, and developing plans to prevent climate change. The legislature has granted Defendant Ecology broad powers to achieve Washington's "public policy to preserve, protect, and enhance the air quality for current and future generations." RCW 70.94.011. Defendant Ecology is authorized to "adopt rules establishing air quality objectives and air quality standards" and establish rules requiring emission sources to "apply reasonable and available control methods." RCW 70.94.331. Ecology is responsible for developing regulations governing the issuance of permits to control air pollution. RCW 70.94.161.

36. Ecology issues air quality and other permits to facilities that emit GHG emissions, including but not limited to projects that burn and promote the use of fossil fuels. Consistent with these efforts that exacerbate the climate crisis, Ecology has not utilized its authority to

initiate any effort to phase out GHG emissions consistent with levels that could avert dangerous disruption of the climate system.

37. Defendant Ecology is entrusted with "the supervision of public waters within the state," RCW 43.21A.064, in accordance with the directive to retain "waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights." RCW 90.03.005. When managing Washington's waters, Ecology has been directed to adopt "policies as are necessary to insure that the waters of the state are used, conserved and preserved for the best interest of the state." RCW 43.27A.090. Defendant Ecology's duty to supervise public waters includes a responsibility to prevent flooding. RCW 43.21A.069.

38. Defendant Ecology also has specific duties to prevent and mitigate against Climate Change Impacts. The legislature has designated Defendant Ecology as "a central clearinghouse for relevant scientific and technical information about the impacts of climate change" and "a central convener for the development of vital programs and necessary policies to help the state adapt to a rapidly changing climate." RCW 43.21M.010. To that end, Defendant Ecology is tasked with developing Washington's initial climate change response strategy. RCW 43.21M.020. Defendant Ecology is charged with reviewing and reporting to the legislature regarding the state's GHG emissions targets to determine its need, applicability and effectiveness and to recommend updates as necessary.

39. Defendant Maia Bellon is the Director of Defendant Ecology and is sued in her official capacity. As Director of Ecology, Defendant Bellon has "complete charge of and supervisory powers over the department" of Ecology, including the actions the agency takes with respect to climate change. RCW 43.21A.050.

40. Defendant Washington State Department of Commerce, P.O. Box 42525, Olympia, WA 98504-2525, is the state agency charged with enhancing and promoting sustainable community and economic vitality in Washington. Washington State's Energy Office is within the Department of Commerce and plays a significant role in developing and implementing the energy policy of Washington. Defendant Commerce has the legislative directive to "supervise and administer energy-related activities" and to "advise the governor and legislature with respect to energy matters affecting the state." Defendant Commerce sets the priorities and implements "the state energy strategy elements and on other energy matters." RCW 43.21F.045.

41. Defendant Commerce, through the Washington State Energy Office, is the state agency responsible for developing and coordinating implementation of the state energy strategy. Among the guiding principles to guide the state's energy strategy are to "[e]nsure that the state's energy system meets the health, welfare, and economic needs of its citizens with particular emphasis on meeting the needs of low-income and vulnerable populations," to "[r]educe dependence on fossil fuel energy sources," and to "[m]eet the state's statutory greenhouse gas limits and environmental requirements as the state develops and uses energy resources." RCW 43.21F.088. The State Energy Office "follows, analyzes and reports on key energy issues, policies and programs related to alternative fuels, energy efficiency, renewable energy development, greenhouse gas emissions, energy supply, prices, security and reliability." Defendant Commerce has not utilized its authority to initiate any effort to create an energy system that is compliant with the Washington Constitution, Public Trust Doctrine, or other mandates to decarbonize Washington's energy system and phase out GHG emissions consistent with levels that could avert dangerous disruption of the climate system. Defendant Commerce is required to develop a Strategic Plan for Energy Efficiency every three years, which includes the consideration of

developing aspirational codes that contain economically and technically feasible standards to achieve higher standards of energy efficiency.

42. Defendant Brian Bonlender is Director of Defendant Commerce and is sued in his official capacity. Defendant Bonlender oversees and supervises the activities of Defendant Commerce, including the agency's work on climate change and energy policy.

43. Defendant Washington State Transportation Commission ("WSTC") is composed of seven voting members, all of whom are appointed by the Governor. WSTC's responsibilities include proposing transportation policies to be adopted by the Governor, providing for public involvement, proposing transportation budgets to the Governor and legislature, and working to minimize adverse environmental and energy impacts of transportation services. The WSTC is responsible for developing the Washington Transportation Plan which establishes a 20-year vision for development of the statewide transportation system, and is designed, in part to enhance Washington's quality of life through transportation investments that promote energy conservation, enhance healthy communities, and protect the environment.

44. Defendant Washington Department of Transportation ("WSDOT") is the state agency responsible for implementing Washington state transportation policy. WSDOT has been repeatedly directed to develop and implement transportation policies designed to reduce greenhouse gas emissions from the transportation sector, including the directive to "gradually reduce the per capita vehicle miles traveled." In spite of these directives, transportation accounts for nearly half of Washington state's GHG emissions and the state is not on track to meet the constitutionally inadequate goal of reducing transportation emissions to 37.5 million metric tons by 2020. WSDOT is responsible for emitting the largest share of GHG emissions of any other state agency.

45. Defendant Roger Miller is the Secretary of Defendant WSDOT and is sued in his official capacity. As Secretary of WSDOT, Defendant Miller oversees and supervises the activities of Defendant WSDOT and is responsible for "18,600 lane miles of highway, 3294 bridges, general aviation airports, passenger- and freight-rail programs, and Washington State Ferries," as well as Defendant Transportation's climate change programs and policies.

46. At all material times, each Defendant acted under the color of the laws of the State of Washington.

47. The acts and omissions of the Defendants described herein were taken pursuant to the laws, policies and customs of the State of Washington.

JURISDICTION & VENUE

48. This Court has jurisdiction to issue a declaration that the Plaintiffs have fundamental rights under the Public Trust Doctrine and Washington State Constitution, that RCW 70.235.020(1)(a)-(b) is unconstitutional, and that the State, the Governor, Ecology, Commerce, WSTC, WSDOT, and their Directors, are not complying with their constitutional and public trust mandates. RCW 7.24.010; .020; .050; RCW 34.05.570.

49. This Court has jurisdiction to enforce the Washington Constitution and State Public Trust Doctrine.

50. This Court has jurisdiction over this action under Article IV, Section 6 of the Washington State Constitution and RCW 2.08.010 because this is a case in equity.

51. This Court has jurisdiction over this action under Article IV, Section 6 of the Washington State Constitution and RCW 2.08.010 because exclusive jurisdiction over this matter has not been vested in some other court.

52. This Court has jurisdiction to enforce fundamental rights contained in and reserved by the Washington State Constitution. Wash. Const., Art. IV, § 6; RCW 7.24; RCW 34.05; RCW 7.40.

53. Venue for this action properly lies in this Court. RCW 4.92.010; 7.24; 34.05.514.

54. Plaintiffs have no alternative adequate remedy at law.

STATEMENT OF FACTS

Anthropogenic Climate Change Is Dangerous To Plaintiffs Unless Atmospheric CO_2 Concentration Declines to 350 ppm or Less By 2100

55. Climate change is human-caused, primarily from burning fossil fuels, and is already dangerous. Climate change results from excess levels of GHG pollution, deforestation, and degradation of soils. Climate Change Impacts are already injuring and irreversibly destroying human and other natural systems, causing loss of life and pressing species to extinction. The time to reverse the dangerous situation is quickly dwindling. Scientists do not know precisely when we will pass a point of no return, but they agree we are nearing a critical threshold of locking in climate danger for generations to come.

56. The global average CO_2 concentration in 2016 was approximately 403 ppm and is increasing at a rate of 2-3 ppm per year, compared to the pre-industrial concentration of 280 ppm. For hundreds of thousands of years prior to the industrial revolution, CO_2 levels naturally fluctuated between 180 and 280 ppm. Atmospheric CO_2 is the primary forcer of climate change. However, the concentrations of other GHGs in the atmosphere have also increased. For example, methane concentrations have increased approximately 250% since the pre-industrial period as a result of human activity.

57. For decades, the U.S. Government and the State of Washington have acknowledged that climate change is occurring from burning fossil fuels, that its adverse effects are underway and that a continuation of a fossil fuel-based energy and transportation system and failure to reduce GHG emissions would consign future generations to irreversible and catastrophic consequences.

58. The impacts of CO_2 emissions on the State of Washington are already severe. Changes in the natural timing of water availability, as well as sea level rise and ocean acidity, among other Climate Change Impacts, are bringing and will increasingly bring significant consequences for the economy, infrastructure, natural systems, and human health of the region.

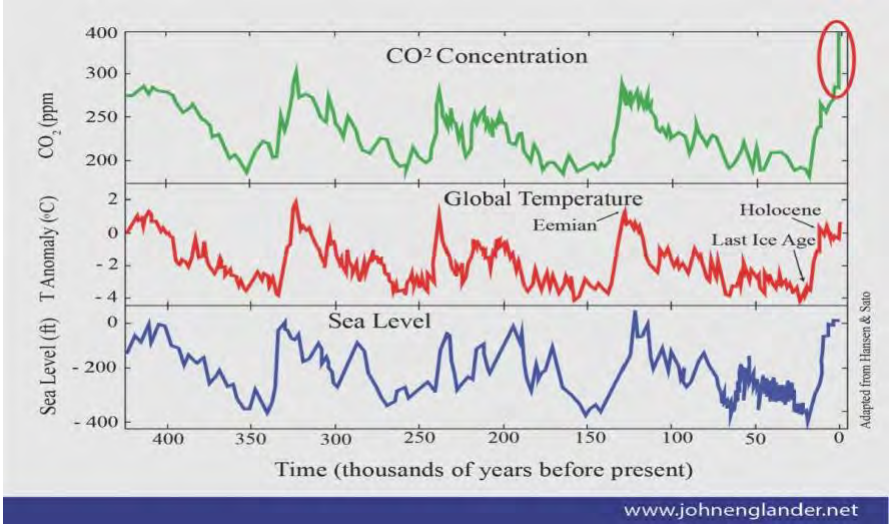
59. Scientists have known since the late 1800s that atmospheric concentration of greenhouse gases, like CO_2, were the control knob for the temperature of the earth. The increased concentrations of greenhouse gases in our atmosphere have raised global surface temperature by approximately 1°C (1.8°F) from 1880 to 2016, causing the end of the Holocene, the epoch in which human civilization developed. 2016 was the hottest year in the human record, with 2012 falling into second place, and 2017 the third hottest year in recorded history. The five hottest years have been in the last decade and every year since 1997 has been warmer than average in the United States. Ocean temperatures have also risen, changing circulation patterns and threatening marine life and ice sheets.

60. Between 1891 and 2011, the average regional temperatures in the Pacific Northwest increased by approximately 1.3°F. In the Puget Sound Region, every year but six from 1980 to 2014 was warmer than the 20th century average.

61. By midcentury, when the Plaintiffs will be adults, conservative models project average annual temperatures will be 2.9 to 5.4°F warmer under a low greenhouse gas emissions scenario

and 5.5 to 7.1°F warmer under a high greenhouse gas emissions scenario, compared to temperatures recorded from 1970 – 1999. The increase will be the largest in the summer. Extreme heat and weather events will occur more often. Increasing temperatures will lead to increases in stream and river temperatures, with Puget Sound rivers projected to increase 4.0 to 4.5°F by the 2080s compared to 1970 – 1999.

62. Atmospheric CO_2 levels, global temperature and sea levels are all closely correlated as depicted in the graph below. When CO_2 levels rise, so too do temperature and the seas.



63. For the first time in the measurable paleo-record, CO_2 levels have risen by more than 125 ppm and within only 150 years. In the past, this type of differential in CO_2 levels drove a series of sea level rise pulses over tens of thousands of years that totaled 120 meters of sea level rise in response to warming and ice melt. The last time in the measured paleo-record when CO_2 levels were as high as present levels, the seas were approximately 70 feet higher than today.

64. Over 93.4 percent of the excess heat caused by rising CO_2 levels is being absorbed by the oceans, causing the largest ice sheets on the planet to melt into the oceans. Oceans will retain that heat for much longer than the surface of the earth because water must lose more energy in

order to cool. Thus, Plaintiffs and future generations will continue to be harmed by the warming oceans long after climate pollution is eliminated.

65. Sea level rise can occur very rapidly. Geologic evidence shows that once ice sheets are destabilized rapid ice sheet disintegration occurs. Scientists are already observing and recording these accelerating feedbacks with rapid ice sheet melt occurring on Greenland and Antarctica. According to the National Oceanic and Atmospheric Administration, between 1992 and 2001, Greenland lost an average of 34 gigatons of ice each year and Antarctica lost an average of 30 gigatons of ice each year. Between 2002 and 2011, the rate of Greenland ice loss increased six-fold to 215 gigatons of ice lost each year and the rate of Antarctic ice loss quadrupled to an average of 147 gigatons of ice lost each year.

66. In January 2017, the U.S. government, through NOAA, projected between 0.9-8 feet global mean sea level rise by 2100. However, for certain coastlines across the U.S., the high ranges could be an additional 1-3.3 feet higher ("or more," according to the NOAA report). NOAA's 2017 projections are higher than the projections it made just five years ago in its 2012 assessment.

67. Under NOAA's 2017 projected scenarios, there could be 2 feet of sea level rise by 2050, 3.9 feet by 2070, 6.6 feet by 2090, 11.8 feet by 2120, 18 feet by 2150, and 31.8 feet by 2200. A 2 or 3-foot rise of sea level will make nearly all of the barrier islands of the world uninhabitable, result in inundation of a major portion of the world's deltas, and challenge low-lying coastal zones like Puget Sound to maintain infrastructure and public welfare and to assure protection of life and property.

68. NOAA reports that even 3 feet of sea level rise would permanently inundate 2 million American's homes and communities and 6.6 feet of sea level rise would put 6 million U.S. homes

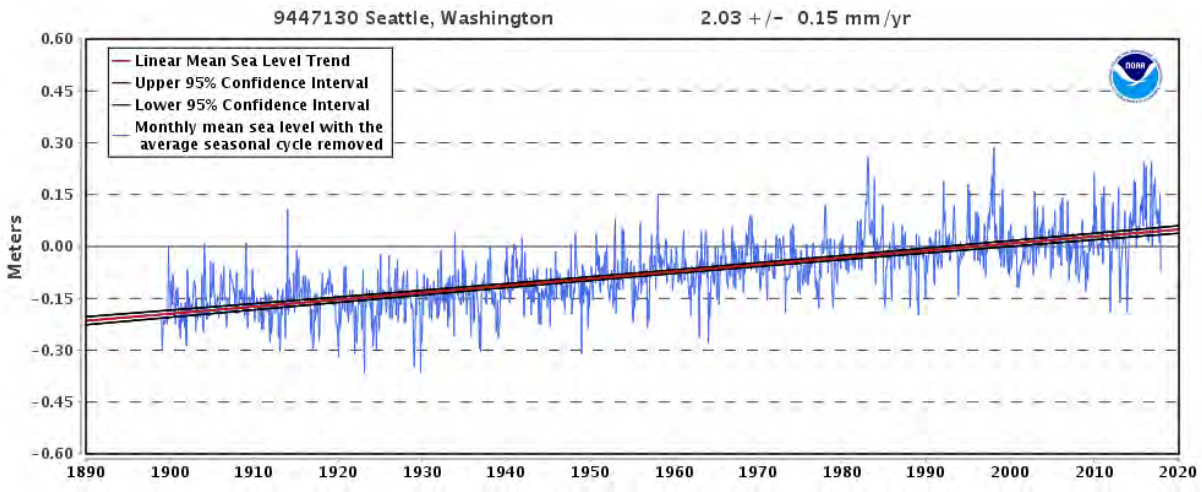
underwater. Already nuisance flooding is 300%-900% more frequent than it was 50 years ago. Sixty percent of Washington's population lives in the Seattle Metro area around the Puget Sound.

69. NOAA's projection of up to 8 feet of sea level rise by 2100 is representative of sea level projections typically made in the scientific literature based on current modeling, including the current rate of accelerated melting in the poles, but it does not constitute the best scientific information available because it ignores other plausible high-risk scenarios. The scientific consensus regarding the historic rapid pulses in sea level rise as ice sheets disintegrate is not incorporated in NOAA's 2017 model, or any of the modeling summarized by the Intergovernmental Panel on Climate Change. Thus, all of those governmental reports likely underestimate the severity and speed with which the seas will rise.

70. The best scientific information available projects a 15-40 foot rise in sea level by 2100 if current trends continue, with even greater rises in subsequent centuries. This projection is based on the historic record, rapid sea level rise pulses, and current rates of sea level rise acceleration, much of which is not taken into account by NOAA in their latest projections.

71. Scientific evidence demonstrates that non-linear sea level rise will submerge many Washington coastal areas, impacting thousands of Washingtonians and billions of dollars of property, unless there are immediate reductions in CO_2 and greenhouse gas emissions.

72. Sea level is rising at most locations in and near Puget Sound. From 1899 to 2016, sea level rose 0.67 feet in Seattle, Washington.



73. There are nearly 2300 miles of Washington shoreline that are being affected and will be further impaired by rising sea levels.

74. Real estate analysts have projected that if sea levels are to rise by six feet, a conservative estimate for the latter part of the century, 31,235 homes in Washington (1.32% of the total housing stock) would be underwater, a loss of $13.7 billion dollars. In Seattle, 1,663 homes (0.9% of the Seattle housing stock), worth a combined total of $2.3 billion would be underwater if sea levels rose 6 feet. Those projections do not include other properties affected by high tides and storm surges, and infrastructure submerged by the rising seas.

75. Sea level rise will seriously impact coastal infrastructure and transportation systems, with severe social and economic consequences. For example, by 2050, dozens of King County Wastewater Treatment Division facilities will be directly inundated by rising seas or through the conveyance systems.

76. Sea level rise will also increase the frequency of extreme coastal and coastal river flood events during high tides and storm surges.

77. Sea level rise will alter coastal habitats, as brackish marshlands are converted into tidal flats and other saltwater habitats. Up to 11% of inland swamps are projected to be flooded by

salt water. Marine animal habitats will also be affected by sea level rise, and resulting erosion, impacting Chinook salmon, Pacific mackerel, Pacific hake, oysters, mussels, English sole, and yellowtail rockfish, as well as phytoplankton and zooplankton, sea otters, and other marine species.

78. Increased CO_2 emissions are having a severe negative impact on ocean health. The oceans absorb around 25-30% of global CO_2 emissions, resulting in acidification of marine waters. Ocean acidity has been rising at a geologically unprecedented rate. Currently, acidity is rising at least 100 times faster than at any other period during the last 100,000 years, threatening marine life, including human food sources, and killing coral reefs.

79. Ocean acidification in the Northeast Pacific Ocean surface waters has severely increased, with a 26% increase in acidity since pre-industrial times. Rising acidity is negatively impacting ocean life, including reducing the availability of calcium carbonate, an essential material for shell growth. Washington is experiencing ocean acidification earlier than other parts of the world leading to devastating effects on the State's oyster industry. Moreover, up to a quarter of pteropods (sea snails comprising a critical part of the marine food web along the west coast of the United States) have been experiencing shell dissolution due to increasing ocean acidity.

80. Washington's seafood industry, which is particularly important to the state's tribal communities, is exceptionally vulnerable to the effects of ocean acidification. Over 30% of the marine life in Puget Sound consists of calcifiers (including oysters, clams, scallops, mussels, abalone, crabs, geoducks, barnacles, sea urchins, sand dollars, sea stars, and sea cucumbers) that will be impacted by declining availability of calcium carbonate, a necessary ingredient for shell construction.

81. While the uptake of atmospheric carbon dioxide is the primary driver of open-ocean acidification, secondary contributions, such as nutrient pollution from land-based sources, also contribute to the acidification of Puget Sound. In the spring and summer, the waters of the Puget Sound experience algal blooms, which have significant health impacts. These blooms, while natural to a limited extent, are made worse by anthropogenic nutrient pollution and increasing temperatures, setting in motion a chain of chemical and biological reactions that increase local acidification.

82. Ocean acidification is disrupting marine ecosystems more generally. Many common single-celled organisms and protists that act as prey for many marine species and some forms of seaweed all produce calcium carbonate structures. Declines in plankton and mollusk populations are expected to result in 10% to 18% declines in the abundance of important west coast groundfish as soon as 2028, including English sole, arrowtooth flounder, and yellowtail rockfish from loss of prey. Additionally, Washington's calcifiers provide important services to society, other organisms and local food webs, the loss or decline of which will further impact these systems. For instance, filter feeders improve water quality by removing organic particles and corals provide habitat and shelter for many plants and animals.

83. Changes in the water cycle as a result of climate change also increase the potential for, and the severity of drought. Western states like Washington will be particularly impacted by drought, reduced precipitation during summer months, increased evaporation, and increased water loss from plants. These changes are already occurring. In 2015, Defendant Governor Jay Inslee declared a state-wide drought emergency for Washington, citing historically low snowpack, falling river levels, and rising temperatures. Washington did not return to a drought-free condition until April, 2016, the first time since 2013.

84. Precipitation is expected to decrease during the summer and increase during other seasons. Models project a decline of 22-50% for summer precipitation in the Puget Sound region in the 2050s. Most models also project the number of days with precipitation greater than one inch (in winter and spring) will increase by 13% between 2041 and 2070. The heaviest 24-hour winter rain events in western Washington will intensify by 22% by the 2080s. These high intensity events are also projected to occur more frequently.

85. Rising temperatures and decreasing snowfall will lead to declining snowpack and earlier melting. The nature of precipitation will shift from snow to rain. By the end of the century, the dominant form of precipitation in most Puget Sound watersheds will be rain. By the 2040s, April 1st snowpack is projected to be up to 47% less than during 1970 to 1999. By the 2080s, average spring snowpack in the Puget Sound region is projected to decline by up to 55%. These projected snowpack losses will increase the probability of landslides. By 2050, snowmelt will begin three to four weeks earlier than the average timing in the 20th century. Peak stream flows are projected to shift four to nine weeks earlier in the Sultan, Cedar, Green, and Tolt watersheds and in the Yakima basin by the 2080s. This shift in snowmelt timing, compounded with reduced snow accumulation, will result in substantially smaller summer stream flows and larger late-winter and early-spring stream flows.

86. Snowpack in the Washington Cascades has declined by about 25% since the mid-20th century, and spring snowmelt has occurred up to thirty days earlier depending on location. These changes have resulted in up to 15% declines in summer stream flows and 20% increases in late winter/early spring flows.

87. Washington's glaciers are in crisis because temperatures are warming faster at higher elevations and precipitation is increasingly falling as rain instead of snow. Fifty-three glaciers in

the North Cascades have disappeared since the 1950s. Glacier area has decreased 56% in the North Cascades and 34% in the Olympic Mountains. In 1982, Olympic National Park had 266 glaciers; by 2009, that number was 184. At Olympic National Park, glacial area has declined 34% in only 30 years, and glacial volume decreased by at least 15% from 1987 to 2009. The Blue Glacier, for example, has retreated 325 feet and lost 178 feet of thickness over approximately 20 years. In the North Cascades, 10% to 44% of total summer streamflow is estimated to originate from glaciers, depending on the watershed. Even if temperatures merely remain at presently elevated levels, only two of the 12 North Cascades glaciers are expected to survive. The Anderson Glacier shrank by 90% between 1927 and 2009, resulting in lower and warmer stream flows in the Quinault River, which it feeds. The Anderson Glacier has lost its ability to survive without its zone of accumulation of snow and ice and has now disappeared.

88. Drier summers from climate change have also created a greater risk of wildfires. The growing number of wildfires has resulted in increasing hospitalizations for respiratory emergencies caused by smoke. The average number of large wildfires in Washington has increased from 6 per year in the 1970s to over 21 per year in the beginning of the 21st century. In 2015, Defendant Governor Jay Inslee called 2015 the worst wildfire season in state history and "an unprecedented cataclysm." The 2017 wildfire season in Washington was also catastrophic, choking the state with ash-filled skies and prompting Governor Inslee to declare a state-wide state of emergency. During the summer of 2017, wildfires burning throughout Washington state caused ash to rain down across the Seattle metro area. Air quality reached hazardous levels in many parts of the state. By 2050, wildfire activity is expected to double in the Pacific Northwest, increasing by 78% the annual mean area burned.

89. The average annual area burned by wildfires in the Northwest is projected to increase to 2 million acres by the 2080s, four times the average area burned annually between 1916 and 2007. Fires are also projected to begin to occur in areas where they do not usually occur, with the annual area burned west of the Cascade Range crest projected to increase by 150% to 1000% in 2070-2099 relative to 1971-2000.

90. Climate Change Impacts will cumulatively impact Washington's forests by increasing tree stress, vulnerability to insects, and flammability. Warmer temperatures will cause forests to be more susceptible to diseases. By mid-to-late century the Northwest habitat for Douglas-fir and pine species will decline substantially, up to 85%.

91. These climatic changes are disrupting the developmental, behavioral, and life cycle experiences and strategies of non-human species. Sockeye migrations are happening earlier, and changes to seasonal events have already caused certain migratory birds to arrive after the peak of their food resources has occurred. Warmer water has caused increased fish kills and has resulted in a decrease in the amount of habitat that is available for salmon species. Lake Washington has experienced a 50-year warming trend, reducing the food available for fish and causing harmful algal blooms. Stream flows in Washington are peaking earlier in the year in many watersheds throughout the state, resulting in lower stream flows during the critical summer months. For example, the Quinault River is projected to shift to a single-peak hydrograph by the 2040s, experiencing significantly reduced flows from April-September.

92. Climate change kills salmon in multiple ways. Drought conditions have caused hundreds of thousands of juvenile salmon to be stranded by low flows in Washington rivers, preventing them from traveling to the Pacific Ocean. Above-normal precipitation and rapid spring snow melt has increased temporal river flows at levels that also kill hundreds of thousands of fish in

Washington rivers. Increasing air temperatures cause high stream temperatures that kill hundreds of thousands of salmon returning from the ocean to spawn in Washington rivers.

93. Climate change unabated will result in the extinction of salmon, steelhead, and trout. Changes in flows and increased water temperature will threaten freshwater fish species, including salmon, steelhead, and trout. Puget Sound rivers are projected to increasingly exceed the thermal tolerances of cold-water fish. By the 2080s, the number of river miles where August stream temperatures surpass the thermal tolerances of adult salmon and char will increase by 1,016 and 2,826 miles, respectively. Durations for which temperatures will exceed thermal tolerances will also increase, and many streams are projected to exceed tolerances for the entire summer season (despite rarely being in excess of these temperatures in the recent past). Increases in forest fire frequency can completely burn out root systems, which contribute to erosion and sedimentation of rivers that salmon frequent. Increased sedimentation in rivers and streams reduces areas of suitable gravel for salmon spawning and kills eggs and juveniles. Sea level rise is likely to flood estuaries, a critical habitat for salmon transitioning between river and ocean life. Flooding from increasingly heavy winter precipitation can wash away salmon eggs and destroy spawning beds completely.

94. Climate change is now threatening and will in the future threaten numerous other species of mammals and birds by causing declining populations and extinction.

95. Climate change will further disrupt Washington's ecosystems by facilitating the increased spread of invasive species, such as western juniper and cheat grass.

96. Washington's agricultural industry is also being harmed by Climate Change Impacts. Rising temperatures increase the heat stress of crops and reduce milk production in livestock. Low annual precipitation forces farmers to depend on irrigation, but decreasing summer flows

mean that the risk of water-short years (for example, those years in which Yakima basin junior water rights holders are allowed only 75% of their water right amount) will increase from 14% to 32% by 2020 and to 77% by 2080. One study found that tuber production decreased by 8% to 17% in response to only modest decreases in irrigation. Increased flooding during other seasons will inundate farmland, negatively affecting crops, preventing planting, and directly damaging farm infrastructure. Many agricultural pests are projected to increase with rising temperatures, including codling moths and cereal leaf beetles. Increasing air temperatures are likely to negatively impact the production of some berries and fruit due to insufficient winter chilling necessary for fruiting and flowering.

97. Communities within Washington state are being forced to relocate because of climate change, sea level rise, and associated Climate Change Impacts. In 2014, rising sea levels breached a seawall that was constructed to protect a Quinault Indian tribal community, Taholah. Taholah is home to the Quinault Indian Nation's school, courthouse, police station and the homes of 700 tribal members, including two Plaintiffs. The seawall was rebuilt, but the flooding continued. The Quinault Indian Nation has now commenced relocation efforts and has developed a plan to move the entire village to upland property, an endeavor estimated to cost $350 million. Similarly, the Hoh Indian Nation is relocating its tribal village on the Olympic Peninsula in response to climate change, resulting in the displacement of 130 Washingtonians. The Quileute and Sauk-Suiattle Indian Tribes are also planning relocation efforts because of climate change. The cultural impacts associated with relocation are significant.

98. Climate change already harms public health and welfare, including an increase in asthma, cancer, cardiovascular disease, stroke, heat-related morbidity and mortality, food-borne diseases, infectious diseases, and neurological diseases and disorders, which will only worsen without

immediate action. Climate change threatens the basic requirements for maintaining health like clean air and water, sufficient food, and adequate shelter. Increased atmospheric concentrations of CO_2 results in food crops with decreased nutritional content.

99. Climate change poses significant risks to the health, personal security, and wellbeing of the Youth Plaintiffs. Health impacts due to climate change include temperature-related effects, the effects of severe weather and disasters, the impact of reduced air quality, aggravation of allergies, increased risk of infectious diseases, nutritional effects, population displacement, civil conflict, and mental health impacts.

100. The increased occurrence and scale of wildfires will severely impact human health by worsening respiratory and cardiovascular illnesses because of the resulting air pollution. Extreme heat events (days above 95°F) are projected to increase. These events will result in increased occurrences of heat exhaustion, heart attacks, strokes, and drownings and will compound problems with respiratory illnesses, cardiovascular disease, and kidney failure.

101. Increased winter flooding will result in injuries or deaths caused directly by exposure to dangerous pollutants, respiratory illnesses from resulting mold growth, and the disruption of infrastructure. Increased forest fires due to drought conditions, warming, and increased tree die off due to climate related beetle and pest increases will result in more respiratory problems, including asthma and pneumonia.

102. Increased production of allergens due to longer pollination seasons will result in more severe allergies and increased asthma attacks.

103. Higher water temperatures promote harmful algal blooms by allowing harmful algae to expand into new areas and extend their blooming seasons. Due to warming temperatures, algal blooms in Washington state are becoming more severe. Toxic algal blooms can cause the shut

down of shellfish harvesting operations and can poison marine mammals and humans who eat contaminated shellfish.

104. Mental health disorders are likely to be one of the most dangerous indirect health effects of climate change. Youth, including the Plaintiffs, are particularly vulnerable to adverse mental health impacts from climate change. The mental health effects include elevated levels of anxiety, depression, PTSD, and a distressing sense of loss. The impacts of these mental health effects include chronic depression, increased incidences of suicide, substance abuse, and greater social disruptions like increased violence. These mental health impacts are exacerbated because climate change is, in part, a direct result of actions taken by their state government, which is supposed to be protecting them, not taking actions that endanger them.

105. Some groups, including children such as these Plaintiffs, are more vulnerable than others to the mental and physical health risks associated with climate change detailed herein.

106. A substantial portion (around 20%) of every ton of CO_2 emitted by human activity persists in the atmosphere for as long as a millennium or more; therefore, the impacts associated with the CO_2 emissions of today will be mostly borne by our children and future generations. The Earth will continue to warm in reaction to concentrations of CO_2 from past emissions, as well as future emissions. This scientific concept has been well understood and accepted by Defendants since at least the early 1980s.

107. In 2008, Defendant Ecology explicitly recognized the disparate impact of their failure to reduce GHG emissions: "[f]ailure to act now will make future Washingtonians vulnerable to the fluctuations in energy prices, political instability, and the effects of climate change resulting

from reliance on carbon-based fuels. We must challenge ourselves to find the political will to look ahead, work together, and act on their behalf."[1]

108. If science-based action is not taken to address the climate crisis and Defendants do not cease taking actions that cause climate change, the costs of climate change and ocean acidification impacts to Washington are projected to reach $10 billion per year by 2020 as the State struggles to deal with increased health costs, storm damage, coastal destruction, rising energy costs, increased wildfires, drought, and other impacts.

109. The best available climate science today prescribes that global heating must be limited to no more than 1°C in the long-term, with a short-term peak of no more than 1.3°C, in order to avert the worst and most catastrophic impacts of climate change. According to the current climate science, to prevent long-term global heating greater than 1°C and to avoid short-term heating of more than 1.3°C, concentrations of atmospheric CO_2 must decline to 350 ppm or less by the end of this century. If CO_2 emission reductions begin in 2018, the global average annual rate of reduction would need to be 9.2% per year. In addition to eliminating CO_2 emissions, the scientific prescription to return to 350 ppm requires the global sequestration of 100 gigatons of carbon through improved land management practices and protection of forests and soils throughout the 21st century. The best available science dictates that this prescription is necessary to restore balance to Earth's climate system and avoid the worst and most catastrophic Climate Change Impacts.

110. In the longer run, beyond this century, to avoid catastrophic ice sheet melt and sea level rise, atmospheric CO_2 levels need to continue to decrease and likely need to return closer to

[1] Ecology & CTED, Growing Washington's Economy in a Carbon-Constrained World: A Comprehensive Plan to Address the Challenges and Opportunities of Climate Change, Ecology Publication No. 08-01-025 (December 2008) at 8.

levels of the Holocene epoch at 280 ppm. There is only one way to accomplish this: by significantly and swiftly reducing fossil fuels as a source of energy. For every additional year of delay, it becomes that much more difficult to reach 350 ppm by 2100.

111. Oceans require the same scientific standard of protection. Critically important ocean ecosystems, such as coral reefs and shellfish beds, and critical foundational food web species, like phytoplankton and zooplankton, are substantially impaired and threatened with increasingly devastating impacts by today's global annual mean CO_2 concentrations of approximately 403 ppm. According to current science, atmospheric CO_2 levels should be reduced to no more than 350 ppm in order to protect ocean ecosystems, foundational food web species, and coral reefs from dangerous acidification and warming. As new scientific studies become available, the best science may show the need to reduce CO_2 concentrations to levels lower than 350 ppm to protect ocean systems.

112. Opportunities to sequester carbon through improved land use practices are technically and economically feasible. For example, improved forestry and agricultural practices can provide a net drawdown of atmospheric CO_2, primarily via reforestation of degraded lands that are of little or no value for agricultural purposes, helping to return to safe levels of atmospheric CO_2.

113. A zero-CO_2 energy and transportation system for Washington state can be achieved by 2050 without acquiring carbon credits from other states or countries. In other words, actual physical emissions of CO_2 from fossil fuels can be eliminated with technologies that are now available or under development.

114. Experts have already concluded the feasibility of, and prepared a roadmap for, the transition of all of Washington's energy use (for electricity, transportation, heating/cooling, and

industry) to a 100 percent renewable energy system by 2050. In addition to the direct benefits of avoiding a destabilized climate system, this transition will reduce air pollution and save lives and costs associated with air pollution. Experts have already analyzed and identified three distinct feasible pathways to achieve emissions reductions in Washington State 80% below 1990 levels by 2050. Each of these pathways retains an economy and lifestyle similar to today, employs commercially demonstrated or near-commercial technologies, does not retire infrastructure early, ensures the reliability of the electric system, and limits unsustainable use of biomass and hydropower resources. Experts point out, however, that the 80% reduction in statewide emissions by 2050 pathway results in cumulative CO_2 emissions that are double what they would be if the state were to achieve a 96% reduction by 2050, consistent with the scientific prescription of returning to 350 ppm of atmospheric CO_2 by 2100. Experts also agree that an 80% reduction by 2050 pathway will lead to at least 2 degrees C of warming, which will be catastrophic. In order to retain a reasonable chance to preserve a stable climate system, the state needs to transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years, and then generate 90% of its electricity from carbon-free sources by 2030. Every year of delay makes it that much more difficult to physically accomplish the transition without overshooting the target and further endangering Plaintiffs.

Defendants' Long-Standing Knowledge and Perpetuation of Climate Danger

115. Since at least the late 1980s, well before these Plaintiffs were born, Defendants have been aware of the dangers of climate change. Washington initiated two global climate change assessment projects in 1988: the Sea Level Rise Response Program and Washington Environment 2010. The Sea Level Rise Task Force and later the 2010 Global Warming and Ozone Depletion Subcommittee conducted a comprehensive review of the issues. The Sea Level

Rise Project predicted that a doubling of atmospheric CO_2 concentrations would lead to 3 to 6 feet of sea level rise in Washington by 2100. Defendant Ecology also forecasted this rise would lead to the drowning of coastal wetlands, increased shoreline erosion and landslides, decreased fish and shellfish productivity and harvests, intensified storm surges and coastal flooding, the contamination of groundwater, and the corrosion of utility and waste storage infrastructure.

116. In 1989, Defendant Ecology reported that a doubling of atmospheric CO_2 concentrations would lead to a 3° to 5°C temperature increase, increasing rain fall, decreasing snowpack, shifting peak stream flows, a possible decrease in water available for irrigation, the dwindling or disappearance of Washington's salmon, and instability in marine food chains. An Ecology report from this era acknowledged the "difficult policy choices, particularly with respect to decisions regarding protection or abandonment of developed areas" that will arise with sea level rise:

> Clearly we will choose to protect lowlying areas such as Harbor Island in Seattle, the Olympia central business district, and the Tacoma waterfront – the cost of relocation would be substantially greater than [the] cost of [adaptation]. It is unlikely that we would choose to spend public monies [to] protect private agricultural, timber, or rural residential lands – the cost of protection would likely exceed the value of the land and structures. The difficult choices will arise with respect to lowlying residential areas where the cost of protection slightly exceeds the value of the developed properties.

117. In 1989, scientists at the University of Washington Climate Impacts Group described the possible impacts of human-induced climate change and advised that "[t]his knowledge must make its way from the realm of research to the realm of decisions, *and be used in decisions*. . . . Meeting the challenges posed by climate variations and climate change will require considerable revision of the policies and practices concerning how the region's natural resources are managed."

118. In the Spring of 1989, the state legislature adopted Joint Memorial No. 8011 finding that "[a]n acceleration of sea level rise due to global warming caused by the greenhouse effect will aggravate existing as well as cause additional problems including (1) An increased frequency and intensity of coastal storm surges and flooding, coastal erosion, and landsliding threatening life and property; (2) Loss of wetlands and shallow water habitat essential to the economic health of this state's fish and shellfish industry; (3) An eventual inundation of low-lying coastal lands causing an adverse financial and fiscal impact upon private and public coastal property and facilities owners." The state legislature asked the U.S. Congress to "continue to support federal and international greenhouse effect and sea level rise research and management programs."

119. On November 21, 1989, the state legislature's House Energy and Utilities and Environmental Affairs Committees held a Joint Legislative Workshop on Ecology's Global Climate Change Programs. The legislators learned that a sea level rise of 3-6 feet is anticipated by 2100, "with a continuing sea level rise continuing beyond that time." The report from Ecology indicated that "Washington's energy system has not yet been analyzed in detail with respect to possible climate changes from the greenhouse effect. However, preliminary analysis reviewed in this report suggests that an increase of 4.5 degrees C in the Northwest could have significant impacts on electricity supply and demand."

120. In 1990, Defendant Ecology acknowledged, "[t]he potential impacts of global warming dwarf those of other environmental threats." Thus, it has been nearly thirty years since Defendants acknowledged "it was clear the societal threat that climate change presents is of a nature and magnitude unlike any other we have faced."

121. Beginning in the early 1990s, Governors of the State of Washington, as well as Ecology, publicly acknowledged the climate crisis and recognized the need to take action to address

climate change to protect the rights of young people. Former Governor Gregoire said in the early 1990s that, "[h]istorically, Washington has risen to great challenges, and we can meet the challenge of climate change. Our children's future depends on the action we take."

122. In 2005, in a report to the legislature, Ecology recognized that "Washington appears to be moving into ongoing climate change." One year later, Ecology issued another report finding that "[c]limate change impacts are visible in Washington State and their economic effects are becoming apparent" and that "[t]he economic effects of climate change in Washington will grow over time as temperatures and sea levels rise." Ecology predicted that the economic consequences of climate change in Washington are likely to grow as temperatures increase. Ecology stated that the needed efforts to reduce greenhouse gas emissions would create economic opportunities for the state. Ecology found that "[b]y focusing now on greenhouse gas emissions reduction while taking prudent steps to prepare the state for climate change impacts, Washington can do its part to resolve global climate change and increase the likelihood that its citizens will prosper in a time of unprecedented changes."

123. In a 2007 Ecology document providing factual information about Washington's retreating glaciers and declining snowpack, Ecology acknowledged "[s]everal well documented trends in Washington provide compelling evidence in support of Washington's aggressive response to climate change."

124. A decade ago, in 2008, Ecology published, *Growing Washington's Economy in a Carbon-Constrained World: A Comprehensive Plan to Address the Challenges and Opportunities of Climate Change*. In the Plan, Ecology stated "[t]he urgent need for a veritable energy revolution, involving a wholesale global shift to low-carbon technologies, is now widely recognized." Ten years later, no such "energy revolution" has been pursued by the Defendants.

125. The "central policy" of the plan was participation in a regional cap-and-trade program designed by the Western Climate Initiative, but this never occurred.

126. Ecology recognized in 2008 that "[b]y capping emissions, we will achieve the environmental certainty scientists say is critical if we are to slow the rate of climate change." Ecology acknowledged that even without a cap-and-trade program, it could regulate emissions under Ecology's existing authority under Washington's Clean Air Act.

127. Ecology concluded in 2008 that it possessed significant regulatory authority to reduce emissions in the transportation sector, including operational standards and fuel standards.

128. In 2007, Governor Gregoire established the Climate Action Team, a group of Washington business, academic, tribal, State and local government, labor, religious, and environmental leaders. Upon information and belief Defendants have not implemented many recommendations originally developed by Washington's Climate Action Team and then endorsed by Ecology in its 2008 plan.

129. In response to a May 2009 executive order directing Ecology to issue recommendations to address climate change, Ecology prepared the April 2012 report *Preparing for a Changing Climate: Washington State's Integrated Climate Response Strategy*. Although the report details "how existing state policies and programs can better prepare Washington State to respond to the impacts of climate change," upon information and belief Washington has completed only 12 of the report's 287 goals.

130. In 2011, the state recognized that "generating electricity from the combustion of coal produces pollutants that are harmful to human health and safety and the environment," but in spite of this knowledge, the state continues to get about 15% of its energy from combustion of coal and Defendants have affirmatively authorized and encouraged the use of coal as a power

source in the state of Washington. In fact, the state has authorized the burning of coal for energy from Washington's sole coal-fired generating station through 2025. RCW 80.80.040(3)(c)(i).

131. In spite of the current scientific knowledge regarding the use of fossil fuels and the need to transition off of fossil fuels in the near-term, in 2011 then-Governor Gregoire executed a Memorandum of Agreement explicitly finding that energy generated by coal "is a climate responsible transition product that will substantially contribute to the state meeting its climate change policies and achieve the greenhouse gas reductions in RCW 70.235.020(1)(a)." This MOA purportedly binds the ability of future legislators to require near-term reductions of greenhouse gas emissions from Washington's sole coal-fired generating station, even if such reductions are scientifically and legally required.

132. In 2012, Defendant Commerce issued the Washington State Energy Strategy in response to a legislative directive. This strategy recognizes that "evidence has accumulated of damage to health, safety and economic well-being caused by climate change" and that "energy production and consumption drive climate effects." However, "the 2012 Energy Strategy does not address the effects of climate change or incorporate climate projections of temperature and hydrology in the forecasting of supply and demand." Defendant Commerce promised that "future updates will" address climate change, but the energy sector is not currently on track to meet the state's greenhouse gas reduction requirements.

133. In June 2014, a coalition of young people aged 10-14, including some of these Plaintiffs, filed a petition for rulemaking with Ecology under the APA seeking a rule capping and regulating carbon dioxide emissions based upon best available science. Ecology denied that petition for rulemaking and has taken no further administrative actions designed to reduce carbon dioxide

emissions in the state of Washington as called for by current science, in spite of additional requests to do so.

134. In December 2014, Ecology issued a report entitled *Washington Greenhouse Gas Emission Reduction Limits: Report Prepared Under RCW 70.235.040*, Ecology Publication No. 14-01-006. This report summarized the current climate change science and found that "[c]limate change is not a far off risk. Globally, it is happening now and is worse than previously predicted, and it is forecasted to get worse. We are imposing risks on future generations (causing intergenerational inequities) and liability for the harm that will be caused by climate change that we are unable or unwilling to avoid. Washington State's existing statutory limits should be adjusted to better reflect the current science. The limits need to be more aggressive in order for Washington to do its part to address climate risks . . . ."

135. Notwithstanding its recognition of the urgency of the climate crisis and the social and intergenerational injustices resulting from its ongoing energy and transportation system actions and inaction on emission reductions, in its December 2014 Report, Ecology recommended further delay. Ecology recommended that no changes be made to the state's statutory emission limits until after the December 2015 United Nations Framework Convention on Climate Change Conference of the Parties (COP) in Paris, France in spite of being in possession of scientific information confirming the need to update the limits.

136. As of 2014, twenty states have reduced their energy-related carbon dioxide emissions by more than Washington State.

137. In June 2015, Governor Inslee directed Ecology to abandon its efforts to develop a Clean Fuel Standard designed to reduce the overall carbon intensity of transportation fuels and signed into law a bill that prohibited promulgation of a Clean Fuel Standard for Washington State. This

directive was in response to a 2015 legislative provision in the transportation budget discouraging the state from adopting a clean fuel standard using executive authority prior to July 1, 2023.

138. On July 28, 2015, in response to the youth's petition for rulemaking seeking a rule regulating carbon dioxide emissions based upon best available science, Governor Inslee directed Ecology to use its existing statutory authority under RCW 70.94 and 70.235 to develop a rule that would cap carbon emissions in Washington, stating: "Carbon pollution and the climate change it causes pose a very real existential threat to our state. Farmers in the Yakima Valley know this. Shellfish growers on the coast know this. Firefighters battling Eastern Washington blazes know this. And children suffering from asthma know this all too well and are right to question why Washington hasn't acted to protect them." The Governor did not direct Ecology to promulgate a rule based upon best available climate science targeted to achieving climate stability as requested by the youth, but rather directed the rule be targeted to achieving the dangerous GHG emission limits contained in RCW 70.235.020, limits Ecology admits are not based on current science and need to be more aggressive. The Governor also did not direct Ecology to develop a comprehensive plan or strategy to reduce GHG emissions as called for by best available science and by Ecology's 2008 strategy.

139. On January 5, 2016, Ecology released its first proposed Clean Air Rule. On February 26, 2016, Ecology withdrew its proposed Clean Air Rule. After being court ordered to promulgate the Clean Air Rule by the end of 2016 in *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. May 16, 2016) *rev'd* No. 75374-6-I (Wash. Ct. App. Sep. 5, 2017) (unpublished), Ecology released a modified Clean Air Rule on June 1, 2016. After soliciting both written and oral comments, the final version of the Clean Air Rule was released on

September 16, 2016. The Clean Air Rule was supported by the International Emissions Trading Association, a business organization that includes fossil fuel companies such as BP, Chevron and Shell. Ecology specifically exempted the state's only coal-fired generating station from compliance with the minimal emission reductions required by the Clean Air Rule. The Clean Air Rule has since been partially invalidated by a Thurston County Superior Court judge and its viability remains in question. *Ass'n of Wash. Business, et al. v. Ecology, et al.*, No. 16-2-03923-34 (consolidated) (Thurston County Super. Ct.).

140. In December 2016, in response to a court order issued in *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. May 16, 2016) *rev'd* No. 75374-6-I (Wash. Ct. App. Sep. 5, 2017) (unpublished), Ecology made a recommendation to the legislature to update the state's existing greenhouse gas emission reductions in RCW 70.235.020. Specifically, Ecology advised the legislature to enact greenhouse gas emission reductions of 80% below 1990 levels by 2050, a level which would do little to avert the climate crisis and would lock in dangerous amounts of temperature increase and sea level rise. The legislature did not act on this recommendation and as of today, Washington's existing greenhouse gas reduction limits are "less stringent than most other states with emission limits"[2] and are not consistent with what the scientific consensus says is needed to stabilize the climate system.

141. In December 2016, Defendant Commerce issued its most recent Report and State Energy Strategy Update to the Legislature. The Report acknowledges that "the region's carbon dioxide emissions from the electricity sector could be reduced by 20 million metric tons, from 54 million metric tons in 2015 to 34 million metric tons by 2035, due to retiring coal generation, and could

[2] Ecology, Washington Greenhouse Gas Emission Reduction Limits: Report Prepared Under RCW 70.235.040 (December 2016) at 21.

be reduced to 16 million tons by 2035 with investments in efficiency and demand management," but the report contains no requirements or recommendations to facilitate the state's transition to 100% renewable energy or to decarbonize Washington state. Nor does it demonstrate compliance with the state's mandatory GHG emission reduction requirements.

142. In December 2016, Defendant Commerce recognized that "Washington's reliance on fossil fuels has led to steady growth in emissions of carbon dioxide, the principal human-caused greenhouse gas" and that "Washington's continued dependence on fossil fuels, particularly petroleum, for energy has led to growth in emissions of CO_2, for much of the last 25 years." Defendants Ecology and Commerce have acknowledged that Washington is not currently on track to meet its 2020 greenhouse gas reduction targets set in RCW 70.235.020.

Defendants' Systemic and Aggregate Actions Allowing and Perpetuating Climate Change Danger Violate Plaintiffs' Public Trust and Other Constitutional Rights

143. As described above, Defendants are responsible for establishing and implementing state-wide energy and transportation policy.

144. In spite of the long-standing knowledge of climate danger described above and Defendants' rhetoric regarding the need to act on climate and "solve climate change," Defendants have a systemic policy, custom and practice of authorizing projects, activities, and policies that cause emissions of dangerous and substantial levels of GHG pollution into the atmosphere. Defendants have also acted to affirmatively exempt many emitters from requirements to reduce greenhouse gas emissions and failed to fully implement and enforce plans and recommendations designed to address the climate crisis.

145. Defendants' actions reflect system-wide deficiencies in the management of Public Trust resources that, taken as a whole, subject Plaintiffs to substantial risk of serious harm and demand judicial intervention. For example:

a. In 2013, the most recent year for which data is available, Washington was responsible for emitting 94.4 million metric tons of greenhouse gases (CO_{2e}), 6 million metric tons *more* than the 1990 baseline of 88.4 million metric tons CO2e. Greenhouse gas emissions went up approximately 8.7% between 1990 and 2010.

b. In 2013, the largest sources of greenhouse gas emissions in Washington resulted from burning fuels for transportation purposes (42.8% of statewide emissions) with gasoline-burning vehicles accounting for 23.0% of statewide emissions. The next largest source of greenhouse gas emissions was electricity (19.3%), and specifically coal-fired electricity that produces 14.1% of statewide emissions. The third largest source of emissions comes from fuels combusted in residential, commercial, and industrial buildings (22.3%). This is primarily natural gas, generating 12.8% of statewide emissions.

c. The U.S. Energy Information Administration reports that Washington emissions from fossil fuel consumption were 70.3 MMT CO_2 in 2011 and grew by 4% to 73.4 MMT CO_2 in 2014.

d. According to Washington State official greenhouse gas inventories, statewide transportation emissions have increased from the 1990 baseline of 37.5 MMT CO_{2e} to 40.4 MMT CO_{2e} in 2013. This coincides with a 37% increase in the number of vehicle miles driven on state highways between 1990 and 2013.

Vehicle miles travelled on state highways grew by 9% in just five years between 2011 and 2016. This is in spite of a legal requirement to decrease the annual per capita vehicle miles traveled by 18% by 2020. 40 R.C.W. 47.01.440(1).

e. State government operations are responsible for 1% of total statewide emissions (941,667 metric tons CO_{2e}). In 2015, Defendant Ecology emitted 4,146 metric tons of CO_{2e}, largely from agency buildings and transportation. In 2015, Defendant WSDOT emitted 248,814 metric tons of CO_{2e}, well above its 2020 goal.

f. Of the 6.4 million cars and trucks registered in the state of Washington, only 25,000 (less than 4%) are electric.

g. In 2015, Washington used 2.61 billion gallons of gasoline, with entities in Washington spending more than $6 billion annually on gasoline.

h. According to the US Energy Information Administration, Washington relied on petroleum to meet more than 1/3 (33.7%) of its total energy needs in 2015. Fossil fuels (petroleum, coal, and natural gas) provided more than half (54.1%) of total energy use in 2015. Petroleum fuels accounted for over 97 percent of transportation energy use in 2015.

i. Defendants authorize private parties to burn large areas of land, releasing significant quantities of GHG pollution into the atmosphere.

j. Defendants authorize and certify energy projects and facilities within the state of Washington that emit significant levels of greenhouse gases and inhibit and delay efforts to decarbonize Washington state.

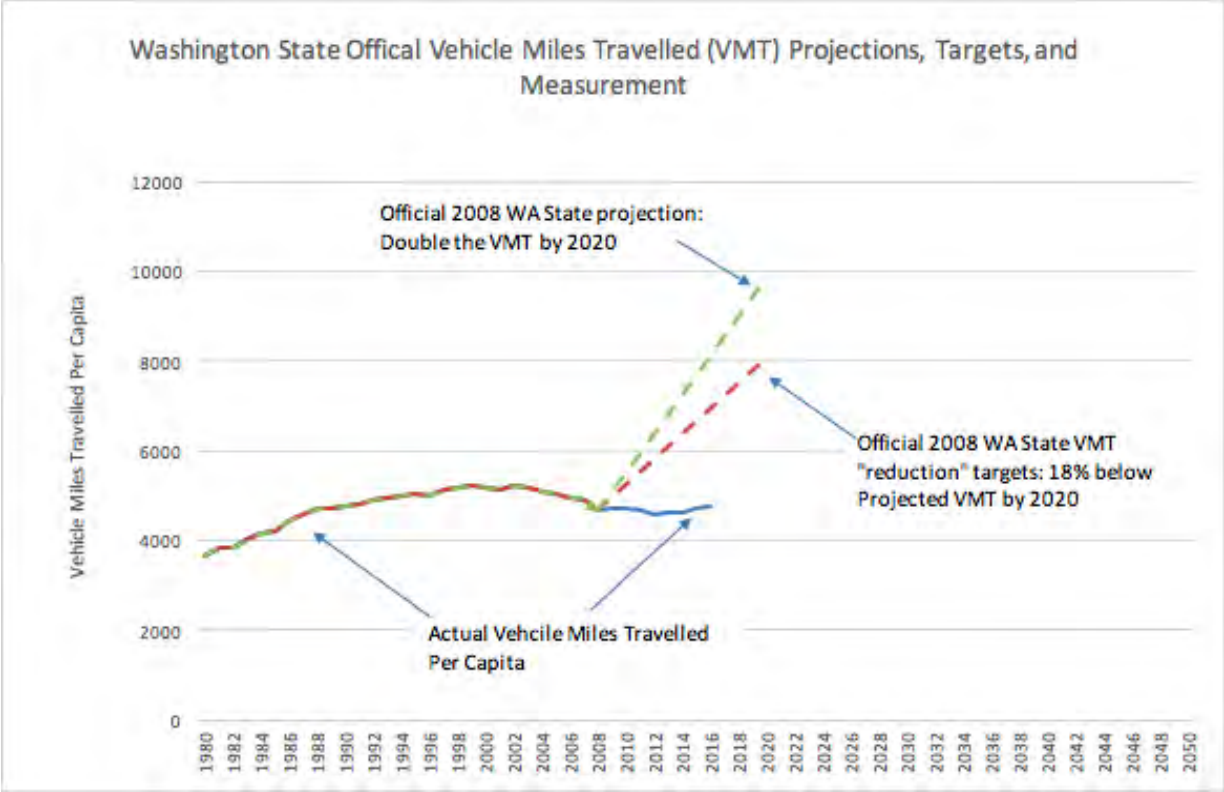
k. Defendants engage in a systemic pattern and practice of issuing permits across departments and offices without adequate consideration of climate change or adequate limits on the amount of greenhouse gas emissions that can be released.

l. Defendants have adopted and enforced GHG emissions standards for petroleum refineries that authorize dangerous levels of GHG emissions and do not put Washington on a path towards decarbonization.

m. Defendants have authorized substantial shoreline development permits for facilities that emit dangerous levels of greenhouse gas emissions. For example, on June 8, 2017, Defendant Ecology issued a shoreline development permit and granted a water quality certification for a proposed project to manufacture and export methanol at the Port of Kalama, a project that would emit 1.24 million tons per year of CO_{2e}, the annual equivalent of CO_2 emissions from 260,000 passenger cars. This amount of emissions authorized by Defendant Ecology would increase Washington's annual emissions by 1.28%.

n. Defendant Ecology has issued a Clean Air Rule that authorizes dangerous levels of GHG emissions, particularly in the near-term to the specific detriment of Plaintiffs, and does not put Washington on a path towards climate stability.

o. Defendants have explicitly adopted and endorsed vehicle miles traveled reduction requirements that lock in dangerous levels of GHG emissions from the transportation sector, as illustrated below:



p. Defendants have explicitly authorized TransAlta's Centralia Generating Facility, the state's largest emitter of greenhouse gas emissions, to continue emitting more than one million tons of greenhouse gases per year through 2025. As to this facility, Defendants have purported to have given up their rights to impose necessary, near-term greenhouse gas emission reductions to adequately address the climate crisis.

q. Defendants have exempted certain energy facilities that burn fossil fuels from present and future compliance with greenhouse gas emission standards.

r. Defendants have adopted and implemented a State Energy Strategy that does not fulfill the state's legal obligations to reduce greenhouse gas emissions, facilitate decarbonization of Washington state, and protect the rights of young people.

s. Defendants continue to invest in fossil fuel infrastructure and energy and transportation systems that are endangering Plaintiffs.

146. As a result of the dangerous levels of GHG emissions caused and contributed to by Defendants' aggregate acts, including but not limited to those identified above, Plaintiffs are being harmed and face an imminent and substantial risk of increasing and likely catastrophic harm.

147. Defendants' aggregate acts, taken pursuant to their systemic policy, custom, and practice of authorizing and implementing projects, activities, and plans that cause emissions of dangerous and substantial levels of GHG pollution into the atmosphere, are ongoing, in spite of their knowledge of their dangers and in spite of requests by these Youth Plaintiffs to mitigate the harm they are causing to Plaintiffs. There is a substantial risk that Defendants' aggregate acts will continue and will further deprive Plaintiffs of their rights. Among other things:

a. Defendants have persisted and continue to persist in a wrongful and systemic course of conduct affirmatively authorizing, permitting, and promoting dangerous levels of greenhouse gas emissions since at least the 1980s;

b. Defendants know and have long known that their wrongful and systemic conduct causes the rights of Plaintiffs to be violated;

c. Defendants have not implemented their authority to reduce Washington's greenhouse gas emissions by levels that preserve the rights of Plaintiffs; and

d. Plaintiffs reasonably believe similar illegal conduct will continue in the future in light of their status as young people, past experience, and Defendants' continuing policies, practices and customs.

148. Non fossil-fuel based energy systems across all sectors, including electricity generation and transportation systems, are feasible and technologically available to employ in Washington but are not being deployed and implemented in Washington on a scale or timeline consistent with GHG emissions reductions rates necessary to protect Plaintiffs.

CLAIMS FOR RELIEF

First Claim for Relief:
Violation of Youth Plaintiffs' Substantive Due Process Rights

149. Plaintiffs hereby re-allege and incorporate by reference each of the allegations set forth above.

150. Article I, Section 3 of the Washington State Constitution recognizes and preserves the fundamental right of citizens to be free from government actions that harm life, liberty, and property without due process of law. These inherent and inalienable rights reflect the basic societal contract of the Constitution to protect citizens and posterity from government infringement upon basic freedoms and basic (or natural) rights. The rights to life, liberty, and property have evolved, and the United States Supreme Court has recognized that there are certain liberty interests protected by the due process clause that are not explicitly enumerated in the Bill of Rights. These rights, including "unenumerated rights," belong to present generations as well as to our "posterity" (or future generations).

151. A stable climate system, including the atmosphere and oceans, is an essential component of Plaintiffs' rights to life, liberty, and property because it is foundational and fundamental to a free and ordered society.

152. Defendants, in pursuing and implementing policies, customs and pervasive practices that result in dangerous levels of GHG emissions, have breached their duty to refrain from actions

that result in a climate system that exposes plaintiffs to dangerous Climate Change Impacts and presents an unreasonable risk of danger, harm, and pain to plaintiffs.

153. Plaintiffs substantive due process rights have been infringed because Defendants have caused and contributed to dangerous levels of atmospheric CO_2 concentrations that interfere with a stable climate system required by Plaintiffs and future generations. The present CO_2 concentration and continuing CO_2 and GHG emissions, caused and contributed to by Defendants' historic and continuing actions, exposes the Plaintiffs to an unreasonable risk of harm and endangers Plaintiffs' lives, liberties, and property and other unenumerated rights, including the right to reasonable safety and the right to a stable climate system that preserves human life and liberties.

154. The affirmative aggregate acts of Defendants described herein have been and are infringing on Plaintiffs' right to life and liberty interests by causing dangerous CO_2 concentrations in our nation's atmosphere and dangerous interference with the stability of Washington's climate system. Defendants have knowingly endangered Plaintiffs' health and welfare by and through their affirmative aggregate acts. All of these actions by Defendants have cumulatively resulted in dangerous levels of atmospheric CO_2, which expose Plaintiffs to an unreasonable risk of harm and deprive Plaintiffs of their fundamental rights to life, liberty, and property and other unenumerated rights, including the right to reasonable safety, the right to a stable climate system that preserves human life and liberty, the right to personal security, and other liberty interests, such as their capacity to provide for their basic human needs, safely raise families, learn and practice their religious and spiritual beliefs, maintain their bodily integrity, and lead lives with sufficient access to clean air, water, shelter, food, and biodiversity

155. Furthermore, Defendants' acts, if not brought into constitutional compliance without delay, will contribute to effecting a complete deprivation of some of Plaintiffs' property interests by virtue of the sea level rise inundation that is an incident of Defendants' unlawful actions.

156. Defendants' acts and omissions described herein constitute a policy, pattern, practice, custom, final policymaking act and/or ratification of action that deprives Plaintiffs of constitutional rights.

157. Defendants' affirmative acts described herein have been and continue to be performed by Defendants and their agents and employees in their official capacities and are causing and contributing to the Plaintiffs' ongoing deprivation of rights secured by the Washington Constitution.

158. Defendants' affirmative acts described herein are the proximate result of the official policies, customs and pervasive practices of Defendants. The Defendants have been and are aware of all of the deprivations described herein and have condoned such conduct.

159. The affirmative aggregate acts of Defendants cannot and do not operate to secure, and are not narrowly tailored to achieve, a more compelling state interest than Plaintiffs' rights to life, liberty, and property, and other unenumerated rights, including the right to a stable climate system that preserves human life and liberty, the right to be free from an unreasonable risk of harm and the right to reasonable safety, nor can such aggregate acts satisfy intermediate scrutiny or rational basis review.

160. Plaintiffs are entitled to declaratory and injunctive relief against Defendants' conduct as described herein because they are suffering and will continue to suffer substantial and immediate irreparable injury from such conduct unless and until Defendants are restrained.

Second Claim for Relief:

State-Created Danger Violates Youth Plaintiffs' Substantive Due Process Rights

161. Plaintiffs hereby re-allege and incorporate by reference each of the allegations set forth above.

162. Defendants' acts and omissions as alleged herein deprive Plaintiffs of their clearly established and well-settled rights to life, liberty, and property under the Washington state constitution. For at least thirty years, Defendants have known about the danger to Plaintiffs' safety created by excessive emissions of CO_2 and other GHGs. Notwithstanding this longstanding knowledge, acting with full appreciation of the consequences of their acts, by and through their affirmative historic and ongoing aggregate actions Defendants knowingly caused and contributed dangerous interference with our atmosphere and climate system, placing Plaintiffs in a position of danger with deliberate indifference to their safety.

163. After knowingly creating this dangerous situation for Plaintiffs, Defendants continue to knowingly enhance that danger with deliberate indifference to Plaintiffs safety by authorizing, allowing, and endorsing activities resulting in ever greater and more dangerous levels of greenhouse gas emissions, thereby violating Plaintiffs' substantive due process rights under Article I, Section 3 of the Washington State Constitution.

164. After placing Plaintiffs in a position of climate danger, Defendants have continued to act with deliberate indifference to the known danger they helped create and enhance. A destabilized climate system poses unusually serious risks of harm to Plaintiffs' lives, personal security, and their bodily integrity and dignity. Defendants have had longstanding, actual knowledge of the serious risks of harm and have not taken necessary and feasible steps to address and ameliorate the known, serious risk to which they have exposed Plaintiffs. With deliberate indifference, Defendants have not implemented their own laws, plans, policies, and recommendations for

climate stabilization or any other comprehensive remedial measures to effectively reduce Washington's CO_2 emissions consistent with levels that would adequately protect Plaintiffs from dangerous climate destabilization. With deliberate indifference, Defendants have also pursued and implemented policies, customs and practices that authorize, allow, and lock in dangerous levels of CO_2 emissions.

165. Defendants, by pursuing and implementing policies, customs and pervasive practices that result in dangerous levels of GHG emissions, have placed Plaintiffs in a position of danger with deliberate indifference to their safety in a manner that shocks the conscience. Having placed plaintiffs in such a position, Defendants' ongoing act of omission in not reducing Washington's GHG emissions consistent with rates that would avoid dangerous climate interference constitutes a breach of their duty to protect plaintiffs' fundamental and inalienable constitutional rights to life, liberty, and property, personal security, reasonable safety, and to a stable climate system that sustains human life and liberty.

166. Defendants' acts and omissions described herein have caused and contributed to the violation of Plaintiffs' constitutional rights.

167. Plaintiffs are entitled to declaratory and injunctive relief against Defendants' conduct as described herein because they are suffering and will continue to suffer substantial and irreparable injury from such conduct unless and until Defendants are restrained.

Third Claim for Relief:
Violation of the Fundamental Right to a Healthful and Pleasant Environment

168. Plaintiffs hereby re-allege and incorporate by reference each of the allegations set forth above.

169. The legislature has expressly recognized that a right retained by the people of Washington is the "fundamental and inalienable right of the people of the State of Washington to live in a healthful and pleasant environment." RCW 43.21A.010.

170. This fundamental right is a substantive legal right constitutionally reserved through Article I, Section 30 of the Washington Constitution.

171. Without a stable climate system, Plaintiffs are unable to exercise their rights to a healthful and pleasant environment, nor their rights to life, liberty and property.

172. The actions of the Defendants in promoting, authorizing, encouraging, and facilitating greenhouse gas emissions are a contributing cause of the degree and pace of climate change. Defendants have authorized dangerous levels of GHG emissions and have not implemented their authority to mandate and ensure science-based reductions of GHG emissions within the state of Washington, thereby depriving Plaintiffs of their fundamental right to live in a healthful and pleasant environment.

173. The affirmative aggregate acts of Defendants cannot and do not operate to secure, and are not narrowly tailored to achieve, a more compelling state interest than Plaintiffs' rights to a healthful and pleasant environment, including the right to a stable climate system that sustains human life and liberty. Nor can Defendants' actions satisfy intermediate scrutiny or rational basis review.

Fourth Claim for Relief:
Violation of the Public Trust Doctrine

174. Plaintiffs hereby re-allege and incorporate by reference each of the allegations set forth above.

175. The Washington Constitution incorporates the common law Public Trust Doctrine, an ancient legal doctrine that is an attribute of sovereignty predating and preserved by Washington's Constitution.

176. Plaintiffs are beneficiaries of rights under the Public Trust Doctrine, rights that are secured by Article I, Section 30 and Article XVII, Section 1 of the State Constitution as well as under Washington common law. The Washington Supreme Court has interpreted Article XVII, Section 1, stating: "the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from title, always remains in the state and the state holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine.'" *Caminiti v. Boyle*, 107 Wash. 2d 662, 669-70, 732 P.2d 989 (1987).

177. Public trust rights secured by the Public Trust Doctrine include the rights of present and future generations to access, use and enjoy those essential resources that are of public importance to the citizens of the state of Washington. These vital natural resources include the air (atmosphere), water, seas, the shores of the sea, submerged lands, and wildlife. The overarching public trust resource is the climate system, which encompasses the atmosphere, waters, oceans, and biosphere. The public's interest in using and accessing such vital natural resources includes the right "of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Id*. (quoting *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)).

178. "The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its designated agency to protect

what it holds in trust."[3] Harm to the atmosphere negatively affects water, wildlife, and fish resources, as well as other Public Trust Resources. Harm to the atmosphere also impairs the public's ability to use, access, enjoy, and navigate other Public Trust Resources, purposes and interests protected under the Public Trust Doctrine and for which Public Trust Resources must be managed, preserved, and protected. The dangerous levels of greenhouse gas emissions that Defendants have allowed into the atmosphere have a scientifically demonstrable effect on the public's ability to use, access, enjoy and navigate the state's tidelands, shorelands, and navigable waters and other Public Trust Resources.

179. The Public Trust Doctrine requires all sovereign governments as trustees to maintain control over, protect, preserve, and prevent waste and substantial impairment to Public Trust Resources for the beneficiaries of the trust—all present and future generations within the government's jurisdiction.

180. Defendants, as trustees, have the duty of loyalty to administer and manage Public Trust Resources in the interest of trust beneficiaries—both present and future generations of citizens. Defendants have the duty of impartiality to not favor one beneficiary over another. Present and future generations are equally protected classes of beneficiaries of the Public Trust Doctrine, both under Washington's Constitution and its common law. Thus, when carrying out its Public Trustee obligations, Defendant trustees must treat present and future generations equally and cannot be shortsighted. Defendants, as trustees, may not manage Public Trust Resources in a manner that benefits the present class of beneficiaries at the expense and to the detriment of future beneficiaries.

[3] *Foster, et al. v. Ecology*, No. 14-2-25295-1 SEA (King County Superior Court) (Order Affirming the Department of Ecology's Denial of Petition for Rulemaking) (November 19, 2015).

181. Defendants, as trustees, have a duty of care to exercise appropriate skill, prudence, and caution in managing the Public Trust Resources.

182. Plaintiffs have no political representation in Washington but do hold these constitutional and public trust rights and may seek, in a court of law, to protect them. They are beneficiaries, both now and into the future, of the State's vital natural resources, which are secured by the Washington Constitution and the Public Trust Doctrine.

183. Defendants have unconstitutionally caused, and continue to cause and allow, substantial impairment to essential Public Trust Resources. Defendants have abdicated their control over and impermissibly alienated Public Trust Resources and have abrogated their duty of care to safeguard, and prevent substantial impairment to Public Trust Resources and the interests of Plaintiffs therein as the present and future beneficiaries of the Public Trust. Such abdication of duty abrogates the ability of succeeding members of the legislative and executive branches of state government to provide for the survival and welfare of our citizens and to promote the endurance of our state.

184. By and through their affirmative acts, Defendants have abdicated control over substantial portions of the atmosphere in favor of the short-term interests of private parties, allowing them to treat the state's atmosphere as a dump for carbon emissions. These affirmative acts prejudice the Public Trust rights and interests of Plaintiffs and future generations of beneficiaries in violation of Defendants' duties of loyalty, impartiality, and prudence. In so doing, Defendants have abrogated their duty of care as trustees to manage the atmosphere in a manner that promotes and does not substantially impair the public interest. Such abdication of control abrogates the sovereign powers of succeeding members of the executive and legislative branches of state government to provide for the survival and welfare of Plaintiffs.

Fifth Claim for Relief:
Violation of the Equal Protection Clause

185. Plaintiffs hereby re-allege and incorporate by reference each of the allegations set forth above.

186. The equal protection clause of Article I, Section 12 of the Washington State Constitution prohibits Defendants from taking actions that harm the climate system the stabilization of which is essential to Plaintiffs' fundamental rights as set forth above.

187. Acting under color of state law, Defendants have a systemic policy, practice, and custom of delaying action to reduce greenhouse gas emissions and pursuing affirmative aggregate acts, policies, practices and customs that cause and contribute to irreversible climate change. As a result, the harm caused by Defendants has denied Plaintiffs the same protection of fundamental rights afforded to prior and present generations of adult citizens. The imposition of this disability on Plaintiffs serves only to disrespect and subordinate them.

188. Plaintiffs, as young people under the age of 18, are a separate suspect and/or quasi-suspect, class in need of extraordinary protection from the political process pursuant to the principles of equal protection. As evidenced by their affirmative aggregate acts identified herein, Defendants have a long history of deliberately discriminating against children and future generations, including Plaintiffs, in exerting their sovereign authority for the economic benefit of industry and present generations of adults. Plaintiffs are an insular minority with no voting rights and little political power or influence over Defendants and their actions. Plaintiffs have immutable age and generational characteristics that they cannot change. They are the living generation that will be most affected by the actions of Defendants.

189. Plaintiffs have no avenue of redress other than this Court, as Plaintiffs cannot challenge

or alter the systemic policies, practices, customs, and actions of Defendants. Plaintiffs are and will disproportionately experience the irreversible and catastrophic impacts of a destabilized climate system and ocean acidification. The adults living in our country today will not experience the full scope of catastrophic harms that will be experienced by Plaintiffs.

190. For purposes of the present action, Plaintiffs should be treated as a protected class because the overwhelming majority of harmful effects caused by the acts of Defendants will occur in the future. As Plaintiffs include citizens presently below the voting age, this Court should determine they must be treated as a protected class, and state actions that disproportionately discriminate against and endanger them must be invalidated.

191. The affirmative aggregate acts of Defendants reflect a *de facto* policy choice to favor the present generation's interests to the long-term detriment of Plaintiffs – precisely the sort of dysfunctional majoritarian outcome that our constitutional democratic system of government is designed to check. Such a check is especially appropriate here because our country will soon pass the point where Plaintiffs will no longer be able to secure equal protection of the laws and protection against an uninhabitable climate system.

192. The aggregate acts, policies, practices and customs of Defendants, which discriminate against Plaintiffs as members of the protected class of youth, and with respect to their fundamental rights, cannot and do not operate to secure, and are not narrowly tailored to achieve, a more compelling state interest than Plaintiffs' rights to life, liberty, and property, and other unenumerated rights, nor their right to be free from unlawful discrimination under principles of equal protection, nor can such aggregate acts satisfy intermediate scrutiny or rational basis review.

193. The harm that Plaintiffs have suffered is caused in substantial part by Defendants'

aggregate acts that authorize dangerous levels of GHG emissions in the state of Washington.

194. Unless enjoined by the Court, Defendants will violate and cause violation of the constitutional rights of Plaintiffs.

195. As a result of Defendants' unconstitutional actions, Plaintiffs are entitled to declaratory and injunctive relief.

Sixth Claim for Relief:
RCW 70.235 is Partially Unconstitutional

196. Plaintiffs hereby re-allege and incorporate by reference each allegation set forth above.

197. RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) legalize dangerous levels of cumulative GHG emissions and allow the perpetuation of an unconstitutional energy and transportation system that harms the Plaintiffs.

198. By requiring only 25 and 50 percent overall statewide GHG emissions reductions by 2035 and 2050 respectively from 1990 emissions levels, RCW 70.235.020(1)(a) unlawfully authorizes ongoing GHG emissions at rates substantially greater than the emissions reductions necessary to stabilize the climate system and to avert the worst and most severe Climate Change Impacts.

199. By requiring only 15, 36, and 57.5 percent reductions in GHG emissions by state agencies from 2005 levels by 2020, 2035, and 2050 respectively, RCW 70.235.050(1)(a)-(c) unlawfully authorizes ongoing GHG emissions at rates substantially greater than the emissions reductions necessary to stabilize the climate system and to avert the worst and most severe Climate Change Impacts. GHG emissions that would continue under full compliance with RCW 70.235.020(1)(a)

and RCW 70.235.050(1)(a)-(c) would continue to cause dangerous Climate Change Impacts described herein.

200. On their face, RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) authorize substantial impairment of Public Trust Resources in violation of the Public Trust Doctrine and further constitute a breach of Defendants' fiduciary duties to protect and refrain from infringement of the constitutional and common law public trust rights of the Plaintiffs and the residents of Washington. Additionally, on their face RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) violate Plaintiffs' rights to substantive due process set forth in Claim 1.

201. RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c)'s authorization of dangerous levels of GHGs to be emitted in the state through mid-century discriminates against Plaintiffs by exacerbating already-dangerous levels of atmospheric CO_2 and an increasingly dangerous climate system, the consequences of which will be irreversible and catastrophic in Plaintiffs' lifetimes. These statutory provisions unconstitutionally deprive Plaintiffs of equal protection of the law because the full impacts of excess atmospheric CO_2 and the destabilized climate system, caused in part by Defendants' conduct, will be disproportionately imposed upon minor children, including Plaintiffs.

202. RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) violate Plaintiffs' rights of equal protection under the law by discriminating against Plaintiffs as members of a protected class of youth in favor of the short-term economic interests of industry and present generations of adults and by further discriminating against Plaintiffs as youth with respect to their fundamental rights to life, liberty, property, and other unenumerated rights including their right to personal security, to reasonable safety, and to a stable climate system capable of sustaining human life and liberty. The discriminatory nature of these statutory provisions towards Plaintiffs' as members of the

class of youth, and with respect to Plaintiffs' fundamental rights, cannot and does not operate to secure, and is not narrowly tailored to achieve, a more compelling state interest than Plaintiffs' rights to life, liberty, and property, and other unenumerated rights, nor their right to be free from discrimination under principles of equal protection, nor can such aggregate acts satisfy intermediate scrutiny or rational basis review.

203. By enacting RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c), the State has alienated to private polluters, and allowed waste of, the *jus publicum*, including but not limited to the air (atmosphere), water, seas, the shores of the sea, wildlife, and our climate system, which encompasses the atmosphere, waters, oceans and biosphere in violation of the Public Trust Doctrine secured by Article I, Section 30 and Article XVII, Section 1 of the State Constitution as well as under Washington common law.

204. By enacting RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c), the State has abrogated its duty to promote the interests of the public in the *jus publicum* and has caused the substantial impairment of all Public Trust Resources within the state of Washington in violation of the Public Trust Doctrine secured by Article I, Section 30 and Article XVII, Section 1 of the State Constitution as well as under Washington common law.

205. RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) are unconstitutional on their face and violate the Public Trust Doctrine.

206. The unconstitutional provisions can be segregated and eliminated without destroying the purpose, intent, and other important provisions of RCW 70.235 that pertain to greenhouse gas monitoring, reporting, planning and emissions reductions. The act was intended to address climate change by ensuring an adequate inventory, reporting, and monitoring, creating a regional multisector market-based system, and developing a GHG reduction plan that reduces emissions.

Eliminating the unconstitutional targets will not destroy other provisions of the act and will ensure the act will be implemented in a manner that protects the constitutional rights of the Plaintiffs.

207. Having an emissions level target of 50% (statewide) and 57% (state agencies) by 2050 embedded in law inevitably permits the State and its agencies (Defendants) to violate constitutional rights of children, including the Plaintiffs. It is akin to saying in a statute that public education for children can be funded at 50%, or only 50% of public schools need be desegregated to protect the rights of African-American children. Absent court intervention, as history has shown, government will do the minimum required of it by the legislature, and young people will suffer. The State's current target to reduce emissions 50% by 2050 is *grossly inadequate*, maintains dangerous dependency on fossil fuels, and will put young people in the difficult position of being forced to choose between heated homes and stable coastlines; between expensive climate adaptation or energy rationing. The unconstitutional targets that lock in climate danger and threaten the lives and fundamental rights of these Plaintiffs should be segregated from the act and set aside as unconstitutional.

REQUEST FOR RELIEF

For the reasons set forth herein, Plaintiffs respectfully request that the Court issue the following relief:

A. Declare that Plaintiffs have fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty.

B. Declare that Defendants have constitutional duties under the Public Trust Doctrine to protect Washington's Public Trust Resources, including the atmosphere, from substantial

impairment, waste, and alienation, and to manage such resources prudently and with impartiality and loyalty to present generations, including Plaintiffs, and future generations and declare further that Defendants have violated those duties.

C. Declare that Defendants' systemic policy, practice, and customs described herein have materially caused, contributed to, and/or exacerbated climate change, in violation of Plaintiffs' fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, including a stable climate system that sustains human life and liberty, and other unenumerated rights, including the right to be free from unreasonable risk of harm, and the right to reasonable safety.

D. Declare that Defendants have placed Plaintiffs' in a positon of danger with deliberate indifference to their safety in a manner that shocks the conscience such that Defendants' ongoing act of omission in not reducing Washington's GHG emissions consistent with rates that would avoid dangerous climate interference further violates Youth Plaintiffs' fundamental and inalienable constitutional rights to life, liberty, and property, to be free from unreasonable risk of harm, to personal security, and to a stable climate system that sustains human life and liberty.

E. Declare that RCW 70.235 authorizes dangerous levels of CO_2 emissions in violation of Plaintiffs' inalienable and fundamental constitutional and Public Trust rights and is therefore partially facially invalid.

F. Enjoin Defendants from acting pursuant to policies, practices, or customs that violate the Plaintiffs' rights under the Washington Constitution and Public Trust Doctrine;

G. Order Defendants to prepare a complete and accurate accounting of Washington's GHG emissions, including those emissions caused by the consumption of goods and services within the state;

H. Order Defendants to develop and submit to the Court by a date certain an enforceable state climate recovery plan, which includes a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend;

I. Retain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court;

J. Award Plaintiffs their reasonable attorneys' fees and costs; and

K. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 16th day of February, 2018

s/ Andrea K. Rodgers
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APPENDIX C

Letter to Wash. Ct. App. Withdrawing Claim Six, *Aji P. v. State*, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed Sept. 9, 2020)

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September 9, 2020

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

Re: Case No. 80007-8-I
A. Piper, et al. v. State of Washington, et al.
Notice of Appellants' Withdrawal of Appeal of Claim Six

Mr. Johnson:

In light of the recent legislative amendments to RCW 70.235, recodified as RCW 70A.45, revising Washington's emissions reduction targets, *see* Respondent's Statement of Additional Authorities (filed September 4, 2020), Appellants hereby withdraw their appeal of the Superior Court's dismissal of Claim Six, a constitutional challenge to RCW 70.235. Claim Six is discussed on pages 42–43 of Appellants' Opening Brief and pages 9–11 of Appellants' Reply Brief. Appellants have informed Respondents of this development.

Respectfully submitted,

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cc: All Counsel of Record

LAW OFFICES OF ANDREA K. RODGERS

September 09, 2020 - 3:15 PM

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Appellate Court Case Number:	80007-8
Appellate Court Case Title:	A. Piper, et al. Appellants v. State of Washington, et al., Respondents

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APPENDIX D

Amended Op. & Order Granting Defendants' Rule 12(c) Motion for Judgment on the Pleadings, Aji P. v. State, No. 18-2-04448-1 SEA (King Cty. Super. Ct. Aug. 14, 2018)

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

AJI P., a minor child by and through his guardian HELAINA PIPER, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. 18-2-04448-1 SEA

AMENDED[1] OPINION AND ORDER GRANTING DEFENDANTS' RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Both sides in this case agree that anthropogenic climate change caused by increased greenhouse gas emissions poses severe threats to our environment and requires urgent governmental action. *See, e.g.* Compl. ¶¶55-142; Answer ¶¶ 55-142. This court also agrees that climate change is a serious problem that calls for a swift

[1] This Amended Opinion restores formatting (such as italics) that was lost in the first e-filed Opinion. There are no other changes.

HONORABLE MICHAEL R. SCOTT
KING COUNTY COURTHOUSE
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SEATTLE, WASHINGTON 98104

response. As the U.S. Supreme Court stated over a decade ago, a "well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related." *Massachusetts v. EPA*, 549 U.S. 497, 504 (2007). The Supreme Court further noted: "The harms associated with climate change are serious and well recognized." *Id.* at 521.

The destruction caused by climate change has significantly increased—as has the need for prompt and effective responses—in the years since *Massachusetts v. EPA*. As this opinion is written, the devastating effects of climate change are raging around the world:

> The disruptions to everyday life have been far-reaching and devastating. In California, firefighters are racing to control what has become the largest fire in state history. Harvests of staple grains like wheat and corn are expected to dip this year, in some cases sharply, in countries as different as Sweden and El Salvador. In Europe, nuclear power plants have had to shut down because the river water that cools the reactors was too warm. Heat waves on four continents have brought electricity grids crashing.
>
> And dozens of heat-related deaths in Japan this summer offered a foretaste of what researchers warn could be big increases in mortality from extreme heat. A study last month in the journal PLOS Medicine projected a fivefold rise for the United States by 2080. The outlook for less wealthy countries is worse; for the Philippines, researchers forecast 12 times more deaths.

Somini Sengupta, *2018 Is Shaping Up to Be the Fourth-Hottest Year. Yet We're Still Not Prepared for Global Warming*, NEW YORK TIMES, Aug. 9, 2018, *available at* https://nyti.ms/2Ol1TVF.

Although both sides to this case agree that climate change is an urgent problem, they disagree on what action should be taken and how quickly it must be done. The question before the court at this juncture is whether this court is an appropriate forum in which to address these issues.

The court concludes the issues involved in this case are quintessentially political questions that must be addressed by the legislative and executive branches of government. These issues cannot appropriately be resolved by a court. Defendants' motion for judgment on the pleadings is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are twelve young Washingtonians, under the age of 18. Compl. ¶¶ 1, 12-24. Plaintiffs' 72-page complaint describes in considerable detail the extent and dangers of climate change. For example, Plaintiffs allege:

> Climate change is human-caused, primarily from burning fossil fuels, and is already dangerous. Climate change results from excess levels of GHG pollution, deforestation, and degradation of soils. Climate Change Impacts are already injuring and irreversibly destroying human and other natural systems, causing loss of life and pressing species to extinction. The time to reverse the dangerous situation is quickly dwindling. Scientists do not know precisely when we will pass a point of no return, but they agree we are nearing a critical threshold of locking in climate danger for generations to come.

Complaint, ¶ 55. Plaintiffs suggest the State of Washington should strive to achieve a 96% reduction of CO_2 by 2050, and assert that "[i]n order to retain a reasonable chance to preserve a stable climate system, the state needs to transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years,

and then generate 90% of its electricity from carbon-free sources by 2030." *Id.,* ¶ 114. Plaintiffs complain that "the State's current target to reduce emissions 50% by 2050 [adopted by the Legislature in RCW 70.235.020] is *grossly inadequate*, maintains dangerous dependency on fossil fuels, and will put young people in the difficult position of being forced to choose between heated homes and stable coastlines; between expensive climate adaptation or energy rationing." *Id.,* ¶ 207 (emphasis in original).

The relief Plaintiffs seek is sweeping in scope. Among other requests, Plaintiffs ask the Court to:

> Declare that Defendants' systemic policy, practice, and customs described herein have materially caused, contributed to, and/or exacerbated climate change, in violation of Plaintiffs' fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, including a stable climate system that sustains human life and liberty, and other unenumerated rights, including the right to be free from unreasonable risk of harm, and the right to reasonable safety;
>
> Declare that Defendants have placed Plaintiffs' in a positon of danger with deliberate indifference to their safety in a manner that shocks the conscience such that Defendants' ongoing act of omission in not reducing Washington's GHG emissions consistent with rates that would avoid dangerous climate interference further violates Youth Plaintiffs' fundamental and inalienable constitutional rights to life, liberty, and property, to be free from unreasonable risk of harm to personal security, and to a stable climate system that sustains human life and liberty;
>
> Declare that RCW 70.235 authorizes dangerous levels of CO2 emissions in violation of Plaintiffs' inalienable and fundamental constitutional and Public Trust rights and is therefore partially facially invalid;

> Order Defendants to prepare a complete and accurate accounting of Washington's GHG emissions, including those emissions caused by the consumption of goods and services within the state;
>
> Order Defendants to develop and submit to the Court by a date certain an enforceable state climate recovery plan, which includes a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend;
>
> Retain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court.

Compl., pp. 70-72.

Defendants' Answer to the Complaint acknowledges the serious threats of climate change, but denies many of Plaintiffs' allegations as unsupported, exaggerated, and untrue. Answer, ¶¶ 55-142. The Answer also asserts several affirmative defenses to Plaintiffs' claims. *Id.,* p. 32.

Defendants have moved for judgment on the pleadings under CR 12(c), seeking dismissal of all claims as a matter of law.

ANALYSIS

I. *Standard of Review.*

Washington courts treat a motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. *P.E. Sys. LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). For both, the purpose is to determine whether a plaintiff can prove any set of facts justifying relief. *Id.* The

only difference is one of timing: a CR 12(b)(6) motion is filed before the answer, whereas a CR 12(c) motion is filed after the pleadings are closed. *Id*. For the motion, any facts well-pled are deemed true. *See Bailey v. Town of Forks*, 108 Wn.2d 262, 264, 737 P.2d 1257 (1987). Dismissal is appropriate where the complaint sets out a claim either not recognized or is directly contrary to Washington law. *See, e.g.*, *Haysy v. Flynn,* 88 Wn. App. 514, 518, 945 P.2d 221 (1997).

II. *Plaintiffs' Claims Are Nonjusticiable.*

The relief sought by Plaintiffs would require the Court to usurp the roles of the legislative and executive branches of our state government. Plaintiffs ask the court to order and oversee the development of a far-ranging climate action plan that would involve a complex regulatory scheme. Any climate action plan and regulatory regime would require the assessment of numerous costs and benefits, balancing many interests, and resolving complex social, economic, and environmental issues. This policy-making is the prerogative and the role of the other two branches of government, not of the judiciary.

"[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Rousso v. State*, 170 Wn.2d 70, 75 239 P.3d 1084, 1086-87 (2010) (*quoting Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)). The Legislature has enacted climate goals in RCW 70.235.020. "It is not the role of the judiciary to second-guess the wisdom of the legislature…. The court has no authority to conduct its own balancing of the pros and cons…." *Id.* "It is the role

of the legislature, not the judiciary, to balance public policy interests and enact law." *Id.* at 92.

Plaintiffs' claims are nonjusticiable – they present political questions that must be resolved by the political branches of government. If the court addressed the issue posed by the Plaintiffs and ordered the relief they seek, it would violate the separation of powers. *See Baker v. Carr*, 369 U.S. 186, 209-217 (1962); *Brown v. Owen,* 165 Wn.2d 706, 712, 206 P.3d 310 (2009). This court "is not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can [it] determine which risks are acceptable and which are not. These are not questions of law; [this Court] lacks the tools." *Rousso*, 170 Wn.2d at 88.

III. *There is No Fundamental Constitutional Right to a Clean Environment.*

To avoid the problem of nonjusticiability, Plaintiffs attempt to frame a constitutional claim. They assert a constitutional right to "a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." Compl., ¶¶ 149-173, 196-207, p. 70. There is no such right to be found within our State Constitution. Plaintiffs ask the court to follow *Juliana v. United States,* 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), in finding a previously unrecognized right to a "stable climate system." Pls.' Opp'n at 5-6. This Court declines to do so. As one federal court has recently observed, *Juliana* is an outlier.

Lake v. City of Southgate, 2017 WL 767879 (slip op.) (E.D. Mich. 2017), fn. 3. Except for *Juliana*, "whenever federal courts have faced assertions of fundamental rights to a 'healthful environment' or to freedom from harmful contaminants, they have invariably rejected those claims." *Id.*

Plaintiffs, like the court in *Juliana*, rely heavily on *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), for the proposition that courts can recognize new unenumerated rights. *Juliana*, 217 F. Supp.3d at 1249; Plaintiffs' Opposition at 5–6 (citing *Obergefell*, 135 S.Ct. at 2598). Their reliance is misplaced. *Obergefell* involved a fundamental *individual* right – the right of a person to marry another person, a right deeply rooted in constitutional jurisprudence protecting personal freedom, and in history and tradition. *Id.* The purported right asserted by Plaintiffs is not analogous. There is no individual, personal right to a "stable climate system," just as there is no personal, individual right to world peace, or economic prosperity, or any of a number of other desirable objectives.

Plaintiffs' citation to *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), is also unavailing. In *McCleary*, the Court interpreted and enforced a specific state constitutional mandate: the "paramount duty of the state to make ample provision for the education of all children residing within its borders…." *Id.* No specific constitutional mandate relates to this case.

A stable and healthy climate, like world peace and economic prosperity, is a shared aspiration – the goal of a people, rather than the right of a person. These

types of aims are the objectives of a polity, to be pursued through the political branches of government. They are not individual rights that can be enforced by a court of law.

IV. *Plaintiffs Have Not Raised A Cognizable Claim Under the Equal Protection Clause.*

Plaintiffs also invoke the Equal Protection Clause of Article 1, Section 12, of the Washington State Constitution. Their equal protection claim is without merit.

Plaintiffs allege that they, "as young people under the age of 18, are a separate suspect and/or quasi-suspect, class in need of extraordinary protection from the political process pursuant to the principles of equal protection…. Plaintiffs are an insular minority with no voting rights and little political power or influence over Defendants and their actions." Compl., ¶ 188. They also assert, puzzlingly, that "Plaintiffs have immutable age and generational characteristics that they cannot change." *Id.* They argue that they have been discriminated against as members of a protected class. Pls.' Opp'n at 10.

Plaintiffs are not an "insular minority." And age is not immutable. Each plaintiff, like every human, will grow older. Plaintiffs cannot prove any set of facts to establish that they have been discriminated against regarding climate change based on their age. Plaintiffs live in the same climate as everyone else. We are *all*, *regardless of age*, experiencing the harmful effects of climate change.

Plaintiffs are also not without power or influence. Although they cannot yet vote, they have influence over those who do, including their parents and guardians, and many others who are concerned about young people and the future they will face. No case has recognized people under the age of 18 as a protected class simply because they cannot yet vote. And Plaintiffs have many other rights, such as rights of free speech and assembly, through which they can advocate for political change. The court encourages Plaintiffs to continue to exercise those rights.

V. *Plaintiffs' Other Claims Must Also Be Dismissed.*

For the reasons stated in Defendants' motion and reply memorandum, all of Plaintiffs' other claims must be dismissed.

CONCLUSION

Defendant's motion for judgement on the pleadings under CR 12(c) is granted, and Plaintiffs' claims are dismissed with prejudice.

The court appreciates Plaintiffs' concerns about climate change, and their passion for and commitment to urgent action. The court hopes Plaintiffs will not be discouraged. As Harvard Professor of Psychology Steven Pinker has recently noted, "given the enormity of the climate change problem, it's unwise to assume we will solve it quickly or easily." STEVEN PINKER, ENLIGHTENMENT NOW – THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS 154 (2018). But "humanity is not on an irrevocable path to ecological suicide." *Id.* There are good reasons for conditional (not complacent) optimism:

> We have some practicable ways to prevent the harms and we have the means to learn more. Problems are solvable. That does not mean they will solve themselves, but it does mean that we can solve them *if* we sustain the benevolent forces of modernity that have allowed us to solve problems so far, including societal prosperity, wisely regulated markets, international governance, and investments in science and technology.

Id. at 154-55 (emphasis in original).

The young people who are the plaintiffs in this case can (and must) continue to help solve the problems related to climate change. They can be advocates, urging the legislature and the executive to enact and implement policies that will promote decarbonization and decrease greenhouse gas emissions, such as a carbon tax, the development of alternative energy sources (including nuclear energy), and international cooperation in climate regulations.[2] These are solutions that must be effected through the political branches of government, and not the judicial branch.

DATED this 14th day of August, 2018.

/s/ *Michael R. Scott*

Honorable Michael R. Scott
King County Superior Court Judge

[2] *See* PINKER (2018) at pp. 121-155, for details about these possible solutions.

King County Superior Court
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Case Number: 18-2-04448-1
Case Title: PIPER ET AL VS STATE OF WASHINGTON ET AL

Document Title: ORDER AMENDED ORDER GRANTING DS' RULE 12

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APPENDIX E

Appellant's Opening Brief, Aji P. v. State, No. 96316-9 (Wash. Sup. Ct.) (filed Jan. 22, 2019); State's Response Brief, Aji P. v. State, No. 96316-9 (Wash. Sup. Ct.) (filed Mar. 25, 2019); Appellants' Reply Brief, Aji P. v. State, No. 96316-9 (Wash. Sup. Ct.) (filed Apr. 24, 2019)

No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This Court should reverse the King County Superior Court's judgment dismissing this case brought by thirteen Washington Youth Appellants (the "Youth") between the ages of 8-18 to enforce their fundamental rights under Washington's Constitution. The Youth allege that Respondents – the State of Washington, Governor Jay Inslee, and six state agencies – despite economically and technologically feasible alternatives, have injured and continue to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that Respondents knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm.

The Youth assert constitutional substantive due process, equal protection, and public trust claims seeking declaratory and injunctive relief to bring Washington's energy and transportation system into constitutional compliance. The Youth also challenge the constitutionality of the dangerous GHG emission targets in RCW 70.235.020. The harms the Youth are personally experiencing, and are projected to get worse, include relocation from their home because of climate-induced sea level rise, denial of their traditional cultural rights to gather shellfish due to warmer ocean temperatures and ocean acidification, and the mental and physical injuries

of hazardous air quality from climate-induced wildfires, are largely undisputed in this case.

The Youth's requested relief does not require this Court to assume the policy-making role of the legislative and executive branches. The Superior Court's conclusion that it lacks jurisdiction to review Respondents' actions for constitutional compliance flouts "the role of the court[s] . . . to police the outer limits of government power . . . ." *McCleary v. State*, 173 Wn.2d 477, 519, 269 P.3d 227 (2012). The Superior Court is without authority to "abdicate [its] duty to interpret and construe" the Washington Constitution. *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 506, 585 P.2d 71 (1978).

II. ASSIGNMENTS OF ERROR

The Youth present the following assignments of error in this appeal:

1. The Superior Court erred by holding that there is no fundamental constitutional right to a healthful and pleasant environment contrary to legislative declaration and applicable law;
2. The Superior Court erred by concluding that the Youth did not raise a cognizable equal protection claim;
3. The Superior Court erred by holding that the Youth's constitutional claims present nonjusticiable political questions;

4. The Superior Court erred by dismissing all of the Youth's other constitutional claims with no legal explanation or analysis.

III. STATEMENT OF THE CASE

A. Washington's Fossil Fuel-Based Energy and Transportation System Causes and Contributes to Climate Change

Respondents are responsible for creating, controlling, operating, and perpetuating Washington's fossil fuel-based energy and transportation system. This system, analogous to the state's education, foster care, and mental health systems,[1] is comprised of Respondents' aggregate and systemic actions with respect to "all components related to the production, conversion, delivery and use of energy"[2] and transportation of people, goods, and services throughout Washington. It is the constitutionality of this system, and Respondents' control and implementation thereof, that the Youth challenge. Examples of the unconstitutional aspects of the system are described in paragraphs 143-148 of the Youth's Complaint, emphasizing

[1] In similar challenges, courts have reviewed Washington's education, foster care, and mental health systems for constitutional compliance and correction. *See McCleary*, 173 Wn.2d 477 (state education system); *Braam ex. Rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003) (state foster care system); *Trueblood v. Wash. State Dep't of Social & Health Serv.*, No. C14-1178-MJP 2016 WL 4268933 (W.D. Wash. Aug. 15, 2016) (state mental health system).

[2] IPCC, 2014: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Cambridge, United Kingdom and New York, NY, USA, Annex I: Glossary, Page 1261 (defining energy system); RCW 42.21F.088(1)(b) (referencing the state's energy system and articulating the principles that guide implementation of the state's energy strategy); RCW 43.21F.010 (describing state's "comprehensive energy planning process").

the systemic nature of the problem from which the Youth seek this Court's protection. Clerk's Papers ("CP") 50-56. Data from Respondents' own documents confirms the state's energy and transportation system causes dangerous levels of GHG emissions, resulting in climate change. *See, e.g.*, CP 51-52, ¶ 145(a)-(h) (70.3 MMT of in-state CO_2 emissions from fossil fuel consumption in 2011; 4% higher by 2014). In fact, Respondent Ecology issued a report just last month showing Washington's GHG emissions have increased by about 6.1%, from 2012 to 2015, "primarily due to increased emissions from the electricity sector."[3]

Respondents admit that "[g]lobal warming is occurring and impacting the Earth's climate. At the same time, ocean acidification has been observed." CP 92. The global average CO_2 concentration was approximately 403 parts per million ("ppm") in 2016, compared to pre-industrial concentrations of 280 ppm, and is increasing at 2-3 ppm per year. CP 24, ¶ 56. Washington is responsible for a substantial amount of GHG emissions and these emissions are *increasing*, largely due to Respondents' fossil fuel-based energy and transportation system. CP 51, ¶ 145(b) (burning fossil fuels for transportation was the largest source of Washington's 2013 GHG emissions (42.8%), with electricity the next largest source (19.3%); ¶

[3] Wash. Dep't of Ecology, *Washington State Greenhouse Gas Emissions Inventory: 1990-2015: Report to the Legislature* (Dec. 2018), https://fortress.wa.gov/ecy/publications/documents/1802043.pdf.

145(a)-(h)). Respondents recognize that "[c]ontinued emissions of greenhouse gases will cause further warming and changes in all components of the climate system." CP 92.

The devastating impacts of climate change are well-documented in scientific literature and detailed in the Complaint. In summary, increased concentrations of GHGs have raised global surface temperature approximately 1°C from 1880 to 2016. CP 25, ¶ 59. The five hottest years on record have occurred in the last decade and every year since 1997 has been warmer than average in the United States. CP 25, ¶ 59. This warming is "already injuring and irreversibly destroying human and other natural systems, causing loss of life and pressing species to extinction." CP 24, ¶ 55. Ocean acidity, which negatively affects ocean life, particularly shellfish, is rising at least 100 times faster than at any period during the last 100,000 years, with Washington experiencing ocean acidification earlier than other parts of the world. CP 30-31, 208-09.

Since the 1970s, the average number of large wildfires in Washington has increased from 6 to over 21 per year. CP 33, ¶ 88. By 2050, wildfire activity in the Pacific Northwest is expected to double, increasing the annual mean area burned by 78%. *Id.* Increasing air and stream temperatures have already killed thousands of salmon in Washington rivers. CP 34-35, ¶ 92. Unabated climate change is likely to result in the extinction

of salmon, steelhead, and trout and, by the 2080s, the number of river miles where August stream temperatures surpass the thermal tolerances of adult salmon and char will increase by 1,016 and 2,826 miles, respectively. CP 35, ¶ 93. The loss of salmon is economically and culturally devastating, particularly for Native American Youth like Appellants Daniel, Kailani, James, and Kylie. *See, e.g.,* CP 7-9, ¶¶ 13-16, CP 13-14, ¶ 23, CP 28, ¶ 71, CP 29, ¶ 75.

Appellants James and Kylie live in Taholah, Washington, a Quinault coastal village that, because of climate change, sea level rise, and other climate change-induced impacts, must be relocated, though there is little funding for the $350 million endeavor. CP 7-8, ¶¶ 14-15, CP 36, ¶ 97. The loss of their place-based heritage, dating back to time immemorial, is irreplaceable, devastating, and permanent. CP 8, ¶ 14. Other communities and infrastructure in Washington face similar displacement. CP 36, ¶ 97.

B. The Youth's Long Quest to Protect Themselves from Their Government's Knowing Contribution to Climate Change

In 2011, a group of youth first filed a case against the state of Washington and state agencies alleging their failure to address climate change violated the Public Trust Doctrine. *Svitak, et al. v. State*, 178 Wn.App. 1020, 2013 WL 6632124 (Wash. Ct. App. 2013) (unpublished

opinion)[4] ("The complainants do not contend that the State violated a specific state law or constitutional provision, but instead challenge the State's failure to accelerate the pace and extent of greenhouse gas reduction."). The case was dismissed on political question grounds because "there [wa]s no allegation of violation of a specific statute or constitution." *Id.* at *1. The Court of Appeals did not reach the merits of the claims "[b]ecause [it] conclude[d] that Svitak [did] not challenge an affirmative state action or the State's failure to undertake a duty to act as unconstitutional[.]" *Id.* at *2.

Following the Court of Appeals' direction in *Svitak* as to justiciability, Washington youth next filed a 64-page petition for rulemaking, with supporting scientific information, with Respondent Ecology in June 2014, seeking science-based GHG emission reductions. *Foster ex rel. Foster v. Wash. Dep't of Ecology*, 200 Wn.App. 1035, 2017 WL 3868481, *1 (Wash. Ct. App. 2017) (unpublished opinion).[5] Ecology denied the petition and the Youth appealed under the Administrative Procedure Act (APA). *Id.*

[4] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.
[5] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

On November 19, 2015, the *Foster* Superior Court rejected Ecology's claims that it was doing enough to address climate change, finding that the "alternative approaches" Ecology identified as a basis for not denying the Youth's proposed rule "indisputably cannot achieve results protecting the state's environment from catastrophic global warming."[6] CP 324. The Superior Court acknowledged that "[t]he scientific evidence is clear that the current rates of reduction mandated by Washington law cannot achieve the GHG reductions necessary to . . . ensure the survival of an environment in which Petitioners can grow to adulthood safely." CP 326. The Superior Court did not originally grant relief, on the grounds that, while the case was being argued, Ecology commenced a process to promulgate the Clean Air Rule, WAC 173-442. CP 331. No party appealed the November 2015 order. After Ecology withdrew its draft Clean Air Rule, the Youth filed a CR 60(b) motion, seeking an order directing Ecology to promulgate a rule that protects Youth. *Foster*, 2017 WL 3868481 at *2. The Superior Court granted that motion, ordering Ecology to issue a rule by the end of 2016. *Id.* Ecology appealed the CR 60(b) order. *Id.*

On September 16, 2016, while the appeal was pending, Ecology released the final Clean Air Rule. CP 48-49, ¶¶ 138-139. Because the Clean

[6] Notably these are the same GHG mitigation approaches that have resulted in a 6.1% increase in GHG emissions from 2012-2015. *See supra* n.3.

Air Rule expressly authorized dangerous levels of GHG emissions, perpetuating the climate crisis, the Youth sought an order of contempt directing Ecology to regulate GHG emissions in a manner fulfilling its statutory and constitutional duties. *Foster*, 2017 WL 3868481 at *2.

On December 19, 2016, the Superior Court denied the Youth's motion, but granting *sua sponte* leave to file an amended pleading:

> Petitioners are GRANTED leave to amend their petition to plead therein a complaint for declaratory judgment or other action regarding their claims that respondent Ecology and/or others are violating their rights to a healthy environment as protected by statute, by Article I, Section 30, Article XVII, Section 1, and Article XVII, Section 1 of the Washington State Constitution and the Public Trust Doctrine embodied therein. The Court takes this action due to the emergent need for coordinated science based action by the State of Washington to address climate change before efforts to do so are too costly and too late.

Id.; CP 317-321.[7] The Court of Appeals denied the Superior Court permission to enter the order granting leave to amend the pleadings pending

[7] Ultimately, for a number of procedural reasons not relevant to the instant appeal, the Superior Court in the *Foster* case vacated the December 2016 order and, in April 2017, entered a substantially similar order granting the Youth's motion for leave to file an amended pleading, stating:

> Thus, considering the alleged emergent and accelerating need for science based response to climate change and the governmental actions and inactions since . . . the *Svitak* case, this Court does not find that case persuasive. It is time for these youth to have the opportunity to address their concerns in a court of law, concerns raised under . . . under the state and federal constitutions. They have argued their petition for a rule limiting GHG emissions based on best available science. A rule has now been adopted, which Ecology agreed during oral arguments on 11/22/16, is not intended to achieve the requirements of RCW 70.235.020.
>
> In their motion for an order to show cause for contempt, petitioners do not seek to have the Court direct Ecology to issue a different rule. Rather,

appeal of the CR 60(b) order and ultimately vacated the 60(b) order, even though Ecology had already fulfilled its requirements. *Foster*, 2017 WL 3868481 at *2, *7.

The Youth's protracted attempt to obtain an administrative rule that protects their rights proved futile after three years of litigation, during which time Washington's GHG emissions continued to rise significantly. Therefore, the Youth filed the instant case following the second path towards justiciability indicated by the Court of Appeals in the *Svitak* case and the Superior Court in *Foster*, challenging the constitutionality of the state's fossil fuel-based energy and transportation system and RCW 70.235.020. the GHG emission targets on which Respondents base all of their GHG mitigation measures. *Svitak*, 2013 WL 6632124 at *2.

C. The Superior Court Improperly Dismissed the Youth's Claims

Respondents moved to dismiss the instant complaint raising a number of arguments. CP 127-152. The Youth responded, CP 285-316, and the Superior Court allowed the League of Women's Voters, CP 169-177,

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> they asked the Court to retain jurisdiction of their claims so they can show evidence and argue that their government has failed and continues to fail to protect them from global warming. This Court gives them leave to amend their case so as to provide for their day in court where all aspects of their claims may be heard. Judicial efficiency and the urgency of these matters dictate that this Court which is advised in the matter thus far retain jurisdiction to avoid fractured presentation of the issues and unnecessary delay.

CP 321.

the faith community, CP 348-366, and environmental organizations, CP 191-215, to submit amicus briefs in support of the Youth. CP 386-87. The Superior Court granted Respondents' motion, CP 442-452, determining the claims raised nonjusticiable political questions. CP 447. Disregarding the Youth's multiple other substantive due process claims and plain statutory language, the Superior Court held there is no fundamental constitutional right to a healthful environment. CP 465-66. Ignoring the Youth's claims of discrimination with respect to their fundamental rights, the Superior Court held the Youth have not raised a cognizable equal protection claim, holding that they are not members of a suspect class, even though they were born into a dangerous climate system, will suffer the most severe consequences of climate change, and cannot vote. CP 468-69. Finally, the Superior Court did not decide the justiciability of the Youth's "other claims," offhandedly dismissing them "[f]or the reasons stated in Defendants' motion and reply memorandum . . . ." CP 469.

IV. STANDARD OF REVIEW

This Court reviews the dismissal of a complaint *de novo*. *P.E., Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012) (treating "a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss"). "All facts alleged in the complaint are taken as true, and [the court] may consider hypothetical facts supporting the plaintiff's

claim." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014). Dismissal is only appropriate if "it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)). Motions to dismiss are granted "'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *Id.* (citation omitted).

V. ARGUMENT

A. The Superior Court Erred in Dismissing the Youths' Substantive Due Process Claims

"Substantive due process forbids the government from interfering with a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest." *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). The Youth properly alleged Respondents violated their enumerated and unenumerated substantive due process rights and deserve their day in court. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 229, 143 P.3d 571 (2006) (this Court "has been a historical, long-standing leader in protecting individual's rights, especially those of the economically powerless.").

1. The Superior Court Erred in Finding The Youth Have No Fundamental, Inalienable Right To Live In A Healthful And Pleasant Environment.[8]

Washington's constitution safeguards "certain fundamental rights protected by the due process clause but not explicitly enumerated in the Bill of Rights." *In re Detention of Morgan*, 180 Wn.2d at 324. According to the U.S. Supreme Court:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty'. . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests required particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (internal citations omitted).

The Complaint alleges Respondents are violating the Youth's "fundamental and inalienable right to live in a healthful and pleasant environment" – a constitutional right statutorily recognized as "fundamental" by Washington's legislature. RCW 43.21A.010; 43.21C.020(3); 70.105D.010. The Complaint narrowly describes this right as including "the right to a stable climate system that sustains human life

[8] Notably, Governor Inslee did not join the other Respondents in challenging the merits of this claim. CP 146, n. 16. Accordingly, at the least, this claim should proceed against him since he does not question that this fundamental right exists.

and liberty." CP 61, ¶¶ 171, 173. In ruling that "[t]here is no such right to be found within our State Constitution," CP 466, the Superior Court erred in four ways: (1) disregarding plain statutory language; (2) mischaracterizing the nature of the right the Youth assert; (3) erroneously concluding that there is no such fundamental right reserved under Article I, Section 30 of the Washington Constitution; and (4) failing to undertake the proper analysis for identifying unenumerated fundamental rights

First, the Superior Court's conclusion runs contrary to the established principle that unenumerated fundamental rights under Washington's Constitution can be created by statute. *State v. Hand*, ___ Wn.2d ___, 429 P.3d 502, 508 (2018) (Madsen, J. concurring opinion) (emphasis added) ("[s]ubstantive due process necessarily requires that a fundamental right exists – either *in statute* or under the Constitution.") (emphasis added); *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)) ("'A liberty interest may arise from the Constitution,' from 'guarantees implicit in the word 'liberty,' 'or from an expectation or interest created by state laws or policies.'").

The right to a healthful environment is the *only* right the Legislature has characterized as "fundamental and inalienable." If the statutory language is clear, "that is the end of the inquiry." *Ballard Square*

Condominium Owner's Ass'n v. Dynasty Const. Co., 158 Wn.2d 603, 612, 146 P.3d 914 (2006). The personal opinion of a judge of the Superior Court that a healthful environment and stable climate system "is a shared aspiration – the goal of a people, rather than the right of a person" cannot override the plain language of the Legislature.[9] CP 467. The Legislature's explicit use of the terms "fundamental and inalienable," distinguishes this right from those important interests that are merely protected, rather than fundamental. *See, e.g., Amunrud*, 158 Wn.2d at 222 ("pursuing a lawful private profession . . . is a protected right under the . . . constitution[]," not a fundamental right, but still applying rational basis review).

Second, the Superior Court expressly mischaracterized the nature of the right the Youth seek to protect: narrowly defined as the right to a stable climate system that sustains human life and liberty. CP 61, ¶¶ 171, 173. The Superior Court misconstrued this right as the right to be free from harmful contaminants. CP 449. The Superior Court's reliance on one inapposite, out-of-state, unpublished decision makes this error clear. CP

[9] The Superior Court's conclusion that the right to a stable climate system is a mere "desirable objective[]" or "shared aspiration" comparable to "world peace" and "economic prosperity" is not only contrary to legislative findings, but inapt. CP 467. Even in the areas of "world peace" or "economic prosperity," when government is alleged to have actively discriminated against or deprived an individual of life or liberty, or of an economic interest, without adequate constitutional justification or process, courts adjudicated such claims on the merits. *See, e.g.*, *Rotsker v. Goldberg*, 453 U.S. 57 (1981) (equal protection challenge to military draft); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (constitutional challenge to discrimination in distribution of food stamps).

448-49 (citing *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017)). *Lake* neither involved government causation of climate change, a legislatively recognized "fundamental and inalienable" right to a healthful environment, nor the narrowly circumscribed right the Youth assert here. Moreover, the *Lake* plaintiff did "not specify the right underlying her § 1983 claim." *Id*. at *3.

No other court has rejected the fundamental nature of the right the Youth assert. Indeed, the only other court to consider the existence of a fundamental due process right similar to that asserted by the Youth, recognized such a right exists under the U.S. Constitution, explaining, "[j]ust as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana v. United States*, 217 F. Supp.3d 1224, 1250 (D. Or. 2016) (citations omitted). The *Lake* court acknowledged that, in recognizing a right to "a climate system capable of sustaining human life," the *Juliana* court provided a "careful description" of a "very narrow right," as is required when courts identify previously unrecognized fundamental rights. 2017 WL 767879, at *4, n. 3 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The *Lake* decision does not consider the *Juliana* case an "outlier;" it simply found the District of Oregon articulated a more circumscribed right than the general right to be free from

harmful contaminants. *Id.* The Youth use the same "careful description" of their asserted liberty interest to live in a healthful and pleasant environment and are entitled to present evidence to show how Respondents have violated that right. *Braam ex rel Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (quoting *Glucksberg*, 521 U.S. at 721) ("Modern substantive due process jurisprudence requires a 'careful description of the asserted fundamental liberty interest.'").

Third, the right to live in a healthful environment, including the right to a stable climate that sustains human life and liberty, reflects an inherent attribute of the Youth's substantive due process rights to be free from government actions that knowingly harm their life, liberty, and property.[10] The Washington Constitution expressly recognizes that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights" and that "[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the

[10] Erroneously concluding that "[n]o specific constitutional mandate relates to" this claim, CP 467, the court ignored the "specific constitutional mandate" that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, § 3. *See McCleary*, 173 Wn.2d at 518-19 ("The vast majority of constitutional provisions, particularly those set forth in . . . our constitution's declaration of rights, are framed as negative restrictions on government action. With respect to those rights, the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries.").

people." Wash. Const. art. I, §§ 1, 30; *see also* art. XVII, § 1. Citing these provisions, this Court stated:

> The legislature represents this sovereignty of the people, except as limited by the constitution. . . . [Section 30] is apparently the expression that the declaration of certain fundamental rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others not expressed, which inherently exist in all civilized and free states. Those expressly declared were evidently such as the history and experience of our people had shown were most frequently invaded by arbitrary power, and they were defined and asserted affirmatively. Consistently with the affirmative declaration of such rights, *it has been universally recognized by the profoundest jurists and statesmen that certain fundamental, inalienable rights under the laws of God and nature are immutable, and cannot be violated by any authority founded in right.*

State v. Clark, 30 Wn. 439, 443-44, 71 P. 20 (1902) (emphasis added). The Legislature has recognized the right to a healthful and pleasant environment is one of those "fundamental, inalienable rights." *Id*.; RCW 43.21A.010.

Fourth, proper application of the analysis for identifying unenumerated fundamental rights mandates that the Youths' claim to violation of their right to live in a healthful environment, including a stable climate system that sustains human life and liberty, should proceed. The Superior Court's conclusion that this right is not fundamental for substantive due process purposes rested in part on its assertion that it is not an "individual" right like the right to marriage. CP 467 (citing no precedent). Washington courts have rejected that narrow approach to

defining fundamental rights: "The Department asserts that substantive rights can be created only by fundamental interests derived from the Constitution and that the protections of substantive due process are limited to such matters as marriage, family, and procreation. *This is clearly incorrect*." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 56 n.7, 309 P.3d 1221 (Wash. Ct. App. 2013) (emphasis added).[11]

To establish a fundamental right, courts must examine whether an asserted right is either: "'objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008) (citation omitted). The identification of fundamental rights "has not been reduced to any formula[;]" "history and tradition guide and discipline this inquiry but do not set its outer boundaries." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). The catalog of fundamental rights is

[11] Not all fundamental rights require an individual's personal choice in order for a person to avail themselves of their protection (like the choice to marry). In this respect, the right to a climate system that sustains human life and liberty is akin to the right to freedom from unlawful restraint: it operates as a limit on government action irrespective of the Youths' intimate individual choices. Regardless, Respondents' knowing causation and contribution to the destabilization of the climate system has *profound* effects on these Youths' intimate, personal, constitutionally protected choices, including their choices and abilities to safely raise families and to learn, practice, and transmit their cultural, religious, and spiritual traditions and beliefs. *See, e.g.,* CP. 6-8, ¶¶ 13-15; CP 13-14, ¶ 23; CP 57, ¶ 154. The Superior Court completely ignored these allegations. In doing so, the it failed to "take the facts alleged in the complaint. . . in the light most favorable to the nonmoving party." *FutureSelect Portfolio Mgmt., Inc.*, 180 Wn.2d at 962.

intended to grow as society develops. *Id.* at 2598. Important fundamental rights include those that are "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), or required "to enable the exercise of all rights, whether enumerated or unenumerated." *Juliana*, 217 F.Supp.3d at 1249; *see also Obergefell*, 135 S.Ct. at 2599 (enumerated liberty right inherently encompasses right to marry).

Proper application of these standards demonstrates that the right to live in a healthful environment, including the right to a climate system that sustains human life and liberty, is both "fundamental to our scheme of ordered liberty" and "preservative of all rights" because a "stable climate system is a necessary condition to exercising other rights to life, liberty, and property." *Juliana*, 217 F. Supp.3d at 1250. Further, this right is "deeply rooted in . . . history and tradition" as demonstrated by, among other things, legislative recognition of its "fundamental and inalienable" nature. RCW 43.21A.010.[12] Respondents' knowing, systemic causation of and contribution to dangerous climate change, and the impacts injuring these Youth, is precisely the type of conduct that "reveals discord between the

[12] Development of a full factual record in this case will further demonstrate the history and tradition of this fundamental right. Importantly, on summary judgment in *Lake*, the plaintiff was afforded an opportunity, but failed to "adduce[] any evidence that her alleged right is rooted in our nation's traditions or implicit in the concept of ordered liberty[.]" 2017 WL 767879 at *4. The Youth were afforded no such opportunity here.

Constitution's central protections and a perceived legal stricture," requiring that their "claim to liberty be addressed." *Obergefell*, 135 S.Ct. at 2598.

2. The Youth Also Alleged Infringement of Well-Recognized Fundamental Substantive Due Process Rights

By focusing solely on the constitutionally-reserved and statutorily-recognized "fundamental and inalienable right . . . to live in a healthful and pleasant environment," CP 466-68, the Superior Court did not address the Youth's alleged infringement of other fundamental substantive due process rights, including their enumerated rights to life, liberty, and property, and other well-recognized unenumerated rights, including the rights to be free from an unreasonable risk of harm,[13] to reasonable safety,[14] to personal security,[15] to maintain bodily integrity,[16] to family autonomy,[17] and the right to learn and practice their religious, cultural, and spiritual beliefs and traditions.[18] CP 57-58, ¶¶ 153-54, 159. This is a legal error.

B. The Superior Court Erred in Dismissing the Youth's Equal Protection Claims

"'The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution'" is "'to secure equality of

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[13] *Braam ex rel. Braam*, 150 Wn.2d 689.
[14] *Id.*
[15] *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).
[16] *Glucksberg*, 521 U.S. at 719-20.
[17] *Moore v. City of E. Cleveland, OH*, 431 U.S. 493 (1977) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972).
[18] *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 148, 166 (1944); *Yoder*, 406 U.S. at 211-212.

treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.'" *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 634-35, 911 P.2d 1319 (1996) (en banc) (quoting *State ex rel. Bacich v. Huse*, 187 Wn.75, 80, 59 P.2d 1101 (1936)). Respondents' conduct in knowingly operating a fossil fuel-based transportation and energy system and enacting RCW 70.235.020, which authorizes dangerous levels of GHGs, discriminates "against Plaintiffs as members of a protected class of youth in favor of the short-term economic interests of industry and present generations of adults and . . . with respect to their fundamental rights. . . ." CP 65-70. The Superior Court erred by focusing only on the Youth's argument that they are members of a suspect class, and incorrectly resolved that question.

This Court has articulated the following standards "to determine whether the equal protection clause has been violated:"

> First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. The third test is rational basis. Under this inquiry, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives."

State v. Harner, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004) (en banc). The Superior Court failed to apply any of these standards. *Maehren v. City*

of Seattle, 92 Wn.2d 480, 490, 599 P.2d 1255 (1979) (emphasis added) ("In an equal protection challenge, *a necessary initial determination* is the proper level of judicial scrutiny applicable to the challenged classification.").

As discussed above, the Youth have numerous fundamental rights implicated by Respondents' affirmative conduct. Section V(A), *supra*. The Superior Court ignored these fundamental rights and the Youth's claims of discrimination with respect to them. CP 65-70. As such, irrespective of the Superior Court's conclusions regarding the Youth's protected status, the Court erred in dismissing the Youth's equal protection claims without applying strict scrutiny. *Am. Legion Post #149*, 164 Wn.2d at 609 ("Strict scrutiny also applies to laws burdening fundamental rights or liberties.").

Furthermore, by erroneously focusing solely on the Youth's age characteristics and ignoring their vulnerable status as children born into dangerous climate change, the Superior Court incorrectly concluded the Youth's "equal protection claim is without merit." CP 450. Finding "age is not immutable," and that Youth are neither "an insular minority," nor "without power or influence," the Superior Court did not address the Youth's other characteristics supporting their status as members of a suspect or semi-suspect class. CP 450-51.

"To show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people." *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 760, 733 P.2d 539 (1987). Here, Respondents' conduct in causing and contributing to dangerous climate change prioritizes the wellbeing of current generations of adults over these Youth – the living generation that will be most affected by climate change. Youth as a class do not have economic power to influence the state's energy and transportation system because they do not own property or earn wages and are unable to protect themselves through the political process because they do not yet have the right to vote. *Am. Legion Post #149*, 164 Wn.2d at 609 n.31 (a suspect class requires a history of discrimination, political powerlessness, or an immutable trait that is unrelated to their ability to contribute to society). There is ample factual support for this notion in the record. *See* Section III(B), *supra*.

The Superior Court improperly concluded that "age is not immutable," positing that "each plaintiff, like every human, will grow older." CP 450. The Superior Court also incorrectly concluded, without analysis, that the Youth "are not an 'insular minority.'" CP 468. However, the U.S. Supreme Court has made clear that heightened scrutiny is applied when discriminatory conduct is "directed against children, and imposes its

discriminatory burden" on the basis of a characteristic over which they "can have little control." *Plyler v. Doe*, 457 U.S. 202, 219-20, 226 (1982).

While this Court previously declined to afford juveniles protected status, *State v. Schaaf*, 109 Wn.2d 1, 17-19, 743 P.2d 240 (1987), it "did so because" it "concluded that children in general were more socially integrated – and thus better represented in the democratic process – than the 'discrete and insular minorities' considered suspect classes for purposes of federal equal protection analysis." *Schroeder v. Weighall*, 179 Wn.2d 566, 578, 316 P.3d 482 (2014) (en banc) (quoting *Schaaf*, 109 Wn.2d at 17, 19). However, where evidence showed that a challenged "law places a disproportionate burden," on Youth, a "group of minors most likely to be adversely affected by [government action] may well constitute the type of discrete and insular minority whose interests are a central concern in our state equal protection cases." *Id.* at 578-79. That is the case here, where the Youth have alleged that "the impacts associated with the CO_2 emissions of today will be mostly borne by our children and future generations." CP 38, ¶ 106. By knowingly operating a fossil fuel-based energy and transportation system that results in dangerous levels of GHG emissions, and by expressly allowing such emissions through 2050 by enacting RCW 70.235.020, Respondents have placed a disproportionate burden on children, including the Youth.

Furthermore, children possess and exhibit significant immutable characteristics; they are socially, emotionally, physically, and psychologically vulnerable and different from adults in manners beyond their control. Indeed, the U.S. Supreme Court has recognized the immutable characteristics of childhood: "'youth is more than a chronological fact' . . . It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (citations omitted).[19] Children are particularly vulnerable to climate change impacts and historic and continuing GHG emissions consign children and future generations to catastrophic and likely irreversible harms that today's generation of adults will not experience. CP 15, ¶ 26, CP 38, ¶ 105 (children are more vulnerable to the mental and physical health risks associated with climate change), ¶ 106 (around 20% of CO_2 emitted persists in the atmosphere for centuries and thus the impacts of today's CO_2 emissions will be mostly borne by children and future generations), ¶ 107, CP 65, ¶ 188, CP 68, ¶ 201, CP 70, ¶ 207.[20] These

[19] *See also State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 349 (2018) (quoting *Miller*, 567 U.S. at 481 ("[t]his court has consistently applied the *Miller* principle that 'children are different'" and "recogniz[ing] that children warrant special protections in sentencing.").

[20] The Superior Court further erred in concluding, contrary to the Complaint, that "[w]e are *all*, *regardless of age*, experiencing climate change" and that the Youth "cannot prove any set of facts to establish that they have been discriminated against regarding climate change . . . ." CP 468. The Superior Court disregarded the factual allegations in the Complaint detailing the specific, individual and unique harms being experienced by each Youth; harms that are more severe because of their young age. CP 5-15, ¶¶ 12-24.

Youth cannot grow older any faster, nor can they possibly alter their generational characteristics determined by the dangerous climate conditions into which they were born – immutable "characteristic[s] determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The Superior Court also erred by failing to consider and accept as true the Youth's factual allegations demonstrating the history of discrimination against their asserted class. Specifically, Respondents have a "long history of deliberately discriminating against children and future generations, including Plaintiffs, in exerting their sovereign authority for the economic benefit of industry and present generations of adults." CP 65, ¶ 188. Respondents' own documents, described in the Complaint, establish that they have long known of the dangers their actions pose to the Youth's class, yet Respondents continue to implement policies that exacerbate that danger, despite clear alternatives. *See, e.g.,* CP 47, ¶ 134 (2014 Ecology report acknowledging "[w]e are imposing risks on future generations (causing intergenerational equities) and liability for the harm that will be caused by climate change that we are unable or unwilling to avoid."); CP 38-39, 44, ¶¶ 107, 124 (2008 Ecology report stating: "[f]ailure to act now will make future Washingtonians vulnerable to fluctuations in energy prices, political instability, and the effects of climate change from reliance

on carbon-based fuels" and recognizing "[t]he urgent need for a veritable energy revolution. . . .").

In assuming, without any evidentiary support, that the Youth can protect their rights with "conditional (not complacent) optimism"[21] through lobbying the legislative and executive branches (CP 469-70), the Superior Court disregarded the Youth's allegations of the long, entrenched, systemic history of Respondents' knowledge, causation of and contributions to climate change – a history demonstrating invidious discrimination against the Youth's class. CP 41-50. In fact, by legalizing dangerous emissions through 2050 in RCW 70.235.020, Respondents ensured that resulting harms to the Youth will continue and be locked in. CP 24, ¶ 55. The judiciary is the Youth's last and only resort, just as it was for the children seeking to desegregate their schools in *Brown v. Bd. of Education*, 347 U.S. 483 (1953).

C. The Claims Addressed by the Superior Court Are Entitled To, At Least, Intermediate or Rational Basis Review

Even if this Court were to condone the Superior Court's errors in finding that the right to live in a healthful environment is not fundamental,

[21] The Superior Court's reliance on Steven Pinker, an outside source for this proposition, illustrates the Court's failure to accept as true the well-pleaded allegations in the Complaint. Most assuredly, the Youth who are forced to relocate from their home and school do not feel optimistic, particularly as they see GHG emissions in Washington continuing to rise.

in ignoring the Youth's alleged violations of and discrimination with respect to other fundamental rights, and that the Youth are not members of a suspect class, that should not result in dismissal of all claims. Rather, intermediate scrutiny applies when there is a deprivation of an important right and the classification involves a semi-suspect class, not accountable for its status. *Westerman v. Cary,* 125 Wn.2d 277, 294, 892 P.2d 1067 (1994). Where a due process challenge implicates no fundamental right, or an equal protection challenge implicates neither a protected class nor a fundamental right, "the proper standard of review is rational basis." *In re Detention of Morgan*, 180 Wn.2d at 324.[22] At the very least, the Youth are entitled to put on their case that there is no rational basis for the state's challenged actions. *See Nielsen*, 177 Wn. App. at 56 n.7 (rejecting as "without merit" the position that a plaintiff "cannot assert a viable substantive due process claim because the right to appeal is not a fundamental interest.").

D. The Political Question Doctrine Does Not Bar The Court's Review of The Youth's Constitutional Claims

The Superior Court erred in concluding that "the issues involved in this case are quintessentially political questions" that must be addressed

[22] As explained in Sections V(A)(2), (V(A)(B), *supra*, Respondents never challenged and the superior court never addressed the Youths' substantive due process claims to infringement of their well-established and previously recognized fundamental rights, nor their claims of discrimination with respect to their fundamental rights. Consequently, the wholesale dismissal of the Youths' case is erroneous on this additional basis.

solely "by the legislative and executive branches." CP 462. There *are no* "quintessential" political questions because the proper analysis requires "a discriminating inquiry into the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 507 (citing *Baker*, 369 U.S. at 217). The Youth's claims call upon the court to engage in its traditional and core duty to interpret and enforce Washington's Constitution. *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 507 (constitutional interpretation falls "within the traditional role accorded courts to interpret the law" and does not implicate the *Baker* factors). The Superior Court's refusal to hear the Youth's constitutional claims flies in the face of long-standing principles of State and federal law:

> [U]nder our form of government, and in our way of life in this country, it is accepted . . . that the interpretation of constitutional provisions is not only a proper and a very necessary function, but also is a duty and a responsibility of the judicial branch of our government.

State ex rel. Swan v. Jones, 47 Wn.2d 718, 738, 289 P.2d 982 (1955) (en banc).

Our tripartite structure of government allows each branch "to exercise limited control over the others in the form of checks and balances." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 613, 229 P.3d 774 (2010); *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 242, 552 P.2d 163

(1976) ("[C]omplete separation was never intended and overlapping functions were created deliberately."). "Once it is determined that judicial interpretation and construction are required, there remains no separation of powers issue." *Seattle School Dist. No. 1 of King County*, 90 Wn.2d 476 at 504.

The Superior Court erroneously focused on a mischaracterization of the Youths' requested relief and the scope of the judiciary's equitable powers. As an initial matter, it is entirely premature at this early stage to speculate as to the propriety of any relief that may ultimately be awarded. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (citation omitted); *McCleary*, 173 Wn.2d at 546 ("While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all."). The political question inquiry focuses on the claims presented, not the relief requested. *Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.").

Further, contrary to the Superior Court's conclusions, the Youths' requested relief would not require it to make policy or "usurp the roles of

legislative and executive branches of our state government." CP 465. It is not the role of the legislative and executive branches to police their own actions for constitutional compliance. The Youth seek a declaration of the constitutional safeguard necessary to protect their fundamental rights and an order for Respondents to develop and implement a plan *of their own devising* to remedy their constitutional violations. This is a familiar and well-established remedial model squarely within the judiciary's power and competence. *See, e.g.*, *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 518 (while the legislature has the authority to devise the details of the education system, "the judiciary is primarily concerned with whether the Legislature acts pursuant to the [constitutional] mandate and, having acted, whether it has done so constitutionally"). In *McCleary*, granting similar relief to that requested here, this Court stated:

> A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court's constitutional obligation.

173 Wn.2d at 545-46*; see also Brown v. Plata*, 563 U.S. 493 (2011) (approving Eighth Amendment remedy ordering state to develop and implement plan to reduce prison populations to no more than 137.5% design

capacity). As in *Plata*, the Superior Court can set the constitutional floor necessary for preservation of the Youth's rights – the maximum safe level of CO_2 concentrations and the timeframe in which that level must be achieved – and leave to Respondents the specifics of developing and implementing a compliant plan.[23]

Finally, even if the relief requested ultimately implicated separation of powers concerns, the Superior Court can tailor or provide alternative remedies as necessary. *See, e.g., McCleary*, 173 Wn.2d at 546. It is the court's duty to hear and decide the Youth's constitutional claims, regardless of whether the source of the harm involves climate change. *New York Times, Co. v. United States*, 403 U.S. 713, 742-43 (1971) (Marshall, J. concurring) ("[C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.").

E. The Superior Court's Dismissal Of The Youth's "Other" Claims For Unspecified Reasons Is Erroneous

The Superior Court erroneously dismissed the Youths' remaining claims "[f]or the reasons stated in [Respondents'] motion and reply

[23] Respondents have existing constitutional and statutory authority to come into constitutional compliance without the need for new legislation. Respondents can remedy their constitutional violations with the same authorities they have discretionarily interpreted and employed to systemically infringe the rights of these Youth. *See, e.g.*, RCW 70.94.331; RCW 43.21F.010; CP 16-23, ¶¶ 29–45. No additional statutory authority is needed for Defendants to cease their ongoing unconstitutional conduct. Further, contrary to Respondents argument below that the Youth's requested relief seeks to compel discretionary action, constitutional compliance is not discretionary. *See Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000).

memorandum." CP 469. As set forth in the Youth's briefing in the Superior Court, and below, none of those reasons supports dismissal.

1. The Youth Alleged a Viable State-Created Danger Claim

After placing the Youth in danger by knowingly causing and allowing dangerous levels of GHG emissions, Respondents' continuing pursuit and implementation of policies that cause significant GHG emissions and their continuing failure to reduce emissions, constitutes a viable state-created danger due process claim. CP 59-60, ¶¶ 161-167. The Superior Court did not address the Youth's Second Claim for Relief.

Ordinarily, government actors do not have an affirmative obligation to protect under the due process clause. *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989).[24] However, an affirmative obligation to protect arises when government conduct places a claimant "in peril in deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997); *Braam ex rel Braam*, 150 Wn.2d at 699-700 ("Exposure of the child to an unreasonable risk of harm violates the substantive due process clause."). Culpability for substantive due

[24] Contrary to Respondents' argument below that no substantive due process duty to protect arises except "out of certain special relationships assumed or established by the state," CP 149, *DeShaney* established two *separate* bases for a duty to protect: the "special relationship" exception and the "state-created" danger exception, which the Youth allege here. *See Triplett v. Washington State Dept. of Soc, and Health Serv.*, 193 Wn.App. 497, 514, 373 P.3d 279 (Wash. Ct. App. 2016).

process violations is judged by whether the challenged conduct "shock[s] the conscience." *County. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998); *Braam ex rel. Braam*, 150 Wn.2d at 700.

Where children are placed in danger due to circumstances "far beyond their control," like when they are placed in foster care, this Court applies a standard more stringent than deliberate indifference:

> '[D]eliberate indifference' is not well suited for analyzing claims of the class. Foster children are entitled to a high standard. Something more than refraining from indifferent action is required to protect these innocents. . . . Foster children, because of circumstances usually far beyond their control, have been removed from their parents by the State for the child's own best interest. More often these children are victims, not perpetrators. Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety. . . . The State, as the custodian and caretaker of these children, is therefore liable for the harm allegedly caused by a violation of a foster child's substantive due process right to be free from unreasonable risk of harm and to reasonable safety only when his or her care, treatment, and services 'substantially depart from accepted professional judgment, standards or practice.'

Braam ex rel. Braam, 150 Wn.2d at 703-704 (internal citations omitted).

Similarly here, these Youth were born into dangerous climate conditions through no fault of their own. They cannot vote and have no say in the development and implementation of the energy and transportation system that is harming them and determining their future in undesirable

ways. It is appropriate for this Court to apply a higher standard, such as the professional judgment standard,[25] when analyzing the Youth's state-created danger claim.

Even if the professional judgment were not applicable, the Youth adequately alleged deliberate indifference. CP 59-60. Government acts with deliberate indifference when it has "actual knowledge of, or willfully ignore[s], impending harm" such that it "knows that something *is* going to happen but ignores the risk and exposes someone to it." *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). A defendant is liable if they "'play[ed] a part' in the creation of a danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016). Here, Respondents have long known of the serious risk of burning fossil fuels and the dangers to which it exposes the Youth, yet continued to pursue the system that increase that danger, threatening the Youth's fundamental rights. CP 41-50, ¶ 115-142 (describing Respondents' long-standing knowledge and perpetuation of climate danger); *Juliana*, 217 F. Supp. 3d at 1251–52 (recognizing danger creation claim alleging defendants' role in and knowledge of climate crisis). Further, Respondents

[25] The professional judgment standard "would allow them to present proof that the decisions they complain of, while not deliberately indifferent to their substantive due process rights, were not the product of professional judgment." *Id.* at 703; *see, e.g.,* CP 56, ¶ 148 ("Non fossil-fuel based energy systems across all sectors, including electricity and transportation systems, are feasible and technologically available to employ in Washington . . . .").

have had ample opportunity to reverse course and reduce Washington's emissions at rates necessary to protect the Youth, yet have persisted in their dangerous systemic affirmative actions. CP 40, ¶¶112-114, CP 51-56 ¶¶145-148. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853.

Contrary to Respondents' arguments below, the Youth allege particularized harm to themselves, not harm to the general public. CP 5-15, ¶¶12-24. No case limits state-created danger claims to actions directed at particular individuals. Respondents have been intimately aware of how climate change affects individuals depending on a person's particular location, interests, age, and other circumstances, CP 5. ¶10, CP 25, ¶57, CP 41-50, ¶¶115–42. The Youth's injuries correspondingly vary according to the same criteria. CP 5-15, ¶¶12–24. Further, state-created danger case law establishes its applicability to claims involving exposure to harmful environmental media like those befalling the Youth, notwithstanding the danger such conditions may pose to the general public. *See, e.g., Pauluk*, 836 F.3d at 1125 (toxic mold); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9th Cir. 2000) (freezing weather).

2. The Youth Alleged Viable Public Trust Doctrine Claims

The Youth adequately allege Respondents have abdicated control over Public Trust Resources, resulting in substantial impairment to those resources, including but not limited to navigable waters and submerged lands.[26] CP 61-64; *Chelan Basin Conservancy*, 190 Wn.2d at 267 ("[W]e have always embraced our constitutional responsibility to review challenged legislation . . . to determine whether that legislation comports with the State's public trust obligations."); *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987). Respondents raised three arguments regarding the Youth's Public Trust claims, all of which are unfounded.

a. The PTD Applies to All Common Natural Resources, Including the Atmosphere.

Respondents argued the Youth did not assert a viable Public Trust claim because "the Public Trust Doctrine is limited to navigable waters and underlying lands." CP 144. That argument is not dispositive because the Youth alleged impairment to traditional Public Trust Resources such as navigable waters and submerged lands. CP 1-72, *passim* (detailing acidification and warming of navigable waters, erosion of shorelands, rising seas and altered tidelands, storm-surge flooding of tidelands, declines of

[26] The Youth's Public Trust claims includes a direct challenge to RCW 70.235.020. CP 67-70; *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 267, 413 P.3d 549 (2018) (emphasis added) ("Because of the doctrine's constitutional underpinning, *any* legislation that impairs the public trust remains subject to judicial review.").

fisheries, and restrictions to access and use of such resources). As such, even if this Court declines to reach the question of whether the atmosphere is a Public Trust Resource, the Youth's Public Trust claim can still proceed.

The Youth also seek a declaration that the atmosphere is a Public Trust Resource. Although Washington courts have not yet applied the Doctrine to natural resources other than water, shorelands, tidelands, and shellfish, this Court has not expressly limited the Doctrine to these resources. In *Rettkowski v. Dep't of Ecology*, this Court intentionally avoided delineating the scope of the Doctrine. 122 Wn. 2d 219, 232 n.5, 858 P.2d 232 (1993). Similarly, in the other cases Respondents cited below, the Court expressly chose to not address the Doctrine's scope, deciding those cases on other grounds. *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn. 2d 118, 134, 969 P.2d 458 (1999); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (Wash. Ct. App. 2004); *Chelan Basin Conservancy*, 190 Wn.2d at 258–61.

There is no legal or scientific basis to exclude the atmosphere from the Public Trust. First, "[t]he principle that the public has an overriding interest in navigable waterways and the lands underneath them has been dated by some jurists as far back as the Code of Justinian, which was developed in Rome during the 6th century." *Chelan Basin Conservancy*, 190 Wn.2d at 259; *Caminiti*, 107 Wn.2d at 668-69. "The Institutes of Justinian,

. . . states: '[T]he following things are by natural law common to all – the air, running water, the sea and consequently the sea-shore.'" *Rettkowski*, 122 Wn.2d at 243 (Guy, J., dissenting). Since the origins of the Public Trust Doctrine explicitly applied to the air, it is illogical to read that common natural resource out of the present-day scope of the Public Trust.

Second, from a scientific perspective, "the navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical." CP 329; *see also Juliana*, 217 F.Supp.3d at 1255 n.10 ("Even Supreme Court case law suggests the atmosphere may properly be deemed part of the public trust *res*."). The Legislature has explicitly recognized the connection between "all environmental media, including air, water, and land." RCW 70.94.011. It would be scientifically untenable for this Court to draw an arbitrary distinction between navigable waters, submerged lands, and the atmosphere.

b. Respondents Must Protect Public Trust Resources

Because the Doctrine is "partially encapsulated" in Article 17 of the Washington Constitution, as trustees, all government actors—including agencies to whom the Legislature delegates authority—have a legal obligation to manage and prevent substantial impairment to Public Trust Resources under their regulatory jurisdiction. *Chelan Basin Conservancy*,

190 Wn.2d at 266. Legal precedent establishes that agencies managing Public Trust Resources, whether shellfish, water, or air, "ha[ve] a continuing obligation under the public trust doctrine to manage the use of the resources on the land for the public interest." *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res.*, 124 Wn. App. 441, 450, 101 P.3d 891 (Wash. Ct. App. 2004); CP 329 ("the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust.").

Below, Respondents incorrectly relied on *Fischer-McReynolds v. Quasim*, to assert that the Governor lacks authority to carry out the State's Public Trust responsibilities. 101 Wash. App. 801, 6 P.3d 30 (2000), *as amended* (Aug. 11, 2000). CP 146. However, as that case explains, the Governor can issue directives, "which serve to communicate to state agencies what the Governor would like them to accomplish [and] agency heads risk removal from office if they do not comply with the order." *Id.* at 813. There is no question that the Governor (and the state, also a named defendant) must comply with the Public Trust Doctrine (which Respondents admit is encapsulated in the constitution) when implementing his authority. CP 144.

Further, irrespective of whether the Public Trust Doctrine imposes *affirmative* obligations on Respondents to act, the Youth clearly allege that

Respondents' historic and continuing affirmative actions, including but not limited to the enactment of RCW 70.235.020, have *alienated* and *substantially impaired* Washington's protected Public Trust Resources in violation of their duties. CP 61-64, ¶¶ 174–84; CP 67-70, ¶¶ 196-207. The Superior Court erred in dismissing the Youths' Public Trust claims in reliance on Respondents' arguments.

3. The Youth Alleged a Viable Constitutional Challenge To RCW 70.235.020

In their Sixth Claim for Relief, the Youth partially challenge the constitutionality of RCW 70.235. Specifically, the Youth allege that RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) legalize dangerous levels of cumulative GHG emissions and perpetuate an unconstitutional energy and transportation system, harming the Youth. CP 67-70, ¶¶ 196-207. As the Youth explained:

> Having an emissions level target of 50% (statewide) and 57% (state agencies) by 2050 embedded in law inevitably permits the State and its agencies [(Respondents)] to violate the constitutional rights of children, including the Plaintiffs. It is akin to saying in a statute that public education for children can be funded at 50%, or only 50% of public schools need be desegregated to protect the rights of African American children.

CP 70, ¶ 207. The Court dismissed the Youth's challenge to RCW 70.235 with no analysis.[27] A core role of the judiciary is to review statutes for constitutionality and this Court "do[es] not shrink from [its] responsibility." *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980) (en banc).

4. The Youths Properly Pleaded Claims Under The UDJA

Respondents admit "[t]he UDJA can . . . be used to determine statutory and constitutional rights in an appropriate case." CP 133. This is an appropriate case. The UDJA "is to be liberally construed and administered." RCW 7.24.120. Respondents' argued below the parties lack "genuine and opposing interests" and that a judicial determination of the dispute will not be "final and conclusive." CP 133-35; *Kitsap County v. Kitsap County Correctional Officers Guild, Inc.*, 179 Wn. App. 987, 994, 320 P.3d 70 (2014). Both arguments are unfounded and unsupported by legal authority.

a. The Parties Have Genuine and Opposing Interests

[27] In *Pasado's Safe Haven v. State*, the court refused to partially invalidate a statute because it would "effect a result that the legislature never contemplated nor intended to accomplish." 162 Wn. App. 746, 754, 259 P.3d 280 (2011). That is not what the Youth seek here. The legislature intented to: "(a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020; (b) minimize the potential to export pollution, jobs, and economic opportunities; and (c) reduce emissions at the lowest cost to Washington's economy, consumers, and businesses." RCW 70.235.005(3). As the Youth alleged, the targets do the opposite, which is uncontrovertible ten years after the targets were enacted and GHG emissions continue to grow. CP 67-70, ¶¶ 196-207. As the Youth clarified in their brief below, if the court believes that the challenged sections are not severable, then the Youth seek full invalidation of the statute. CP 309-10.

Genuine and opposing interests exist when parties dispute the existence of legal right or duty. *Id.* at 994–95. Not only do Respondents dispute the existence and applicability of the Youth's asserted legal rights and Respondents' duties thereunder, they dispute their creation, operation, and maintenance of a fossil fuel-based energy and transportation system and their knowledge that it creates an unreasonable risk of present and future harm to the Youth. CP 84, ¶¶ 2-3, CP 105, ¶¶ 145, 151, CP 106, ¶ 154.

Regardless of Respondents' purported "fundamental interest" in reducing Washington's greenhouse gas emissions, the facts alleged in the Complaint demonstrate Respondents' fidelity to a course of conduct that is causing dangerous climate change. CP 50-56. Respondents' unsupported and false claim that they are "ambitiously" using their authority to reduce GHG emissions is completely contradicted by their own documents and Washington's growing GHG emissions. *See, e.g.*, CP 51-52, ¶ 145(a)-(h). Respondents' have vigorously opposed, on numerous occasions, including in this suit, requests to reduce the state's GHG emissions by rates necessary to avert catastrophic climate change and preserve these Youths' fundamental rights. *See, e.g.,* CP 46-47, ¶¶ 133-34. The opposing interests of the Parties could not be more clear.

b. The Court Can Provide a Final and Conclusive Remedy

Respondents argued below that the courts cannot provide a final and conclusive remedy in this case. CP 134. Respondents admit the UDJA allows a "declaration of rights," but ignore the declaratory relief the Youth seek in this case. CP 70-71 (Request for Relief (A)-(E)). Further, as demonstrated in Section V(D), *supra*, Respondents mischaracterize the injunctive relief the Youth seek under RCW 7.24.080 and 7.40.[28] Arguments about the appropriate relief to protect the Youth's interests are entirely speculative prior to this Court's delineation of the scope of Respondents' liability, and the Youth requested relief is consistent with the judiciary's broad authority to "fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown*, 563 U.S. at 526; *McCleary*, 173 Wn.2d at 541 ("What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education."). The Court can, and must, provide a remedy in this case.

5. The APA Does Not Displace the Youth's Claims

Notwithstanding RCW 34.05.510, the Youth's constitutional claims against Respondent state agencies are not displaced by the APA, RCW

[28] Respondents did not challenge the Superior Court's authority to issue the injunctive relief requested in paragraphs (F) and (G) of Plaintiffs' Request for Relief. CP 71-72.

34.05.[29] The Youth do not seek review of individual agency actions. They challenge Respondents' *systemic* conduct in creating, controlling, operating, and maintaining the state's fossil fuel-based energy and transportation system, thereby causing and contributing to climate change in violation of the Youth's constitutional rights. No case holds that such a challenge must be brought under the APA. To the contrary, constitutional challenges of this nature to systemic government conduct have rightfully proceeded outside of the APA in other contexts. *See, e.g.*, *Braam ex rel. Braam*, 150 Wn.2d 689 (broad-based, non-APA case against Washington agency by foster children to protect their constitutional rights). In *Wash. State Coal. for the Homeless v. Wash. State Dep't of Social & Health Serv.*, this Court ruled that "[w]here . . . the plaintiffs are a class of children who are or will be affected . . . the most efficient and consistent resolution on the

[29] Respondents implicitly conceded that their APA arguments do not apply to the State and Governor. CP 135. The State and Governor are explicitly excluded from the APA; constitutional claims against them can only proceed under the UDJA. RCW 34.05.010(2). However, Respondents argued that the Governor should be dismissed as a Defendant because the claims against him are a collateral attack on agency action or inaction. This mischaracterizes the nature of the Youth's legal claims and ignores the allegations in the Complaint regarding the Governor's unconstitutional conduct. CP 18-19, ¶¶ 33–34, CP 43-44, ¶ 121, CP 45, ¶ 128, CP ¶ 46, 131, CP 47-48, ¶¶ 137-38. Respondents essentially argue the Governor is beyond constitutional command; such a position is contrary to law. *Cf. Clinton v. Jones*, 520 U.S. 681, 683 (1997) ("when the President takes official action, the Court has the authority to determine whether he has acted within the law."). Above and beyond his authority as head of the executive branch, the Governor plays a key role in formulating the state's energy and transportation policy that is injuring Plaintiffs. *See, e.g.*, Wash. Const. Art 3, § 5; RCW 43.21F.045(d); CP 18-19, ¶ 34, CP 47-48 ¶ 137. Respondent Inslee's unconstitutional actions can and should be subject to judicial review.

question is through a declaratory action, rather than a case-by-case, appeal-by-appeal basis in individual . . . proceedings." 133 Wn.2d 894, 916–17, 949 P.2d 1291 (1997). In so ruling, the majority rejected the dissenting opinion's position that "the APA provides the exclusive means of judicial review." *Id.* at 947 (Durham, C.J., dissenting).

When challenging agency action[30] under the APA, a petitioner can argue that an individual agency action violates constitutional provisions. RCW 34.05.570(2)(c) (final rules); RCW 34.05.570(3)(a) (agency orders in adjudicative proceedings); RCW 34.05.570(4)(c)(i) (other agency action). However, given the circumstances of this case, where it is Respondents' systemic actions continuing over several decades that harm these young children and threaten their fundamental rights, application of RCW 34.05.510, limiting the Youth's claims to the strictures of the APA, would violate their procedural due process right to meaningful review of their constitutional claims. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (statutory limited review procedures did not apply where they would foreclose "meaningful judicial review" of challenge to agency's pattern of unconstitutional conduct); *Webster v. Doe*, 486 U.S. 592, 603

[30] Some of Respondents' unconstitutional acts are not "agency actions" subject to the APA. "Agency action" does not include "any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests." RCW 34.05.010.

(1988) (interpreting federal APA to deny "any forum for a colorable constitutional claim" would "raise serious constitutional questions").

Determining whether procedural limitations, like those governing review of agency conduct in the APA,[31] effectuate a violation of due process, requires consideration of three factors: "(1) the potentially affected interest; (2) the risk of erroneous deprivation of that interest through the challenged procedures, and probable value of additional safeguards; and (3) the government's interest, including the potential burden of additional procedures." *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). Each of these factors favors the Youth.

First, the private interest at stake here is unquestionably of the highest constitutional importance because the Youth allege infringement of their fundamental rights. *Second*, there is an absolute risk of erroneous deprivation of the Youth's fundamental rights if they must plead their claims under and subject to the strictures of the APA. It is the systemic nature of Respondents' conduct and affirmative aggregate actions in creating, controlling, operating, and maintaining the state's fossil fuel energy and transportation system, that is causing the profound harms and

[31] *See, e.g.*, RCW 34.05.534 (exhaustion of administrative remedies required for each agency action); RCW 34.05.566 (limitation of review to record for individual agency action); RCW 34.05.542 (petition for judicial review of agency action must be filed within thirty days).

constitutional violations befalling the Youth. To force these Youth to individually challenge each of the myriad agency actions that have contributed to their injuries, within 30-day time frames, would be a herculean, if not impossible, task. Further, the limitation of review of each agency action to the agency record would foreclose consideration, review, and redress of the systemic nature of the constitutional violations at issue here as well as the severity of the harm. *See McNary*, 498 U.S. at 496 (limiting review of agency's pattern of unconstitutional violations to administrative records would preclude meaningful review). Moreover, many of the discriminatory agency actions comprising Respondents' systemic constitutional violations were committed decades ago, before these Youth were born and could even attempt to comply with the APA's deadlines for seeking review. *Amunrud*, 158 Wn.2d at 217 (procedural safeguards must be offered "at a meaningful time and in a meaningful manner."). To preclude review of these Youth's constitutional claims under the UDJA would not only risk erroneous deprivation of their rights; it would render such deprivation inevitable. *Downey v. Pierce County*, 165 Wn. App. 152, n.9, 267 P.3d 445 (2011) (case properly under UDJA because plaintiff "does not appear to have any other adequate remedy available to her . . . ."). *Third*, the government's interest in administrative efficiency favors litigating the Youth's claims as a single systemic challenge rather than a

myriad of challenges to a multitude of individual agency actions, which would undoubtedly prove costly, inefficient, and unduly burdensome for all parties involved.

It is unimaginable in our divided structure of government that Respondents' systemic and catastrophic constitutional violations could be placed beyond the Court's basic power and duty to safeguard fundamental rights. The very premise that *constitutional* claims could be precluded by *statute* runs contrary to the primacy of the constitution in the hierarchy of legal authorities. While RCW 34.05.510 may permissibly channel constitutional challenges to individual, discrete agency actions through the APA and it's strictures, its application in these unique circumstances would violate these Youth's procedural due process rights.

VI. CONCLUSION

For the reasons set forth above, the Youth respectfully request that this Court reverse the Superior Court's erroneous dismissal of their Complaint.

Respectfully submitted this 22nd day of January, 2019.

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I hereby certify that on the 22nd day of January, 2019, I served one true and correct copy of the foregoing on the following individuals using electronic mail in accordance with the parties' electronic service agreement:

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January 22, 2019 - 3:58 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96316-9
Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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80007-8

NO. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., a minor child by and through his guardian HELAINA PIPER, et al.

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON, et al.

Defendants/Respondents.

STATE OF WASHINGTON'S RESPONSE BRIEF

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I. INTRODUCTION

Washington is a recognized leader in addressing the urgent threat of climate change. For example, under Governor Inslee's watch, Washington became one of only two states to adopt greenhouse gas emissions standards; tens of millions of dollars were devoted to clean energy projects; and transportation emissions will decrease thanks to the biggest green transportation package ever passed in state history.

Wanting the State[1] to do more, a group of minor plaintiffs has cast off the political process and asks the judiciary to insert itself into the management and regulation of greenhouse gasses. Plaintiffs ask for the Court to closely manage, over the course of several decades, the climate response strategies chosen and implemented by the executive and legislative branches of government. This the judiciary cannot do.

The superior court properly dismissed Plaintiffs' claims as precluded by the separation of powers doctrine because the sweeping remedy sought—an injunction requiring the State to enact a "climate recovery plan" that would phase out fossil fuel use within 15 years and reduce greenhouse gas emissions by 96 percent by 2050, and decades of judicial oversight through continuing jurisdiction—would have required the

[1] Respondents Governor Inslee, the Departments of Ecology, Commerce, and Transportation and their directors, and the State of Washington are collectively referred to as "the State."

court to usurp the roles of the legislative and executive branches. Courts are not greenhouse gas regulatory agencies, and it is not their role to craft the State's approach for reducing greenhouse emissions.

At its core, Plaintiffs' claims are improper attacks on agency action and inaction under the Administrative Procedure Act (APA) and nonjusticiable under the Uniform Declaratory Judgment Act (UDJA). In addition, Plaintiffs claim a never-before-recognized constitutional right to a "healthful environment," pursue equal protection status based solely on the age of the Plaintiffs, and allege an unprecedented atmospheric trust doctrine, all of which lack a foundation in Washington law. The superior court's order of dismissal should be affirmed.

II. ISSUES PRESENTED

1. Whether the superior court properly dismissed Plaintiffs' claims as nonjusticiable and precluded by the separation of powers doctrine, where the relief sought would require the court to usurp the role of the legislative and executive branches to initiate and oversee a greenhouse gas regulatory regime.

2. Whether the superior court properly found that Plaintiffs failed to identify an individual fundamental constitutional right to a healthful environment, where no language or principle in the constitution provides such an affirmative individual right.

3. Whether the superior court properly found that Plaintiffs failed to state an equal protection claim based upon the disproportionate future impact of climate change on the young Plaintiffs due to their age, where well-settled precedent establishes

that young Plaintiffs are not a protected class for equal protection purposes.

4. Whether Plaintiffs' atmospheric trust doctrine claim lacks a basis in state law, where the public trust doctrine in Washington applies to navigable waters and the submerged lands beneath them, not to the atmosphere.

III. STATEMENT OF THE CASE

Washington State has implemented numerous actions to decrease greenhouse gas emissions and mitigate against the threat of climate change. During Governor Inslee's administration alone, the executive branch initiated or implemented over two dozen actions, including promulgating the Clean Air Rule to set greenhouse gas emission standards (WAC 173-442),[2] passing the greenest transportation package in state history,[3] and establishing unprecedented funding and incentives for clean energy,[4] new solar,[5] electric vehicles,[6] and electric vehicle charging

[2] On April 27, 2018, Thurston County Superior Court invalidated the Clean Air Rule as exceeding Ecology's statutory authority. The Supreme Court accepted direct review and heard oral argument on March 19, 2019.

[3] Laws of 2015, 3d Spec. Sess., ch. 44.

[4] Laws of 2013, 2d Spec. Sess., ch. 19, § 1074; Laws of 2015, 3d Spec. Sess., ch. 3, § 1028(11); Laws of 2018, ch. 2, § 1013.

[5] Laws of 2017, 3d Spec. Sess., ch. 36.

[6] Executive Order 18-01 (directing state agency directors to prioritize the lease or purchase of battery-electric vehicles) https://www.governor.wa.gov/sites/default/files/exe_order/18-01%20SEEP%20Executive%20Order%20%28tmp%29.pdf; Washington State Electric Fleets Initiative (2015), http://www.governor.wa.gov/sites/default/files/documents/ElectricFleetsInitiative12_07_2015.pdf.

stations.[7] *See also* Exec. Order 14-04 (directing new programs to reduce greenhouse gas emissions and directing the Governor's carbon taskforce to develop recommendations for comprehensive climate change legislation).

The State has also adopted numerous other statutes and policies, which have been implemented by the executive branch to reduce emissions. These include reducing power plant emissions under RCW 80.70.020 and RCW 80.80.040(3)(c)(i); improving appliance efficiency under RCW 19.260.040; promoting renewable energy under RCW 19.285.040; adopting a greenhouse gas emission standard for electric power under RCW 80.80.040; and implementing California's "Clean Car" standards embodying the most stringent greenhouse gas motor vehicle emission standards in the nation under RCW 70.120A.010.[8]

Plaintiffs want the State to do more. In this lawsuit, they seek sweeping changes to the State's climate change policy through action in the courts. Plaintiffs ask the judiciary to order the State to develop a "climate recovery plan" to reduce greenhouse gas emissions by 96 percent by 2050

[7] WSDOT, Washington State Electric Vehicle Action Plan (Feb. 2015), http://www.wsdot.wa.gov/NR/rdonlyres/28559EF4-CD9D-4CFA-9886-105A30FD 58C4/0/WAEVActionPlan2014.pdf; *see also* http://www.wsdot.wa.gov/Projects/ Funding/CWA/.

[8] Under the federal Clean Air Act, states are generally preempted from adopting their own motor vehicle emission standards. 42 U.S.C. § 7543(a). California, however, may adopt its own standards if it receives a waiver from EPA and if its standards are at least as stringent as the federal standards. 42 U.S.C. § 7543(b). Other states may then choose to adopt California's standards, which is what Washington did. 42 U.S.C. § 7507.

and for the judiciary to enforce the plan through continuing jurisdiction for decades to come. *See* CP 40–41, 72 (¶ H). To achieve this, Plaintiffs contend that "the state needs to transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years, and then generate 90% of its electricity from carbon-free sources by 2030." CP 41. Plaintiffs argue that the State's "fossil fuel-based energy and transportation system," violates their rights to substantive due process and equal protection, and violates the public trust doctrine. CP 2, 4, 56–67; Appellants' Opening Brief (App. Br.) at 1, 3, 10, 25, 42, 44, 46. Plaintiffs also allege that the State's greenhouse gas reduction limits, RCW 70.235.020, .050, are unconstitutionally inadequate. CP 69.

This is not the first time that the Plaintiffs have sought to enact a greenhouse gas regulatory program through the judiciary. In 2012, the same legal counsel filed a similar suit against the State, Governor Gregoire, and three state agencies, alleging a public trust doctrine claim and seeking 6 percent in annual emissions reductions. *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) (unpublished).[9] The *Svitak* plaintiffs "sought a declaration that the public trust doctrine applies to the atmosphere and that the State has a fiduciary duty . . . to reduce carbon

[9] As an unpublished opinion, this decision lacks precedential value, is not binding, and is cited for such persuasive value as the Court deems appropriate. GR 14.1.

dioxide emissions by six percent per year" to achieve a certain numeric goal by 2100. *Id.* at *1. After the Supreme Court denied direct review, the Court of Appeals affirmed the superior court's dismissal of the case in an unpublished opinion based largely on separation of powers grounds. *Svitak*, 2013 WL 6632124, at *2. *See also Svitak v. State*, Supreme Court No. 87198-1.

In 2014, another group of minor plaintiffs with the same legal counsel filed a second suit under the APA, RCW 34.05, alleging that Ecology violated the public trust doctrine and the constitution by denying their petition for rulemaking to reduce greenhouse gas emissions by a specified amount. *Foster v. Dep't of Ecology*, No. 75374-6-I, 2017 WL 3868481 (Wash. Ct. App. Sept. 5, 2017) (unpublished). The Court of Appeals ultimately concluded that the superior court abused its discretion in ordering Ecology to adopt a rule.[10] *Id.* at *7.

In the present case, the State moved to dismiss under CR 12(c), arguing that the case was nonjusticiable because (1) the relief sought would violate the separation of powers doctrine, (2) the claims constitute a challenge to agency action and inaction that must be brought under the APA, (3) the claims were improper under the UDJA, and that (4) Plaintiffs

[10] Ecology did separately adopt greenhouse gas emissions standards for facilities and fossil fuel emissions, WAC 173-442, but it was adopted based on a directive from Governor Inslee and was unrelated to the *Foster* lawsuit. *Foster*, 2017 WL 3868481, at *3.

failed to state valid claims under the public trust doctrine or the constitution. CP 127–53.

The superior court agreed and dismissed the case. The court recognized that the sweeping declaratory and injunctive relief sought by Plaintiffs would require the court to rewrite the state's statutory climate goals in RCW 70.235.020 and legislate an extensive regulatory regime in violation of the separation of powers doctrine. Accordingly, the court found that the claims presented nonjusticiable political questions that must be addressed through the other branches of government. CP 447. In addition, the court found that Plaintiffs' constitutional and other claims lacked a basis in law. CP 448–51. Plaintiffs now appeal.

IV. STANDARD OF REVIEW

Washington appellate courts review a dismissal under CR 12(c) de novo. *P.E. Sys. LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). A motion for judgment on the pleadings is treated identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. *Id.* For both, the purpose is to determine if a plaintiff can prove any set of facts justifying relief. *Id*. For purposes of the motion, facts well-pled in the complaint are deemed true. *See Bailey v. Town of Forks*, 108 Wn.2d 262, 264, 737 P.2d 1257 (1987). However, conclusory allegations and facts that are not well-pled are not deemed admitted. *See Hodgson v. Bicknell*, 49 Wn.2d 130,

136, 298 P.2d 844 (1956) (motion for judgment on the pleadings admits only facts that have been well pled and does not admit mere conclusions), *Shutt v. Moore*, 26 Wn. App. 450, 453, 613 P.2d 1188 (1980) (conclusory allegations are insufficient to defeat CR 12(b)(6) motion). Dismissal is appropriate where the complaint sets out a claim that is either not recognized or is directly contrary to Washington law. *See, e.g.*, *Havsy v. Flynn*, 88 Wn. App. 514, 518, 945 P.2d 221 (1997).

Under the UDJA, courts have discretion to determine whether to entertain a declaratory judgment action. A trial court's decision not to consider such an action is reviewed for an abuse of discretion, except that questions of law are reviewed de novo. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001); *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). An abuse of discretion exists only when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Id*.

V. ARGUMENT

The superior court properly dismissed Plaintiffs' claims due to fatal procedural and substantive defects. Plaintiffs seek a sweeping, court-enforced climate recovery plan as a remedy, but this requires legislative—not judicial—action. Such claims are squarely precluded by the separation of powers doctrine and are improper under the UDJA.

Further, at its core, Plaintiffs' claims are a complaint that state agencies have not done enough to address climate change through agency action, but Plaintiffs fail to plead their claims under the APA which is the exclusive means to review agency action and inaction.

As for the substance of their claims, Plaintiffs ask the Court to establish a new fundamental right to a healthful environment and claim that their substantive due process rights have been violated because the State has failed to protect this as-of-yet, unidentified right. Plaintiffs also plead an equal protection discrimination claim based solely on their age and they ask the court to recognize an atmospheric trust doctrine. These claims lack merit under state and federal constitutional law. Because Plaintiffs' claims are both procedurally and substantively infirm, the superior court properly dismissed them under CR 12(c). This Court should affirm.

A. Plaintiffs' Claims are Nonjusticiable

1. The separation of powers doctrine precludes Plaintiffs' claims because only the Legislature can adopt new laws

Plaintiffs claim that the State's "fossil fuel-based energy and transportation system" is unconstitutional and seek a court order that would dismantle that system. CP 2, 4, 40–41, 72 (¶ H). To accomplish this, the State would necessarily have to pass new laws. However, under separation of powers principles, it is the role of the Legislature, not the judiciary, to set

policy and enact laws. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). This is because courts are not well-equipped to conduct their own balancing of the pros and cons associated with legislative policy. *Rousso v. State*, 170 Wn.2d 70, 74, 239 P.3d 1084 (2010).

Similarly, when an issue involves matters of political and governmental concern, courts consider such questions to be nonjusticiable "political questions." *Brown v. Owen*, 165 Wn.2d 706, 712, 206 P.3d 310 (2009). Like the separation of powers doctrine, the primary concern is "that the judiciary not be drawn into tasks more appropriate to another branch and that its institutional integrity be protected." *Id.* at 719. Courts thus decline to intervene in legal challenges that invoke fundamental public policy considerations and political questions best left to the Legislature. *See also Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (Legislature, not the court, determines the wisdom of legislative policy).

In accordance with these principles, Washington courts have steadfastly declined to adopt regulatory policy under the guise of resolving constitutional questions: "This Court is not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can we determine which risks are acceptable and which are not. These are not questions of law; we lack the tools." *Id.* at 88.

For example, in *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), the plaintiffs claimed that legislation authorizing gambling on horse races unconstitutionally failed to authorize similar gambling on dog races. The Court of Appeals rejected the claim because the requested relief "is primarily a political question in an area of almost complete legislative discretion and in an area vitally affecting public safety and morals." *Id*. at 321. More recently, the Court of Appeals declined to hear a lawsuit by animal rights activists who challenged the legality of the exemptions contained within the animal cruelty statutes. *See Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 244, 242 P.3d 891 (2010) (*NARN)*. The court noted that the judiciary is in no position to second guess the Legislature's balancing of the policy interests inherent in legislation. *NARN*, 158 Wn. App at 245–46.

Under this firmly established body of case law, the superior court correctly concluded that Plaintiffs' claims are nonjusticiable:

> Any climate action plan and regulatory regime would require the assessment of numerous costs and benefits, balancing many interests, and resolving complex social, economic, and environmental issues. This policy-making is the prerogative and the role of the other two branches of government, not of the judiciary.

CP 447. The superior court recognized that Plaintiffs' challenge to the state's energy and transportation system would necessarily require a remedy

that would force the Court to step into the realm of policy making reserved for the Legislature and the Executive.

The *Svitak* court dismissed the Plaintiffs' nearly identical 2012 lawsuit on these same grounds. *Svitak,* 2013 WL 6632124, at *2. Like the superior court here, the *Svitak* court understood that the relief sought by the plaintiffs "would necessarily involve resolution of complex social, economic, and environmental issues" and that ordering such relief would impermissibly invade legislative prerogatives. *Id*.

Plaintiffs argue that the superior court mischaracterized their requested relief and the scope of the judiciary's equitable powers. App. Br. at 31. Not so. Plaintiffs challenge the state's entire energy and transportation system. *See* App. Br. at 3–4; CP 2–3 (¶¶ 1–2), 50 (¶¶ 143-48). In doing so, they ask the courts to revamp that system through a detailed and prescriptive permanent injunction compelling government action that hews to the policy and regulatory approach that Plaintiffs champion. CP 72 (¶ H). Specifically, Plaintiffs seek a court-enforceable "climate recovery plan" that would reduce greenhouse gas emissions by 96 percent by 2050. CP 40–41 (¶ 114), 72 (¶ H). To achieve this, Plaintiffs contend that "the state needs to transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years, and then generate 90% of its electricity from carbon-free sources by 2030." CP 41 (¶ 114). But

Plaintiffs identify no current statutes or other authority that would allow the defendant state agencies to force every Washingtonian to surrender their natural gas furnace and petroleum-fueled vehicle, or to otherwise implement and enforce the plan that Plaintiffs seek. There is none. The Legislature would necessarily need to pass new laws to achieve the results sought by the Plaintiffs.

Plaintiffs argue that the political question and separation of powers doctrines are not implicated because Plaintiffs are asking the judiciary to act as a check on the coordinate branches of government by policing constitutional compliance in a declaratory judgment. App. Br. at 32. This claim is belied by their own brief. Plaintiffs contend that the judiciary "can set the constitutional floor necessary for the preservation of the Youth's rights – the maximum safe level of CO_2 concentrations and the timeframe in which that level must be achieved" and issue "an order for Respondents to develop and implement a plan of their own devising." App. Br. at 32–33 (emphasis omitted). But there is no authority that would allow the named state agencies to implement the regulatory regime necessary to accomplish Plaintiffs goals.[11] The relief requested would necessarily require legislative

[11] As noted in footnote 8, with regard to motor vehicle emissions and fuel standards federal law generally preempts states from setting key standards that would reduce greenhouse gasses.

action. But ordering the Legislature to pass laws violates separation of powers. *Hale*, 165 Wn.2d at 494; *Rousso*, 170 Wn.2d at 74.

Plaintiffs also suggest that it is premature at this stage to "speculate as to the propriety of any relief that may ultimately be awarded." App. Br. at 31. But, no speculation is needed. Plaintiffs seek a declaration that the State Defendants have violated their constitutional rights by "creating, operating, and maintaining a fossil fuel based energy and transportation system . . . ." App. Br. at 1. *See* CP 56–72. The relief they seek is a dismantling of that system, something that would clearly require legislative action. Unlike *Baker v. Carr*, where there was "no cause…to doubt" that the court could fashion relief for the alleged constitutional violations, the breadth of Plaintiffs' claim and the unavailability of any relief is a central failing of Plaintiffs' case. *Baker v. Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Finally, Plaintiffs' reliance on *McCleary*, is misplaced. App. Br. at 2, 17 n. 10, 45, 31–33. *McCleary* involved the "*paramount duty* of the state to make ample provision for the education of all children . . . ." *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). The Supreme Court granted relief that ensured the State would satisfy this positive constitutional right and perform its paramount duty. *McCleary*, 173 Wn.2d at 483, 514, 518–19; *see* Const. art. IX, § 1.

Rather than seeking to enforce an established "positive constitutional right," as in *McCleary*, Plaintiffs here seek to enforce a silent, unestablished constitutional right to a healthful environment. *McCleary*, 173 Wn.2d at 518–19. Far from requiring the Legislature to provide sufficient funding to fulfill its express paramount constitutional obligation, Plaintiffs here ask the Court to require the State to enact a comprehensive greenhouse gas regulatory regime tuned to specific emission reduction requirements. This, the Court cannot do without violating the separation of powers doctrine. The superior court properly dismissed Plaintiffs' case.

a. Invalidation of RCW 70.235.020 and .050 would also violate separation of powers

RCW 70.235.020 sets statewide greenhouse gas reduction limits, and RCW 70.235.050 requires state agencies to meet those limits for their agency operations. Plaintiffs challenge these statutes claiming the limits are not stringent enough. App. Br. at 42–43; CP 69 (¶¶ 203–06). It is hard to understand what Plaintiffs hope to achieve because invalidation of the statute would result in the State having *no* greenhouse gas limits and state agencies would no longer be obliged to reduce their own emissions. What the Plaintiffs really seek is for the Court to invalidate these statutes and then

establish its own enforceable reduction limits. This too would violate separation of powers.

Courts will not rewrite statutes. *Jensen v. Henneford*, 185 Wash. 209, 224, 53 P.2d 607 (1936). This is because doing so would impute to the Legislature an intent not sustained by the words of the statute and would require the court to indulge in an impermissible legislative act. *Id.; see also Pasado's Safe Haven v. State*, 162 Wn. App. 746, 754–55, 259 P.3d 280 (2011). In *Pasado's*, the Court of Appeals refused to declare provisions of an animal cruelty statute that exempted slaughters performed for religious rituals unconstitutional. *Id.* at 761–62. The court found that excising those portions of the statute would encroach upon the Legislature's authority by creating a result that the Legislature never contemplated. *Id.* at 755, 759.

Plaintiffs seek to rewrite existing statutes in the very manner rejected by *Pasado's*. But the *Svitak* court already rebuffed this attempt, noting that the Legislature had acted in this arena and the plaintiffs simply wanted the court to accelerate the pace and extent of the action. *Svitak,* 2013 WL 6632124, at *2. Courts, though, will not second guess the policy wisdom of the Legislature by rewriting a statutory emission reduction schedule. *Id.; see also State v. Peeler*, 183 Wn.2d 169, 185, 349 P.3d 842

(2015) ("We do not rewrite the law to insert our own policy judgments."). Plaintiffs' challenge to RCW 70.235.020 and .050 fails.

Plaintiffs' challenge to the statutes fails for the additional reason that Plaintiffs mischaracterize what the statutes do. They claim that the statutes "legalize dangerous levels of cumulative GHG emissions and perpetuate an unconstitutional energy and transportation system . . . ."App. Br. at 42. The statutes do no such thing. Far from authorizing emissions, RCW 70.235 requires *reductions* in greenhouse gas emissions. RCW 70.235.020(1)(a) ("The state shall limit emissions of greenhouse gases"); RCW 70.235.050(1) ("All state agencies shall meet the statewide greenhouse gas emission limits"). The Legislature has already begun to act to address the widespread issue of climate change by setting a state greenhouse gas emission schedule. *See Svitak,* 2013 WL 6632124, at *2. Plaintiffs cannot obtain a different schedule through the courts.

b. Ordering the Governor to engage in discretionary actions would violate separation of powers

Where Plaintiffs are not improperly seeking legislation, Plaintiffs improperly seek to compel the Governor to administer the law in a particular way. App. Br. at 41–42, 46 n.29. Such a claim against the Governor must be pursued as a mandamus action under RCW 7.16. Plaintiffs did not properly plead a mandamus claim against the Governor, but even if they

had, it would fail because the Court cannot order the Governor to exercise his discretion in a particular fashion without violating separation of powers.

In the mandamus context, the Supreme Court has refused to compel discretionary acts by elected officials. *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994). Plaintiffs argue in a footnote that they do not seek to compel discretionary action because, in their view, such actions are required by the Constitution. App. Br. at 33 n.23. But mandamus is not available to order a state official to "adhere to the constitution." *Walker,* 124 Wn.2d at 407–08. The mandamus remedy only compels performance of ministerial or nondiscretionary tasks.[12] *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010). Even then, mandamus is only available to compel discrete identifiable acts, not to compel an entire course of conduct, as Plaintiffs ask here. *Walker*, 124 Wn.2d at 407–08.

The Court in *SEIU Healthcare* refused to compel then-Governor Gregoire to include specific items in the budget she submitted to the Legislature. *SEIU Healthcare*, 168 Wn.2d at 599–600. The Court reasoned that the Governor's inclusion of budget items is not ministerial because it required her to make decisions about budget priorities. *Id*. The creation and

[12] Plaintiffs' citation to *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) in footnote 23 of their brief is inapposite. *Nurse* dealt with a statutory exception to the Federal Tort Claims Act, not with mandamus or the scope of relief available to a court regarding discretionary action by a government executive.

submission of budgets are discretionary acts, which are "in their nature political" and "are, by the constitution and laws, submitted to the executive . . . ." *Id.* at 600.

Here, because the Governor has already taken numerous actions to reduce emissions, it is not clear what more Plaintiffs think he can do without additional statutory authority. But to the extent that Plaintiffs want the judiciary to order the Governor to propose different laws to the Legislature or to issue different executive orders, such actions go to the heart of the Governor's discretionary authority and cannot be judicially compelled. *Id.* at 599–600.

2. Plaintiffs' claims are nonjusticiable under the UDJA

Plaintiffs plead their case under the UDJA. App. Br. at 43. CP 3, 70–71. The UDJA can be used to determine statutory and constitutional rights in an appropriate case. However, courts will only proceed where a justiciable controversy exists that can be finally and conclusively resolved through a declaratory judgment. *To-Ro Trade Shows*, 144 Wn.2d at 410–11.

It is well-settled law that a justiciable controversy under the UDJA requires four elements:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,

> (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Id. at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). If these elements are not met, "the court steps into the prohibited area of advisory opinions." *To-Ro Trade Shows,* 144 Wn.2d at 416. Here, the Court cannot provide a final and conclusive remedy under the fourth factor. Far beyond seeking a declaration of rights—as the UDJA allows—Plaintiffs seek a sweeping permanent injunction compelling government action that hews to the specific policy approach that Plaintiffs champion.

Specifically, Plaintiffs seek a court-enforceable "climate recovery plan" that would reduce greenhouse gas emissions by 96 percent by 2050. *See* discussion *supra* Section V.A.1. Such a climate policy would have to be accomplished through a new regulatory regime enacted by the Legislature—something unavailable as a remedy due to the separation of powers doctrine. Plaintiffs' mere reference to the judiciary's general authority to fashion injunctive relief is not sufficient to overcome this deficit. *See* App. Br. at 45. Plaintiffs also cite two inapposite cases, *Brown v. Plata* and *McCleary v. State*, neither of which support ordering the injunctive relief that Plaintiffs seek here. App. Br. at 45.

The Governor and the State agencies do have the authority to *develop and propose* plans for reducing greenhouse gas emissions. Indeed, they have done so numerous times. CP 41–50 (¶¶ 115–42), 97–100 (¶ 129). The Governor also has authority to make recommendations to the Legislature, as he has repeatedly done. Const. art. III, § 6. He also has a duty to ensure that the laws are faithfully executed. Const. art. III, § 5. However, neither the Governor nor State agencies have authority to enact the laws that would be necessary to enforce Plaintiffs' proposed plan. That authority lies exclusively with the Legislature or the people through initiative. Const. art. II, § 1.

In briefing below, Plaintiffs baldly asserted that the Governor and state agencies have existing authority to implement the climate recovery plan they seek. CP 291, 301–02, 307–08 (nn.4, 11 & 14). But Plaintiffs have *never* identified what authority that would be or even what actions the judiciary could order to achieve the requested relief.

The primary statute Plaintiffs identify as authorizing additional action is one provision in the state Clean Air Act: RCW 70.94.331. CP 308; App. Br. at 33 n.23. In fact, Ecology *did* adopt greenhouse gas emission standards under this provision to limit the emissions from facilities and

fossil fuels. Those emission standards were struck down by Thurston County Superior Court as exceeding Ecology's statutory authority.[13]

The only other statute identified by Plaintiffs is RCW 43.21F.010, which is a legislative policy statement related to energy planning. App. Br. at 33 n.23. Policy statements do not constitute substantive law and cannot constitute a legal basis for agency action. *Kilian v. Atkinson*, 147 Wn.2d 16, 23, 50 P.3d 638 (2002).

Plaintiffs identify no other statutory authority that would enable the state agencies or Governor to implement the sweeping reform that they seek. The judiciary therefore cannot provide final and conclusive relief to the Plaintiffs. RCW 7.24.060 (court may refuse declaratory judgment if it "would not terminate the uncertainty or controversy giving rise to the proceeding"); *To-Ro Trade Shows*, 144 Wn.2d at 411 (requiring judicial determination to be final and conclusive). Plaintiffs' claims are nonjusticiable under the UDJA and were properly dismissed on this basis as well.

3. Plaintiffs were required to plead their claims against agency action and inaction under the APA

At its core, Plaintiffs' case contends that the State's efforts through agency action have been insufficient to limit emissions. These claims fail

[13] *See* supra note 2, (the Supreme Court accepted direct review and heard oral argument on March 19, 2019).

for the additional reason that they were not brought under the APA, which provides "the exclusive means of judicial review of agency action." RCW 34.05.510, .570(4); *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 138 Wn.2d 161, 178, 979 P.2d 374 (1999); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). And, to the extent that Appellants challenge the Governor's actions, they are essentially arguing that he has not directed state agencies to do more to reduce emissions. App. Br. at 41; CP 18–19 (¶¶ 33–34), 47–48 (¶¶ 137–38). This too is an improper collateral attack on agency action or inaction, and such claims must be brought against the agencies exclusively under the APA. RCW 7.24.146; RCW 34.05.510; *see also Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 812–13, 6 P.3d 30 (2000), *as amended* (Aug. 11, 2000) (Governor can issue executive orders to direct agencies to use existing authority, but cannot create obligations having the force and effect of law).

Plaintiffs contend, however, that they do not seek review of individual agency actions, but instead seek to challenge "systemic conduct in creating, controlling, operating, and maintaining the state's fossil fuel-based energy and transportation system, thereby causing and contributing to climate change . . . ." App. Br. at 46 (emphasis omitted).

Although Plaintiffs now point to unspecified "systemic conduct" as the basis for their claims, *id.,* their Complaint identifies a number of agency

actions that they allege are unconstitutional or unlawful.[14] For example, Plaintiffs identify the Transportation Commission's development of a 20-year Washington Transportation Plan, CP 22 (¶ 43), Ecology's denial of a petition for rulemaking on climate change, CP 46–47 (¶ 133), and Commerce's December 2016 energy strategy update to the Legislature, CP 49 (¶ 141), to name a few. Every single one of the named agency actions can and must be challenged under the APA.

Indeed, many of these actions already have been challenged under the APA, including Ecology's 2017 issuance of a shoreline permit and water quality certification for a proposed methanol plant in Kalama and Ecology's promulgation of the Clean Air Rule. *See* CP 53 (¶¶ 145(m), (n)). And some of these same Plaintiffs already challenged Ecology's denial of their petition for rulemaking under the APA. *Foster*, 2017 WL 3868481. Simply labeling a large number of agency actions as a "systemic policy, practice and custom" does not change the fact that these actions must be reviewed under the APA. Plaintiffs' conclusory allegations that a number of specific agency actions constitute a "system" or a "pattern" does not circumvent the exclusivity provision of the APA. RCW 34.05.510.

[14] Appellants do not identify any specific actions by the agencies that constitute this alleged "systemic conduct." Such a vague and conclusory allegation is insufficient to defeat a motion to dismiss under CR 12(c). *See Hodgson*, 49 Wn.2d at 136; *Shutt*, 26 Wn. App. at 453.

Plaintiffs suggest that their "systemic" challenge would be more efficient and appropriate than requiring appeals of many specific agency actions. App. Br. at 46–47. The cases cited by Plaintiffs, however, involved situations where the state was providing direct care to foster and homeless children, and the state's specific practices in providing such care was alleged to be causing harm to the children. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 702, 81 P.3d 851 (2003); *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 912, 133 Wn.2d 894, 949 P.2d 1291 (1997). These cases are a far cry from Plaintiffs' conclusory allegation that the agencies have engaged in unspecified systemic conduct that is preventing the state's energy and transportation systems from being dismantled quickly enough. Simply put, *Braam* and *Wash. Coalition for the Homeless* do not help the Plaintiffs here.

Plaintiffs acknowledge that they can bring their constitutional claims under the APA. App. Br. at 47. However, they argue that doing so violates their due process rights and denies them meaningful review because of the "strictures" of the APA. *Id*. These "strictures" purportedly include the APA's 30-day appeal period, the large number of actions that affect climate change, and the fact that some of the unidentified actions Plaintiffs seek to challenge occurred decades ago, before Plaintiffs were born. App. Br. at 47–49. Judicial review of agency decisions under the APA, however, is

well-established as the effective and appropriate means for judicial consideration of government decision-making. *E.g., Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 354, 271 P.3d 268 (2012).

Indeed, it is through specific agency actions, such as environmental permits, construction designs, and long-term plans and strategies that the State's impact on climate change is implemented and can be most effectively reviewed. Under the State Environmental Policy Act, RCW 43.21C, agencies must consider whether projects or plans will foreseeably cause a significant, cumulative impact to climate change. WAC 197-11-060(4)(e). Judicial review under the APA of these kinds of decisions provides courts with adequate oversight to ensure agencies are acting within their authority and are reaching non-arbitrary, rational decisions with regard to climate change.

B. The Superior Court Correctly Denied Plaintiffs' Due Process Claims[15]

In granting the State's CR 12(c) motion, the superior court properly understood the nature of the right Plaintiffs are seeking to protect and recognized that it is not a "fundamental" right under the Washington

[15] Respondent Governor Inslee does not join subsections B or C of this brief, which argue that there is no fundamental constitutional right to a stable climate. In not joining these sections of the brief, the Governor chooses to rest on the strength of the preceding arguments, rendering it unnecessary to take a position on the constitutional issues raised by Appellants.

Constitution that triggers substantive due process protections. Thus, there is no error.

1. Courts impose "judicial self-restraint" when considering what rights are fundamental

Our state constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law," which is analogous to federal Fourteenth Amendment protections for individuals from state action. U.S. Const. amend. XIV; Const. art. I, §. 3. Substantive due process protects individuals from arbitrary government action. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). This Court has held that "[s]ubstantive due process forbids the government from interfering with a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest." *In re Det. of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

The State agrees with Plaintiffs that what rights are considered "fundamental" has "not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). The *Poe* court recognized that courts must strike a balance between individual liberty rights and the overarching needs of society: "[t]he best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of

the individual, has struck between that liberty and the demands of organized society." *Id.* at 542. Judges are not "free to roam where unguided speculation might take them" but must respect the balance between individual liberty and the needs of the community at large, which is informed by our national tradition. *Id*. Indeed, "[n]o formula could serve as a substitute, in this area, for judgment and restraint." *Id*.

This principle is reinforced in *Washington v. Glucksberg*, which held that courts must exercise "utmost care" when considering whether to expand substantive due process protections, because by doing so (and thus imposing strict scrutiny), the court effectively moves the liberty interest "outside the arena of public debate and legislative action." *Wash. v. Glucksberg*, 521 U.S. 720, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The Washington Supreme Court recognized this principle in *Morgan* when it declined to declare a fundamental right to competency in the context of civil commitment. *Morgan,* 180 Wn.2d at 324; *see also Ockletree v. Franciscan Health Sys*., 179 Wn.2d 769, 779–81, 317 P.3d 1009 (2014) (right of action against private employer discrimination is an important, but not fundamental, right because the state constitution does not prohibit discrimination in private employment).

2. There is no fundamental right to a "healthful and pleasant environment" under the due process clause

In an attempt to sidestep the nonjusticiability issues, Plaintiffs argue that our state constitution affords them an unenumerated (and historically unrecognized) right to "a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." CP 56–61 (¶¶ 149–73), 67–70 (¶¶ 196–207). The superior court correctly declined to expand substantive due process to include a right to a clean environment. CP 448.

The State agrees with Plaintiffs that a healthful environment and stable climate are critically important. Protection of our shared climate is especially important today as we endeavor to mitigate decades of global greenhouse gas emissions that entered our atmosphere through the independent actions of billions of human beings and millions of businesses. As important as it is, however, a healthful environment is not a fundamental individual right recognized by the state constitution. This Court has never held that a citizen possesses such a fundamental right that triggers due process protections, and the federal courts that have considered the question are nearly unanimous in their rejection of it.[16]

[16] *See Clean Air Coun. v. United States*, No. 17-4977, 2019 WL 687873, at *8 (E.D. Pa. Feb. 19, 2019); *S.F. Chapter of A. Philip Randolph Inst. v. Envtl. Prot. Agency*, No. C 07-04936, 2008 WL 859985, at *6–7 (N.D. Cal. Mar. 28, 2008); *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426 (8th Cir. 1992); *Ely v.*

Clean Air Council is a recent example. In that case, a group of plaintiffs which included minors sought a declaratory judgment that the U.S. government's actions (or failures to act) would exacerbate climate change in violation of the plaintiffs' Fifth Amendment due process rights. *Clean Air Coun. v. United States*, No. 17-4977, 2019 WL 687873, at *24 (E.D. Pa. Feb. 19, 2019). The court held that individuals do not possess a fundamental liberty interest in a "life-sustaining climate system" and thus "there is no constitutional right to a pollution-free environment." *Id*. at *8 (quoting *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980).

Plaintiffs rely entirely upon *Juliana v. United States*, arguing that it is the only case that has precedential value for their claims against the State. App. Br. at 16. The *Juliana* court, while recognizing the judiciary must exercise "utmost care" when considering expanding substantive due process to additional rights or liberty interests, nevertheless held that "'new' fundamental rights are not out of bounds," and that "the right to a climate

Velde, 451 F.2d 1130, 1139 (4th Cir. 1971); *MacNamara v. Cty. Council of Sussex Cty.*, 738 F. Supp. 134, 142–43 (D. Del. 1990), *aff'd* 922 F.2d 832 (3d Cir. 1990); *Sequoyah v. Tenn. Valley Auth*., 480 F. Supp. 608, 611 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980); *Upper W. Fork Watershed Ass'n. v. Corps of Eng'rs, U. S. Army*, 414 F. Supp. 908, 931–32 (N.D. W.Va. 1976) *aff'd*, 556 F.2d 576 (4th Cir. 1977); *Pinkney v. Ohio Envtl. Prot. Agency,* 375 F. Supp. 305, 310 (N.D. Ohio 1974); *Hagedorn v. Union Carbide Corp*., 363 F. Supp. 1061, 1064–65 (N.D. W. Va. 1973); *Tanner v. Armco Steel Corp*., 340 F. Supp. 532, 537 (S.D. Tex. 1972). *But see Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

system . . . is quite literally the foundation of society . . . ." *Juliana v. United States,* 217 F. Supp. 3d 1224, 1249 (D. Or. 2016). However, as the superior court and the court in *Clean Air Council* recognized, *Juliana* is an outlier. CP 448; *Clean Air Coun.,* 2019 WL 687873, at *15.

This is because the *Juliana* court improperly relied upon *Obergefell v. Hodges* to justify expanding substantive due process to the realm of climate change policy. *Juliana,* 217 F. Supp. 3d at 1249. The fundamental right at issue in *Obergefell* was an individual's right to marry, which the Court extended to same-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d 609 (2015). This is an individual liberty interest closely linked to the concept of individual autonomy; like choices concerning contraception and childrearing, a person's choice regarding marriage is constitutionally protected as falling within an individual right of privacy. *Id*. at 2599. Moreover, the Court did not carve out a new fundamental liberty interest from whole cloth; instead, it "inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right." *Id*. at 2602.

The *Juliana* court did something much different; it extended due process protections to an individual right regarding a community resource (our climate) that has never been previously recognized by the courts and is not "deeply rooted in this Nation's history and tradition".

See McDonald v. City of Chicago, 561 U.S. 742, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). While the district court in *Juliana* wanted to "provide some protection against the constitutionalization of all environmental claims," its opinion fails to offer any meaningful limitation on the fundamental right it recognized. *See Juliana,* 217 F. Supp. 3d at 1250 ("where a complaint alleges governmental action is affirmatively and substantially damaging the climate system . . . it states a claim for due process violation").

In this case, Plaintiffs ask the Court to declare an even broader right than the right declared by the district judge in *Juliana*. They claim a fundamental right to a "healthful and pleasant environment" which includes a "stable climate system that sustains human life and liberty." App. Br. at 13–14. While Plaintiffs contend they have "narrowly" described this right, they do not define "healthful and pleasant environment" or what type of climate system is stable enough to sustain their due process rights to life, liberty, or property. *See id*. In dismissing Plaintiffs' due process claim, the superior court recognized that a stable climate is "the goal of a people, rather than the right of a person." CP 449. This places Plaintiffs' claims within the realm of the political process, not the courts. *Id*.; *see also Allen v. Wright*, 468 U.S. 737, 760, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Thus, this Court should affirm.

Plaintiffs argue that a legislative declaration that Washingtonians have a "fundamental and inalienable right to live in a healthful and pleasant environment" amounts to the creation of an unenumerated constitutional right by statute. App. Br. at 13–14. This argument misapplies the law.

Plaintiffs rely upon RCW 43.21A.010, the introductory declaration for the enabling legislation for the Washington State Department of Ecology. It declares the State's policy and interest in being responsible stewards of how natural resources are utilized. RCW 43.21A.010. The Plaintiffs also cite policy statements in the State Environmental Policy Act. RCW 43.21C.020(3). But, as this Court has repeatedly held, policy statements do not create legal obligations, let alone constitutional rights. *Kilian*, 147 Wn.2d at 23; *Int'l Union of Operating Eng'rs Local 286, AFL-CIO v. Sand Point Country Club*, 83 Wn.2d 498, 505, 519 P.2d 985 (1974) (citing numerous cases).

Plaintiffs rely on *State v. Hand* in support of their argument that statutes can confer liberty interests on individuals that implicate due process. This is not so, at least not in relation to their claims in this case. While courts have recognized that a liberty interest may arise from an "expectation or interest created by state laws or policies," these laws or policies have traditionally addressed early release from incarceration or other liberty interests not recognized in the constitution but that stem from

state criminal justice statutes. *Wolff*, 418 U.S. at 556–58 (liberty interest in avoiding withdrawal of state-created system of good-time credits); *In re McCarthy*, 161 Wn.2d 234, 241–42, 164 P.3d 1283 (2007) (limited liberty interest under state statute governing end of sentence hearings for sex offenders); *State v. Hand*, __Wn.2d __, 429 P.3d 502, 505 (2018) (incompetent criminal defendants have a liberty interest in receiving restorative treatment if they are not convicted of a criminal offense). These cases are unpersuasive to the issue of whether a legislative policy statement (that is not a constitutional amendment) can conjure a fundamental, constitutional liberty interest where none previously existed.

3. The trial court properly dismissed Plaintiffs' state-created danger claim

While the trial court did not specifically analyze Plaintiffs' state-created danger claim, it dismissed that claim "[f]or the reasons stated in [the State's] motion and reply memorandum . . . ." CP 451. There was no error in this dismissal as Plaintiffs failed to state a cognizable state-created danger claim.

The due process clause does not guarantee minimum levels of safety and security. *Triplett v. Dep't of Soc. & Health Servs*., 193 Wn. App. 497, 512, 373 P.3d 279 (2016) (citing *DeShaney v. Winnebago Cty. Dept. of Soc. Servs*., 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 249 (1989)). It also

does not impose upon the government an affirmative obligation to act except in limited circumstances, even when such act "may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney*, 489 U.S. at 196. The "danger creation" exception (which Plaintiffs alleged below) permits a substantive due process claim when the government has a duty to an individual that arises out of certain special relationships assumed or established by the state. *Triplett*, 193 Wn. App. at 513.

To demonstrate creation of a danger, Plaintiffs must first show that the State exposed them to a danger "which [they] would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). Put another way, Plaintiffs must be placed in a worse position than they would have been had the State not acted at all. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). Additionally, Plaintiffs must demonstrate that the State recognized the unreasonable risks and actually intended to expose them to these risks "without regard to the consequences." *Campbell v. Wash. Dept. of Soc. & Health Servs*., 671 F.3d 837, 846 (9th Cir. 2011). Plaintiffs must further establish that the State acted with either "deliberate indifference," which requires a culpable mental state more than gross negligence, or with professional judgment. *Braam*, 150 Wn.2d at 700. Only

government action that "shocks the conscience" creates a cognizable due process violation. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

Plaintiffs' argument here is baseless because the danger creation exception evolved from cases involving affirmative state actions giving rise to a duty to protect an individual from particular harm, not to protect society as a whole from a systemic, global threat such as climate change. *See, e.g., DeShaney*, 489 U.S. 189 (agency's temporary custody of a child did not create continuing duty of care to protect the child from an abusive parent). While Plaintiffs argue that they are similarly situated to foster children because of their relative powerlessness to influence government conduct and are entitled to hold the State to the professional judgment standard, this is an inapt (and insensitive) comparison. App. Br. at 3435. As this Court noted in *Braam*, foster children are removed from their parents by the State to protect them from abuse and neglect, and since the State has assumed responsibility for their care and safety, this creates a substantive due process right to be free from "unreasonable risk of harm." *Braam,* 150 Wn.2d at 703–04.

The same cannot be said for Plaintiffs. While the State has acted (and continues to act) to combat climate change, it does not owe the same affirmative duty to Plaintiffs as it does to Washington's children in foster care. *See Cummins v. Lewis Cty.*, 156 Wn.2d 844, 852–53, 133 P.3d 458

(2006) (in negligence cases, a duty to the general public does not support a cause of action against the state except in limited circumstances). The State's actions on climate change impact the community at large and does not confer upon it "custodian" or "caretaker" responsibilities that it assumes when it removes children from their parents' care. *See Braam*, 150 Wn.2d at 703. Thus, the professional judgment standard is not appropriate in this case.

Plaintiffs cite two cases for the proposition that "exposure to harmful environmental media" can give rise to a danger creation claim. App. Br. at 37 (citing *Munger* and *Pauluk*). Neither case helps them. *Pauluk* concerned an individual's exposure to toxic mold within an indoor workplace, not the atmosphere. *Pauluk*, 836 F.3d at 1118. *Munger* involved an individual suffering from hypothermia after being ejected from a bar for being drunk and disorderly. *Munger v. City of Monroe*, 227 F.3d 1082, 1084 (9th Cir. 2000). Neither case supports the proposition that the state-created danger theory creates a constitutional claim against Washington State because of the existence of climate change.

Even if the danger creation exception applied, Plaintiffs have not pled specific facts to show that they are in a worse position than if the State had not acted at all, or that the State has acted with deliberate indifference. *See Pauluk*, 836 F.3d at 1125. On the face of the pleadings, it is evident that

the issue is not whether the State is enacting laws and policies that combat climate change, it is that Plaintiffs think the State is not doing enough. CP 445–46, 70 (¶ 207). This does not support a finding of deliberate indifference, and thus the superior court did not err in dismissing Plaintiffs' state-created danger claim.

4. Article I, section 30 does not create constitutional rights

Plaintiffs alternatively rely on article I, section 30 of the Washington State Constitution as a basis for their constitutional claims. App. Br. at 17–18. Article I, section 30 reserves unenumerated rights to the people of Washington; it represents the well-settled principle that just because some rights are enumerated in the constitution that does not mean other fundamental, "immutable" rights are not recognized. *State v. Clark*, 30 Wn. 439, 443–44, 71 P.20 (1902). But article I, section 30 was never meant to create constitutional rights where none previously existed. *See Halquist v. Dep't of Corr.*, 113 Wn.2d 818, 820, 783 P.2d 1065 (1989) (article I, section 30 did not grant a constitutional right to attend an execution); *Clark*, 30 Wn. at 447–48 (article I, section 30 does not grant a constitutional right to be free from taxation on inheritance). Thus, article 1, section 30 also fails to create the constitutional right that the Plaintiff seek. Plaintiffs' substantive due process claims were properly dismissed.

5. Plaintiffs cannot establish infringement of any other fundamental right under the due process clause

Plaintiffs argue the superior court erred by declining to address their "other" fundamental substantive due process rights. App. Br. at 21. This argument fails for two reasons. First, the fundamental rights Plaintiffs assert are individual life and liberty interests that have not been extended to government conduct regarding climate or the environment. The cases Plaintiffs cite are clearly distinguishable from the case before the Court.[17]

Second, Plaintiffs rely upon conclusory allegations and have failed to plead sufficient facts in their complaint to support causes of actions regarding these "other" fundamental rights. As stated above, these conclusory statements are not deemed as true for purposes of a CR 12(c) motion, so the superior court invited no error in granting the State's motion to dismiss on these claims. *See Hodgson*, 49 Wn.2d at 136.

[17] *See Braam*, 150 Wn.2d 689 (foster children possess a liberty interest from unreasonable risk of harm and reasonable safety); *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1997) (public school students have a liberty interest from unreasonable corporal punishment); *Wash.*, 521 U.S. at 722–25 (an individual's liberty interest in bodily integrity did not extend to physician-assisted suicide); *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (a city's ordinance imposing unreasonable restrictions on family members occupying a single dwelling violated a liberty interest in family living arrangements); *Wisconsin v. Yoder*, 406 U.S. 205, 235, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (a state could not compel Amish parents to send their children to public school).

C. Plaintiffs' Equal Protection Claims Were Properly Dismissed

Plaintiffs assign error to the superior court's dismissal of their state equal protection claims. But dismissal was appropriate in light of the fact that Plaintiffs (a) failed to establish a fundamental right to a healthful environment, and (b) could not demonstrate they are part of a suspect or semi-suspect class.

Our state constitution's privileges and immunities clause provides that in order to sustain an equal protection claim under article 1, section 12, an individual must show the law (or its application) confers a "privilege" (fundamental right) under the state constitution to a class of citizens, to the detriment of another class. *Grant Cty. Fire Prot. Dist. 5* v. *City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004). The appropriate level of scrutiny depends on the nature of the classification or rights involved; if a suspect classification or fundamental right is not implicated, rational basis review applies. *Am. Legion Post 149 v. Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008).

Plaintiffs assign error to the superior court's application of rational basis review to their equal protection claim. They assume that they have established a fundamental right to a healthful environment, and thus the trial court erred by "focusing solely" on Plaintiffs' "age characteristics." App. Br. at 23. This misunderstands the superior court's order. The superior court

first determined that no fundamental right or liberty interest is implicated in this case for both due process and equal protection purposes, then turned to whether Plaintiffs' status warrants heightened scrutiny under article I, section 12 of our state constitution. CP 448–50.

Since this case does not involve a fundamental right, the question for equal protection purposes is whether Plaintiffs are in a suspect or quasi-suspect class.[18] Plaintiffs allege that they, as minors, will disproportionately experience the impacts of climate change. CP 65–66. However, minors are not regarded as a suspect or semi-suspect class, and "age" is not a suspect classification. *State v. Schaaf,* 109 Wn.2d 1, 19, 743 P.2d 240 (1987).

Plaintiffs attempt to reframe the issue by asserting that they are a group most likely to bear the burden of climate change, since they allege "the impacts associated with CO2 emissions of today will be mostly borne by our children and future generations." App. Br. at 25; CP 38 (¶ 106). But this "disproportionate burden" argument is merely a logical extension of their age discrimination argument; because Plaintiffs (by virtue of being minors) will likely live longer than their adult contemporaries, they will experience climate change and its impacts on our society farther into the future. This argument fails as a matter of law. For equal protection purposes,

[18] Plaintiffs offer no separate legal analysis as to why minors constitute a semi-suspect class, so this Court need not consider the distinction.

the harm being suffered must impact a population that is vulnerable due to current, and not future or aggregate, impacts. *See Schroeder v. Weighall*, 179 Wn.2d 566, 579, 316 P.3d 482 (2014) (holding that a statute that eliminates tolling provisions for minors in medical malpractice actions is unconstitutional because it disproportionately affects children disadvantaged by placement in foster care or otherwise with incapable or inattentive parents). And Plaintiffs mischaracterize the holding in *Plyler v. Doe*; in that case, the Supreme Court held that "heightened scrutiny" was appropriate where a distinct class of youth (children of undocumented immigrants) were being denied access to public education. *Plyler v. Doe,* 457 U.S. 202, 225–26, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). The "characteristic" in *Doe* was the children's immigration status which was outside their control, unlike Plaintiffs who are being no more adversely impacted by the effects of climate change than other children, no matter where they live on this planet. No heightened scrutiny is appropriate here.

Plaintiffs also make the puzzling argument that they possess "immutable" characteristics by virtue of being young. App. Br. at 26 (arguing that social, emotional, and physical immaturity are immutable). "Immutable" means "not capable or susceptible of change." Immutable, *Webster's Third New International Dict*. (3rd ed. 1981). As the superior court recognized, youth is not an immutable characteristic because we all

grow older. Consequently, the trial court was correct in its ruling that Plaintiffs have not proven sufficient facts to establish discrimination regarding climate change based on age. CP 450.

Plaintiffs argue that, absent heightened scrutiny, this Court should vacate the superior court's dismissal and remand for further review of their constitutional claims under the rational basis standard. App. Br. at 28–29. Because Plaintiffs fail to identify a fundamental right or identify as a suspect class, neither due process nor equal protection issues are raised and no scrutiny should be applied.

D. Plaintiffs' Atmospheric Trust Doctrine Claim Lacks a Basis in State Law

Plaintiffs allege that various state actions and inactions violate Washington's public trust doctrine. CP 61–64. This doctrine derives from the common law principle that the state has sovereignty and dominion over the tidelands, shorelands, and beds of navigable waters, and that the state holds such dominion in trust for the public. *Caminiti v. Boyle*, 107 Wn.2d 662, 668–70, 732 P.2d 989 (1987); *Chelan Basin Conserv. v. GBI Holding Co*., 190 Wn.2d 249, 258–61, 413 P.3d 549. (2018). The Washington Constitution also partially encapsulates this principle. Const. art. XVII, § 1; *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P. 2d 232 (1993).

The doctrine is comprised of two aspects: *jus privatum* and *jus publicum. Caminiti*, 107 Wn.2d at 668. The *jus privatum,* or private property interest allows the state to convey title to aquatic lands in any manner and for any purpose not forbidden by the state or federal constitutions. *Id.* The *jus publicum*, or public authority, interest provides the public with an overriding interest in navigation and recreational rights incident thereto. *Id.* at 668–69. The test for whether the public trust has been violated under this latter aspect is whether the state action being challenged: (1) has relinquished the state's right of control over the *jus publicum*, and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.[19] *Id.* at 670.

1. The scope of the public trust doctrine is limited to navigable waters and underlying lands

Plaintiffs contend that the public trust doctrine extends beyond navigable waters and underlying lands and applies to the atmosphere. App. Br. at 38–40; CP 4 (¶ 7), 62 (¶ 177) (arguing the doctrine extends to atmosphere, forests, wildlife, etc.). However, the Washington Supreme Court has declined to expand the scope of the doctrine beyond its historic roots in state law such that the doctrine would apply beyond navigable waters and submerged lands.

[19] However, the Court recently declined to apply this test to the unique circumstances of historic fills predating the enactment of the Shoreline Management Act. *Chelan Basin*, 413 P.3d at 559.

Looking "solely to Washington law" to determine the scope and application of the doctrine, the Court has repeatedly observed that the public trust doctrine has not been expanded in Washington beyond its traditional application to navigable waters. *Chelan Basin Conserv.*, 190 Wn.2d at 260 (quoting *State v. Longshore,* 141 Wn.2d 414, 427–28, 5 P.3d 1256 (2000)). For example, in *Rettkowski*, the Court rejected the argument that the public trust doctrine authorizes Ecology to restrict use of groundwater, in part because the doctrine has never been applied to non-navigable waters. *Rettkowski*, 122 Wn.2d at 232. In *R.D. Merrill*, the Court reiterated that the public trust doctrine had never been expanded to apply to non-navigable water, and declined to do so. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999) (rejecting a claim that Ecology had violated the doctrine by approving groundwater rights for a ski resort). And most recently, the Court reiterated that the doctrine applies to "navigable waterways and the lands underneath them." *Chelan Basin*, 190 Wn.2d at 259; *see also Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004) (declining to expand the doctrine to apply to wildlife).

Plaintiffs' argue that because the ancient Institutes of Justinian, out of which our modern public trust doctrine has grown in Washington law, lists air alongside of water and submerged lands as resources that "are by

natural law common to all," that air should be included in Washington's doctrine as a protected trust resource. App. Br. at 39–40. But this does not expand the scope of public trust doctrine in Washington. The doctrine has since passed through English common law where it was focused on property rights. It was then incorporated into Washington law in connection with article 17, section 1 of the constitution "for the purpose of establishing the right of the state to the beds of all navigable waters in the state," including a non-alienable "easement in such waters for the purposes of travel and rights incidental and corollary to the rights of navigation, such as fishing and swimming. *Caminiti*, 107 Wn.2d at 667–69. Washington's public trust doctrine does not extend beyond the use of navigable waters.

Neither can interactions between air and other environmental media extend the doctrine to the atmosphere. *See* App. Br. at 40. All environmental law concerns the impact of human activity on natural resources that are shared in common and interact with each other, but this recognition does not transfer policy-making on all such environmental issues to the judiciary to undertake regulation under the name of the public trust doctrine.

For example, water quality and air quality regulation have both been addressed by the Legislature and the Executive under statutory and regulatory regimes. The courts then resolve issues under those regimes, not under the public trust doctrine. *See* RCW 90.48 and RCW 70.94. The public

trust doctrine has a specific role in Washington law tied to the protection of submerged property and navigable waters, and therefore provides no basis to require the atmospheric regulatory regime Plaintiffs now seek.

Nor can Plaintiffs change the scope of Washington's public trust doctrine by reference to the Oregon District Court's finding in *Juliana* that the atmosphere may be deemed part of the public trust *res*. App. Br. at 40 (citing *Juliana*, 217 F. Supp. 3d at 1255 n.10). That decision is under appeal, no other court has agreed, and other courts that have reviewed the issue have rejected *Juliana's* reasoning. "The *Juliana* Court alone has recognized this new doctrine. Again, that Court's reasoning is less than persuasive." *Clean Air Coun.*, 2019 WL 687873, at *11 (citations omitted); *see also Lake v. City of Southgate*, 2017 WL 767879 at *4 n.3 (slip op.) (E.D. Mich. 2017) (noting *Juliana* as an outlier among courts which have otherwise "invariably rejected" assertions of "fundamental rights to a 'healthful environment' or freedom from contaminants").

2. The public trust doctrine does not compel state action

Plaintiffs also argue that the public trust doctrine compels state action. App. Br. at 40–42; CP 16–17 (¶ 29), 63 (¶ 179). To the contrary, the doctrine restrains state actions that impair the public's interest in navigable waters, but does not require affirmative state actions to protect the public trust. *See Caminiti*, 107 Wn.2d at 665–66, 675 (concluding that a statute

allowing private docks to be installed on public lands did not unreasonably interfere with public use of the resource); *Orion Corp. v. State*, 109 Wn.2d 621, 641–42, 747 P.2d 1062 (1987); *Weden v. San Juan Cty.*, 135 Wn.2d 678, 698–700, 958 P.2d 273 (1998) (ordinance banning use of personal watercraft did not violate the doctrine); *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969) (requiring removal of fill that impaired navigational rights).

Here, Plaintiffs do not seek to invalidate specific actions already taken by Respondents. Rather, they seek a judicial order for the state to do more. CP 40–41 (¶ 114), 72 (¶ H). Thus, even if Plaintiffs' claims concerned navigable waterways, which they do not, their remedy is not cognizable.

Plaintiffs' baffling claim that the "enactment of RCW 70.235.020, [has] alienated and substantially impaired Washington's protected Public Trust Resources" is no different. *See* App. Br. at 41–42 (emphasis omitted). The enactment of the statewide greenhouse gas reductions limits under RCW 70.235 set *limits* on greenhouse gasses; it did not *cause or permit* any emissions or impairment at all. The emissions reduction statute thus cannot serve as a specific action for the purposes of their public trust claim either. What Plaintiffs truly seek is an order compelling the State to take affirmative actions to more aggressively curb greenhouse gas emissions—an affirmative remedy not available under the public trust doctrine.

3. The public trust doctrine does not provide an independent source of authority for gubernatorial or agency action

Plaintiffs' claims against the Governor and agency defendants fail for the additional reason that the public trust doctrine does not provide independent authority for the Governor or agencies to act. Rather, the Governor has only those powers granted by the constitution and statute. *Fischer-McReynolds*, 101 Wn. App. at 813 (2000) (citing Op. Att'y Gen. No. 21 (1991)). The same principle applies to state agencies. *Rettkowski*, 122 Wn.2d at 226.

Plaintiffs suggest otherwise, citing *Fischer-McReynolds*, for the proposition that the Governor can issue executive orders based on the public trust doctrine. App. Br. at 41. However, the *Fischer-McReynolds* court was careful to point out that these executive orders themselves are only effective "if a statute or constitutional provision grants the Governor the authority to issue such orders." *Fischer-McReynolds*, 101 Wn. App.at 813. As described throughout this brief, no statute or constitutional provision provides the executive with the authority that would be needed to develop and implement the extensive regulatory regime needed to achieve the greenhouse gas reductions that Plaintiffs seek. Here too, Plaintiffs failed to state a public trust claim against the Governor or the state agencies.

VI. CONCLUSION

Plaintiffs cannot obtain the relief they seek under the separation of powers doctrine, their claims raise nonjusticiable political questions, and are nonjusticiable under the UDJA, under which they were brought. Plaintiffs' case is really a challenge to agency action and inaction and should have been brought under the APA, which it was not. Plaintiffs also fail to state a claim, constitutional or otherwise. Recognizing these many substantive and procedural flaws, the Superior Court properly dismissed Plaintiffs' case as raising nonjusticiable political questions. Plaintiffs have not identified any reason to disturb the superior court's judgment. The State therefore respectfully asks the Court to affirm.

RESPECTFULLY SUBMITTED this 25th day of March, 2019.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify, under penalty of perjury under the laws of the state of Washington, that on March 25, 2019, I served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

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March 25, 2019 - 4:22 PM

Transmittal Information

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Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

This Court should reverse the dismissal of Appellants' (the "Youth's") complaint. Respondents provide no basis to close the courthouse doors on the Youth's constitutional claims. Instead, Respondents attempt to escape accountability for their affirmative infringements of the Youth's constitutional rights by mischaracterizing their claims and requested relief. But Respondents cannot refute that they continue to operate a fossil fuel-based energy and transportation system resulting in increasingly dangerous greenhouse gas ("GHG") emissions that, by their admission, disproportionately harm the Youth. The Youth allege viable infringements to their constitutional due process, equal protection, and public trust rights that can and should be resolved by a court of law.

A. The Youth's Claims Are Justiciable

Without engaging in the requisite analysis under *Baker v. Carr*, 369 U.S. 186 (1962), Respondents manufacture a separation of powers problem by mischaracterizing the justiciability inquiry, the nature of the Youth's claims, and the requested relief. In reality, the Youth's claims call upon the judiciary to fulfill its core duty to interpret the constitution, "even when that interpretation serves as a check on the activities of another branch . . . ." *In re Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (en banc) ("*Juvenile Dir.*").

1. Separation of Powers Compels Justiciability of the Youth's Constitutional Claims

Respondents misstate the justiciability inquiry as barring any claims that "involve[] matters of political and governmental concern." Resp. at 10. Such a broad formulation would bar any case against the government and runs entirely contrary to the judiciary's responsibility "to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (citation omitted).[1] The doctrine does not categorically bar any matter with political overtones. *See, e.g.*, *id.* at 204-05 (Sotomayor, J., concurring)*; I.N.S. v. Chadha*, 462 U.S. 919, 942-43 (1983). Respondents' interpretation eviscerates the doctrine of checks and balances, which has "evolved side-by-side with and in response to the separation of powers concept" *Juvenile Dir.*, 87 Wn.2d at 242-43.

The justiciability inquiry here *requires* Washington courts to hear and decide the Youth's constitutional claims. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffuse power the better to secure liberty.'") (citation omitted). As the Court made clear:

> Thus, even in enforcing the separation of powers, courts must intervene in the operation of other branches. This is no inconsistency in constitutional theory, since complete

[1] *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (Washington's political question doctrine is "similar to the federal political question doctrine").

> separation was never intended and overlapping functions were created deliberately . . . . It is an oversimplification to view the doctrine as establishing analytically distinct categories of government functions.

Juvenile Dir., 87 Wn.2d at 242; *id.* at 243 (recognizing "judicial authority to declare legislative and executive acts unconstitutional").

Erroneously attempting to frame this case as a policy dispute and to equate the Youth's claims with those in the unpublished decision *Svitak ex rel. Svitak v. State*, 178 Wn. App. 1020 (2013),[2] Respondents repeatedly mischaracterize the Youth's claims as "a complaint that state agencies have not done enough to address climate change through agency action." *See, e.g.*, Resp. at 9, 25, 3. However, *Svitak* presented a single-count public trust claim challenging "the State's failure to accelerate the pace and extent of greenhouse gas reduction" that was dismissed for its failure to challenge affirmative state action or allege a constitutional violation. 178 Wn. App. at *1-2; Op. Br. at 6-7. Here, following the guidance of the *Svitak* court, the Youth challenge the State's *affirmative actions* in creating and effectuating "systemic policy, practice, and customs [that] have materially caused, contributed to, and/or exacerbated climate change" as violative of their constitutional rights. CP 71-72; *see also* CP 1, 26, 45, 50-58. These claims

[2] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

clearly invoke Washington courts' obligation to assess the constitutionality of the political branches' conduct.

2. Justiciability Focuses on the Claims, Not the Relief Requested

Respondents attempt to focus the justiciability inquiry on speculation of the propriety of an apocryphal version of the Youths' requested relief. Resp. 14, 20-22. However, justiciability is determined by the claims asserted, not assumptions as to what remedy might be appropriate should plaintiffs prevail. *Baker*, 369 U.S. at 198; *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976). In *Rousso v. State*, while cautioning that it was not the judiciary's role to decide "whether Internet gambling . . . should be illegal," the Washington Supreme Court still proceeded to determine "whether Washington's ban on Internet gambling is an unconstitutional infringement . . . ." 170 Wn.2d 70, 74-75, 239 P.3d 1084 (2010) (en banc). Similarly here, the justiciable question is not what specific climate policy measures should be adopted, but whether Respondents' challenged affirmative conduct violates the Youth's constitutional rights. While premature to speculate as to what relief may ultimately be appropriate, the judicial branch has ample authority to remedy constitutional violations in a manner that does not usurp legislative or executive authority. *See, e.g. McCleary v. State*, 173 Wn.2d 477, 545-46, 269 P.3d 227 (2012); *Hills*, 425 U.S. at 297 (constitutional violation

"provided the necessary predicate for the entry of a remedial order against [the agency] and, indeed, imposed a duty on the District court to grant appropriate relief.").

3. The Youth's Requested Injunctive Relief is Appropriate

Deciding the Youth's constitutional claims would not require a balancing of "the pros and cons associated with legislative policy." Resp. at 10. Courts are well-equipped to measure governmental conduct against constitutional provisions, even when the inquiry involves factual or technical analysis.[3] *See McCleary*, 173 Wn.2d at 545-46; *In re Flynn*, 52 Wn.2d 589, 592 n.1, 328 P.2d 150 (1958) (en banc) (collecting cases "applying substantive due process standards"); *see also Juliana v. United States*, 217 F.Supp.3d 1224, 1239 (D. Or. 2016), *interlocutory appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018) (determining whether government's affirmative actions in contributing to climate change violate the constitution "can be answered" solely by reference to standards governing protection of constitutional rights, and "without any consideration of competing interests.").

[3] *See* Justice Stephen Breyer, *Science in the Courtroom*, Issues in Science and Technology (2000), https://issues.org/breyer/ (detailing the duty of the judiciary to confront scientific and technical analysis in deciding "basic questions of human liberty").

In arguing the Youth's claims are not justiciable under the UDJA,[4] Respondents erroneously assume new laws would "be necessary to enforce Plaintiffs' proposed plan." Resp. at 21. No new laws are necessary to remedy past and ongoing constitutional violations, and in any case, that inquiry is premature until the scope of any constitutional violations are determined. *Baker*, 369 U.S. at 198. Respondents cite no authority that would prevent them from using their existing statutory authority to develop a plan to operate Washington's energy and transportation system in a fashion that does not violate the Youth's constitutional rights. In fact, Respondents admit, they have ample existing authority to prepare and implement plans to reduce GHG emissions and to set energy and transportation policy.[5] Resp. at 21; *see also* CP 16-23, 50-56 (detailing Respondents' extensive authority and control over Washington's energy and transportation system, including development of state energy strategy and 20-year transportation plan). A declaration that Respondents' affirmative actions resulting in dangerous levels of GHGs infringe the Youth's constitutional rights would be final, conclusive and justiciable. *See*

[4] Respondents argued below that the parties lack genuine and opposing interests under the UDJA, CP 134, but have not preserved that argument on appeal.

[5] Even if new laws were required to bring Washington's energy and transportation system into constitutional compliance, that does not divest courts of jurisdiction to hear and decide the Youth's claims. *See McCleary*, 173 Wn.2d at 546-47 (ordering legislature to devise and implement a plan to come into constitutional compliance).

Ronken v. Bd. of County Comm'rs. of Snohomish County, 89 Wn.2d 304, 310-12, 572 P.2d 1 (1977) (en banc).

After finding constitutional violations, it is well within the courts' authority to issue an order leaving it to Respondents, not the court, to articulate and identify the specific actions needed to come into constitutional compliance.[6] "Once a right and a violation have been shown, the scope of a . . . court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); Wash. Const. Art. IV, Sec. 6; *Ronken*, 89 Wn.2d at 312, (citing RCW 7.24.080); CP 24, 72. Our Nation's canon of constitutional cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *Brown v. Plata*, 563 U.S. 493 (2011); *Hills*, 425 U.S. 284; *Milliken*, 418 U.S. at 723; *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Bolling v. Sharp*, 347 U.S. 497 (1954).

[6] Contrary to Respondents' representations, a remedial plan is not the Youth's sole requested remedy. The Youth also seek declarations of law and other forms of injunctive relief to bring Respondents into constitutional compliance. CP 70-71.

The Youth's requested relief does not require the court "to craft the State's approach for reducing greenhouse gases."[7] Resp. at 2. Rather, the Youth request a declaration of their constitutional rights and Respondents' infringement thereof, and an order directing Respondents to prepare an implement a remedial plan *of their own devising*. *See* Substantive Limits on Liability and Relief, 90 Harv. L. Rev. 1190, 1248 (1977) ("[I]n each of the [institutional reform] cases . . . the court sought a proposed plan from the defendant officials before being forced to consider shaping one of it[s] own over their objections."). In *McCleary*, this Court retained jurisdiction while ordering the legislature to fully fund and "develop a basic education program geared toward delivering the constitutionally required education. . . ." 173 Wn.2d at 546-47.[8] The Court did not draft the education policies; it ordered the State to do so in a constitutionally compliant manner.

[7] Nothing in the Youth's requested relief asks the court "to force every Washingtonian to surrender their natural gas furnace and petroleum-fueled vehicle." Resp. at 13. None of the plans that have been prepared to decarbonize Washington's energy system across all sectors call for such draconian measures and Respondents' inflammatory assertion contradicts well-pleaded allegations in the Complaint. *See, e.g.,* CP 56, ¶ 148.

[8] Respondents attempt to distinguish *McCleary* on the grounds that it involved a "positive constitutional right." Resp. at 14-15. The public trust doctrine does confer positive rights on the Youth. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 259, 413 P.3d 549 (2018) (describing the rights protected by the public trust doctrine). Respondents' distinction is also irrelevant to the courts' authority to remedy the rights asserted here that encompass negative rights preventing the government from affirmatively harming the Youth. *See McCleary*, 173 Wn.2d at 518-19 (distinguishing positive and negative constitutional rights and stating that "[w]ith respect to those [negative] rights, the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries."). This Court has never said it lacks jurisdiction to enter a remedy in a negative rights case.

These cases demonstrate that the systemic violations alleged fully justify the systemic remedy the Youth request and further illustrate the necessity of injunctive relief. *See McCleary*, 173 Wn.2d at 540-41 (explaining how the Court's decision in *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), to "defer[] to ongoing legislative reforms and simply declare[] the funding system inadequate" resulted in "30 years of an education system that fell short of the promise of article IX, section 1 and that ultimately produced this lawsuit."). These Youth do not have thirty years to wait.[9] CP 24, 39-41.

4. The Youth's Challenge to RCW 70.235.020 and .050 Is Justiciable

The Youth challenge the GHG emissions targets in RCW 70.235.020 and 70.235.050 as unconstitutionally legalizing and authorizing dangerous levels of GHG emissions through 2050. CP 67-70. Respondents' spurious claim that the targets limit rather than authorize GHG emissions is belied by Washington's increasing emissions and misses the point.[10] Even if Respondents were abiding by the targets, which they are not, the targets still authorize *dangerous levels* of GHG emissions through 2050 that

[9] Even if part of the requested injunctive relief were unavailable, that says nothing as to the *justiciability* of the Youth's claims because declaratory and other injunctive relief would be within the court's power to order. *Id.* (citing RCW 7.24.080); CP 24, 72.

[10] *See* Wash. Dep't of Ecology, *Washington State Greenhouse Gas Emissions Inventory: 1990-2015: Report to the Legislature* (2018), https://fortress.wa.gov/ecy/publications/documents/1802043.pdf (Washington's emissions have increased 6.1% from 2012-2015).

discriminate against the Youth and cause constitutional deprivations, facts which will be proven at trial and must be taken as true at this stage.[11] CP 67-70.

Respondents erroneously assert that "invalidation of the statute would result in the State having no greenhouse gas limits and state agencies would no longer be obliged to reduce . . . emissions." Resp. at 15. First, the Youth seek invalidation of the targets, not the duty to reduce GHG emissions. Second, Respondents' argument ignores their vast authority to protect the environment and shape the state's energy and transportation system. *See, e.g.,* CP 16-23; *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976) (en banc) (Ecology has "very broad authority and responsibility for managing this state's environment."); RCW 43.21F (comprehensive energy planning process); RCW 47.01.071 (describing statewide transportation system). If the targets are deemed unconstitutional, Respondents would no longer be statutorily enabled to pursue energy and transportation policies resulting in dangerous buildup of GHGs.

[11] Respondents also completely ignore the Youth's claim that by adopting the targets, the state has abdicated its control of public trust resources resulting in substantial impairment to trust resources, a question over which this Court has clear jurisdiction. *Chelan Basin Conservancy*, 190 Wn.2d at 267.

Relying on *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 259 P.3d 280 (2011), Respondents argue courts cannot rewrite statutes, but that is not what the Youth seek.[12] Resp. at 16. *Pasado's* does not stand for the proposition that courts cannot partially invalidate statutes, but rather that doing so must align with legislative intent. 162 Wn. App. at 753-54; *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002) (en banc). Moreover, the *Pasado's* plaintiffs did not alternatively seek full invalidation of the statute challenged, as the Youth do here.[13] *Id.* at 749; CP 309-10.

5. Mandamus is Not Required for Relief Against the Governor

Respondents concoct a strawman argument that this case violates separation of powers because a mandamus action against the Governor is improper. This is not a mandamus action and Respondents provide *no* support for the proposition that claims against the Governor must be brought as such. Resp. at 17. The Youth seek review of the Governor's affirmative actions in implementing a fossil fuel-based energy and transportation system that is harming them and an order requiring

[12] The Youth are not asking the courts to re-write the targets in the statute. Rather, they seek invalidation of the targets (RCW 70.235.020(1)(a) and RCW 70.235.050) because they enable and perpetuate conduct that is causing them harm. *See, e.g.,* CP 49, ¶ 140.

[13] Respondents' reliance on *NW Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973) and *NW Animal Rights Network v. State*, 158 Wn. App. 237, 244, 242 P.3d 891 (2010), is similarly misplaced. The court found both cases nonjusticiable under the UDJA for failing to join indispensable parties and for seeking relief that required the court to dictate legislative policy regarding the extent to which professional gambling and animal cruelty should be criminalized. In essence, the requested relief would have criminalized activity deemed lawful by the legislature.

Respondents to cease those actions. Both U.S. and Washington Supreme Court precedent are clear that the Executive's actions are subject to review for constitutional compliance. *See Wash. State Legislature v. State*, 129 Wn.2d 129, 985 P.2d 353 (1999) (en banc); *Clinton v. City of New York*, 524 U.S. 417 (1998). *If* a violation is found and *if* the court orders development of a remedial plan, Respondents, including the Governor, would maintain discretion on *how* to achieve constitutional compliance. However, compliance with the constitution itself is not discretionary.[14] *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000).

6. The APA Does Not Govern the Youth's Claims

In cases involving systemic violations of children's rights to be free from an unreasonable risk of harm, the Washington Supreme Court has allowed constitutional claims against state agencies to proceed outside of the APA. *See, e.g.*, *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003); *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 949 P.2d 1291 (1997). The Youth clearly alleged, as in *Braam* and *Washington State Coalition*, that "the state's

[14] Respondents reliance on *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994), for the notion that mandamus is not available to order a state official to "adhere to the constitution" is misplaced and taken out of context. Not only is this not a mandamus action, the Youth seek to enforce *specific* provisions of the constitution and do not seek, as opposed to the plaintiffs in *Walker*, general compliance with unspecified constitutional provisions. *Id.* ("Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.").

specific practices," CP 50-56, are "causing harm to children." *Contra*, Resp. at 25; CP 5-16. These cases make clear that systemic challenges to agency conduct can proceed independently of the APA when necessary to protect constitutional rights.

Braam challenged the systemic placement of foster children in multiple homes. 150 Wn.2d at 694. Even though individual DSHS agency actions could be reviewed under the APA, the *Braam* children's systemic substantive due process claim proceeded independently of the APA. Similarly, in *Washington State Coalition*, the Court permitted a systemic challenge under the UDJA, rather than requiring case-by-case review under the APA. 133 Wn.2d at 916-17 n.6. Because the plaintiffs requested a declaration of their constitutional rights in the context of a systemic challenge, *id.*, the Court rejected the dissent's view that "the APA provides the exclusive means for judicial review," *id.* at 947 (Durham, C.J., dissenting). These cases demonstrate that the APA, does not apply when necessary to protect constitutional rights from systemic government conduct.

Respondents claim the Youth "acknowledge that they can bring their constitutional claims under the APA," Resp. at 25, but the Youth thoroughly explained that application of the APA's strictures here would violate their procedural due process rights by preventing meaningful review

of their challenge to Respondents' systemic conduct, including the acts of the State and Governor, who are not subject to the APA. Op. Br. at 47-50.[15] Respondents did not even *mention* the procedural due process factors.

The Youth challenge systemic conduct, which, by definition, includes a multitude of discrete actions and policies, such as those identified as examples by the Youth, the collective effect of which is harming them. CP 50-56. The full contours of Respondents' energy and transportation system is a factual matter,[16] and the Youth's allegations describing the system, the types of actions comprising it, and the harms that result therefrom, are to be taken as true. Further, the specific agency actions in the Youth's Complaint bely Respondents' argument that the Youth "do not identify any specific actions by the agencies that constitute this alleged 'systemic conduct.'" Resp. at 24 n.14. Perplexingly, what Respondents now call "vague and conclusory allegation[s]" of systemic conduct, they classified as "extensive allegations related to specific agency actions" in briefing below. CP 395. Respondents do not dispute that they control and

[15] *See also Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 355, 271 P.3rd 268 (2012) (courts interpret Washington's APA consistent with federal APA); *Webster v. Doe*, 486 U.S. 592, 603 (2004) (Federal APA's explicit limitations not applicable where they would otherwise prevent review of constitutional claims).

[16] *Nurse*, 226 F.3d at 1002 (the question of "whether the acts of the policy-making defendants violated the Constitution, and, if so, what constitutional mandates they violated" "are questions that will be fleshed out by the facts as this case proceeds towards trial" and are not always appropriate for a motion to dismiss).

operate the state's energy and transportation system and admit that it is through "environmental permits, construction designs, and long-term plans and strategies that the State's impact on climate change is implemented." Resp. at 26; CP 50-56. In *Ronken*, the Court explicitly rejected the argument that systemic challenges to government action must proceed in isolated administrative appeals, like those required under the APA. 89 Wn.2d at 309-310. The Court reasoned that, as here, the plaintiffs:

> [W]ere not parties to the record of any of the . . . decisions challenged by them in this lawsuit. . . . Neither were they harmed by a single decision of the county commissioners, such that appeal would be an appropriate remedy. Rather, it was a continuing policy . . . and ongoing series of decisions . . . which adversely affected [them], thus the [systemic declaratory and injunctive] remedy was well-suited.

Id. The APA does not govern the Youths' constitutional claims.

B. The Youth Alleged Viable Due Process Claims

1. Washington's Constitution Protects the Fundamental Right to a Healthful Environment, Including A Stable Climate

The Youth alleged a viable claim to violation of their unenumerated due process right to a healthful environment, *specifically* the right to a stable climate that sustains human life and liberty. CP 57-61.[17] Respondents

[17] The Youth's right to a stable climate system is also "constitutionally reserved through Article I, Section 30 of the Washington Constitution." *See, e.g.*, CP 61. The Youth rely on this provision as support for their unenumerated substantive due process rights. *See* Resp. at 38. Respondents recognize this section preserves "fundamental, 'immutable'" rights, yet seek to drain all meaning from the provision. *Id.*

nakedly assert that the right to a stable climate is not "deeply rooted in this Nation's history and tradition," but offer no support or analysis for this position. Resp. at 31. Respondents argue that protecting a constitutional right to a stable climate system would "move[] the liberty interest 'outside the arena of public debate and legislative action," Resp. at 28 (citation omitted). That argument is easily refuted; the right to a "healthful environment" has already been, and indeed is the only right recognized by the legislature as "fundamental and inalienable." RCW 43.21A.010; 43.21C.020(3); 70.105D.010. Such legislative recognition also confirms the right's roots in Washington's history and tradition. *See In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007) (liberty interest may arise from state law).

Respondents attempt to corner the principle that fundamental rights can arise in statute to the criminal justice context, while conveniently ignoring cases that apply the principle elsewhere. *See, e.g.*, *State v. Jorgenson*, 179 Wn.2d 145, 170, 312 P.3d 960 (2013) (right to bear arms); *King County Dep't of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 353, 254 P.3d 927 (2011) (public records); *Coal. of Chiliwist v. Okanogan Cty.*, 198 Wn. App. 1016, at *7 (2017)[18] (order to vacate road).

[18] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

The legislature declared without any such qualification "each person has a fundamental and inalienable right to a healthful environment . . . " RCW 43.21C.020(3); *see also* RCW 43.21A.010; 70.105D.010.

A fundamental liberty interest can arise "'from an expectation or interest created by state laws or policies.'" *In re McCarthy*, 161 Wn.2d at 240 (citation omitted). The Youth have not filed suit to enforce RCW 43.21A.010, but cite this provision as proof and support for the unenumerated fundamental right they assert. Neither of Respondents' cited cases involved an express legislative declaration of a "fundamental and inalienable right" and both support the principle that policy statements are indicative of legislative intent. *Int'l Union of Operating Engineers Local No. 286, AFL-CIO v. Sand Point Country Club*, 83 Wn.2d 498, 500, 505, 519 P.2d 985 (1974);[19] *see also Kilian v. Atkinson*, 147 Wn.2d 16, 24, 50 P.3d 638 (2002). The legislature's explicit recognition of a "fundamental and inalienable right" to a healthful environment can and does have constitutional implications, and at the very least supports the notion that such a right is "'implicit in the concept of ordered liberty'" under

[19] The plaintiffs in *Int'l Union of Operating Engineers* were asking the court to read an unwritten provision into the policy statement. 83 Wn.2d at 503-04.

Washington law.[20] *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008).

All of the cases Respondents cite in urging rejection of the fundamental right pled here—"a healthful and pleasant environment, including a stable climate system that sustains human life and liberty" are inapposite.[21] Both the rights analyzed and the contextual circumstances of those cases present substantial distinctions. *Clean Air Council v. United States*, for example, like the superior court in this case, improperly grounded its decision in a conflation of "the right to a climate system capable of sustaining human life" with the "right to a pollution-free environment."[22]

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[20] Development of a full factual record will further demonstrate the history and tradition of this fundamental right in Washington. Many important fundamental rights cases were decided on appeal of merits decisions, not on motions to dismiss. *See, e.g., Obergefell*, 135 S. Ct. 2584; *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Furman v. Georgia*, 408 U.S. 238 (1972); *Brown v. Bd. of Educ*., 347 U.S. at 486 n.1.

[21] Respondents claim that the Youth did not narrowly define the fundamental right, but the Youth alleged that a stable climate system can be defined according to the best available science, currently as atmospheric concentrations of carbon dioxide no greater than 350 parts per million. CP 39-40. The application of this standard to Respondents conduct is a question to be resolved at trial based upon the evidence. *Braam*, 150 Wn.2d at 700-04 (remanding for application of culpability standard). Respondents' claim that the Youth seek a broader right than that found in *Juliana* is false. Resp. at 32. 217 F.Supp.3d at 1247-48, 1250 (recognizing "right to climate system capable of sustaining human life" tied to lowering carbon dioxide levels to less than 350 parts per million by 2100).

[22] Respondents' other comparisons are equally unhelpful. *See* Resp. at 29 n. 16 (citing cases that are factually distinct and do not involve the same "fundamental and inalienable" right alleged here). Supporting recognition of the right to a stable climate, a vast body of foreign jurisprudence recognizes a fundamental right to a healthful environment. *See, e.g., Asghgar Leghari v. Fed'n of Pakistan*, (2015) W.P. No. 25501/2015, ¶6 (Lahore High Court) (Pak.) (climate change is "a legal and constitutional . . . clarion call for the protection of fundamental rights"); *Minors Oposa v. Sec'y of the Dep't of Envt'l & Natural Res.*, G.R. No. 101083, 33 I.L.M. 173, 187-88 (S.C., Jul. 30, 1993) (Phil.) (without "a balanced and healthful ecology," future generations "stand to inherit nothing but parched earth incapable

See No. CV 17-4977, 2019 WL 687873, at *8 (E.D. Pa. Feb. 19, 2019). Most importantly, *none* of the cases cited by Respondents involved a legislatively-recognized "fundamental and inalienable" right. A finding that the Youth have no right to a stable climate system necessary for their lives and liberties "would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breath or the water its citizens drink." *Juliana*, 217 F. Supp.3d at 1250.

Without analysis, Respondents endorse the superior court's error that the right to a stable climate system is "the goal of a people, rather than the right of a person." Resp. at 32. However, not all inalienable rights are about exercising intimate personal choices—take the rights to be free from unlawful restraint, unreasonable government-imposed fines, and unreasonable risks of harm. Further, one could classify virtually any already-recognized fundamental right, such as the right to free assembly, as a society-wide aspirational goal. That does not negate their extension to individuals as fundamental rights upon which the government cannot

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of sustaining life."); *Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 SCC 520 (India) (right to life encompasses right to healthy environment); Note by the Secretary-General, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶ 54, U.N. Doc. A/73/188, (July 19, 2018) ("155 States have a binding legal obligation to respect, protect and fulfill the right to a healthy environment").

infringe. Even so, the Youth alleged that Respondents' conduct has harmed them in ways implicating intimate personal choices. CP 5-16.

Respondents also erroneously claim the fundamental right to marriage recognized in *Obergefell* fell "within an individual right of privacy." Resp. at 31. As retired Justice John Paul Stevens wrote, "[t]he *Obergefell* majority, furthermore, correctly framed the right to marriage in terms of the Fourteenth Amendment's protection of liberty rather than 'privacy.'"[23] Respondents' arguments dismantle the concept of inalienable rights settled since the Declaration of Independence (U.S. 1776), which recognized that inalienable rights like "Life, Liberty and the pursuit of Happiness," are natural rights, not bestowed by the laws of people, but "endowed by their Creator." Decl. of Independence, ¶ 2 (U.S. 1776); Wash. Const. Art. I, § 30. The right of these Youth to live with the climate system that nature provides, free of government-sanctioned destruction, is the very foundation of, and preservative of, all of their fundamental, inalienable natural rights. It is, in fact, the prerequisite to life itself.

Finally, Respondents attempt to escape accountability for their affirmative contributions to climate change by framing the problem as one caused by "billions of human beings and millions of businesses." Resp. at

[23] Justice John Paul Stevens (Ret.), *Two Thoughts About* Obergefell v. Hodges, 77 Ohio St. L.J. 913 (2016).

29. However, because of Respondents' creation and control of the energy and transportation system, the majority of Washington's GHG emissions are contemplated, authorized, and sanctioned by Respondents. CP 50-56. Regardless of the conduct of third parties, the government has a constitutional obligation refrain from engaging in activities knowingly injurious to children under its jurisdiction. The Youth are not asking Respondents to solve climate change, but to stop affirmatively contributing to it and causing them harm.[24]

C. The Youth Alleged a Viable State-Created Danger Claim

There are *two distinct DeShaney* exceptions implicating the positive governmental duty to take affirmative action to protect life, liberty, and property: the "special relationship" exception and the "state-created danger" exception. *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 200-01 (1989); *Triplett v. Washington State Dep't of Soc. & Health Servs.*, 193 Wn. App. 497, 513-14, 373 P.3d 279 (2016). Respondents conflate the two. Resp. at 35. The Youth bring a "state-created danger" challenge, under

[24] Respondents improperly limit due process rights to the narrow circumstances in which they have been previously recognized. Resp. at 39. Such an approach is contrary to the nature of constitutional rights and the role of precedent in legal analysis. When government conduct infringes an existing liberty interest, there is a claim for relief regardless of whether an infringement has previously occurred in that exact factual scenario. *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 848, (1992) ("Liberty . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.") (citation omitted).

which government is "liable for failing to protect a person's . . . personal security or bodily integrity" if it "affirmatively and with deliberate indifference placed that person in danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

Focusing on the "special relationship" standard, Respondents erroneously conclude that cases involving foster children are inapposite because the state "assumed responsibility for [the foster children's] care and safety." Resp. at 36. However, the parallels between the State's role in the energy and transportation system and in the foster system "in creating or exposing plaintiffs to danger they otherwise would not have faced," is clear. *Pauluk*, 836 F.3d at 1122. Just as in the foster cases, Respondents' knowingly harmful implementation of a state-controlled system is injuring the Youth. CP 1-5; CP 50-56 (describing how dangerous GHG emissions have resulted from Respondents' energy and transportation system); CP 56 (describing feasible alternatives to existing system); CP 47; CP 41-50 (Respondents' long-standing knowledge of climate danger); CP 5-16 (the Youth's substantial individual harms stemming from Respondents' actions). Respondents' own documents acknowledge that Youth are particularly vulnerable to climate change and the State's role in accentuating that danger. CP 47. As such, the Youth have properly pled a state created danger claim and have justified application of the professional

judgment standard to determine Respondents' culpability. *See Braam*, 150 Wn.2d at 703-04 ("Something more than refraining from indifferent action is required to protect these innocents.").

D. The Youth Alleged Viable Equal Protection Claims

The Youth are members of a *distinct* class—children born into dangerous climate change—who will suffer disproportionately from climate change impacts. CP 65-67. Even though these children will grow up, the Youth's generation was born into a climate crisis contributed to by Respondents' knowing decisions systematically favoring previous generations' convenience over the Youth's wellbeing. CP 65-70; *cf. State v. Schaaf*, 109 Wn.2d 1, 19, 743 P.2d 240 (1987) (previous hesitancy to declare youth as a suspect class was based on belief that minors "tend to be treated in legislative arenas with full concern and respect."). Under the facts of this case, the Youth therefore "have immutable age and generational characteristics that they cannot change."[25] CP 65; CP 24-41 (summarizing scientific evidence that Youth will face climate catastrophe, while prior generations benefited from unrestrained emissions for decades).

[25] To minimize the disproportionate harm the Youth suffer, Respondents claim that "[f]or equal protection purposes, the harm being suffered must impact a population that is vulnerable due to current, and not future or aggregate, impacts." Resp. at 41-42 (citing *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014)). The *Schroeder* case says no such thing. Even so, while the Youth certainly will continue to disproportionately suffer from climate change in the future, Respondents ignore the Youth's *current* and *ongoing* injuries and more vulnerable status. CP 2-3, 15; 38, ¶ 104-05.

Even if, after a proper analysis of *all* substantive due process rights pleaded and the Youths' asserted protected status, it is determined neither strict nor intermediate scrutiny applies, the Youth are *still at least* entitled to rational basis review. *See Am. Legion Post #149*, 164 Wn.2d at 609 ("If a suspect classification or fundamental right is not involved, rational basis review applies."). The superior court erred by not, at the least, allowing the Youth to present evidence and analyzing whether Respondents' systemic actions fail rationality review.

E. The Youth Alleged Viable Public Trust Claims

Respondents present no viable argument as to why courts lack jurisdiction to hear the Youth's claim of impairment to traditional public trust resources (tidelands, shorelands and navigable waters). As to extending the doctrine to the atmosphere, the Washington Supreme Court has purposely avoided limiting the doctrine when addressing a proposed expansion has been unnecessary to resolve presented claims. *See, e.g.*, *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232 n.5, 858 P.2d 232 (1993); *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004); *see also In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Were

the doctrine strictly limited to traditional trust resources, surely the Court would have taken one of these opportunities to say so and justify its departure from the doctrine's ancient roots. Op. Br. at 39-40.

Respondents argue the existence of air and water quality regulatory regimes means *ipso facto* that claims implicating those resources are to be resolved "under those regimes, not under the public trust doctrine." Resp. at 46. To the contrary, "[b]ecause of the doctrine's constitutional underpinning, any legislation [or regulatory action] that impairs the public trust remains subject to judicial review." *Chelan Basin Conservancy*, 190 Wn.2d at 266; *Wash. State Geoduck Harvest Ass'n v. Washington State Dep't of Nat. Res.*, 124 Wn. App. 441, 451, 101 P.3d 891 (2004) ("[W]e must determine whether DNR has violated the doctrine through its management regime."). Further, while the Youth allege impairment to public trust resources through Respondents' affirmative actions, CP 64, 69, the public trust doctrine also imposes on Respondents an affirmative duty to protect public trust resources. Op. Br. at 40-42. The Youth have alleged a viable public trust claim.

II. CONCLUSION

The Youth respectfully request that this Court reverse the Superior Court's erroneous dismissal of their Complaint.

Respectfully submitted this 24th day of April, 2019,

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APPENDIX

Washington State Constitution

Article I, Section 3
PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

Article I, Section 12
SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Article I, Section 30
RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

RCW 43.21A.010

Legislative declaration of state policy on environment and utilization of natural resources.

The legislature recognizes and declares it to be the policy of this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources. The legislature further recognizes that as the population of our state grows, the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic and other needs will place an increasing responsibility on all segments of our society to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.

RCW 43.21C.020(3)

The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RCW 70.105D.010

Declaration of policy.

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

(6) Because releases of hazardous substances can adversely affect the health and welfare of the public, the environment, and property values, it is in the public interest that affected communities be notified of where releases of hazardous substances have occurred and what is being done to clean them up.

RCW 70.235

70.235.005
Findings—Intent.

(1) The legislature finds that Washington has long been a national and international leader on energy conservation and environmental stewardship, including air quality protection, renewable energy development and generation, emission standards for fossil-fuel based energy generation, energy efficiency programs, natural resource conservation, vehicle emission standards, and the use of biofuels. Washington is also unique among most states in that in addition to its commitment to reduce emissions of greenhouse gases, it has established goals to grow the clean energy sector and reduce the state's expenditures on imported fuels.

(2) The legislature further finds that Washington should continue its leadership on climate change policy by creating accountability for achieving the emission reductions established in RCW 70.235.020, participating in the design of a regional multisector market-based system to help achieve those emission reductions, assessing other market strategies to reduce emissions of greenhouse gases, and ensuring the state has a well trained workforce for our clean energy future.

(3) It is the intent of the legislature that the state will: (a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020; (b) minimize the potential to export pollution, jobs, and economic opportunities; and (c) reduce emissions at the lowest cost to Washington's economy, consumers, and businesses.

(4) In the event the state elects to participate in a regional multisector market-based system, it is the intent of the legislature that the

system will become effective by January 1, 2012, after authority is provided to the department for its implementation. By acting now, Washington businesses and citizens will have adequate time and opportunities to be well positioned to take advantage of the low-carbon economy and to make necessary investments in low-carbon technology.

(5) It is also the intent of the legislature that the regional multisector market-based system recognize Washington's unique emissions portfolio, including the state's hydroelectric system, the opportunities presented by Washington's abundant forest resources and agriculture land, and the state's leadership in energy efficiency and the actions it has already taken that have reduced its generation of greenhouse gas emissions and that entities receive appropriate credit for early actions to reduce greenhouse gases.

(6) If any revenues that accrue to the state are created by a market system, they must be used to further the state's efforts to achieve the goals established in RCW 70.235.020, address the impacts of global warming on affected habitats, species, and communities, and increase investment in the clean energy economy particularly for communities and workers that have suffered from heavy job losses and chronic unemployment and underemployment.

70.235.010
Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Carbon dioxide equivalents" means a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential.

(2) "Climate advisory team" means the stakeholder group formed in response to executive order 07-02.

(3) "Climate impacts group" means the University of Washington's climate impacts group.

(4) "Department" means the department of ecology.

(5) "Director" means the director of the department.

(6) "Greenhouse gas" and "greenhouse gases" includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and any other gas or gases designated by the department by rule.

(7) "Person" means an individual, partnership, franchise holder, association, corporation, a state, a city, a county, or any subdivision or instrumentality of the state.

(8) "Program" means the department's climate change program.

(9) "Western climate initiative" means the collaboration of states, Canadian provinces, Mexican states, and tribes to design a multisector market-based mechanism as directed under the western regional climate action initiative signed by the governor on February 22, 2007.

70.235.020
Greenhouse gas emissions reductions—Reporting requirements.

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state:

(i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels;

(ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels;

(iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.

(b) By December 1, 2008, the department shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions in (a) of this subsection by using existing statutory authority and any additional authority granted by the legislature. Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.

(c) Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 limits any state agency authorities as they existed prior to June 12, 2008.

(d) Consistent with this directive, the department shall take the following actions:

(i) Develop and implement a system for monitoring and reporting emissions of greenhouse gases as required under RCW 70.94.151; and

(ii) Track progress toward meeting the emission reductions established in this subsection, including the results from policies currently in effect that have been previously adopted by the state and policies adopted in the future, and report on that progress.

(2) By December 31st of each even-numbered year beginning in 2010, the department and the *department of community, trade, and economic development shall report to the governor and the appropriate committees of the senate and house of representatives the total emissions of greenhouse gases for the preceding two years, and totals in each major source sector. The department shall ensure the reporting rules adopted under RCW 70.94.151 allow it to develop a comprehensive inventory of emissions of greenhouse gases from all significant sectors of the Washington economy.

(3) Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

70.235.030
Development of a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas—Information required to be submitted to the legislature.

(1)(a) The director shall develop, in coordination with the western climate initiative, a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020(1).

(b) By December 1, 2008, the director and the director of the *department of community, trade, and economic development shall deliver to the legislature specific recommendations for approval and request for authority to implement the preferred design of a regional multisector market-based system in (a) of this subsection. These recommendations must include:

(i) Proposed legislation, necessary funding, and the schedule necessary to implement the preferred design by January 1, 2012;

(ii) Any changes determined necessary to the reporting requirements established under RCW 70.94.151; and

(iii) Actions that the state should take to prevent manipulation of the multisector market-based system designed under this section.

(2) In developing the design for the regional multisector market-based system under subsection (1) of this section, the department shall consult with the affected state agencies, and provide opportunity for public review and comment.

(3) In addition to the information required under subsection (1)(b) of this section, the director and the director of the *department of community, trade, and economic development shall submit the following to the legislature by December 1, 2008:

(a) Information on progress to date in achieving the requirements of chapter 14, Laws of 2008;

(b) The final recommendations of the climate advisory team, including recommended most promising actions to reduce emissions of greenhouse gases or otherwise respond to climate change. These recommendations must include strategies to reduce the quantity of emissions of greenhouse gases per distance traveled in the transportation sector;

(c) A request for additional resources and statutory authority needed to limit and reduce emissions of greenhouse gas consistent with chapter 14, Laws of 2008 including implementation of the most promising recommendations of the climate advisory team;

(d) Recommendations on how projects funded by the green energy incentive account in **RCW 43.325.040 may be used to expand the electrical transmission infrastructure into urban and rural areas of the state for purposes of allowing the recharging of plug-in hybrid electric vehicles;

(e) Recommendations on how local governments could participate in the multisector market-based system designed under subsection (1) of this section;

(f) Recommendations regarding the circumstances under which generation of electricity or alternative fuel from landfill gas and gas from anaerobic digesters may receive an offset or credit in the regional multisector market-based system or other strategies developed by the department; and

(g) Recommendations developed in consultation with the department of natural resources and the department of agriculture with the climate advisory team, the college of forest resources at the University of Washington, and the Washington State University, and a nonprofit consortium involved in research on renewable industrial materials, regarding how forestry and agricultural lands and practices may participate voluntarily as an offset or other credit program in the regional multisector market-based system. The recommendations must ensure that the baseline for this offset or credit program does not disadvantage this state in relation to another state or states. These recommendations shall address:

(i) Commercial and other working forests, including accounting for site-class specific forest management practices;

(ii) Agricultural and forest products, including accounting for substitution of wood for fossil intensive substitutes;

(iii) Agricultural land and practices;

(iv) Forest and agricultural lands set aside or managed for conservation as of, or after, June 12, 2008; and

(v) Reforestation and afforestation projects.

70.235.040
Consultation with climate impacts group at the University of Washington—Report to the legislature.

Within eighteen months of the next and each successive global or national assessment of climate change science, the department shall consult with the climate impacts group at the University of Washington regarding the science on human-caused climate change and provide a report to the legislature summarizing that science and make recommendations regarding whether the greenhouse gas emissions reductions required under RCW 70.235.020 need to be updated.

70.235.050
Greenhouse gas emission limits for state agencies—Timeline—Reports—Strategy—Point of accountability employee for energy and climate change initiatives.

(1) All state agencies shall meet the statewide greenhouse gas emission limits established in RCW 70.235.020 to achieve the following, using the estimates and strategy established in subsections (2) and (3) of this section:

(a) By July 1, 2020, reduce emissions by fifteen percent from 2005 emission levels;

(b) By 2035, reduce emissions to thirty-six percent below 2005 levels; and

(c) By 2050, reduce emissions to the greater reduction of fifty-seven and one-half percent below 2005 levels, or seventy percent below the expected state government emissions that year.

(2)(a) By June 30, 2010, all state agencies shall report estimates of emissions for 2005 to the department, including 2009 levels of emissions, and projected emissions through 2035.

(b) State agencies required to report under RCW 70.94.151 must estimate emissions from methodologies recommended by the department and must be based on actual operation of those agencies. Agencies not

required to report under RCW 70.94.151 shall derive emissions estimates using an emissions calculator provided by the department.

(3) By June 30, 2011, each state agency shall submit to the department a strategy to meet the requirements in subsection (1) of this section. The strategy must address employee travel activities, teleconferencing alternatives, and include existing and proposed actions, a timeline for reductions, and recommendations for budgetary and other incentives to reduce emissions, especially from employee business travel.

(4) By October 1st of each even-numbered year beginning in 2012, each state agency shall report to the department the actions taken to meet the emission reduction targets under the strategy for the preceding fiscal biennium. The department may authorize the department of enterprise services to report on behalf of any state agency having fewer than five hundred full-time equivalent employees at any time during the reporting period. The department shall cooperate with the department of enterprise services and the department of commerce to develop consolidated reporting methodologies that incorporate emission reduction actions taken across all or substantially all state agencies.

(5) All state agencies shall cooperate in providing information to the department, the department of enterprise services, and the department of commerce for the purposes of this section.

(6) The governor shall designate a person as the single point of accountability for all energy and climate change initiatives within state agencies. This position must be funded from current full-time equivalent allocations without increasing budgets or staffing levels. If duties must be shifted within an agency, they must be shifted among current full-time equivalent allocations. All agencies, councils, or work groups with energy or climate change initiatives shall coordinate with this designee.

70.235.060
Emissions calculator for estimating aggregate emissions—Reports.

(1) The department shall develop an emissions calculator to assist state agencies in estimating aggregate emissions as well as in estimating the relative emissions from different ways in carrying out activities.

(2) The department may use data such as totals of building space occupied, energy purchases and generation, motor vehicle fuel purchases and total mileage driven, and other reasonable sources of data to make these estimates. The estimates may be derived from a single methodology using these or other factors, except that for the top ten state agencies in occupied building space and vehicle miles driven, the estimates must be

based upon the actual and projected operations of those agencies. The estimates may be adjusted, and reasonable estimates derived, when agencies have been created since 1990 or functions reorganized among state agencies since 1990. The estimates may incorporate projected emissions reductions that also affect state agencies under the program authorized in RCW 70.235.020 and other existing policies that will result in emissions reductions.

(3) By December 31st of each even-numbered year beginning in 2010, the department shall report to the governor and to the appropriate committees of the senate and house of representatives the total state agencies' emissions of greenhouse gases for 2005 and the preceding two years and actions taken to meet the emissions reduction targets.

70.235.070
Distribution of funds for infrastructure and capital development projects—Prerequisites.

Beginning in 2010, when distributing capital funds through competitive programs for infrastructure and economic development projects, all state agencies must consider whether the entity receiving the funds has adopted policies to reduce greenhouse gas emissions. Agencies also must consider whether the project is consistent with:

(1) The state's limits on the emissions of greenhouse gases established in RCW 70.235.020;

(2) Statewide goals to reduce annual per capita vehicle miles traveled by 2050, in accordance with RCW 47.01.440, except that the agency shall consider whether project locations in rural counties, as defined in RCW 43.160.020, will maximize the reduction of vehicle miles traveled; and

(3) Applicable federal emissions reduction requirements.

70.235.900
Scope of chapter 14, Laws of 2008.

Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 alters or limits any authorities of the department as they existed prior to June 12, 2008.

LAW OFFICES OF ANDREA K. RODGERS

April 24, 2019 - 3:40 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96316-9
Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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APPENDIX F

Brief for Sauk-Suiattle Indian Tribe as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed Apr. 11, 2019); Brief for Faith Community as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed June 6, 2019); Brief for League of Women Voters as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed June 6, 2019); Brief for Environmental Groups as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed July 3, 2019); Brief for Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish Tribe as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed July 12, 2019); Brief for Public Health Officials, Public Health Organizations, and Medical Doctors as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed July 12, 2019); Brief for Washington Businesses as Amici Curiae Supporting Appellants, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (filed July 12, 2019)

80007-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 96316-9

AJI P.*,et al.,*

Plaintiff-Appellant,
v.

STATE OF WASHINGTON, et al.

Appeal from a Decision of the Superior Court of the State of Washington
For King County

Civil Action No. 18-2-04448-1 SEA

Honorable Michael R. Scott

AMICUS BRIEF OF SAUK-SUIATTLE INDIAN TRIBE SEEKING REVERSAL IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

The Sauk-Suiattle Indian Tribe has inhabited what is now the State of Washington since Time Immemorial. In the Treaty of Point Elliott it reserved the right to fish, hunt, gather, and harvest vegetative resources in the former Territory of Washington potentially impacted by respondents' failure to act to avoid degradation of resources by addressing climate changes.

Counsel for amicus is a non-profit tribal corporation which provides legal advice and assistance to low-income members of Indian tribes in the State of Washington with experience in preservation of natural resources. Appellants and Respondents consented to the filing of this *amicus* brief.

To supplement their diet and carry on subsistence practices they have relied upon since Time Immemorial, *amicus* harvests animal, aquatic and vegetative resources, all of which exist only within the parameters of very specific ecosystems. Erna Gunther, *Ethnobotany of Western Washington; the Knowledge and Use of Indigenous Plants by Native Americans* (1945). *See generally*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed* 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Failure to address climate change which effects one species of plant, fish or animal

life relied upon by this population has devastating ripple effect on the entire life cycle of the precious species of the Pacific Northwest region. Not less than 15 tribal reservations in the State of Washington are situated adjacent to marine waters. According to the National Congress of American Indians, 31 villages inhabited by nearby Native Alaskans are eligible for relocation due to the rise in oceanic water levels.[1] The Environmental Protection Agency has predicted that the next 40 to 80 years will see the loss of more than half of the salmon and trout habitats throughout the United States. According to the University of Maryland School of Public Policy, Native Americans in the United States are disproportionately affected by climate change. C. Cotterell, *Indigenous Populations in the U.S. Disproportionately Affected by Climate Change* (November 29, 2018).[2] *See also*, Fourth National Climate Assessment (U.S. Govt. Printing Office, 2018), Ch. 7 [Indigenous Peoples] ("adverse impacts on subsistence activities have already been observed").[3] According to the most recent Indian Labor Force Statistics maintained by the United States Bureau of Indian

[1] http://www.ncai.org/policy-issues/land-natural-resources/climate-change

[2]http://www.cgs.umd.edu/news/2018/11/29/indigenous-peoples-in-the-us-are-disproportionately-affected-by-climate-change-says-new-us-climate-reports

[3] https://nca2018.globalchange.gov/

Affairs, unemployment among Indian tribes in Washington State is as high as nearly fifty percent: Yakama 48.9%; Umatilla 43%; Shoalwater Bay Tribe 49.1%; Cowlitz 66%. U.S. Dept. of Interior, *American Indian Population and Labor Force Report* (Jan. 16, 2014).[4] Such factors make the availability of natural foods and medicines relied upon for the diet and subsistence of Native American communities especially important. As was stated in the landmark case of Sohappy v. Smith, 302 F. Supp. 899 (1969), native Americans in what was formerly Washington Territory were loath to sign treaties until assured that they continue their subsistence lifestyles. To date, consideration of the effects of failure to address climate change has focused primarily on such things as increasing temperatures, storm strength, wildfires and higher ocean levels necessitating relocation of communities. Very little attention has been given to the effect upon resources relied upon by the first inhabitants of this region for their very existence and culture. Since Time Immemorial, people of the First Nations in Washington State have relied upon the little-known plant resources in the State, many of which survive only under narrow ecological conditions—and many sensitive species of which are

[4] https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf

now either absent or are have been so reduced in availability due to climate change that the unwritten cultural laws prohibit their harvest.

The Sahkumehu, or Sauk-Suiattle Tribe, traditionally harvested ćabid (wild onions), šagʷək (Indian carrots), hačoʔ (a celery-like plant), ćagʷič (a root that tastes like garlic), and k'auxʷ (camas) at Sauk Prairie, a moist meadow near their homeland which is increasingly drying up.[5] In testimony before the United States Indian Claims Commission (Sauk-Suiattle Indian Tribe, docket no. 97), the son of Nels Bruseth (1851-1905), an immigrant from Norway who settled near Darrington, Washington, testified that:

> The first white men to visit Sauk Prairie were surprised at the number of Indians living there. The sloughs were full of canies, and houses, shacks and camps like a town stood on the banks. There were big racks of roots drying in the sun[.]

The reliance upon such delicate plants native to Washington is not unique among Washington tribes. The Yakama, for example, "derived their subsistence primarily from the gathering of wild plant foods, fishing and hunting, approximately in that order of importance." H. Schuster,

[5] S. Snyder, *Field Notes for Swinomish, Upper Skagit and Sauk-Suiattle* (1952-55), Univ. Wn. Special Collections, *cited* in A. Onat and J. Hollenbeck, *Inventory of Native American Religious Use, Practices, Localities, and Resources on the Mt. Baker-Snoqualmie National Forest*, U.S. Forest Service (1979).

Yakama Indian Traditionalism; a Study in Continuity and Change (Univ. Wa. Doctoral Dissertation, 1977). According to ethnologist and photographer Edward Sheriff Curtis in 1911, the Yakama harvested "no fewer than twenty-three kinds of roots and eighteen kinds of berries",[6] including sawitk, piyəx̲ʷay (bitterroot), pənq'u (little potato), wapato, and k'unč—each of which have experienced loss due to climate change.

Although Appellants' claims relate mainly to the climatic impacts of Appellees' encouragement of the use of fossil fuels and its resultant increase in CO_2 emissions, appellants have failed in their duties to plan for avoidance of exacerbated climate conditions in other ways. Appellant Commissioner of Public Lands' failure to address the effects of managing the State's timber harvesting lands owned by the State of Washington Department of Natural Resources and managing timber harvests by private timberland owners to limit the practice of "clear-cutting" timber in important mountain watersheds, for example, causes removal of important shade canopies which reduce flooding and preserve water flows.

Although the dangers of climate change have only recently arisen to national attention, the Tribal citizens of the State of Washington have for decades enunciated their concern

[6] E. Curtis, *The North American Indians,* Vol. 7 (1911).

over the diminishment of their tribal resources and received little attention. As was eloquently stated in by the Blackstone of American Indian law, Felix Cohen, to the rest of our citizenry the Indian often serves as the canary in the coalmine, providing an advance warning "mark[ing] the shifts from fresh air to poison gas in our political atmosphere."[7]

The students who filed the litigation under appeal have similarly enunciated their concerns and have presented a complaint alleging a statement of facts—presumed to be true—demonstrating their belief that they can prove them. As a matter of substantive due process, they should be allowed the opportunity to do so. At least 4 of the plaintiffs are members of tribal nations. As was noted by the United States Congress, when enacting the Indian Child Welfare Act, among tribal nations children are considered to be our greatest natural resource and they are deserving of greater legal protection than other citizens. 25 U.S.C. § 1901 (3). For such reasons, *amicus* supports the appellants, ages eight to eighteen, in their petition seeking review.

[7] F. Cohen, *The Erosion of Indian Rights, 1950-53; a Case Study in Bureaucracy*, 62 Yale L. J. 349, 390 (1953).

STATEMENT OF THE CASE

Amicus incorporates by reference the allegations contained in appellants complaint filed in the Superior Court and in appellant's opening brief.

ISSUES PRESENTED

Did the superior court err in ruling that appellant's civil complaint presented questions which were quintessentially political in nature?

Did the superior court err in ruling that consideration of plaintiffs' complaint would violate separation of powers?

Did the superior court err in determining that plaintiffs' complaint raised no cognizable claims arising under the Washington State Constitution?

Did the superior court err in ruling that only personal or claims for injury to a single individual were cognizable under the Equal Protection clause and that claims for communal harm to large numbers of persons were not cognizable?

STANDARD OF REVIEW

The standard for reviewing a CR 12 (c) motion is the same as review of a CR 12 (b) (6) motion to dismiss for failure to state a cognizable claim. Hodgson v. Bicknell, 49 Wn. 2d 130 (1956); Bailey v. Forks, 108 Wn. 2d 262 (1987). The court must accept

as true all well-pleaded allegations of a plaintiff's complaint and construe it most strongly in favor of the non-moving party. A superior court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that appellate courts review *de novo*. The same standard should apply to review of the grant of a CR 12 (c) motion for judgment on the pleadings.

SUMMARY OF ARGUMENT

For each of the above issues presented *post* for review, the answer as to whether the superior court committed reversible error is "yes". Washington is a notice pleading state. This means a simple concise statement of the claim and of the relief sought in a pleading is sufficient to allow a case to proceed. Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). Pleadings are to be liberally construed; their purpose is to facilitate a proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. State v. Adams, 107 Wn.2d 611, 619–20 (1987). A complaint need merely contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled.

Relief in the alternative or of several different types may be demanded. CR 8 (a). In Washington, no technical form of pleading is required. CR 8 (e) (1). All pleadings are to be construed to do substantial justice. CR 8 (f). In a notice pleading state, it is contemplated that more specific detail is to be obtained in Discovery. CR 26.

As set for the below, appellants' complaint in the Superior Court satisfied the pleading requirements of CR 8 (a).

ARGUMENT

Construing appellants' pleadings as a whole, it is apparent what plaintiffs' claims are based upon. It is alleged that appellees violated duties imposed upon them by the common law Public Trust Doctrine to preserve the public resources of the State for the benefit of all state citizens. Complaint, ¶ 183, p. 64. *See generally*, Caminiti v. Boyle, 107 Wn. 2d 662 (1987). Each named plaintiff appears to be a citizen of the State of Washington. Complaint, ¶ 1, p. 1 and ¶¶ 12-24, pp. 9-14. *See also*, ¶25 ("all Plaintiffs are residents of the State of Washington and beneficiaries of the essential Public Trust Resources managed by Defendants"). They further allege that the conduct of the defendants violates rights conferred upon them by statute. ¶ 169, p. 61 (citing RCW 43.21A.010).

Appellant's further base their claims upon their substantive due process rights to a clean and healthful environment and their disparate treatment as children subjected to a degraded environment. Complaint., ¶¶ 149-173, 196-207, p. 70. Construing the allegations of their complaint as a whole, taking them as true, and resolving all doubts in their favor, there is little doubt as to the basis of their claims for relief.

The second prong of CR 8 (a) is that of a demonstration and demand for the relief to which they deem they are entitled. As to such relief, the appellants seek a declaratory judgment that they possess certain rights to a healthful environment. They further seek a declaration affirming that the defendant state officials are subject to a trust or duty imposed by the Public Trust Doctrine and that they have through act or omission violated such duty. They seek a declaration that acts or omissions of the defendants impair their constitutional and other enumerated rights and that RCW 70.235 is invalid. Appellee's complaint seeks injunctive relief requiring them to take action to address the foregoing alleged violations, subject to continuing jurisdiction by the superior court. The relief to which they deem themselves entitled as citizens of the State of Washington is clearly demonstrated in their complaint.

Notwithstanding the foregoing liberal rules of pleading applicable to civil actions in this state, the superior court applied a far higher, and more technical, standard for the validity of the youth's complaint. Their complaint seeking declarations that the defendants had certain duties imposed by constitution, statutes and common law doctrines owed to them as a matter of right as state citizens, that the defendants breached or violated such duties, and enjoining them to fulfill such duties under ongoing court order or supervision is essentially in nature an action in *mandamus*. Such civil actions to compel governmental officials to fulfill their legal duties is by no means unprecedented. The Superior Court below ruled that "Plaintiffs' claims are non-judiciable" (Order Granting Defendants' Motion for Judgment on the Pleadings, pg. 6) because:

> The relief sought by Plaintiffs would require the Court to usurp the roles of the legislative and executive branches of our state government.

Id. Issuing a writ or order requiring state officials to perform duties imposed as a matter of law by constitutional or statutory authority is the very nature of what a superior court does in a *mandamus* action, in which a writ:

> [M]ay be issued by any court, except a district or municipal court, to any inferior tribunal,

> corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or
> station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.

RCW 7.16.160. The plaintiffs need not have entitled their complaint as such in order for that to be the essence of their civil action. In this state, pleadings are deemed amended to conform to the evidence presented to the court. CR 15 (b). The plaintiffs have pleaded much factual evidence in the complaint demonstrating that their goal is for the court to declare that the defendants have violated their rights by failing to perform official duties and compel them to perform them. As such, by virtue of allowing the appellants' litigation to proceed, the superior court would not have been engaging in "quintessentially political" matter, nor would doing so have violated separation of powers. Rather, the court would merely be determining the scope of the defendants constitutional, statutory, and common law duties, if any, and determining whether that duty was breached—necessitating judicial intervention compelling enforcement of such duties.

The trial court's determination that it could not entertain the case is contrary to the broad authority it possesses:

> The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of *mandamus*, *quo warranto*, review, *certiorari*, prohibition and writs of *habeas corpus* on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of *habeas corpus* may be issued on legal holidays and nonjudicial days.

RCW 2.08.010. *See also* Wash. State Const., Art IV, § 6. It is apparent from the technical details alleged in appellants' 72 page complaint that their case is complex and will require an extended period of time for completion. However, the *difficulty* of a case is not a basis for its declination or dismissal. The Superior Court Civil Rules provide procedures for the efficient

processing of complex cases. CR 16 (pretrial procedure and formulating issues). *See also* Manual for Complex Litigation 4th (2004). According to the Washington Code of Judicial Conduct:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Rule 2.6 (Ensuring the Right to Be Heard).

There is no authority for the trial court to have concluded that rights enumerated in the Washington Constitution or imposed by statute or principles of common law protect only purely private "individuals". Order Granting Defendants' Motion, p. 8 (plaintiffs' claims "are not individual rights that can be enforced by a court of law"). This is a torpid reading of plaintiffs' complaint. Each individual plaintiff named in the complaint sets forth the right they claim has been harmed by defendants' failures to act. Complaint, ¶¶ 12-25.

The Superior Court further erred in its "blanket" decision regarding the plaintiffs' constitutional claims, treating the case as though the claims of all plaintiffs were identical rather than giving them the "individual" consideration that the trial court derided the plaintiffs for not asserting. For example, as a member of a federally recognized tribal nation with which the

first Governor of Washington Territory signed a treaty[8], the claims asserted by individual plaintiff Daniel M certainly raise a constitutional claim.

The Washington State Constitution expressly provides that "the *Constitution of the United States* is the supreme law of the land". Wash. State Const., Art. I, § 2 (emphasis added). According to that United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, Cl. 2. Daniel M's claim that the defendants' acts and omissions infringed upon or damaged his ability to exercise his treaty rights is therefore a constitutional question. As stated in Seattle School District No. 1 of King County v. State, 90 Wn.2d 476 (1978), a Superior Court cannot abdicate its duty to interpret and construe questions arising under the Washington State Constitution. 90 Wn.2d at 506.

In the Quinault Treaty, Daniel M's tribe reserved an environmental right subjecting Washington state officials to

[8] Treaty with the Quinielt, etc., 12 Stat. 971 (1859).

protect the habitat of resources reserved by the Treaty. United States v. Washington, 864 F. 3d 1017 (9th Cir. 2017), *affirmed* (U.S. Supreme Ct. No. 17-269) (June 11, 2018). Daniel M, as an individual member of the Quinault Nation, is a beneficiary of this right. Although the treaties were negotiated with Washington tribes:

> They reserved rights, however, *to every individual Indian*, as though named therein.

United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added). Daniel M's claim is *inter alia* that his ability to harvest salmon has been impaired due to the disappearance of Anderson Glacier (Complaint, ¶ 23, p. 13) and that species of cultural importance to him have diminished (Id.) due to the defendant state officials' knowledge of the danger caused by climate change (Complaint, ¶ 115, p. 41) and their failure to fulfill their legal duties to prevent or mitigate it (Complaint, ¶¶ 156, 162). The superior court's dismissal prevents the parties to the case below from the opportunity, through Discovery, motions practice and litigation, to determine the merit of his claims. Additionally, as stated by the United States Supreme Court, the rights reserved to *Daniel* are not exclusive to the Indian signatories to the treaty. Because the right is "in common", citizens of the State of Washington like the other named plaintiffs are also

beneficiaries who share in it. Winans, *supra* ("as a mere right, it was not exclusive in the Indians, citizens might share it"). As such, they too are beneficiaries of this environmental right.

It is apparent that the Superior Court failed to exercise the judicial curiosity and diligence necessary to thoroughly assess the merit of appellants' complaint, simply stating that:

> Plaintiffs attempt to frame a constitutional claim. They assert a constitutional right to "a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." *There is no such right to be found within our State Constitution.*

Order, p. 7 (emphasis added). Certainly, there may be no such *textual* right to be found in the Washington State Constitution but, read in its entirety, there is sufficient likelihood that the plaintiffs can prove that their state constitution embodies such a right to allow their case to proceed. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the United States Supreme Court held that, although there was no *express* provision of the U.S. Constitution creating a "right to privacy", various separate provisions of the constitution, read *in pari materia,* established a "penumbra of privacy" sufficient to support plaintiff's claim that Connecticut state officials violated plaintiffs' right to privacy. The youthful appellants in this appeal should similarly be afforded the opportunity to demonstrate, as a matter of law, that

the Washington State Constitution read in its entirety reserved to them a right to a healthy environment. The dismissal of their cause at such a preliminary stage denied them this opportunity.

At a minimum, a superior court ruling upon a motion which is dispositive of whether a civil action will proceed should enunciate the *reasons* for its decision. In the absence of stated reasons, a reviewing court is left in the position of having to guess at the basis for the dismissal of an action. According to CR 54:

> A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.

The civil rules generally contemplate that a court issuing a judgment or order from which an appeal can be taken set forth written findings or conclusions from which the reasons for the ruling can be discerned. In this case, as to many of the claims asserted in the plaintiffs' complaint, the superior court—rather than undertake to state its own basis for the ruling—merely stated that "for the reasons stated in Defendants' motion and reply memorandum"… "all of plaintiffs' other claims must be dismissed." Order, p. 10. Which *particular* reasons, or even what particular page, of Defendants' pleadings the superior court relied upon is not specified, leaving appellants to wonder,

for purposes of this appeal, what law, rule or precedent the court relied upon. At a minimum, the case should be remanded for clarification of just what authority the superior court was relying upon to dismiss all of plaintiffs' unspecified "other claims."

Finally, the superior court's "conclusion" (Order, pp. 10-11) reads like a class lecture from a member of a former generation to the current one, congratulating the plaintiffs for their passion while urging them as "young people" to trust "the legislature and the executive to enact and implement policies that will promote decarbonization and decrease greenhouse gas emissions"—the very officials they allege have failed in their duty to protect plaintiffs' rights. It is reminiscent of the decisions of previous courts best relegated to a bygone era where the wisdom of governments of higher authorities was deemed superior[9] to that of those in a "state of pupilage". Elk v. Wilkins, 112 U.S. 94, 108 (1884). It is apparent from the careful and technically accurate drafting of their complaint that the plaintiffs' complaint was not based upon mere youthful enthusiasm.

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[9] Johnson v. McIntosh, 21 U.S. 543, 574 (1823) ("while the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves").

CONCLUSION

For the foregoing reasons, the decision of the District Court should be *reversed* and the cause remanded for further proceedings.

DATED this 11th day of April, 2019.

Respectfully submitted,

S/ *Jack W. Fiander*

Counsel for Amicus Curiae
Sauk-Suiattle Indian Tribe

CERTIFICATE OF COMPLIANCE

Pursuant to, I certify that:

1. This brief complies with the type-volume limitation of because it contains 4,096 words, excluding the parts of the brief exempted by rule

2. This brief complies with the typeface requirements of and the type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Century Schoolbook.

Date: April 11, 2019 S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

I certify that:

No counsel for any party authored this brief in whole or in part and no person or entity other than amicus or its counsel made a monetary contribution for the preparation or submission of this brief.

Date: April 11, 2019 S/Jack W. Fiander

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court Participants in the case who are registered users will be served by the appellate system.

Date: April 11, 2019 S/Jack W. Fiander

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Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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80007-8

No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents.

AMICUS CURIAE BRIEF OF LEAGUE OF WOMEN VOTERS OF WASHINGTON

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I. STATEMENT OF INTEREST

This *amicus curiae* brief is filed on behalf of League of Women Voters of Washington (the "League"). The League is a grassroots, nonpartisan, nonprofit organization, whose primary mission and focus is ensuring effective representative government through voter registration, education, and mobilization. The League works to ensure that the voices and interests of all individuals, particularly those underrepresented in government, are spoken and accounted for in political decisionmaking.

The League files this brief in support of the thirteen Washington Youth Appellants (the "Youth"), to emphasize the proper role of the courts, in keeping with the separation of powers, to serve as a check and balance on the legislative and executive branches, particularly when their actions, as here, have infringed upon the fundamental rights of individuals, especially those who cannot yet vote.

II. STATEMENT OF THE CASE

The League concurs with and incorporates by reference the statement of the case set forth in the brief of Appellants, pages 3–11.

III. SUMMARY OF ARGUMENT

The League joins the Youth's request that this Court reverse the superior court's decision and allow the Youth to present evidence of the infringement of their rights under the Washington State Constitution and

Public Trust Doctrine. The Youth's fundamental rights have been and are being infringed by Respondents' historical and continuing creation and exacerbation of a dangerous climate system. Given their age, most of the Youth cannot rely on the representational political process to safeguard their fundamental rights. In addition to the lack of direct representation in democracy, the Youth also lack economic power. The lack of economic power, combined with the increasing costs of climate change mitigation, disproportionately burdens the Youth and the children of Washington.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As a check on the legislative and executive branches, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Given the advancing nature of climate change, the risks the Youth face from its impacts, and the fundamental rights at issue in this case, the matter falls squarely within the judiciary's role.

IV. ARGUMENT

A. The Youth Will Suffer Disproportionate Climate Change Impacts, Yet Lack Political and Economic Remedies.

Climate change disproportionately threatens children for at least two reasons. First, the progressive nature of climate change's impacts means

that today's children and future generations will see greater warming and associated impacts, including more frequent and severe extreme weather. "Warming and associated climate effects from CO_2 emissions persist for decades to millennia."[1] In Washington, wildfires are predicted to occur more frequently and more severely, due to drier summers.[2] Higher temperatures in the spring are predicted to result in the earlier melting of snowpack, which could cause more flooding in the spring, and affect water availability in the summer.[3] Sea levels are also expected to rise and coupled extreme weather events, will result in displacement and disruption of access to education, health care, and nutrition.[4]

Second, the unique life phase of childhood leaves children especially vulnerable to the impacts of climate change.[5] "Children are especially vulnerable because of (1) their growing bodies; (2) their unique

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[1] D.J. WUEBBLES ET AL., CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, 1 USGCRP 1, 1–31 (2017), https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf.

[2] REBEKAH FRANKSON ET. AL., WASHINGTON STATE CLIMATE SUMMARY, 149 WA NOAA Tech. Report NESDIS 1, 4 (2017), https://statesummaries.ncics.org/chapter/wa/.

[3] *Id*.

[4] EPA, *Fact Sheet: Climate Change and the Health of Children* 1 (May 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-10/documents/children-health-climate-change-print-version_0.pdf.
see also A.K. Snover et al., *Climate Change Impacts and Adaptation in Washington State*: *Technical Summaries For Decision Makers*, University of Washington Climate Impacts Group, Ch. 12 (Dec. 2013), http://cses.washington.edu/db/pdf/snoveretalsok816.pdf.

[5] REIDMILLER, D.R., ET AL., IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, 2 USGCRP 1, 28 (2018), https://nca2018.globalchange.gov/.

behaviors and interactions with the world around them; and (3) their dependency on caregivers."[6] Children likely will experience cumulative mental and physical health effects from climate change due to increased toxic exposures (such as increased ground-level ozone pollution in urban areas or increased risk of drinking water contamination in rural areas),[7] and increased exposure to extreme weather events (such as heat stress, trauma from injury, or displacement).[8] Children are more vulnerable than adults to pollution from burning fossil fuels,[9] and climate change is expected to lead to longer and more severe pollen seasons, which will trigger asthma in children.[10]

Although the children of Washington, including the Youth here, will experience disproportionate harm from climate change impacts, they have no direct representation in our government. The choices Respondents make today will determine the magnitude of climate change risks during the coming decades and beyond.[11] By continuing to utilize, authorize, and

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[6] EPA, *supra* note 4, at 1.

[7] REIDMILLER, *supra* note 5, at Chapter 24. Infants and children are more vulnerable to toxic exposures because they eat, drink, and breathe more in proportion to their body size. EPA, *supra* note 4, at 3.

[8] REIDMILLER, *supra* note 5, at Chapter 24; *see also* EPA, *supra* note 4, at 3 (explaining that children have a higher risk of becoming ill or dying due to extreme heat).

[9] *See* Samantha Ahdoot et. al., *Am. Academy of Pediatrics Council on Envtl. Health*: *Policy Statement on Global Climate Change and Children's Health*, 136 Pediatrics, no.5, 994 (2015), https://pediatrics.aappublications.org/content/pediatrics/136/5/992.full.pdf.

[10] EPA, *supra* note 4, at 1.

[11] *See* Fourth National Climate Assessment, *supra* note 1, at 31.

promote Washington's fossil fuel energy system, Respondents are jeopardizing our children's future existence. As Governor Inslee has stated, "If we don't act, our children and grandchildren will inherit these problems on a scale that's hard to imagine. Vibrant forests, farms, salmon and shellfish are their birthright—part of what it is to be a Washingtonian."[12] However, children do not have rights of participation in our political process, where the decisions being made today will determine whether the State will continue to sustain the climate system they depend on for their lives, liberties, and futures.

In addition to the lack of direct representation, children also lack economic power in our society. The lack of economic power, combined with the increasing costs of climate change mitigation, will disproportionately burden the Youth and all other affected children. As time progresses, children will be saddled with the financial burdens of the changing climate. "Children cannot wait for adaption to climate change; they are and will continue to be the biggest losers if climate finance and adaptation continue to fall so far short of what is needed."[13]

Children and future generations will be forced to deal with the loss

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[12] Governor Jay Inslee, *Climate Impacts in Washington State*, https://www.governor.wa.gov/issues/issues/energy-environment/climate-impacts-washington-state (last visited June 19, 2018).

[13] Elizabeth Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice*, 16 HHR. 1, 3–10 (2014).

of land and property due to rising waters along the coasts, especially in places like Washington. It will also be incredibly expensive to rebuild and relocate after natural disasters influenced by changing climate. "Continued high fossil fuel emissions unarguably sentences young people to either a massive, implausible cleanup or growing deleterious climate impacts or both."[14] The financial burdens faced by the next generation due to the current decisions of State officials could be substantially reduced if science-based action to reduce greenhouse gas emissions is taken today.

B. It is the Duty of the Courts to Protect Individual Rights.

The Youth ask Washington's judiciary to determine whether Respondents' systemic actions violate the Youth's constitutional rights, a question that implicates the judiciary's core role. As explained by the Washington Supreme Court long ago:

> Of course, when it comes to considering individual rights such as are protected by the guaranties * * * that no law shall grant to any citizen or class of citizens privileges or immunities upon which the same terms shall not equally belong to all citizens, and many other constitutional guaranties that look to protection of personal rights, the courts have ample power, and will go to any length, within the limits of judicial procedure, to protect such constitutional guaranties.

Gottstein v. Lister, 88 Wn. 462, 493, 153 P. 595 (1915).

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[14] James Hansen, *Young People's Burden: Requirement of Negative CO2 Emissions*, 8 ESD. 578, 577–95 (2017).

More than 60 years after *Gottstein*, the Washington Supreme Court re-affirmed "the need to protect those constitutional guaranties of a personal nature." *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 503, 585 P.2d 71 (1978); *see also McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). The Court in *Seattle School District* declared that children have a constitutional right to an adequately funded education program pursuant to the Washington State Constitution Article IX, Sections 1 & 2. The State defendants in that case argued that the challenge violated the separation of powers doctrine. The Court disagreed, finding that "the ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary. 90 Wn.2d at 496; *see also Leonard v. City of Spokane*, 127 Wn.2d 194, 897 P.2d 358 (1995); *Plummer v. Gaines*, 70 Wn.2d 53, 422 P.2d 17 (1966).

Indeed, the courts historically have exercised jurisdiction to determine the constitutional rights of children. In recognizing the rights of children, courts have relied on both the autonomy rights of children and their special vulnerability to deprivations of liberty or property interests by the State. "A child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion). In *Bellotti*, the United States Supreme Court noted that its "concern for the vulnerability of children is demonstrated in its decisions

dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State." *Id.* at 634.

For example, the United States Supreme Court has found that children have the right to notice and counsel under the Equal Protection Clause of the Fourteenth Amendment. *See In re Gault*, 387 U.S. 1, 13 (1967). Students, both in and out of school, have First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). Children may not be deprived of certain property interests without due process. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975). Children are entitled to protections under the Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). And, as discussed above, Washington courts have determined the rights of children under the Washington State Constitution. *See generally Seattle Sch. Dist.*, 90 Wn.2d 476; *McCleary*, 173 Wn.2d 447; *see also Schroeder v. Weighall*, 179 Wn.2d 566, 578–79, 316 P.3d 482 (2014) (en banc).

Here the Washington Legislative and Executive branches have actively infringed upon the fundamental rights of the Youth, and so the judiciary must fulfill its role to serve as a check and balance. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the

better to secure liberty."). "[P]olicing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court." *N.L.R.B. v. Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring) (internal quotations omitted).

The Youth are vulnerable to deprivations of liberty by the government because they must rely on others to advocate for them, and at the same time, are directly impacted by Respondents' decisions and actions in furthering and responding to climate change. "The nature of injustice is that we may not always see it in our own times." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). Respondents' knowing causation of and contribution to climate change presents one of those injustices, and the Youth assert "a claim to liberty [that] must be addressed." *Id.*

C. The Youth Lack Available Redress through the Political Process.

The majority of these Youth are minors who cannot vote and must depend on others to protect their political interests. In the 1962 case *Baker v. Carr*, plaintiffs alleged that the Tennessee Secretary of State had violated their equal protection rights under the Fourteenth Amendment by failing to reapportion legislative districts in response to significant population migrations. 369 U.S. 186, 187–88 (1962). The *Baker* plaintiffs alleged that the malapportionment scheme resulted in a "debasement of their votes" and

accompanying diminishment of their voice in representational government. *Id.* Plaintiffs like those in *Baker* must rely on the courts for redress because, by the nature of their claims, cannot effectively preserve their fundamental rights through the political process.

The Youth here share that characteristic. The Youth's fundamental rights, arising under Article I, Sections 3, 12, and 30 of the Washington State Constitution and the Public Trust Doctrine, have been and are being infringed upon by Respondents' historical and continuing creation and exacerbation of a dangerous climate system. The Youth cannot rely on the representational political process to safeguard their fundamental rights; by the time many of the Youth are able to participate in the political process to preserve their rights, the stable climate system on which their rights depend will have already sustained irreparable damage. Accordingly, their only redress is through the judiciary.

D. This Case Does Not Implicate Nonjusticiable Political Questions.

The superior court determined that "Plaintiffs' claims are nonjusticiable—they present political questions that must be resolved by the political branches of government. If the court addressed the issue posed by the Plaintiffs and ordered the relief they seek, it would violate the separation of powers." Order at 7. However, the United States Supreme Court in *Baker*

explained that simply because a case implicates significant and entrenched political issues does not make it a case involving a "political question." 369 U.S. at 217. The "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.* Respondents, in their briefing on appeal, urge this Court to adopt a new, unworkable standard for the political question doctrine—one that would preclude almost any case against the government. This Court should reject Respondents' approach.

1. Respondents propose a dangerous standard that is contrary to the established law of the political question doctrine and separation of powers.

The political question doctrine was first discussed by the Supreme Court of the United States in *Marbury.* There, the Court explained, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'" 5 U.S. (1 Cranch) at 170. Here, however, the Youth seek protection of their individual rights, which the State has no discretion to violate.

Respondents argue that "when an issue involves matters of political and governmental concern, courts consider such questions to be nonjusticiable 'political questions.'" Response Brief at 10 (quoting *Brown v. Owen*, 165 Wn.2d 706, 712, 206 P.3d 310 (2009)). Respondents' proposed framework would preclude almost all cases against the

government, which would directly contradict the system of checks and balances underlying the separation of powers. Respondents misapprehend the law. Indeed, the *Brown* case on which they rely contradicts their simplified approach. 165 Wn.2d at 718 ("To determine whether a particular action violates separation of powers, we look not to whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.").

Many of our nation's and state's most celebrated cases have involved matters of profound governmental concern. For example, in *Baker*, the United States Supreme Court decided that an apportionment challenge was justiciable. The Court acknowledged that the claims had political aspects and ramifications, but nonetheless concluded that the case did not involve nonjusticiable political questions. 369 U.S. at 209; *see also Brown v. Plata*, 563 U.S. 493 (2011); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

Washington cases are consistent. In *Seattle School District*, the use of special excess tax levies to fund basic education was deemed unconstitutional. 90 Wn.2d at 526. The mechanisms by which public education is funded surely is a "matter of governmental concern," and one that involves "policy considerations." *Contra* Response Brief at 10 (citing *Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997)). The Washington

Supreme Court, however, determined that the issue did not involve a nonjusticiable political question. 90 Wn.2d at 490; *see also Wash. State Coal. for the Homeless v. Dep't of Social & Health Servs.*, 133 Wn.2d 894, 918, 949 P.2d 1291 (1997) ("[W]here the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, then the courts may interfere to protect the rights of individuals.").

In *Marbury*, the United States Supreme Court clarified the distinction: "[t]he province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." 5 U.S. (1 Cranch) at 170. It is axiomatic that government conduct "cannot be discretionary if it violates a legal mandate," especially a constitutional protection of individual liberties. *Nurse v. U.S.*, 226 F.3d 996, 1002 (9th Cir. 2000).

In this case, the Youth challenge the State's systemic conduct as infringing upon their rights, and therefore, resort to the judiciary. The quest for the protection of individual rights is not a nonjusticiable political question and, therefore is ripe for resolution by the judiciary. *See I.N.S. v. Chadha*, 462 U.S. 919, 942–43 (1983) ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications[.]").

2. Application of the *Baker* factors shows that there is no separation of powers issue.

Courts have a test for identifying political questions to determine whether a case must be resolved by political means, as required by the doctrine of separation of powers. This test is definitively stated in the United States Supreme Court case, *Baker v. Carr*. Respondents do not mention the *Baker* factors, which provide the proper and well-established formula for identifying political questions. *See Seattle Sch. Dist.,* 90 Wn.2d at 504; *Davis v. Passman*, 442 U.S. 228, 242 (1979); *Nixon v. United States*, 506 U.S. 224, 226 (1993); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004); *Corrie v. Caterpillar*, 503 F.3d 974, 980 (9th Cir. 2007). Application of the *Baker* factors to the present case demonstrates that this case is not one that can be resolved by the political branches, but rather one that requires resolution by the judiciary.

The Court in *Baker* set forth six formulations under which a political question may arise:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning

> adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. The Court continued: "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'" *Id*.

Neither the superior court nor Respondents mentioned any of the *Baker* factors, nor did they perform any *Baker* analysis. Since the factors are listed in decreasing order of importance and certainty, *see Vieth*, 541 U.S. at 278, the League briefly addresses only the first three in order to demonstrate the political question doctrine's inapplicability to this case.

First, there is no "textually demonstrable constitutional commitment" to the legislative or executive branches of government of the right to a stable climate system. In fact, the interpretation of the scope and extent of constitutional rights, as are implicated by this case, squarely rests within the domain of the judiciary. *See Marbury*, 5 U.S. (1 Cranch) at 170. Nothing in the Youth's prayer asks the court to issue a ruling requiring that Respondents pass legislation or specific regulations. Rather, it asks the court to declare that Respondents' systemic actions have infringed upon the Youth's fundamental rights.

Second, case law interpreting equal protection, due process, and the Public Trust Doctrine provide clearly judicially discoverable and manageable standards. *See, e.g., Schroeder*, 179 Wn.2d at 578 (recounting levels of scrutiny in equal protection challenges). As there are standards available for interpreting equal protection challenges, there also are standards for due process and the Public Trust doctrine. *See, e.g.*, *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006) (articulating test for level of review to be applied in a due process challenge).[15]

Third, adjudicating the Youth's claims would not require a policy determination, but rather, a determination of whether the State's already existing policies and actions comport with the constitution. The Youth do not request that the court substitute its judgment for that of the legislative and executive branches. Rather, they request that the court declare that Respondents have violated the Youth's rights and direct Respondents to prepare a plan—of their own devising—adequate to protect the Youth from further injury. *Cf. McCleary*, 173 Wn.2d at 51 (declaring that the State

[15] The Public Trust doctrine protects, at minimum, "public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality." *Weden v. San Juan County*, 135 Wn.2d 678, 698 (1998). "The state can no more convey or give away this jus publicum interest than it can abdicate its police powers in the administration of government and the preservation of the peace." *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987) (citation omitted).

failed to comply with its constitutional duties and directing the Legislature to develop a basic education program).

The Youth are asserting their individual constitutional rights—including the right to a stable climate system, which is encompassed by the right to a healthful environment recognized by the Legislature as inalienable. Because the Youth's claims implicate none of the *Baker* factors, the case does not involve nonjusticiable political questions. In fact, the very basis of the political question doctrine—separation of powers—calls upon the courts to exercise their constitutional duty to serve as a check and balance on the other branches where they have violated individual rights. *See Bowsher*, 478 U.S. at 721. This Court should reverse the superior court's declination of its constitutional duty to hear this case.

3. Respondents attempt to stretch *Northwest Greyhound* and *Northwest Animal Rights* beyond their breaking point.

Respondents point to two cases to argue that the Youth's statutory challenges are nonjusticiable. Both cases are easily distinguishable because the issue in each was the Legislature's prerogative to define criminal conduct, based on a balancing of public policy and morals. In contrast, the Youth's concern is one of individual rights. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1270 (D. Or. 2016) ("If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve

a political question.") (citing Howard Fink & Mark Tushnet, *Federal Jurisdiction: Policy and Practice* 231 (2d ed. 1987)).

In *Northwest Greyhound Kennel Association v. State*, "the thrust of [the] action [was] to involve the courts in the question of the degree to which professional gambling activities will be permitted in this state." 8 Wn. App. 314, 319, 506 P.2d 878 (1973). The court characterized this as "primarily a political question * * * of almost complete legislative discretion and in an area vitally affecting public safety and morals." *Id.* at 321. The court concluded that "appellant's complaint does not raise a controversy involving the equal protection of the law, but instead raises a legislative policy question concerning how wide the door should be opened to professional gambling." *Id*.; *see also State v. Gedarro*, 19 Wn. App. 826, 579 P.2d 949 (1978) ("[A]ny approved gambling activity is a legislative privilege and not an inherent right.").

The underlying issue in *Northwest Animal Rights Network v. State* likewise implicated the "function and responsibility of the legislature to define crimes." 158 Wn. App. 237, 245, 242 P.3d 891 (2010). The court decided that the issue of what conduct should be criminalized was not for the courts to decide. *Id*. "Our legislature has determined that certain common and customary activities involving animals are not abhorrent to our society * * * It is not the role of the judiciary to second-guess the

wisdom of the legislature." *Id*. at 246; *accord Pasado's Safe Haven v. State*, 162 Wn. App. 746, 758, 259 P.3d 280 (2011) ("[T]he authority to define crimes is legislative, not judicial[.]").

In contrast, the Youth's claims, including those challenging RCW 70.235.020 and RCW 70.230.050, do not ask the courts to interfere with the Legislature's policy discretion to define criminal conduct. The Youth argue that the State's creation and perpetuation of a fossil-fuel based economy, including vis-à-vis the challenged statutory provisions, violate their fundamental rights. Unlike the plaintiffs in *Northwest Greyhound* and *Northwest Animal Rights*, here, the Youth do not ask the court to second-guess the legislature's intent or to re-balance public policy concerns. Rather, they ask the courts to, *inter alia* "ensure the act will be implemented in a manner that protects the constitutional rights of the Plaintiffs." Complaint at 70.

In its Order, the superior court mischaracterizes the Youth's claims, and the role of the courts' in serving as a check and balance on the coequal branches: "Plaintiffs ask the court to order and oversee the development of a far-ranging climate action plan that would involve a complex regulatory scheme. * * * This policy-making is the prerogative and the role of the other two branches of government, not of the judiciary." Order at 6. The superior court put the cart before the horse. This constitutional challenge asks the

courts to measure existing policies for constitutional compliance; as explained in *Marbury*, where individual rights depend on the performance of a specific duty that has already been assigned by law, the injured party has the right to a remedy. 5 U.S. (1 Cranch) at 170.

V. CONCLUSION

In *Seattle School District*, the Washington Supreme Court explained, "[w]e must *interpret* the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning." 90 Wn.2d at 516 (emphasis in original). Just as Washington courts have found that the requirements of "ample" provision for education under the Washington Constitution are different today than in 1889, the challenges of climate change were unknown to the framers during the Constitutional Convention.

Today's protection of the guarantees enshrined in the Constitution is all the more important; it is the judiciary's duty to safeguard those rights. It would be fundamentally contrary to the State's founding principles if the systemic violations of the rights of the Youth were beyond the courts' core role to serve as a check on the unconstitutional conduct of coequal branches. Given the urgency of climate change and the disproportionate harms that children will suffer from it, the courts must act to fulfill this vital function to safeguard the Youth's constitutional rights.

RESPECTFULLY SUBMITTED this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 4th, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered e-portal users will be served by the appellate system.

s/ Oliver J. H. Stiefel
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June 04, 2019 - 10:48 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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80007-8

No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., *et al.,*

Appellants,

v.

STATE OF WASHINGTON, *et al.,*

Respondents.

AMICUS BRIEF OF FAITH COMMUNITY IN SUPPORT OF APPELLANTS

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I. INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici curiae, collectively referred to as the "Faith Community," are Earth Ministry, Rev. Richard E. Jaech, the Rt. Rev'd Gretchen M. Rehberg, the Pacific Northwest Conference of the United Church of Christ, the University Temple United Methodist Church Council, the Faith Action Climate Team, Rabbi Olivier BenHaim, the Seattle Mennonite Church, JUUstice Washington, the Social and Environmental Justice Committee at BUF, Rev. Beth Chronister, and the Intercommunity Peace & Justice Center. The Faith Community have established sacred trusts based on deep covenants of obligation to environmental stewardship, justice for all generations, and to all Creation.

Specific interests of each of the Faith Community is set forth in its Motion to file *Amicus Curiae* filed concurrently with this *amicus curiae* brief.

Faith Community hereby submits the following *amicus curiae* brief in this matter. This *amicus* brief is designed to assist the Court in resolving the issues presented in this case. *Ochoa Ag. Unlimited, LLC v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005) ("The purpose of an amicus brief is to help the court with points of law."). Specifically, this brief addresses the legal, moral, and religious elements of the Public Trust Doctrine.

The Faith Community believe the superior court should not have dismissed this case and that Appellants should have an opportunity to present evidence of the violation of their constitutional rights, including their rights under the Public Trust Doctrine. The foundational Public Trust Doctrine cases hold that government cannot substantially impair or alienate resources crucial to the public welfare. The

State's public trust over these resources is an attribute of sovereignty that Respondents (Defendants below) cannot shed. The Public Trust Doctrine prevents the government from depriving future legislatures and administrations of the natural resources necessary for the well-being and survival of its citizens. Not only is the Public Trust Doctrine firmly grounded in Washington legal precedent, it also reflects the shared reasoning underlying the moral values and religious teachings of many faiths.

The Public Trust Doctrine imposes sovereign duties on the State of Washington and its officials to protect, and at minimum refrain from affirmative actions which substantially impair, the climate system necessary for human survival. The State of Washington and its officials have taken affirmative actions, leading to excessive carbon dioxide emissions, jeopardizing the fundamental rights of the Youth Plaintiffs in this case and future generations. *See generally* Clerk's Papers ("CP") 50-56. If fossil fuel emissions are not rapidly abated, then Appellants and future generations will confront an inhospitable future.

Arguments contained in the Respondents' Motion for Judgment on the Pleadings should not outweigh the ability of the Appellants to have their day in court. Pope Francis, addressed a Vatican climate change conference, stating the importance of working together to combat climate change, "We will all have to make a radical change in our lifestyle: the use of energy, consumption, transport, industrial production, construction, agriculture, etc. Each of us is called to act. But,

we must also take action together, starting with governments and institutions, families, and people: we need all hands on deck."[1]

II. SUMMARY OF ARGUMENT

Appellants' claims invoke the same moral imperative that motivates the Faith Community. The Public Trust Doctrine mirrors a *sacred trust* based on deep covenants of obligation to environmental stewardship, justice for all generations, and to all Creation. As the climate crisis threatens the future survival of civilization, the Public Trust Doctrine could hardly have a more compelling application.

III. ARGUMENT

A. THE PUBLIC TRUST DOCTRINE IMPOSES SOVEREIGN DUTIES ON THE STATE GOVERNMENT TO PROTECT THE CLIMATE NECESSARY FOR HUMAN SURVIVAL.

The term "public trust" broadly refers to a fundamental understanding that no government can legitimately abdicate its core sovereign powers, including its control over crucial natural resources.[2] In *Stone v. Mississippi*, the United States Supreme Court held:

> No legislature can bargain away the public health or the public morals . . . . The supervision of both these subjects of governmental power is continuing in its nature . . . . [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.

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[1] Junno Arocho Esteves, *'Startling' inaction on climate change must end, pope says,* National Catholic Reporter (May 28, 2019), *Available at* https://www.ncronline.org/news/environment/startling-inaction-climate-change-must-end-pope-says

[2] This broad trust principle is commonly referred to as the "reserved powers doctrine." However, as used in this brief, the terms "public trust" and "public trust doctrine" refer to the application of the reserved powers doctrine to sovereign natural resources critical to the public welfare.

101 U.S. 814, 819-20 (1879); *see also Butchers' Union v. Crescent City*, 111 U.S. 746, 766 (1884) (Justice Field, concurring).

In addition, a government has a duty to manage its natural resources under the Public Trust Doctrine, and the beneficiaries of this duty include those who have not been born or cannot vote yet:

> But the sovereign's duty to manage its natural resources recognized in the public trust doctrine is not limited, and the primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or are too young to vote. Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of future generations.

Citizens for Responsible Wildlife Management v. State, 124 Wn. App. 566, 577, 103 P.3d 203, 208 (2004) (C.J. Quinn-Brintall, concurring).

The Public Trust Doctrine prohibits the alienation of the public from crucial natural resources, which the State has the duty to control. *Caminiti v. Boyle,* 107 Wn.2d 662, 666, 732 P.2d 992 (1987). Also, the Public Trust Doctrine prohibits the State from substantially impairing the public's interest in crucial natural resources. *Id* at 670, 994 (quoting *Illinois Central R.R. Co v. Illinois,* 146 U.S. at 387, 453 (1892)).

The landmark public trust case is *Illinois Central R.R. Co.,* 146 U.S. at 453, where the Supreme Court applied the doctrine to crucial natural resources, holding such resources are held in trust and cannot be alienated. At issue was control of Chicago's Harbor, which the Illinois legislature had privatized. In an explanation

that extends beyond submerged lands, the Court explained the rationale of the Public Trust Doctrine:

> The state can no more abdicate its trust over property in which the whole people are interested, *like* navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time . . . . The trust with which they are held, therefore, is *governmental*, and cannot be alienated . . . [.]

Id. at 453-55 (emphasis added).

Illinois Central made clear that alienating or substantially impairing essential resources would amount to relinquishing sovereign powers in violation of the Public Trust Doctrine. *Caminiti,* 107 Wn.2d at 666; *see also Chelan Basin Conservancy v. GBI Holding Co.,* 190 Wn.2d 249, 267, 413 P.3d 549, 558 (2018); *see also* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* 72, 234 (2013); Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* at 131, Cambridge University Press (2013); *see also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?,* 35 Colum. J. Envt'l L. 287, 311 (2010).

Subsequent decisions have applied the Public Trust Doctrine to other crucial resources. For instance, wild game is recognized as a trust resource in virtually all states. *Citizens for Responsible Wildlife Mgmt*, 124 Wn. App. at 569-700 ("Title to animals *ferae naturae* belongs to the state in its sovereign capacity and the state

holds this title in trust for the peoples' use and benefit," but declining to decide whether the Public Trust Doctrine applies to wildlife in Washington); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1439-40 (2013). The U.S. Supreme Court also recognized an interest associated with migratory birds in *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

The application of the Public Trust Doctrine to the atmosphere and climate system is well supported. The Public Trust Doctrine can be traced to Roman and English law. *Caminiti,* 107 Wn.2d at 668-69; *Illinois Central,* 146 U.S. at 456 (*citing Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821)); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122-23 (D. Mass. 1981). English law stated that the title and dominion of land and waters within the jurisdiction of the crown of England, were ruled by the king, as the sovereign, and his duty was to allow these lands to be used for public benefit. *Shivley v. Bowlby,* 152 U.S. 1, 11 (1894). This basic idea of a sovereign's duty to allow the public to access lands and waters under its control was implemented in the United States. *Id.* Prior to the American Revolution, as subjects of the king, when land was discovered, possession was taken in the name of the king who held the land in trust for the nation. *Id.* Once the American Revolution concluded, rights of the king were surrendered to the United States government, through charters, constitutions, or laws, where the government was entrusted with allowing lands and waters, along with other natural resources for the public. *Id.*

This historical premise of the Public Trust Doctrine is present in the United States, and has been expanded to include other resources, in addition to land and

water. *Foster v. Washington Department of Ecology* and *Juliana v. United States*, both recognize that the atmosphere and other Public Trust Doctrine resources are intertwined, and that the atmosphere can be recognized as a Public Trust Doctrine asset. 2015 WL 13729180 (2015); *Juliana v. United States,* 217 F.Supp.3d 1224 (D. Or. 2016). In *Foster v. Washington Department of* Ecology, King County Superior Court ruled that the Public Trust Doctrine requires protection of the atmosphere in the context of climate change. 2015 WL 13729180 (2015). Further, *Robinson Township v. Commonwealth,* also supports the recognition of the atmosphere as a Public Trust Doctrine, by stating that the right to an environment of quality, specifically clean air, is an obligation on the government's behalf to refrain from alienating or substantially interfering with the right. 623 Pa. 564, 647, 83 A.3d 901, 952 (2013). Also, *Bosner-Lain v. Texas Commission on Environmental Quality*, recognizes that the atmosphere is a trust asset protected by the Public Trust Doctrine. 2012 WL 3164561 (2012), *vacated on other grounds,* 438 S.W. 3d 887 (TX Ct. App 2014). Like the trust arising as to navigable waters and migratory wildlife, climate protection is a trust that is inherently governmental.

B. DEFENDANTS HAVE A DUTY TO PRESERVE THE PUBLIC TRUST.

The Public Trust Doctrine imposes not only a State duty to refrain from actively causing substantial impairment to public trust resources, but also a sovereign fiduciary duty to protect the public's crucial assets from irrevocable damage. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927); *see also* George G. Bogert, et al., Bogert Trusts and Trustees, § 582 (2011). Under well-established core principles of trust law, trustees have a basic duty not to sit idle and

allow damage to the trust property. Appellants are calling on this Court to ensure that the State of Washington and its officials refrain from further destruction and exacerbation of irreparable harm to an asset that must be sustained for generations of citizens to come.

C. THE MORAL FOUNDATIONS OF THE PUBLIC TRUST DOCTRINE AKIN TO THE FOUNDATIONS OF RELIGIOUS TRADITIONS.

Courts in the United States have traced the origins of the Public Trust Doctrine back through the English legal system to Roman law and natural law, identifying it as one of the pillars of ordered civilization. *Caminiti,* 107 Wn.2d at 668-69; *see also Illinois Central,* 146 U.S. at 456 (*citing Arnold v. Mundy*, 6 N.J.L. at 78 (N.J. 1821)); *see also U.S. v. 1.58 Acres of Land*, 523 F. Supp. at 122-23. Not surprisingly, the public trust is also a central principle in legal systems of many other countries throughout the world. Law professor and public trust scholar Michael Blumm concludes that the doctrine is "close to becoming considered customary law" of an international scale. Michael C. Blumm & Rachel D. Guthrie, *Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision,* 45 U.C. Davis L. Rev. 741 (2012); s*ee also* Mary Turnipseed, et al., *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, Environment Magazine, Vol. 52, No. 5 at 12 (2010); David Takacs, *The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property*, 16 N.Y.U. Envtl. L. J. 711, 746 (2008).

This enduring nature and universality of the Public Trust Doctrine is based on multiple moral understandings including: (1) an ethic toward future generations;

(2) an affirmation of public rights to natural assets; and (3) a condemnation of waste. These values are deeply reflected in and rooted in this nation and state's history and tradition[3] and are mirrored in the religious teachings of many faiths, including Christian, Jewish, Islamic, Hindu, and Buddhist.[4]

1. Principle of Creation.

The Faith Community believe that this earth and its natural resources were a gift created by God:

> But ask the animals, and they will teach you, or the birds in the sky, and they will tell you; or speak to the earth, and it will teach you, or let the fish in the sea inform you. Which of these does not know that the hand of the LORD has done this? In his hand is the life of every creature and the breath of all mankind.

Job 12:7-10[5].

Therefore, as we treat the gift, so we treat the giver. The Public Trust Doctrine reflects the religious teachings of many faiths which view the earth as a sacred endowment created for the benefit of all humanity. The public trust protects property rights, held in common by present citizens, to these crucial natural resources which are "a subject of concern to the whole people" clothed with sovereign trust interests compelling protection. *Illinois Central R.R. Co,* 146 U.S. at 455. Even if not all religious traditions adhere to the theory of creation by God,

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[3] *See, e.g.,* RCW 43.21A.010.

[4] *See*, *e.g.*, *Islamic Declaration on Global Climate Change*, International Islamic Climate Change Symposium, August 2015, *available at* http://islamicclimatedeclaration.org/islamic- declaration-on-global-climate-change; *Hindu Declaration on Climate Change*, November 23, 2015, *available at* http://www.hinduclimatedeclaration2015.org; *see also*, Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (2013) at 279-280 (citing multiple faiths as recognizing public trust obligations to present and future generations).

[5] *New International Version- Job 12*, Biblica: The International Bible Society (June 20, 2018), *available at* https://www.biblica.com/bible/niv/job/12/

there is undeniably a sense of connection to the Earth and a recognition of the earth's importance to the religious traditions and deeply rooted wisdoms. As Clark Strand, an ex-Rinzai Zen Buddhist Monk and author puts it, "Nature is the great teacher. Shakyamuni went to the jungle to find its teachings, Moses up the mountain, Jesus to the desert, and Bodhidharma and Muhammad to their caves."[6]

2. Principle of Stewardship.

Scores of public trust cases declare that future generations are legal beneficiaries with entitlement to the *res* of the public trust. *See, e.g.*, *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 457 Mass. 663, 702 (Mass. 2010) (Marshall C.J., concurring in part and dissenting in part); *Citizens for Responsible Wildlife Management,* 124 Wn.App. at 577; *State v. Rome,* 47 Wn.App. 666, 669, 736 P.2d 709 (1987) (recognizing the state's compelling need "to insure that this precious natural resource [fish] will be available for use by future generations and to accommodate the interests of commercial fishermen, sport fishermen and the Indian Tribes, as well as complying with federal laws and regulations and international treaties."); *State v. Dexter,* 32 Wn.2d 551, 556-57, 202 P.2d 906, 908 *aff'd*, 338 U.S. 863, 70 S. Ct. 147, 94 L. Ed. 529 (1949) ("Edmund Burke once said that a great unwritten compact exists between the dead, the living, and the unborn. We leave to the unborn a colossal financial debt, perhaps inescapable, but incurred, none the less, in our time and for our immediate benefit. Such an unwritten compact requires that we leave to the unborn something more

[6] Clark Strand, *Turn Out the Lights,* Tricycle Magazine (Spring 2010), *available at* https://tricycle.org/magazine/turn-out-lights/?utm_source=Tricycle&utm_campaign=828a32671a-Daily_Dharma_12_27_2017&utm_medium=email&utm_term=0_1641abe55e-828a32671a-307279917.

than debts and depleted natural resources. Surely, where natural resources can be utilized and at the same time perpetuated for future generations, what has been called 'constitutional morality' requires that we do so."); *see also Laudato Si',* ¶ 159.

Preservation of land for future generations is a duty recognized in the historical underpinnings of intergenerational principles and faith-based ideologies. Stewardship in the Public Trust Doctrine highlights that man has a covenant to future generations to a fair share of what the earth has to offer. Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age,* 264 (2013). This duty to future generations is also found among multiple faiths with their appeal to save the earth. *Id.*

The Framers recognized each generation's fundamental obligation to *preserve* the value and integrity of natural resources for later generations. The most succinct, systematic treatment of intergenerational principles is provided by Thomas Jefferson to James Madison:

> The question [w]hether one generation of men has a right to bind another . . . is a question of such consequence as not only to merit decision, but place among the fundamental principles of every government . . . . I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living' . . . [.]

Jefferson to James Madison, September 6, 1789, *Papers of Thomas Jefferson*, Julian Boyd ed., XV at 392-98 (1950).

Strikingly, Jefferson based his theory of intergenerational political sovereignty on a prior "self-evident" concept of intergenerational rights and

obligations to the earth. In Jefferson's time as now, "usufruct" referenced the rights and responsibilities of tenants, trustees, or other parties temporarily entrusted with an asset—usually land. Usufructuary rights-holders were prohibited from committing waste (lasting damage) to the property. *See* William Blackstone, II, *Commentaries on the Laws of England* (1769) at 281.

These dual concepts of usufruct and waste, applied to entailed estates over the course of centuries, reflected a bedrock ethical principle of intergenerational stewardship clearly evident in the political philosophy of the late 1700s. This sense of intergenerational responsibility was widely shared, shaping the early "traditions and conscience of our people." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *see also* Herbert Sloan, *Principles and Interest: Thomas Jefferson on the Problem of Public Debt* 5 (1995).

The Founding Fathers provide additional support for the deep roots of the Public Trust Doctrine in our nation's history and traditions. As James Madison succinctly detailed in the Federalist Papers, "the federal and State governments are in fact but different agents and trustees of the people."[7]

The writings of Theodore Roosevelt also furnish powerful expressions of the sovereign obligations of intergeneration equity to future generations, the youth, as the foundation of the American conservation ethic:

> The "greatest good of the greatest number" applies to the number within the womb of time, compared to which those now alive form but an insignificant fraction. Our duty to the whole including the unborn generations, bids us restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the

[7] *The Federalist No. 46* (James Madison).

> conservation of . . . all our natural resources [is] essentially democratic in spirit, purpose, and method.

Theodore Roosevelt, *A Book-lover's Holidays in the Open*, 299-300 (1916).

The trust approach provides tangible legal backing to the concept of intergenerational equity, and the same public trust principles continue to find expression in numerous state constitutions, including the Washington Constitution, and federal statutes today. *See, e.g.*, Pa. Const. art. I, § 27; Mont. Const. art. IX, § 1; Haw. Const. art. IX, §1; Ill. Const. art. XI, §1; Wash. Const. art. XVII, §1; Ak. Const. art. VIII; National Environmental Policy Act, 42 U.S.C. § 4331(b)(1).

Faith-based ideologies of stewardship echo this intergenerational covenant to preserve the Earth from ecological crisis. Pope Francis repeatedly refers to this sacred trust in *Laudato Si',* describing the natural environment as "a collective good, the patrimony of all humanity and the responsibility of everyone." *Laudato Si'*, ¶ 95; *see also* ¶ 93 ("Whether believers or not, we are agreed today that the earth is essentially a shared inheritance, whose fruits are meant to benefit everyone."). Perhaps the oldest extant affirmation of the importance of taking to heart the young and future generations in protecting the Earth and preventing its destruction is the very last passage of the last of the ancient Hebrew Prophets:

> See, I will send the prophet Elijah to you before that great and dreadful day of the LORD comes. He will turn the hearts of the parents to their children and the hearts of the children to their parents; or else I will come and strike the land with utter destruction.

Malachi 4:5-6.[8]

[8] *New International Version- Malachi* 4, Biblica: The International Bible Society (June 20, 2018), *available at* https://www.biblica.com/bible/niv/malachi/4/

In our own generation, Jewish wisdom has underscored this truth:

> In Leviticus 26, the Torah warns us that if we refuse to let the Earth rest, it will "rest" anyway, despite us and upon us – through drought and famine and exile that turn an entire people into refugees. Human behavior that overworks the Earth – especially the over-burning of fossil fuels – crests in a systemic planetary response that endangers human communities and many other life-forms as well.[9]

In 2017, the Catholic Pontifical Academy of Sciences released a declaration on the dangers of climate change and the responsibilities of Catholics to participate in the actions to mitigate the impending and ongoing damages caused by climate change. [10] The solutions proposed, among others, included education of the young to become sustainability leaders, to undertake actions to protect public health, and to restore degraded lands to protect biodiversity. *Id.*

In 2007, in an interfaith gathering held in Greenland, with a coalition of Muslim, Buddhist, Hindu, Jewish, Christian, and Shinto leaders, urged citizens to leave the planet, "in all its wisdom and beauty to the generations to come." Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (2013) at 265. Buddhist environmentalism also displays principles of trusteeship in the protection of land for future generations. His Holiness the Dalai Lama also presents religious instruction infused with obligations to future generations, the

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[9] Rabbi Arthur Waskow, *Rabbinic Letter on Climate- Torah, Pope, & Crisis Inspire 425+ Rabbis to Call for Vigorous Climate Action,* published May 2015, *available at* https://theshalomcenter.org/RabbinicLetterClimate

[10] The Pontifical Academy of Sciences, *Declaration of the Health of People, Health of Planet and Our Responsibility Climate Change, Air Pollution and Health Workshop,* (*last visited* on February 24, 2019), *available at* *http://www.casinapioiv.va/content/accademia/en/events/2017/health/declaration.html*

hallmark of a trust.[11] Also, his Holiness the Dalai Lama made a plea to current and future generations that many of the problems the current generation faces are of their own creation, and to solve these problems, the current generation must make an effort to help not only themselves, but future generations. *Id.* Additionally, Justice Weeramantry recounts a story of a monk's sermon to a king: although the king was King of the country, he was not the owner but the trustee of the land on which he was hunting. *See*, Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (2013) at 23 (citing C.G. Weeramantry, *Buddhist Contribution to Environmental Protection*, Asian Tribune (June 20, 2007). This sermon reiterates the basic principle of the Public Trust Doctrine that the government is a trustee of the land and has a duty to protect the land from either being alienated or substantially impaired for the public's use and future generations.

In short, stewardship through compassion and resistance to degradation of the environment and its natural resources runs deep in the guiding moral principles upon which humanity has gleaned the ideal of righteous governance for centuries.

3. Principle of Justice.

Justice is in the interest of every religion. It is geared towards equality and fairness for future generations yet has roots in the present. Our rapidly heating climate, along with the Defendants action in causing high levels of carbon dioxide emissions, implicates public trust principles to a far greater degree than the submerged lakebed of *Illinois Central*. Climate degradation poses a threat to human society of a magnitude unimaginable in the day when Justice Field invoked the

[11] Dalai Lama, *An Ethical Approach to Environmental Protection* (June 5, 1986), available at http://www.dalailama.com/messages/environment/an-ethical-approach.

doctrine to protect Chicago Harbor. As the preeminent climatologist, Dr. James Hansen, has warned, "[f]ailure to act with all deliberate speed in the face of the clear scientific evidence of the long-term dangers posed, is the functional equivalent of a decision to eliminate the option of later generations and their legislatures to preserve a habitable climate system."[12]

Speaking at the White House in 2015, Pope Francis urged action: "[C]limate change is a problem which can no longer be left to a future generation. When it comes to the care of our 'common home,' we are living at a critical moment in history".[13] Justice for all individuals transcends the needs of the minority. If diverse faith-based communities can agree on equity principles with regard to the climate, then the State of Washington as trustee should have no problems dutifully fulfilling their obligations with public trusts affecting all citizens.

These children will be most affected by the impending disaster of climate change. Throughout the United States and the world, the next generation of youth are fighting for their right to a liveable future.[14] *See, e.g., Juliana,* 217 F.Supp.3d 1224; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018 (Colom.); *Minors Oposa v. Sec'y of the Dep't of Envtl. & Nat. Res.*, G.R. No. 101083, 33 I.L.M. 173, 187 (S.C., Jul. 30, 1993). In *Schroeder v. Weighall*, the Washington

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[12] James E. Hansen et al., *Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature*, NASA (Jul. 9, 2012), *available at* http://pubs.giss.nasa.gov/abs/ha08510t.html.

[13] Ryan Teague Beckwith, *Read the Speech Pope Francis Gave at the White House*, TIME Magazine, (June 6, 2019), *available at http://time.com/4045956/pope-francis-us-visit-white-house-transcript/*

[14] *Students worldwide skip school to demand tough action on climate change,* CBS News (March 15, 2019), *available at* https://www.cbsnews.com/news/youth-climate-strike-students-skip-class-demand-tough-action-on-climate-change/

Supreme Court stated that the "group of minors most likely to be adversely affected [government action] may well constitute the type of discrete and insular minority whose interests are a central concern in our state equal protection cases." 179 Wn. 2d 566, 579, 316 P.3d 482, 489 (2014). This argument should logically be extended to the Appellants at hand – the State of Washington must act to protect this generation of children who will have to deal with the effects of climate change for the longest period of time may very well constitute a "discrete and insular minority" who may be successful in a state equal protection case.

Additionally, Appellants in their original complaint discussed the urgency of the climate change crisis in the State of Washington. The atmospheric carbon dioxide ("CO_2") concentrations, in the State of Washington, now exceed 415 parts per million ("ppm"), compared to pre-industrial levels of 280 ppm. CP 3. This excessive increase in atmospheric carbon dioxide has substantially impacted the Appellants, as CO_2 and other greenhouse gases have caused, dangerously increasing temperatures, changing precipitation patterns, heatwaves, rising storm-surge, ocean acidification, and other adverse health and environmental risks. CP 3-4. The Complaint explains that an increase in atmospheric carbon dioxide levels, has led to rising sea levels, which will force some of the Appellants and their families to relocate from historical areas of Washington where these families have lived since time immemorial. CP 7-8. Other Appellants allege that the increasing temperatures combined with heatwaves, have led to disastrous wildfires throughout the State of Washington, burning large tracts of wildlife and subsistence habitat, and have affected the health of those in Washington with high levels of unhealthy

air for all groups. CP 7, 9, 12. Climate change is a problem affecting not only the current generation, but also future generations.

With so little time remaining to curb carbon dioxide emissions before our nation crosses irrevocable climate thresholds, it is urgent that Washington's courts exercise jurisdiction to assess the constitutionality of Respondents' affirmative actions in contributing to the climate crisis.

IV. CONCLUSION

In the papal encyclical, *Laudato Si'*, Pope Francis issued a clarion call for "the establishment of a legal framework which can set clear boundaries and ensure the protection of ecosystems." *Laudato Si'*, ¶ 53. Under the Public Trust Doctrine, citizens stand as beneficiaries holding clear public property interests in these essential natural resources. The public trust demarcates a society of "citizens rather than serfs." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 484 (1970). All faiths represented in this brief, and many others, recognize and support governments' public trust obligations.

The Public Trust Doctrine plainly applies to the prevention of climate change impacts, necessary for the welfare of present and future generations. The signatories to this brief, represent a broad cross-section of faiths united on the principles of creation; stewardship; and justice, respectfully request this Court to reverse the Superior Court's incorrect dismissal of the Appellants' complaint, and let the Appellants have their day in court.

RESPECTFULLY SUBMITTED this 6th day of June 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6th, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered eportal users will be served by the appellant system.

s/*Vicki L Yount*
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Paralegal, SCBA 136

UNIVERSITY LEGAL ASSISTANCE

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80007-8

NO. 80007-8

WASHINGTON COURT OF APPEALS, DIVISION I

AJI P. *et al.,*

Appellants,

vs.

STATE OF WASHINGTON *et al.,*

Respondents

BRIEF OF AMICI CURIAE ENVIRONMENTAL GROUPS

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I. INTRODUCTION

Pursuant to RAP 10.6, *amici* Center for Environmental Law & Policy, Climate Action Bainbridge, Friends of Toppenish Creek, NoMethanol360, Parents for Future Seattle, Puget Soundkeeper, Sierra Club, South Seattle Climate Action Network, Sunrise Movement Seattle, Sunrise Movement Walla Walla and 350 Seattle, (collectively, "Environmental Groups") respectfully offer the following information and argument regarding Washington's Public Trust Doctrine ("PTD") and its application to natural resource protection, to assist the court in resolving the important issues in this case. Environmental Groups discuss the importance of a stable and healthful climate to Washington's guarantees of life, liberty, property, and the pursuit of happiness, the evolving nature of Washington's PTD in light of improving knowledge of our interconnected natural resources, and how the PTD applies to the atmosphere as well as to navigable waters.

Environmental Groups concur with Appellants' arguments that the right to a healthful climate system is fundamental under Washington law, that the Public Trust Doctrine requires the State to protect the public's interest in and access to a stable climate system, and that protection of the public trust in Washington's atmosphere and navigable waters requires that

Appellees cease their affirmative conduct that results in dangerous levels of greenhouse gas emissions.

II. IDENTITY AND INTERESTS OF THE AMICI

Environmental Groups hereby incorporate by reference their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae, filed concurrently with this brief.

III. STATEMENT OF THE CASE

Environmental Groups adopt the statement of the case as set forth in Appellants' Opening Brief, filed in this matter January 22, 2019.

IV. ARGUMENT

A. A healthful climate system is fundamental to American guarantees of life, liberty, and the pursuit of happiness.

Our essential American concept of the inalienable right to "life, liberty, and the pursuit of happiness"[1] reflects the understanding that each person is free to choose his or her own path in life and is guaranteed certain fundamental rights.[2] This understanding was forged in a young country where success or failure rested largely on one's own efforts in utilizing the resources of its vast territory. In this context, republican citizenship was not

[1] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[2] The "inalienable right" to "follow any of the common occupations of life" is protected by the Fourteenth Amendment's guarantee of the right to "life, liberty, and property." *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90, 41 L. Ed. 832 (1897).

an abstract condition, but was grounded, actualized, and fulfilled in material nature, generally in "land" but more precisely in soil, minerals, water, plants, animals, atmosphere, sunlight, and seasons, each a component in the organic unity now known as the climate system.[3] People manipulated or "improved" portions of the Earth to make a living and to achieve their individual, collective, and republican potentials.[4] Agricultural "improvement" included use of farming techniques that would preserve the soil's fertility and allow the land to be handed down to, and to support, future generations.[5]

The American concepts of freedom, opportunity, and individualism are thus implicitly premised on the belief that the American environment, the ecological foundation of our democracy, will continue to support future generations. Put another way, a stable and predictable climate system is the basis of our continued ability to pursue our way of life in Washington. *See* Gov. Elisha P. Ferry's Inaugural Message (Nov. 11, 1889)[6] (connecting

[3] James Madison, Address to the Agricultural Society of Albemarle (May 12, 1818) (warning Americans about the harmful effects of deforestation and soil over-exploitation, describing the importance of the atmosphere in supporting the life and health of humans and animals, and stating "the atmosphere is the breath of life. Deprived of it, they all equally perish.").

[4] Mark Fiege, *The Republic of Nature* 156-198 (2012).

[5] Steven Stoll, *Larding the Lean Earth* 13-31 (2002).

[6] http://leg.wa.gov/LIC/Documents/Historical/Legislative%20Manuals/1889-1890%20Legislative%20Manual.pdf

Washingtonians' "prosperity, health and happiness" to the state's "climate which commend itself to all who experience it . . . .").

Long before the establishment of Washington State, Native American societies relied on the knowledge that the rains would come to nourish their crops, game would be available to hunt, and the fish would return to the rivers annually. The treaties negotiated with Northwest tribes reflect and preserve this expectation for future generations, in the rights to fish and hunt that the Indians reserved for themselves in perpetuity. *See United States v. Washington*, 827 F.3d 836, 851 (9th Cir. 2016) ("[The Tribes] reasonably understood that they would have, in Stevens' words, 'food and drink . . . forever.'"). *See also Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665 (1979) (When the treaties were signed, "anadromous fish were even more important to most of the population of western Washington than they are today.").

Later generations of immigrants arrived with the expectation that, as new Americans, they could find work fishing, logging, or farming and were free to arrange their lives unrestricted by the circumstances or locations of their birth. Thousands moved West on the promise that they would receive

land to homestead and could earn a living off the land.[7,8] The local and global climate, including the atmosphere and its effect on the oceans, were critical in supporting the natural resources that allowed these new Americans to prosper.

American optimism that the environment would provide for the needs of the population has long been tempered with concern, however. As early as the 18th century, colonists in New England realized that over-harvesting of timber threatened the forests that provided wood and fuel, and that deforestation could lead to altered local climates and to consequences such as increased flooding.[9] In 1818, James Madison predicted in a speech to Virginia farmers that human-caused changes to the environment could weaken the "life-supporting power" of Earth's atmosphere.[10] In this light, it is no surprise that our National Park system, designed to conserve natural areas in their unaltered state, is a uniquely American invention.[11]

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[7] The Homestead Act, 12 Stat. 392 (May 20, 1862) encouraged movement west, by allowing settlers to "prove up" ownership of land by living and farming on it for a specified period. Settlers in the western Great Plains experienced an early warning of our ability to damage the environment in the Dust Bowl drought of the early 1930s, when topsoil was blown away from millions of acres of land and hundreds of thousands were displaced. *See* Timothy Egan, *The Worst Hard Time*, Mariner Books, (2006).

[8] By 1900, 35.4, 22.0, and 28.9 percent of the populations of North Dakota, South Dakota, and Minnesota, respectively, were foreign-born. Campbell J. Gibson and Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 1990*, (U.S. Census Bureau, Washington, DC, 1999).

[9] William Cronon, *Changes in the Land*, Hill & Wang (2003) at 111-14; *id*. at 122-5.

[10] James Madison, *Address to the Agricultural Society of Albemarle* (1818).

[11] *See* Frederick Law Olmsted, *Yosemite and the Mariposa Grove* (Victoria Post Raney, ed., Yosemite Association 1995) (1865) "[t]he occasional contemplation of natural scenes of an impressive character . . . not only gives pleasure for the time being

Just as Madison feared, we now face the threat of a changing climate in which the rains do not reliably arrive (or come in the form of ever-more violent and damaging storms), rivers are too warm to support fish, and the ocean waters are becoming too acidic to support the growth of shellfish and coral reefs.[12] CP30-33. This outcome is not consistent with Washingtonian or American tradition; rather, a stable and sustainable society in this State depends on protecting our climate so that future generations will benefit from the opportunities enjoyed by those in the past.

B. The Public Trust Doctrine has ancient roots, but its vitality has been reaffirmed by modern Washington courts.

The concept of government as a steward of the resources that sustain society is ancient. The Public Trust Doctrine (PTD) is a legal concept, first codified in the 6th century C.E., providing that certain natural resources are commonly held and available for all to use. *Caminiti v. Boyle*, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987) (tracing the PTD to the Code of Justinian and English Common law). The PTD's Roman law origin states that "[b]y the law of nature these things are common to mankind -- the air, running water, the sea and consequently the shores of the sea." *Nat'l Audubon Soc'y*

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but increases the subsequent capacity for happiness and the means of securing happiness."

[12] For a general discussion of climate change effects in Washington, *see* Snover, A.K, G.S. Mauger, L.C. Whitely Binder, M. Krosby, and I. Tohver, *Climate Change Impacts and Adaptation in Washington State: Technical Summaries for Decision Makers. State of Knowledge Report prepared for the Washington State Department of Ecology.* Climate Impacts Group, University of Washington, Seattle (2013).

v. Superior Court, 33 Cal. 3d 419, 433-34, 658 P.2d 709 (1983) *(quoting* Institutes of Justinian 2.1.1). The PTD was adopted into the common law of England and became the law of the thirteen colonies and eventually, each of the United States. *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 283-87, 138 L. Ed. 438 (1997) (explaining origins of public ownership of navigable waters); *Orion Corp. v. State,* 109 Wn.2d 621, 639, 747 P.2d 1062 (1987).

The essence of the PTD is that government, whether acting through the legislature or the executive and its agencies, cannot abdicate control over, or substantially impair public rights to, certain public resources (traditionally referred to as the *jus publicum*). *Caminiti*, 107 Wn.2d at 668-70. These public rights pre-existed statehood, and are "partially encapsulated" in Article XVII, Section 1 of the Washington Constitution, which asserts public ownership over all navigable waters of the state, including harbors, rivers and lakes. *Rettkowski v. Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993); Utter, R.F. & H. D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE, at 212-17 (Greenwood Press 2002); *see also* Wash. Const. Art. I, § 30 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.").

The constitutionally reserved and recognized public rights protected by the PTD are an attribute of the people's essential sovereignty. *Illinois*

Central R.R. v. Illinois, 146 U.S. 387, 455, 459-60, 36 L. Ed. 1018 (1892) (navigable waters of Chicago harbor and underlying lands are "a subject of concern to the whole people of the state" and must be held "in trust for their common use and of common right, as an incident of their sovereignty.") The public trust may not be abdicated. *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 123 (D. Mass. 1981) ("the trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.")

The Washington Supreme Court protects this sovereignty through its oversight, development, enforcement and application of the PTD, thereby ensuring that public resources are protected in perpetuity for public use. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App 566, 575, 103 P.3d 203 (2004) (J. Quinn-Brintnall, concurring)(discussing sovereign duty to regulate natural resources for benefit of *future* generations); J. L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 557-65 (1970). In 1987, our Supreme Court formally acknowledged the PTD's role in Washington law, stating that "[a]lthough not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has always existed in the State of Washington." *Caminiti*, 107 Wn.2d at 670.

C. The PTD Acts as a Limit on State Action.

The PTD is a limit on state power, and our Supreme Court has "always embraced [its] constitutional responsibility to review challenged legislation . . . to determine whether that legislation comports with the State's public trust obligations." *Chelan Basin Cons. v. GBI Holdings Co.*, 190 Wn.2d 249, 266-7, 413 P.3d 549 (2018)(as amended)(citing *Caminiti,* 107 Wn.2d at 670). The same analysis should apply in a constitutional challenge to the state's affirmative actions, including agency action, that are causing and contributing to climate change and violating plaintiffs' constitutional rights. As creatures of the legislature, agencies "may exercise only those powers conferred either expressly or by necessary implication." *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indust.,* 121 Wn.2d 776, 780, 854 P.2d 611 (1993). When the state regulates natural resources "by executive order, legislative enactment or public initiative, the tenets of the public trust doctrine must be satisfied." *Responsible Wildlife,* 124 Wn.2d at 577**.**

D. The American PTD has evolved along with our understanding of the public's interest in natural resources.

Respondents urge a narrow construction of the PTD, limited to its "traditional application to navigable waters." State of Washington's

Response Brief, filed March 25, 2019 at 45.[13] But the PTD is a living doctrine. American courts have adapted it to the unique circumstances of our society and continue to expand its contours to protect changing public interests in trust resources. *See* Carolyn Kelly (2019), *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U Envtl. L.J. 184, 191-3. One very early adaptation was expansion of the public trust from rivers "subject to the ebb and flow of the tide" to *all* navigable waters, as the American rivers supported important navigation and commerce for hundreds of miles above any tidal influence.[14] *Id*., *see also Bullock v. Wilson*, 2 Port. 436, 448 (Ala. 1835); *Carson v. Blazer*, 1810 Lexis 36 at **14 (Penn. 1810).

The PTD's applicability to natural resources in addition to water was noted very early in American jurisprudence. In 1821, the Supreme Court of New Jersey stated that title to "the air, the running water, the sea, the fish, and the wild beasts," was placed "in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit." *Arnold*

[13] Even if it were correct (it is not), this argument could not dispose of the entirety of Appellants' PTD claim challenging Respondents' affirmative conduct that is substantially impairing our navigable waters. *See* Appellants' Op. Br. at 38-39.

[14] By arguing that the PTD applies to "navigable waters," Respondents acknowledge that the American PTD has been expanded from its "traditional" application to "tidal" rivers.

v. Mundy, 6 N.J.L. 1, 71 (N.J. 1821). In *Geer v. Connecticut*, the United States Supreme Court's discussion of property that remained in common ownership included "the air, the water which runs in the rivers, the sea and its shores . . ." 161 U.S. 519, 525, 40 L. Ed. 793 (1896) (internal citation omitted) (*overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322, 60 L. Ed. 250 (1979). A decade after *Geer,* the Court noted in *Georgia v. Tennessee Copper Co*. that "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." 206 U.S. 230, 237, 51 L. Ed. 1038 (1907).[15]

Recent Washington decisions have broadened the PTD's scope to protect modern uses that depend on environmental values. In *Orion*, 109 Wn.2d at 641, the Washington Supreme Court noted that "[r]ecognizing modern science's ability to identify the public need, state courts have expanded the doctrine beyond its navigational aspects." The *Orion* Court went on to analogize the PTD to "a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife." *Id*. at 640. *Wilbour v. Gallagher,* 77 Wn.2d 306, 316, 462 P.2d 232 (1969), expanded the PTD's scope beyond traditional areas of navigation, commerce and fishing to include corollary recreational uses of

[15] More than 100 years later, the United States Supreme Court noted that Georgia's "independent interest in all the earth and air within its domain" supported federal jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007).

Washington's waters. *See also Esplanade Properties v. Seattle*, 307 F.3d 978, 980 (9th Cir. 2002) (development that would interfere with recreational use of waters inconsistent with PTD); *Weden v. San Juan County*, 135 Wn.2d 678, 698, 700 958 P.2d 273 (1998) ("it would be an odd use of the [PTD] to sanction an activity that actually harms and damages the waters and wildlife of this state"); *Wash. Geoduck Harvest Ass'n v. Dep't of Natural Res.*, 124 Wn. App. 441, 449, 101 P.3d 891 (2004) (shellfish embedded on public property are public trust resources).

Courts in other states have also recognized the PTD's evolving nature. In *Marks v. Whitney*, 6 Cal.3d 251, 260, 491 P.2d 374 (Ca. 1971) the California Supreme Court explained that preservation of tidelands "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life" was encompassed within the tidelands trust. *See also In re Water Use Permit Applications,* 94 Haw. 97, 135, 9 P.3d 409 (Haw. 2000) ("'purposes' or 'uses' of the public trust have evolved with changing public values and needs"); *Matthews v. Bay Head Imp. Ass'n*, 95 N.J. 306, 325, 471 A.2d 355 (N.J. 1984) ("we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'"); *Nat'l Audubon Soc'y*, 33 Cal. 3d at 434-35. More recently, the

New York Court of Appeals noted that "our courts have time and time again reaffirmed the principle that parkland is impressed with a public trust." *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630, 750 N.E.2d 1050 (2001).

E. The public trust includes the atmosphere.

1. The atmosphere has been judicially recognized as a public trust resource.

Courts have recently invoked the PTD to protect the atmosphere from impairment due to climate change. *Juliana v. United States*, 217 F. Supp. 1224 (D. Or. 2016), *appeal docketed*, No. 18-36082 (9th Cir. June 4, 2019) (plaintiffs' allegation that the United States' allowing and facilitating use of fossil fuels violated the PTD stated a claim for which relief could be granted), *Foster et al. v. Dept. of Ecology*, No. 14-2-25295-1, 2015 WL 7721362, at *7-*8 (King Cty. Sup. Ct. Nov. 19, 2015) ("*Foster* Order"); *see also* Wood, M.C. and Woodward IV, C.W., *Atmospheric Trust Litigation and a Constitutional Right to a Healthy Climate System: Judicial Recognition at Last,* 6 Wash. J. Envtl. L. & Pol. 633 (2016).

In *Robinson Township v. Commonwealth*, 623 Pa. 564, 689-90, 83 A.3d 901 (Pa. 2013), the Pennsylvania Supreme Court invalidated a statute that barred local governments from restricting oil and gas drilling, partly based on state constitutional guarantees of the rights to "clean air, pure

water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[16] The *Robinson* court observed that the rights to clean air and pure water were "inherent in man's nature and preserved rather than created by" the Constitution, and that the Commonwealth was "trustee" of these resources. *Id.* at 640; *Id.* at 653. Such natural rights are similarly preserved by the Washington Constitution. Wash. Const. Art. I, § 30.

2. No Washington case precludes application of the PTD to the atmosphere.

No Washington court has held that the PTD cannot apply to the atmosphere.[17] Neither the *Rettkowski* nor *R.D. Merrill* decision limits the doctrine to only navigable waters; both merely noted (arguably in dicta) that the doctrine had not been applied to non-navigable waters or to groundwater, and both were decided on other grounds. *R.D. Merrill v. Pol. Cont. Hrgs. Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999); *Rettkowski*, 122 Wn.2d at 232. Nor does *Responsible Wildlife*, 124 Wn. App. 566 address this question; that case dealt with whether terrestrial wildlife was a public

[16] Pa. Const., art. I § 27.

[17] Protection of the atmosphere as a public trust resource is well within the police power of the state. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) ("Air pollution prevention falls under the police powers of the states, which include the power to protect the health of citizens in the state." The exercise of that legislative power is, however, subject to judicial review for constitutional compliance.

trust resource.[18] And *Chelan Basin Cons.,* 190 Wn.2d at 259, in no way *limits* application of the PTD to navigable waters; the Court in that case merely applied the PTD to the resources at issue.

F. Protection of navigable waters cannot be separated from protection of the atmosphere.

Whether or not the atmosphere *per se* is a public trust asset, it is beyond dispute that the very changes (chiefly elevated CO_2 levels in the atmosphere) that are causing warming and disruption to the climate overall impermissibly harm the *jus publicum* by harming navigable waters. CP29-31. The atmosphere exists in equilibrium with the oceans, lakes, and rivers and affects them in numerous ways.[19] As Judge Hollis Hill noted in *Foster*, "the navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that [greenhouse gas] emissions do not affect navigable waters is nonsensical." *Foster* Order at 8.

1. Higher sea levels threaten the public's interest in navigable waters, tidelands and shorelands.

Rising atmospheric CO_2 levels are causing rising sea levels and warmer temperatures. Clerk's Papers ("CP") at 26. The oceans absorb much

[18] *Responsible Wildlife* cannot reasonably be read as limiting application of the PTD; in fact, that court ultimately analyzed the question before the court as though wildlife *was* a public trust resource, concluding that in any event, the challenged initiatives had not given up control over the state's natural resources. 124 Wn. App. at 575.

[19] For example, the atmosphere contains more than six times the amount of water in all of Earth's rivers combined. *The World's Water*, USGS, water.usgs.gov/edu/earthwherewater.html (last visited June 4, 2019).

of the increased heat in the atmosphere. *Id*. This causes the planet's large ice sheets to melt, contributing to higher sea levels. *Id.* Because oceans retain heat far better than the air, warming due to increased CO_2 levels will remain for generations. *Id.* Warmer water expands, further contributing to rising sea levels. The best scientific information available projects a 15-40-foot rise in sea level by 2100 if current trends continue, with even greater rises in subsequent centuries. CP28. Rising sea levels are already being detected in Washington and are forcing some of the Plaintiffs to relocate. *Id*.; CP36

2. Climate change will disrupt flows in Washington's rivers.

A warming atmosphere reduces the percentage of precipitation falling as mountain snow, and what snow does fall now melts earlier in the year. CP32. The reduced snowpack in turn reduces streamflows at the critical times of late summer and early fall, with resulting harm to fish and wildlife. CP31. In addition to reduced summer flows, climate change is producing larger winter flows, which will lead to increased flooding. CP32; CP37. Along with sea level rise, more frequent and intense storms produced by climate change pose threats to port facilities and operations.[20] Each of these effects implicates "traditional" public trust issues in navigable waters.

[20] Snover *et al*., note 12, *supra* at p. 10-4.

3. **Ocean acidification threatens the marine food web and the public's interest in fisheries.**

Perhaps most seriously for Washington, elevated CO_2 levels in the atmosphere directly acidify the oceans by increasing levels of CO_2 dissolved in seawater. CP30 (acidity rising at "geologically unprecedented rate"). Ocean acidification threatens the very existence of oceanic life, in part by reducing the availability of calcium carbonate, an essential material for shell construction; this impairs the ability of numerous marine organisms to construct their shells. *Id.* Washington's waters are particularly susceptible to acidification, and effects of ocean acidification on shellfish populations, including disastrous die-offs of oyster larvae, are already being seen on our coast. *Id.*; R.K. Craig, *Ocean Acidification and Current Law: Dealing with Ocean Acidification: the Problem, the Clean Water Act, and State and Regional Approaches*, 6 Wash. J. Envtl. L. & Pol'y 387, 437-440 (2018). Pteropods (small snails that are a critical part of the marine food web) experience shell dissolution due to increased ocean acidity. CP30. Many other small organisms that are important food sources for fish are strongly susceptible to acidification, threatening the food web on which oceanic life depends. CP31. CO_2-driven climate change thus directly implicates the PTD by impairing the public's interest in fishing, accessing food resources, and in studying and enjoying the oceans.

4. Climate change threatens Washington's iconic salmon.

Perhaps nothing is as closely associated with the Pacific Northwest, and Washington in particular, as the salmon that depend on our state's rivers. Salmon are a symbol of the Northwest lifestyle, an important economic driver, and a central element of Northwest Tribal culture. Washington law has protected salmon since the state's beginnings. *See, e.g.,* An Act to Protect the Food Fishes of the State of Washington (Feb. 11, 1890). Salmon are a critical public trust resource, implicating the public's traditional right to fish in the public waters and the core PTD. *See Orion*, 109 Wn.2d at 640 (PTD is for the benefit of the public and "the land's dependent wildlife."); *Esplanade Properties*, 307 F.3d at 980 (development that would interfere with fishing and recreation inconsistent with the PTD); *Commonwealth v. Alger*, 61 Mass. 53, 98-100 (Mass. 1851) (discussing public's right to "have rivers kept open and free for the migratory fish, such as salmon . . . to pass from the sea").

Because of their unique migratory life cycle, salmon are at extreme risk from climate change. CP34-5. Ocean acidification threatens the food web on which they depend during their time at sea, and reduced streamflows and increased instream temperatures will make it difficult or impossible for adult fish to migrate upstream and spawn or for young fish to grow and successfully return to the ocean. CP30-31; CP34-35. By authorizing and

contributing to GHG emissions which harm the oceans and rivers, the State has impaired the public's interest in its fisheries. This issue is particularly devastating to the Youth Appellants like Kailani, Daniel, James and Kylie, who are members of the Colville and Quinault Tribal Nations, respectively, and for whom access to salmon is of critical cultural importance. CP7-9.

5. Washington's GHG emissions will have local effects.

In addition to global climate change effects, there is evidence that local GHG emissions have distinct effects on the local environment. Recent studies have identified areas of locally high CO_2 concentrations over cities, because of imperfect mixing in the atmosphere. These higher local concentrations are correlated with weekday patterns of high motor vehicle traffic.[21] Modeling studies predict higher concentrations of pollutants such as ozone and particulate matter in high-CO_2 urban areas because of increased temperature and other atmospheric feedback mechanisms. Jacobsen, 44 Envir. Sci. Technol. at 2497-2501.

Elevated local CO_2 concentrations in the Puget Sound region are predicted to lead to small but significant decreases in pH and carbonate availability, which will exacerbate the ecological damage being caused by

[21] Loretta Gratani and Laura Verone, *Daily and Seasonal Variation of CO_2 in the City of Rome in Relationship with the Traffic Volume*, 39 Atmospheric Environment 2619-2624 (2005); Craig D. Idso, Sherwood B. Idso, & Robert C. Balling Jr., *An Intensive Two-Week Study of an Urban CO_2 Dome in Phoenix, Arizona, USA*, 35 Atmospheric Environment 995, 997-9 (2001); *see also* Mark Z. Jacobsen, *Enhancement of Local Air Pollution by Urban CO_2 Domes*, 44 Envir. Sci. Technol. 2497 (2010).

ocean acidification. Greg Pelletier *et al*., *Salish Sea Model: Ocean Acidification Module and the Response to Regional Anthropogenic Nutrient Sources*, Washington State Department of Ecology (2017) at 58-61.

V. CONCLUSION

The Public Trust Doctrine is more relevant now than ever, as the climate of our state and of our planet is under assault. As discussed above, the "traditional" public trust resources of navigable waters, fish, and shellfish are strongly intertwined with the atmosphere. Protection of these resources without addressing atmospheric greenhouse gas levels is simply impossible.

The State of Washington is obligated to protect the State's atmosphere, climate, rivers and oceans for the benefit of future generations:

> [T]he primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or who are too young to vote. Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of future generations.

Resp. Wildlife Mgmt., 124 Wn. App. at 577 (Quinn-Brintnall, C.J., concurring).

Environmental Groups respectfully urge this Court to hold that the State must meet this obligation, so that future generations of Washingtonians will enjoy the rights to life, liberty, and the pursuit of happiness that their forebears established.

Respectfully submitted this 3d day of July, 2019.

/s/ Dan J. Von Seggern

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DECLARATION OF SERVICE

I, Dan J. Von Seggern, certify that I am a resident of the State of Washington, residing in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on July 3, 2019, I caused the following documents to be served on the following parties in the manner indicated: **Environmental Groups' Motion for Leave to File Amicus Curiae Brief; Brief of Amici Curiae Environmental Groups.**

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Signed and certified on this 3d day of July, 2019,

/s/ Dan J. Von Seggern

Dan J. Von Seggern

APPENDIX

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Constitution

Art. 1, § 30

RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

Art. XVII, § 1

DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

Pennsylvania Constitution

Art. I, § 27

NATURAL RESOURCES AND THE PUBLIC ESTATE. The people have a right to clean air, pure water, and to the preservation of the natural,

scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

STATUTES

An act to protect salmon and other food fishes in the State of Washington and upon all waters upon which this State has jurisdiction and concurrent jurisdiction. 1889-90 Wash. Laws 106 (Approved Feb. 11, 1890)

Homestead Act. 12 Stat 392 (1862)

FISH; PROTECTION OF.

AN ACT to protect salmon and other food fishes in the State of Washington, and upon all waters upon which this State has jurisdiction and concurrent jurisdiction.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. It shall not be lawful to take or fish for salmon in the Columbia river or its tributaries by any means, in any year hereafter, between the first day of March and the tenth day of April, or between the tenth day of August and the tenth day of September; and also, during the weekly close time; that is to say, between the hour of six o'clock P. M. on each and every Saturday and six o'clock in the afternoon of the following Sunday, and any person or persons fishing for or catching salmon in violation of this section by catching salmon, or purchasing salmon unlawfully caught, or having in his or their possession any such unlawfully caught salmon, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars.

Offense defined.

Penalty.

SEC. 2. It shall be unlawful to catch, kill, or in any manner destroy any salmon on or within one mile below any rack or other obstruction erected across any river or stream for the purpose of obtaining fish for propagation, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars, and any and all appliances used in the violation of this act, viz.: Boats, nets, traps, wheels, seines or other appliances, shall be subject to execution for the payment of the fine herein imposed.

Fish for propagation protected.

Property subject to execution.

SEC. 3. It shall not be lawful for any person or persons to take or fish for salmon on the waters of Shoalwater bay and the rivers with their tributaries flowing into said bay, and also on the waters of Gray's Harbor and the rivers with their tributaries flowing into said Gray's Harbor,

Shoalwater Bay.

Gray's Harbor and tributaries

from the fifteenth day of November until the fifteenth day of December during any year hereafter, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Penalty.

SEC. 4. It shall not be lawful for any person or persons to take or fish for salmon during the months of March, April and May of each year, on the waters of Puget Sound. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars. Puget Sound. Penalty.

SEC. 5. For the purpose of more clearly defining the provisions of section four of this act, all that portion of the tide waters emptying into the Straits of Fuca, and the bays, inlets, streams and estuaries thereof, shall be known and designated in this act as Puget Sound.

SEC. 6. It shall not be lawful for any pound net, set net, trap, weir, wheel or other fixed appliance for taking fish, to extend more than one-half of the way across the breadth of any stream, channel or slough of any waters mentioned in this act at the time and place of such fishing, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Size of nets and traps limited. Penalty.

SEC. 7. It shall not be lawful to cast or pass, or allow to be cast or passed, into any of the rivers and streams of this state into which salmon or trout are wont to be, any lime, gas, coculus indicus, or any other substance deleterious to fish, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Waters must be kept pure.

SEC. 8. Any person or persons now owning or maintaining, or who shall hereafter construct or maintain any dam or other obstruction across any stream in this state which any food fish are wont to ascend, without providing Fishways.

a suitable fishway or ladder for the fish to pass over such obstruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars, and said dam or obstruction may, in the discretion of the court, be abated as a nuisance.

Penalty.

Nuisance.

Sawdust and refuse.

SEC. 9. It shall not be lawful for the proprietor of any sawmill in this state, or any employee therein, or any other person, to cast sawdust, planer shavings or other lumber waste made by any lumber manufacturing concern, or suffer or permit such sawdust, shavings or other lumber waste to be thrown or discharged in any manner into the Columbia river and its tributaries, and all other streams and lakes in this state where fish resort to spawn, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than one hundred dollars nor more than two hundred and fifty dollars.

Penalty.

Moneys.

SEC. 10. All the moneys collected under the provisions of this act shall be paid into a fund to be known as a fish commission fund.

"Salmon" defined.

SEC. 11. Whenever the term salmon is used in this act, it shall be construed to include chinook, steelhead, blueback, silversides and all other species of salmon.

Division of fines.

SEC. 12. One-half of all the moneys collected under the provisions of this act shall be paid to the informer, if there be one, one-quarter to the attorney prosecuting, and the remainder shall be put into a fund to be known as the fish commission fund, and it shall be the duty of the attorney prosecuting, or justice of the peace, to cause to be endorsed upon the back of the indictment or complaint, the name of any person who shall voluntarily make complaint for violation of any of the provisions of this act.

SEC. 13. Payment of any fine and cost imposed under the provisions of this act shall be enforced in the same manner as is now provided by law in other criminal actions.

Jurisdiction of courts.

SEC. 14. Justices of the peace shall have concurrent jurisdiction with the superior court of all offenses mentioned in this act.

SEC. 15. Nothing in this act shall be construed so as to prevent the taking of fish at any time of year, and in any manner, for propagation.

SEC. 16. All acts and parts of acts heretofore passed by the legislative assembly of the Territory of Washington in relation to the subject matter of this act be and the same are hereby repealed.

Approved February 11, 1890.

PRIZE FIGHTING; TO PROHIBIT.

AN ACT to prohibit prize fighting and sparring matches.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Any person who, within this state, engages in, instigates, aids or encourages, or does any act to further a contention or fight, with or without weapons, between two or more persons, or a fight commonly called a sparring match, in which the combatants are provided with gloves, or who sends or publishes a challenge, or acceptance to a challenge, for such a contention, prize fight, sparring match, with or without gloves, or carries or delivers such a challenge or acceptance, or trains or assists any person or persons in training or preparing for such contention, prize fight or sparring match, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term of not less than thirty days nor more than one year, and by a fine of not less than fifty dollars nor more than one thousand dollars: *Provided*, That nothing in this section shall be so construed as to interfere with members of private clubs sparring or fencing for exercise among themselves.

Misdemeanor defined.

Penalty.

SEC. 2. Any person who bets, stakes or wagers money

Repeal of inconsistent laws.

SEC. 20. *And be it further enacted*, That all acts and parts of acts heretofore passed, which are inconsistent with any of the provisions of this act, are, for the purposes of this act, hereby repealed, so far as the same are inconsistent herewith.

APPROVED, May 17, 1862.

May 20, 1862.

CHAP. LXXV. — *An Act to secure Homesteads to actual Settlers on the Public Domain.*

Certain persons may enter certain quantities of certain unappropriated public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preëmption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided*, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Such persons to make affidavit.

SEC. 2. *And be it further enacted*, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the

Contents of affidavit.

said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however*, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided, further*, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicil, sell

Certificates and patents, when to issue and upon what proof.

Affidavit.

Provision in case of death of applicant, &c.

said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

Record of applications to be made.

SEC. 3. *And be it further enacted*, That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

Such lands not to be subject to prior debts.

SEC. 4. *And be it further enacted*, That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

When lands thus entered revert to government.

SEC. 5. *And be it further enacted*, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

Not over one quarter section can be thus acquired.

SEC. 6. *And be it further enacted*, That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: *Provided*, That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preëmption rights: *And provided, further*, That all persons who may have filed their applications for a preëmption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided, further*, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

Rules and regulations of Land Office.

Fees of registers and receivers, when to be paid.

Existing preemption rights not impaired.

Certain minors may have the privileges of this act.

Punishment for false swearing under this act.

1857, ch. 116, § 5. Vol. xi. p. 250.

SEC. 7. *And be it further enacted*, That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighteen hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

Applicant may have the land upon paying minimum price, &c., before the five years expire.

SEC. 8. *And be it further enacted*, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preëmption rights.

APPROVED, May 20, 1862.

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Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80007-8
Appellate Court Case Title:	A. Piper, et al. Appellants v. State of Washington, et al., Respondents
Superior Court Case Number:	18-2-04448-1

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No. 80007-8-I
King County Superior Court No. 18-2-04448-1 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

BRIEF OF *AMICI CURIAE* PUBLIC HEALTH OFFICIALS, PUBLIC HEALTH ORGANIZATIONS, AND MEDICAL DOCTORS

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I. STATEMENT OF INTEREST

This *Amici Curiae* brief is filed on behalf of the undersigned public health officials, public health organizations, and medical doctors. *Amici* offer a unique perspective on the damage caused by climate change to an individual's physical, emotional, and mental health. While many individuals will suffer from climate change, the most vulnerable of our society are also those who are facing and will face the most harm: our children. Consequently, and for the reasons detailed below, *amici* file this brief in support of Appellants and urge the Court to apply bedrock constitutional principles and protect our children from irreparable injury.

II. STATEMENT OF THE CASE

Amici concur with and incorporate by reference the statement of the case set forth in the brief of Appellants.

III. SUMMARY OF ARGUMENT

Climate change is a public health emergency,[1] resulting in impermissible injury to the physical and mental well-being of Washington's children. Yet, to the detriment of these children, the most vulnerable in our society, Defendants are continuing to authorize dangerous levels of greenhouse gas emissions that cause such climate change, as opposed to transitioning Washington off of fossil fuels.

[1] *U.S. Call to Action on Climate, Health, and Equity: A Policy Action Agenda* (2019), https://climatehealthaction.org/media/cta_docs/US_Call_to_Action.pdf.

Through this ongoing decision to knowingly authorize future harm, Defendants have discriminated against current and future generations of Washington youth by depriving them of a climate system necessary for the pursuit of rights guaranteed under our State's constitution. Only by adequately reducing greenhouse gas emissions can we alleviate the health burden that each generation of Washington youth will be forced to endure and guarantee equal protection for Plaintiffs and all our State's citizens.

IV. ARGUMENT

Climate change impacts Washington in dangerous ways.[2] Since 1920, the average annual temperature in the Pacific Northwest has increased by 1.5°F;[3] between 1987 and 2003, the frequency of Washington wildfires was 400 percent greater than in the prior 16-year period;[4] and, in recent decades, greenhouse gas emissions in Washington rose to their highest recorded levels.[5] Such changes cause devastating

[2] *See Climate Change and the Environment*, Wash. State Dep't of Ecology, https://ecology.wa.gov/Air-Climate/Climate-change/Climate-change-the-environment (last visited July 2, 2019); *see also* J. Elizabeth Jackson et al., *Public health impacts of climate change in Washington State: projected mortality risks due to heat events and air pollution*, 102 Climatic Change, 159, 159-186 (2010).
[3] Hedia Adelsman & Joanna Ekrem, *Preparing for a Changing Climate: Washington State's Integrated Climate Response Strategy*, Dep't of Ecology State of Wash. 43 (2012), https://fortress.wa.gov/ecy/publications/documents/1201004.pdf.
[4] *Id*.
[5] *Washington State Greenhouse Gas Emissions Inventory: 1990-2015*, Dep't of Ecology State of Wash. 7 (2018), https://www.eenews.net/assets/2019/02/11/document_cw_02.pdf.

impacts to the physical and mental well-being of children[6] and are only expected to become more frequent, more catastrophic, and therefore more detrimental to the most vulnerable among us.[7] As doctors, nurses, and healers, we cannot sit idly while Defendants establish and maintain energy and transportation systems that harm those we are charged to protect. *Amici* therefore concur with, and incorporate by reference, the statement of the case set forth in the brief by the young plaintiffs, who carry with them our hopes for all future generations of Washingtonians.[8]

A. Children are Uniquely Susceptible to the Impacts of Climate Change

Children possess innate physiological and behavioral characteristics that make them uniquely susceptible to the climate changes occurring in Washington State, and with events like floods and wildfires occurring with greater frequency, the adverse impacts on children's health are being compounded.

Children have physiological traits that make them uniquely vulnerable to the effects of degraded air quality resulting from climate change. Compared to adults, children have a higher respiratory rate that

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[6] Anthony Costello, et al., *Managing the health effects of climate change*, 373 Lancet,1963, 1693-733 (2009).
[7] *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments*, Intergovernmental Panel on Climate Change (Oct. 8, 2018), https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/.
[8] Compl. for Declaratory and Injunctive Relief at 12, Feb. 16, 2018, No. 18-2-04448-1.

requires them to take in more air per unit of body weight when breathing, which consequently exposes them to increased levels of airborne pollutants.[9] Furthermore, children's lungs and other organs are still developing, and harmful exposure can result in permanent damage to how these systems function.[10] For children suffering from chronic respiratory issues such as asthma or allergies, the health risks associated with reduced air quality stemming from climate change are even more serious.

A high metabolic rate also puts children at increased risk during extreme heat events because they are less adept at adapting to temperature changes, and subsequently are at a higher risk for heat-related illnesses.[11] Additionally, without proper supervision, a child may fail to make life-saving decisions necessary to avoid dehydration, such as taking reasonable breaks from activity and drinking adequate fluids.[12]

The behavioral characteristics of children also increase their opportunities for exposure to potentially harmful toxins or pollutants. By simply spending more time outside, children are exposed to more airborne

[9] Tanya Tillett, *Climate Change and Children's Health: Protecting and Preparing Our Youngest*, 119 Envtl. Health Perspectives A132, A132 (2011).
[10] Samantha Ahdoot & Susan E. Pacheco, *Global Climate Change and Children's Health*, 136 Pediatrics e1468, e1468 (2015).
[11] Tillet, *supra*, at A132.
[12] Ahdoot & Pacheco, *supra*, at e1471.

pollutants such as wildfire smoke, pollen, and other pollutants related to fossil fuel combustion, which can cause chronic health conditions.[13]

B. Climate Change Impacts the Physical Health of Children in Washington through Multiple Pathways

Climate change impacts the health of Washington's children through multiple pathways, including: the degradation of overall air quality; an increase in average temperatures; and exposure to extreme weather events such floods, droughts, heat waves, and wildfires. Each of these pathways carries its own individual health concerns, but all are causally facilitated by Defendants' management of energy and transportation systems that allow dangerous levels of greenhouse gas emissions to pollute our climate.

i. Air Quality

Poor air quality is a major threat to the health of children living in Washington. In 2017, air quality in Washington reached hazardous levels several days in a row due to wildfire smoke,[14] depriving the plaintiffs and countless Washington youth the chance to play safely outdoors and

[13] Matthew J. Strickland et al., *Short-term Associations Between Ambient Air Pollutants and Pediatric Asthma Emergency Department Visits*, 182 Am. J. of Respiratory and Critical Care Med.307, 307-316 (2010).
[14] *See* Lane Regional Air Protection Agency, *Wildfire Information*, LRAPA, http://www.lrapa.org/242/Wildfire-Information (last updated Aug. 31, 2018); *Hazardous air again. When will it clear up?*, Yakima Herald-Republic, Sep. 7, 2017, https://www.yakimaherald.com/hazardous-air-again-when-will-it-clear-up/article_18a8356c-93f3-11e7-9588-47333b74a7e2.html.

harming their physical and mental health.[15] Activities such as fossil fuel combustion and climate change-induced wildfires reduce air quality by emitting greenhouse gases, creating particulate matter, and releasing other airborne pollutants which cause respiratory illness in children and hinder the development of the lungs' defense systems.[16] Childhood exposure to particulate matter has been linked to decreased lung function, chronic asthma, and the development of bronchitis,[17] all of which can lead to missed school days, hospital visits, and premature death.[18] In fact, asthma, a condition endured by plaintiff India, is the top reason for missed school days in the U.S., affecting 8.3 percent of children.[19]

The greenhouse gas emissions that are authorized by Defendants are also associated with an increase in carbon dioxide (CO_2) levels, which negatively impact air quality. Plants produce more pollen as CO_2 levels rise, which exacerbates symptoms for children suffering from chronic respiratory issues such as asthma or allergies.[20] Unfortunately, the length

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[15] Compl. for Declaratory and Injunctive Relief at 12.
[16] Environmental Protection Agency, *Climate Change & Children's Health* (2009), https://www.epa.gov/sites/production/files/2014-05/documents/ochp_climate_brochure.pdf.
[17] *Id.*
[18] Decl. of Dr. Howard Frumkin in Supp. of Plfs' Resp. in Opp. to Defs.' Mtn. for Summ. J. at 5, *Juliana v. United States,* 217 F. Supp. 3d 1224 (D. Or. 2016).
[19] Hatice S. Zahran et al., *Vital Signs: Asthma in Children—United States, 2001-2016*, 67 Morbidity and Mortality Weekly Report 149, 149-155. Feb. 9, 2018, https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6705-H.pdf.
[20] *Global Climate Change Impacts in the United States* 96 (Thomas R. Karl, Jerry M. Melillo, Thomas C. Peterson & Susan J. Hassol eds., Cambridge University Press 2009).

of annual ragweed pollen seasons in North America have increased by as much as 27 days since 1995 as a consequence of higher temperatures and greater carbon dioxide levels.[21] Allergen-related issues are prevalent among children and can negatively impact their psychological and physical health by disrupting sleep, preventing outdoor recreation, and reducing school attendance and performance.[22]

Degraded air quality is detrimental to developing fetuses, as well. Prenatal exposure to airborne pollutants can trigger changes in neurological development, behavioral and motor problems, and reduced IQ.[23] These effects carry on into adulthood and correlate with the development of cancer, adverse economic consequences due to reduced IQ, and stunted mental development.[24] More directly, poor air quality is one of the leading causes of premature mortality worldwide.[25]

Transportation-related emissions constitute the largest category of Washington's greenhouse gas emissions.[26] Traffic-related air pollutants,

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[21] Lewis Ziska et al., *Recent Warming by Latitude Associated with Increased Length of Ragweed Pollen Season in North America*, 108 Proc. Nat'l Acad. Sci. 4248, 4248 (2011).
[22] Declaration of Dr. Howard Frumkin at 7.
[23] Susie E. L. Burke et al., *The Psychological Effects of Climate Change on Children*, 20 J. Current Psychiatry Rep., May 2018, at 1, 34-35.
[24] Frederica P. Perera, *Multiple Threats to Child Health from Fossil Fuel Combustion: Impacts of Air Pollution and Climate Change*, 125 Envtl. Health Perspectives 141, 141-148 (2017).
[25] J. Lelieveld et al., *The contribution of outdoor air pollution sources to premature mortality on a global scale*, 52 Nature 367, 367-371 (2015).
[26] *Washington Greenhouse Gas Emissions Inventory: 1990-2015–Report to the Legislature*, *supra*, at vii.

such as particulate matter (PM2.5), polycyclic aromatic hydrocarbons, and ground-level ozone, have been linked to serious developmental disruptions for children.[27] Prenatal exposure to ambient levels of traffic-related air pollutants is associated with low birth weight and preterm birth, both of which are known risks factors for an array of neurodevelopmental disorders and heart disease in children.[28] The severity of the health risks posed by traffic may be partially determined by proximity. Studies reveal that children who live closer to roadways, typically from lower income households,[29] suffer more pronounced decreases in cognitive functioning.[30] Additionally, childhood leukemia is positively associated with residential levels of traffic exposure.[31]

ii. Temperature

Washington children experience substantial health burdens due to the increase in average temperatures. In the United States, heat-related

[27] Perera, *supra*, at 142.
[28] Kim T. Ferguson et al., *The physical environment and child development: An international review*, 48 Int'l J. Psychol. 437, 440 (2013).
[29] Chang-Hee Christine Bae et al., *The Exposure of Disadvantaged Populations in Freeway Air-Pollution Sheds: A Case Study of the Seattle and Portland Regions*, 34 Env't and Plan. B: Plan. and Design 154, 154–170 (2007).
[30] S Franco Suglia et al., *Black Carbon Associated with Cognition Among Children in a Prospective Birth Cohort Study*, 18 Epidemiology S163, S163 (2007); Maria H. Harris et al., *Prenatal and Childhood Traffic-Related Air Pollution Exposure and Childhood Executive Function and Behavior*, 57 Neurotoxicology and Teratology 60, 60-70 (2016).
[31] Vickie L. Boothe et al., *Residential Traffic Exposure and Childhood Leukemia: A Systematic Review and Meta-analysis*, 46 Am. J. Preventive Med. 413, 413-422 (2014).

illnesses are one of the leading causes of climate change related deaths,[32] and the threat to Washington's children begins during early pregnancy.

The risk of preterm birth increases with rising temperatures,[33] along with increased rates of blood disorders, digestive conditions, and Sudden Infant Death Syndrome (SIDS).[34] The risk of infant mortality during the first seven days of life increases by 25% on extremely hot days.[35] Additionally, prenatal exposure to extreme heat has also been associated with developmental delays resulting in lower IQ scores, decreased motor skills, behavioral issues,[36] and congenital heart defects.[37]

Children under the age of five are disproportionately at risk because of their inability to regulate their body temperatures as effectively as adults.[38] Children of all ages maintain a higher body temperature when active.[39] They do not sweat like adults, and extremely young children lack the ability to communicate their needs when in danger of overheating.[40]

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[32] Decl. of Dr. Susan E. Pacheco in Supp. of Plfs' Resp. in Opp. to Defs' Mtn. for Summ. J. at 11, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).
[33] Shia T. Kent et al., *Heat Waves and Health Outcomes in Alabama: The Importance of Heat Wave Definition*, 122 Envtl. Health Perspectives 151, 151–158 (2014).
[34] Decl. of Dr. Susan E. Pacheco, *supra*, at 12.
[35] Xavier Basagaña et al., *Heat Waves and Cause-specific Mortality at all Ages*, 22 Epidemiology 765, 765-772 (2011).
[36] Burke, *supra*, at 35.
[37] Wangjian Zhang et al., *Projected Changes in Maternal Heat Exposure During Early Pregnancy and the Associated Congenital Heart Defect Burden in the United States,* 8 J. Am. Heart Ass'n, Feb. 2019, at 1, 2-4.
[38] Decl. of Dr. Susan E. Pacheco, *supra*, at 12.
[39] *Id.* at 7.
[40] *Id.* at 6.

In Washington, rising heat has been associated with an increase in hospital admissions, particularly for youth between the ages of 5 and 17 years and children with pre-existing respiratory issues.[41] Moreover, young athletes face an increased risk of heat stroke when participating in outdoor sports, which often take place during the hottest months of the year.[42]

iii. Extreme Weather Events

The prenatal and postnatal development of a child, as well as their overall subjective well-being, are impacted by extreme weather events such as droughts, floods, heat waves, and wildfires. As a consequence of the authorization of dangerous levels of greenhouse gas emissions by government-controlled agencies, such events are occurring in greater frequency[43] and harming Washington's youth.

Prenatal exposure to extreme weather events may lead to a higher risk of asthma, language impairments, and schizophrenia in children.[44] In fact, recent research showed that six-month old children who were exposed in-utero to an extreme weather event exhibited significantly less smiling, less laughter, and were more difficult to soothe when compared to

[41] Tania Busch Isaksen et al., *Increased hospital admissions associated with extreme-heat exposure in King County, 1990-2010*, 30 Rev. Envtl. Health 51, 51-64 (2015).
[42] Ellen E. Yard et al., *Heat illness among high school athletes—United States, 2005-2009*, 41 J. Safety Res. 471, 471-474 (2010).
[43] *Explaining Extreme Events of 2017 from a Climate Perspective*, 99 Bull. Am. Meteorological Soc'y S1, S1 (Dec. Supp. 2018) (certain climate events would not have been possible without human action); *Explaining Extreme Events of 2016 from a Climate Perspective*, 99 Bull. Am. Meteorological Soc'y S1, Sii (Jan. Supp. 2018).
[44] Burke, *supra*, at 2.

similar children whose mothers did *not* experience an extreme weather event while pregnant.[45] Unfortunately, 2019 is projected to be one of the most prolific years for drought in Washington,[46] ensuring that children are born into and exposed to a climate that is hazardous to their well-being.

Postnatally, children who experience a flood or a drought during key developmental periods can suffer an array of complications including stunted physical growth.[47] More directly, children of all ages are at risk of physical injury during extreme weather events;[48] for example, wildfire smoke inhalation can damage a child's respiratory system, heatwaves can increase the chance of heatstroke, and floods carry the threat of drowning.

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[45] Yoko Nomura et al., *Influence of In Utero Exposure to Maternal Depression and Natural Disaster- Related Stress on Infant Temperament at 6 Months: The Children of Superstorm Sandy*, 40 Infant Mental Health J. 204, 204-216 (2019); Marlene Cimons, *Extreme weather can stress pregnant women-and their unborn babies*, Popular Science, Feb. 19, 2019, https://www.popsci.com/environmental-stress-passed-through-pregnancy/ (last visited Jul 5, 2019) (climate change consequences on developing brain).

[46] Glenn Farley, *2019 shaping up to be one of Washington's worst droughts*, K5 News, (Jan. 2019), https://www.king5.com/article/news/2019-shaping-up-to-be-one-of-washingtons-worst-droughts/281-7445ac29-d988-491c-abd6-5baaa64a1336; *Drought in Washington 2019,* Wash. State Dep't of Ecology, (2019), https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Statewide-conditions/Drought-2019.

[47] Sheridan Bartlett, *Climate change and urban children: impacts and implications for adaptation in low- and middle-income countries*, 20 Env't and Urbanization 501, 501-519 (2008).

[48] UNICEF, *Unless We Act Now: The impact of climate change on children* 8 (Nicholas Rees & David Anthony eds., 2015), https://www.unicef.org/publications/files/Unless_we_act_now_The_impact_of_climate_change_on_children.pdf.

Children who suffer from chronic illnesses, such as asthma, are more susceptible to the effects associated with extreme weather events.[49]

Finally, prolonged or repetitive droughts that destroy crops can create food insecurity and periods of malnutrition, adversely affecting childhood development.[50] The threat may be amplified as carbon dioxide levels rise and deplete the nutritional value of remaining food sources.[51]

B. Climate Change Impacts the Mental Health of Children

Changes in climate, such as the rising sea claiming the homes of plaintiffs James and Kylie, and extreme weather events, such as the droughts threatening plaintiff India's family farm, cause children to suffer profound mental health effects. These psychological effects are often more insidious than the physical impacts of climate change and correlate with negative health outcomes into adulthood.[52]

Awareness of climate change causes children like the plaintiffs to express worry, fear, and anxiety about the stability of their future.[53] Such findings have led researchers to describe climate change as a "stressor" for

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[49] Susan Clayton Whitmore-Williams et al., *Mental Health and Our Changing Climate: Impacts, Implications, and Guidance*, Am. Psychol. Ass'n & ecoAmerica 1, 38 (2017), https://www.apa.org/news/press/releases/2017/03/mental-health-climate.pdf.
[50] *Id.* at 13.
[51] Lewis H. Ziska et al., *The impacts of climate change on human health in the United States: A scientific assessment* ch. 7 at 189–216. Washington, D.C.: U.S. Global Change Research Program.
[52] Burke, *supra*, at 1.
[53] Jazmin Burgess, *Climate Change: Children's Challenge*, UNICEF UK, (2013), https://www.unicef.org.uk/publications/climate-change-report-jon-snow-2013/.

young people, even when the impacts are indirect.[54] For example, extensive interviews with 10-12 year old children in the U.S. revealed strong feelings of sadness and anger when simply discussing environmental problems,[55] and many young people around the world fear that "the world may end before they grow old."[56]

The direct impacts of climate change cause children to experience severe mental health effects such as depression and panic disorders.[57] For instance, exposure to extreme temperatures and increased levels of precipitation has been shown to amplify the likelihood of mental health issues on an annual basis.[58] Furthermore, chronic stress from ongoing impacts of climate change can alter a child's biological stress response and increase their risk for conditions such as anxiety later in life.[59]

The increase in average temperatures has also been linked to increases in levels of suicide and childhood aggression.[60] In fact, increased

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[54] Katie Hayes et al., *Climate change and mental health: risks, impacts and priority actions*, 12 Int'l J. of Mental Health Sys., June 2018, at 1, 1-12.
[55] Burke, *supra*, at 33.
[56] Joe Tucci et al., *Children's Fears, Hopes and Heroes* 13 (Australian Childhood Foundation 2007).
[57] Burke, *supra*, at 2.
[58] Nick Obradovich et al., *Empirical Evidence of Mental Health Risks Posed by Climate Change,* 115 Proc. Nat'l Acad. Sci. 10953, 10954 (2018).
[59] *See* 2 USGCRP, *Fourth National Climate Assessment: Impacts, Risks, and Adaptation in the United States* 326, 546 (Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart eds., U.S. Global Change Research Program 2018).
[60] Hsin-Chien Lee et al., *Suicide Rates and the Association with Climate: A Population-Based Study*, 92 J. Affective Disorders 221, 221-226 (2006).

temperatures can induce physical symptoms for those already suffering from mental health issues; for example, children who use certain types of ADHD medications and engage in physical activity in hot conditions may be at increased risk for heat-related illnesses.[61]

As children are exposed to an increasing number of extreme weather events caused by climate change, their psychological resilience is weakened, leaving them more susceptible to developing prolonged mental health conditions.[62] Specifically, extreme weather events can result in acute instances of trauma that can develop into chronic psychological disorders, and prolonged exposure to environmental stressors may compound and detrimentally impact overall mental health.[63] The threat posed by these events extends throughout the household; for example, parents who experience multiple years of drought are more susceptible to negative mental health consequences which vicariously take their toll on children.[64] Left untreated, the acute stress associated with an extreme

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[61] Melanie M. Thoenes, *Heat-Related Illness Risk with Methylphenidate Use,* 25 J. Pediatric Health Care 127, 127-128 (2011).
[62] Tracey-Lee Carnie et al., *In their own words: Young people's mental health in drought-affected rural and remote NSW*, 19 Austl. J. Rural Health 244, 244–248 (2011).
[63] François Bourque & Ashlee Cunsolo Willox, *Climate Change: The Next Challenge for Public Mental Health?*, 26 Int'l Rev. Psychiatry 415, 416 (2014).
[64] Taegen Edwards & John Wiseman, *Climate Change and Human Well-Being: Global Challenges and Opportunities* ch. 10 (Inka Weissbecker ed., Int'l Cultural Psychol. Ser., 2011); Stevan E. Hobfoll et al., *Five Essential Elements of Immediate and Mid-Term Mass Trauma Intervention: Empirical Evidence,* 70 Psychiatry Interpersonal & Biological Processes 283, 296-297 (2007).

weather event can develop into PTSD and other diagnosable disorders such as depression, anxiety, and substance abuse.[65]

Climate change represents a profound threat to the physical and mental health and well-being of these youth plaintiffs and, indeed, all of Washington's youth and future generations.[66] Only by reducing greenhouse gas emissions can we alleviate the continual health burden that each new generation of Washington youth will be forced to endure.

C. Children are a Quasi-Suspect Class, Warranting Heightened Scrutiny of the Government-Controlled Systems that Discriminate Against Them

The children of Washington represent an insular minority: a class of individuals who, through no fault of their own, suffer the physical and mental harms of a climate system that has been severely damaged by Defendants' authorization of dangerous levels of greenhouse gas emissions. The energy policies promulgated by Defendants – in which children have no say or participation – deprive Washington's current and future youth of the stable climate necessary for well-being and the free

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[65] Yuval Neria & James M. Schultz, *Mental Health Effects of Hurricane Sandy: Characteristics, Potential Aftermath, and Response,* 308 JAMA 2571, 2571 (2012); David M. Simpson, Inka Weissbecker & Sandra E. Sephton, *Climate Change and Human Well-being: Global Challenges and Opportunities ch. 4* (Inka Weissbecker ed., Int'l Cultural Psychol. Ser., 2011); Teun Terpstra, *Emotions, Trust, and Perceived Risk: Affective and Cognitive Routes to Flood Preparedness Behavior,* 31 Risk Analysis 1658, 1658-1675 (2011).

[66] Richard Carmona & David Satcher, *Why Two Ex-Surgeons General Support the 'Juliana 21' Climate Lawsuit*, New York Times (June 3, 2019), https://www.nytimes.com/2019/06/03/opinion/climate-change-juliana-21.html.

exercise of the fundamental rights guaranteed by the Washington Constitution. When government action imposes such a hardship upon a class of citizens for matters beyond their control, justice demands that the offending systems are scrutinized for constitutionality and, indeed, the sake of future generations. As medical professionals, we have taken a Hippocratic oath to do no harm. To stand by while state government perpetuates state-controlled energy and transportation systems that breach this sacred trust is to condone discrimination against our most vulnerable.

The U.S. Supreme Court has explicitly stated that children need protection from government action that causes them harm. *In re Gault*, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436, 18 L. Ed. 2d 527 (1967). Indeed, if a government-controlled system – whether it be public education, marriage licensing, or state-operated welfare – imposes significant risks and injury to children's well-being for matters beyond their control, heightened judicial review is warranted. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 220, 223-24, 102 S. Ct. 2382, 2396, 2398, 72 L.Ed.2d 786 (1982).

For example, in *Brown v. Board of Education,* the Court ushered in the "modern era of equal protection justice"[67] for children by demanding heightened scrutiny of an educational system that discriminated against children of a particular race, stating that separating children based on the

[67] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 668 (3d ed. 2006).

immutable characteristic of race generated "feelings of inferiority" that would likely cause a lifetime of harm. 347 U.S. 483, 494, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

The Supreme Court also gives heightened scrutiny when government actions deprive children the benefits of state-controlled systems because of their birth status. In *Levy v. Louisiana,* the Court stated it was "invidious discrimination" to make a child suffer for their mother's conduct when benefits were denied by law to an "illegitimate" child after the death of their mother. 391 U.S. 68, 71-72, 88 S. Ct. 1509, 1511, 20 L.Ed.2d 436 (1968). Similarly, in *New Jersey Welfare Rights Organization v. Cahill*, a state-sponsored welfare program was ruled unconstitutional because it limited assistance to children born in wedlock by male-female couples. 411 U.S. 619, 620-21, 93 S. Ct. 1700, 1701, 36 L.Ed.2d 543 (1973) (per curiam). As in *Levy*, the Supreme Court found it was "impermissible discrimination" to allow laws that penalize children with long-term disadvantages for acts over which the child has no control, such as the marital status of their parents; therefore, the Court demanded heightened scrutiny of the offending government-controlled systems. *See also Weber v. Aetna Cas. & Sur. Co*., 406 U.S. 164, 169, 175–76, 92 S. Ct. 1400, 1403, 1406-07, 31 L.Ed.2d 768 (1972).

More recently in the cases of *Obergefell v. Hodges* and *United States v. Windsor,* the Court alluded to its protective function toward children by noting the psychological and economic harms that befall children of same-sex couples when it struck down state marriage bans. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603-04, 192 L.Ed.2d 609 (2015) (laws prohibiting same-sex marriage violate the equal protection clause because they, *inter alia*, "harm and humiliate the children of same sex couples"); *United States v. Windsor*, 570 U.S. 744, 772, 133 S. Ct. 2675, 2694, 186 L.Ed.2d 808 (2013) ("DOMA humiliates tens of thousands of children" being raised by same-sex couples, making it "even more difficult for the children to understand the integrity and closeness of their own family[.]"). As these cases show, heightened scrutiny is warranted when evaluating government-controlled systems that disproportionately impact children.

This State's constitutional jurisprudence is in accord. The Washington Supreme Court construes Article I, Section 12 of the Washington constitution as "substantially similar" to the federal equal protection clause. *Seeley v. State*, 132 Wn.2d 776, 788, 940 P.2d 604, 610 (1997). The Court has also indicated that the State's Equal Protection clause is likely more protective than the U.S. Constitution, such as when "undue political influence" is exercised by a privileged few. *Schroeder v.*

Weighall, 179 Wn.2d 566, 572, 316 P.3d 482, 485 (2014). For instance, in *Schroeder*, the Washington Supreme Court noted that "children are most likely to be adversely affected by government action," and because they cannot participate in that political process, "they may well constitute the type of insular minority whose interests are a central concern in our state's equal protection analysis." *Id*. Analogous to the U.S. Supreme Court, the Washington Supreme Court recognizes that heightened scrutiny should be required for government action that harms children, who have no means to protect themselves via the political process.

The case brought forth by youth Plaintiffs is the exact type of situation, implicating government action that is harming Washington's children, which should trigger heightened scrutiny. Here, Defendants are responsible for creating and operating the State's energy and transportation systems that result in dangerous levels of greenhouse gas emissions. More damaging, Defendants have set inadequate and harmful greenhouse gas emission targets that guarantee high levels of emissions for decades and fail to ensure future Washingtonians will have a climate stable enough for exercising their constitutionally guaranteed rights.

Without question, Defendants' climate and energy policies, and ongoing authorization of dangerous levels of greenhouse gas emissions, demand heightened scrutiny because they cause disproportionate injury to,

and discriminate against, Washington youth. The children in Washington are an insular minority because they are unable to participate in the political process that shapes our climate and energy policies; they cannot vote nor do they possess adequate economic power to influence political systems. Yet, current and future Washington youth bear and will continue to bear the most significant and deleterious impacts of the Defendants' management of climate and energy systems: not only are children more susceptible to the harmful impacts of climate change, but they also have more years left to endure an environment made inhospitable by Defendants' authorization of dangerous greenhouse gas emissions.

By establishing and maintaining a fossil-fuel based energy system, Defendants are culpable for imposing a lifetime of hardship on Washington's children. This is especially egregious in light of Defendants' responsibility to protect the constitutional rights of current and future Washington citizens, with *equal* protection for all. Only by instituting science-based reductions in greenhouse gas emissions can Defendants ensure Plaintiffs' constitutional rights are protected. As such, *amici* submit that this Court should find the youth Plaintiffs are a quasi-suspect class, warranting heightened constitutional protection from the government-controlled systems that cause them injury.

//

V. CONCLUSION

For the reasons stated herein, *amici* urge the Court to rule in Appellants' favor.

RESPECTFULLY SUBMITTED THIS 12TH DAY OF JULY, 2019.

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Washington Physicians for Social Responsibility:

> As an organization, Washington Physicians for Social Responsibility joins this brief as *amici*. Washington Physicians for Social Responsibility represents over 900 health professionals and health advocate members across Washington. It is the Washington state chapter of Physicians for Social Responsibility (PSR). PSR is a nonprofit organization representing medical and health professionals and concerned citizens, with approximately 40,000 members and supporters and with chapters in major cities and medical schools throughout the United States. PSR has been working for more than 50 years to create a healthy, just and peaceful world for both the present and future generations.

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Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80007-8
Appellate Court Case Title:	A. Piper, et al. Appellants v. State of Washington, et al., Respondents
Superior Court Case Number:	18-2-04448-1

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80007-8

No. 80007-8

**IN THE DIVISION I COURT OF APPEALS
OF THE STATE OF WASHINGTON**

AJI P., et al.,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondent.

Appeal from a Decision of the Superior Court of the State of Washington

For King County

Civil Action No. 18-2-04448-1 SEA

Honorable Michael R. Scott

AMICUS BRIEF OF THE SWINOMISH INDIAN TRIBAL COMMUNITY, QUINAULT INDIAN NATION, AND SUQUAMISH TRIBE IN SUPPORT OF PLAINTIFFS

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I. Introduction

We do not inherit the earth—we borrow it from our children. With those future generations firmly in mind, tribal leaders have long recognized that sound environmental stewardship requires balancing use with conservation. In keeping with these teachings, the Swinomish Indian Tribal Community, Suquamish Tribe, and Quinault Indian Nation (collectively, the "Tribes") support the youth Plaintiffs in this case.

The State of Washington's actions, detailed in Plaintiffs' complaint, have contributed to and failed to mitigate the impacts of climate change. Climate change threatens the Tribes' cultural, economic, and territorial integrity, and the subsistence of the Tribes' members. It is a present-day crisis with devastating current and future impacts.

Each of the Tribes' reservations abut marine waters. Within decades, rising sea levels are expected to inundate substantial portions of each Tribe's reservation. 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. Taken holistically, these harms—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 Tribal member. Parents fear their children will no longer be able to

live in their ancestral homeland. Children face an uncertain future in which their individual choice to pursue the Tribal way of life is increasingly imperiled.

The Tribes firmly believe that the Washington State Constitution protects against these fundamental threats to Tribal members' homelands, livelihoods, security, families, and societal well-being, and that the judiciary has an essential role in enforcing those protections. Pursuant to RAP 10.6, the Tribes respectfully request that this Court recognize the right to a livable climate as a fundamental right protected by the Washington State Constitution.[1]

II. Identity and Interest of Amici Tribes

The Tribes are located in Western Washington, signatories to treaties with the United States, and dependent on the natural world for perpetuation of their economies and culture.

The Swinomish Indian Tribal Community is a federally recognized Indian tribe and a political successor-in-interest to certain tribes and bands that signed the Treaty of Point Elliott (1855), which established the Swinomish Reservation on Fidalgo Island in Skagit County and reserved

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[1] Plaintiffs describe this right, in part, as encompassed within the right to a "healthful environment," drawing from RCW 43.21C.020(3). However, Plaintiffs have narrowly defined the fundamental constitutional right they seek to protect as the "livable climate," and the Tribes support that narrow formulation.

fishing, hunting, and gathering rights for the Swinomish people. Since time immemorial, the Swinomish Tribe and its predecessors have occupied and used land and water in the Puget Sound region to fish, hunt, gather, and otherwise support the Swinomish way of life. Pacific salmon and other marine resources have played central and enduring roles in the Swinomish Tribe's culture, identity, and economy.

The Suquamish Tribe is a federally recognized Indian tribe and signatory to the Treaty of Point Elliott (1855). In exchange for ceding most of its aboriginal homeland, the Suquamish Tribe reserved the Port Madison Indian Reservation on the Kitsap Peninsula and fishing, hunting, and gathering rights. The Reservation encompasses approximately 7,657 acres allocated in two parcels, and includes 12.4 miles of Puget Sound shoreline. Old Man House, the home of both Chief Kitsap and Chief Seattle, was located on Agate Pass just south of the present-day village of Suquamish, WA. Since time immemorial, the Suquamish Tribe has occupied and used the marine waters of Puget Sound, from the Fraser River in the north to Vashon Island in the south, and the Hood Canal, to support its marine fishing lifestyle. The Suquamish have always depended on salmon, cod and other bottom fish, clams, cockles and other shellfish, berries, camas and roots, ducks and other waterfowl, deer, elk and other

land game for food, family and community use, ceremonial feasts, and trade.

The Quinault Indian Nation is a federally recognized Indian tribe occupying a Reservation on the western Olympic Peninsula. The Quinault Reservation includes 208,000 acres of mostly forested land, thirty miles of undeveloped Pacific Coast beach lands, and thousands of miles of rivers and streams. Quinault ancestors signed the Treaty of Olympia (1856), which reserved a permanent homeland and the rights to hunt, fish, and gather, in order to preserve Quinault's ability to sustain a traditional way of life. Fish and shellfish are a source of social, economic, and cultural value for Quinault. Salmon and razor clams are communally served at all social and community events. Fishing is also a way to teach younger generations traditional knowledge and the importance of preserving natural resources for future generations.[2]

A. The Tribes' study of climate change.

As governments responsible for the safety and well-being of their communities, the Tribes have dedicated significant resources to the study of climate change. As a result, the Tribes have a clear and sophisticated

[2] Three of the named youth Plaintiffs are Quinault Tribal members: James Charles D., Kylie Joann D., and Daniel M. This amicus brief is filed on behalf of the Tribes, including the Quinault Indian Nation, and not on behalf of any individual Tribal member.

understanding of the existential threat facing their governments, Reservations, and members.

In 2007, recognizing the growing and irrefutable evidence of climate change, the Swinomish Senate issued a proclamation authorizing an investigation of climate change impacts on Swinomish lands, resources, and the community.[3] The resulting Swinomish Climate Change Initiative, conducted in collaboration with the University of Washington Climate Impacts Group and Skagit County, produced two key reports: the 2009 Impact Assessment Technical Report (analyzing expected climate change impacts) and the 2010 Climate Adaptation Action Plan (establishing guidelines for adaptive planning).[4]

The Suquamish Tribe is also assessing and mitigating climate change problems. Suquamish partnered with the Northwest Indian Fisheries Commission to study ocean acidification and sea level rise,[5]

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[3] Available here: http://www.swinomish-nsn.gov/climate_change/Docs/Swinomish%20Climate%20Change%20Proclamation.pdf (last accessed June 3, 2019).

[4] A description of the initiative is available here: http://www.swinomish-nsn.gov/climate_change/climate_main.html. Work on the Swinomish Climate Change Initiative is ongoing. For example, the Tribe is a key participant in the Skagit Climate Science Consortium, a nonprofit organization of scientists working with local stakeholders to assess, plan, and adapt to climate related impacts. http://www.skagitclimatescience.org/ (last accessed June 3, 2019).

[5] *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

including partnering with the University of Washington to develop a low-cost zooplankton imaging and computer identification system to study planktonic communities vulnerable to ocean acidification.[6] Suquamish is also working with the University to project climate change effects on stream flows and temperature in Chico Creek, which is the most productive salmon stream on the Kitsap Peninsula.

Quinault retained Oregon State University to conduct its first climate impacts assessment in 2016, which confirmed changes will occur across the Quinault landscape.[7] Quinault has also worked with the U.S. Department of Energy's National Renewable Energy Laboratory to research how to develop a climate change resistant community and energy resources.[8]

B. Resource, economic, and cultural impacts to the Tribes caused by climate change.

Climate change adversely impacts nearly every aspect of life for the Tribes and their members. These impacts are already occurring and,

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[6] State of Our Watersheds (2016), phttps://geo.nwifc.org/sow/SOW2016_Report/Suquamish.pdf

[7] "Climate Change Vulnerability Assessment for the Treaty of Olympia Tribes" (February 2016) https://quileutenation.org/wp-content/uploads/2017/02/Climate_Change_Vulnerablity_Assessment_for_the_Treaty_of_Olympia_Tribes.pdf; *see also* "Quinault Indian Reservation 2016 Tribal Hazards Mitigation Plan Update" (July 2016). http://quinaultindiannation.com/documents/Hazard%20mitigation%20draft.pdf.

[8] https://www.energy.gov/indianenergy/articles/doe-assists-quinault-indian-nation-plans-climate-resilient-community

absent major changes in climate law and policy, will certainly increase in the future.[9]

The Swinomish Tribe's Impact Assessment Technical Report[10] observes that between 2006 and 2010, the Tribe experienced tidal surges several feet above normal, devastating winter storms, and an unprecedented heat wave. The Report further identifies serious impending harm to the Swinomish Reservation, including: inundation of over 1,100 acres of the Reservation, constituting approximately 15% of Reservation uplands; inundation risk to approximately 160 residential structures, 18 non-residential or commercial structures, and to vital transportation links and access routes to and from the Reservation; significant inundation and permanent loss risk to areas of traditional tribal resource harvests; and risk of physical and mental illness to the entire Reservation population resulting from increased heat and loss of resources. The estimated cost to respond to these changes is more than $700 million in 2019 dollars. Some

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[9] *See* https://nca2018.globalchange.gov/chapter/1/ (discussing recent climate science and increasing rate of change); C. Figueres et al, *Three years to safeguard our climate*, Nature 546, 593-95 (2017), available here: https://www.nature.com/news/three-years-to-safeguard-our-climate-1.22201.

[10] *See* http://www.swinomish-nsn.gov/climate_change/Docs/SITC_CC_ImpactAssessmentTechnicalReport_complete.pdf.

resources, such as land lost on the island Reservation, can never be replaced.

The anticipated negative impacts of climate change extend off-Reservation throughout the Swinomish Tribe's Treaty-reserved fishing areas. The Skagit Climate Science Consortium has identified key scientific findings and projections for climate variability in the Skagit River Basin, including temperature and precipitation, glaciers, hydrology, sediment, snow elevation, forest fires, and sea level rise. The consequences of those changes include reduced low flows, increased flooding frequency and severity, and an altered sediment regime.[11] These changes cause increased fish mortality, render certain sub-basins inhospitable as habitat, and decrease reproductive success.

The Suquamish Tribe is also impacted by climate change, particularly with respect to its freshwater fisheries. These fisheries are vulnerable to climate change because of the unique hydrology of the Kitsap Peninsula, which is dominated by numerous, small, rain-fed streams. These streams are greatly impacted by the longer, drier, and hotter summer seasons caused by climate change. Summer rearing habitat for juvenile salmon is limited due to low flows and high water

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[11] http://www.skagitclimatescience.org/skagit-impacts-overview/

temperatures, and those conditions are worsening. During the late fall and early winter, climate change will likely increase the intensity and frequency of heavy rainfall, causing heavier and swifter stream flows, which can destroy salmon eggs.

The Quinault are experiencing dire climate-related impacts, two of which are highlighted here. First, in both 2018 and 2019, Quinault was forced to close its Quinault River Blueback sockeye fishery due to historically low return runs. Blueback are a genetically distinct and culturally-critical sockeye that have sustained the Quinault people for millennia. In recent years, however, factors associated with rising global temperature have severely impacted Blueback populations: the marine heatwave known as the "Blob" (2013-15) and the "Godzilla El Niño" global climate event (2015-2016) resulted in low survival rates for fish returning to the Quinault River. Then, in 2018, the Anderson Glacier disappeared. The absence of the glacier, which previously fed the Quinault River with cold water critical to the Blueback run, further impacts survivability.

Second, due to climate change and its proximity to the Cascadia Subduction Zone, the Village of Taholah—the most populated Quinault residential area—is under threat from tsunamis, storm surge, and riverine flooding. The Village consists of approximately 175 homes housing 660

people, a K-12 school, a mercantile and gas station, post office, fish processing plant, museum, office space for 60 tribal employees, and vital community services including police and fire. In March 2014, the confluence of two large storms (wave heights in excess of 20 feet and 13.5 feet, respectively) and high tides caused significant erosion at the toe of the 2,000-foot seawall protecting the Village. The seawall failed, resulting in severe flooding of many homes and buildings. The Village has experienced flooding every year since.

C. Climate change impacts on Tribal culture.

For the Tribes, the environment and culture are inextricably linked. Stewardship and use of natural resources are enduring cultural connections that stabilize and unify individual, family, and community identities. Salmon and shellfish are served at weddings, celebrations, and funerals. Parents bond with their children and teach them broader life lessons while catching, gathering, preserving, and preparing foods.

As a result of this cultural dependence on the environment, the impacts of climate change are multiplied for tribal populations. The loss of traditional foods and practices, discussed above, will inevitably cause cultural harm. The Swinomish Climate Adaptation Action Plan, citing a large body of indigenous peoples social sciences research, explains:

> In many Native American communities, Swinomish included, health is defined on a community level, consisting of inseparable strands of human health, ecological health, and cultural health woven together, all equally important. Within this definition, many of the dimensions of good health . . . such as participation in spiritual ceremonies, intergenerational education opportunities, and traditional harvesting practices . . . may be negatively impacted or even destroyed when resources are scarce or disappear. [12]

The present and future climate change impacts to the Tribes' lands and waters threaten the very essence of what it means to be a Tribal member and Tribal nation.

D. The Tribes' preparations for climate change.

In addition to research and planning, the Tribes are taking concrete steps to address climate impacts. The Swinomish Tribe has developed a new Forest Management Plan that increases resiliency and carbon sequestration, instituted a practice of "beach nourishment" to replace eroded beaches, and sited a new location to cultivate clams and other shellfish to replace inundated tidelands. The Swinomish Senate amended the Tribal Shorelines and Sensitive Areas Code to address sea level rise through designation of, and stricter rules for activities in, the inundation risk zone. STC 19-04.010 *et. seq.*[13]

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[12] Climate Adaptation Action Plan at 59.
[13] http://www.swinomish.org/media/4944/1904shorelines_sensitiveareas.pdf

The Suquamish Tribe has worked with partners to implement aggressive habitat restoration, including eelgrass restoration near Bainbridge Island and restoration of Chico Creek and its estuary. These efforts will help to mitigate some local impacts of climate change.[14] Suquamish is also investing in community education, preparing youth for climate change through its Suquamish Youth Climate Change Club and development of an ocean acidification curriculum.

In response to recurring floods, the Quinault Indian Nation must take the radical—and expensive—step of moving the entire Lower Tahollah Village. In 2017, Quinault finalized a Taholah Village Master Relocation Plan, relocating the village to higher ground a half mile from the existing site.[15] The first building in the new Upper Village—WenɑsgwəllɑʔɑW (Generations Building), housing elders' and children's programs—is currently under construction at a cost of nearly $15 million. Infrastructure costs alone for the new Upper Village are projected to be over $50 million.

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[14] https://geo.nwifc.org/sow/SOW2016_Report/Suquamish.pdf
[15] The Plan creates a mixed-use community of approximately 300 dwelling units and 200,000 square feet of community facilities, as well as parks, trails, and open space. http://www.quinaultindiannation.com/planning/FINAL_Taholah_Relocation_Plan.pdf

E. The Tribes have a direct and unique interest in this litigation.

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, all of which are dependent upon a livable climate, are fundamental to the lives and identity of Tribal members. For these reasons, the Tribes have a great interest in these proceedings and seek to make their views known as *amicus curiae*.[16]

III. Statement of the Case

The Tribes generally concur in the statement set forth in the Petitioner's Statement of Grounds for Direct Review.

IV. Argument

A. Washington Residents, Including Tribal Members, Have a Fundamental Right to a Livable Climate.

The Washington State Constitution guarantees a fundamental right to a livable climate. Although unenumerated, the right to a livable climate is retained by the people of Washington and enforceable as the necessary prerequisite to the free exercise of specific, enumerated rights.

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[16] 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.

To determine whether an unenumerated constitutional right exists, courts primarily consider whether such a right is implicit and necessary to the exercise of enumerated rights, and whether the right is deeply embedded in societal values. *See, e.g.*, *Eggert v. Seattle*, 81 Wash. 2d 840, 841-44, 505 P.2d 801, 803 (1973); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534, (1925); *see also Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash. 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). For example, Americans enjoy a fundamental right to travel, despite travel not being expressly referenced in the federal or Washington State Constitution. *Eggert*, 81 Wash. 2d at 841-44. State and federal courts recognize the right to travel as fundamental because it is implicit in protecting the rights to liberty, to petition government, to participate in interstate commerce, to exercise free speech, to protect due process, and to guarantee equal protection. *Id.*; *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (right to travel protected in part because it "may be necessary for a livelihood."). Courts also recognize the right to travel because of its longstanding social value: "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." *Kent v. Dulles*, 357 U.S. at 126.

The United States and Washington Supreme Courts have employed the same analysis to recognize the fundamental rights to marry and raise a family. Summarizing decades of jurisprudence, in *Stanley v. Illinois*, the Supreme Court recognized that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man." 405 U.S. 645, 651 (1972) (citations and internal quotations omitted). As support for such recognition the Court relied upon "the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Id.* Subsequent courts have anchored constitutional support for the right to marry and raise a family in the key role the family instruction plays in societal well-being. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015); *Custody of Smith*, 137 Wash. 2d 1, 15, 969 P.2d 21, 28 (1998) ("The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts.").

The Court should utilize the same analytical framework adopted for recognition of other unenumerated rights and hold that there is a fundamental right to a livable climate. Like freedom to travel, a livable climate is essential to the exercise of recognized life, liberty, and property rights, as well as participation in commerce among the states and with tribes. The liberty right "is deemed to embrace the right of the citizen to

be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Williams v. Fears*, 179 U.S. 270 (1900). The rights of enjoyment, living where one desires, and earning a livelihood, and the associated liberty right, cannot be exercised by Tribal members without a livable climate. Indeed, "it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989).

The right to a livable climate is also implicit and necessary in protecting enumerated constitutional rights to certain forests, agricultural lands, and tidelands. Article 16, Section 1 of the Washington State Constitution provides that "[a]ll the public lands granted to the state are held in trust for all the people." Similarly, Article 17, Section 1 provides that "Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide…" These express constitutional ownership duties to the people extend to more than two million acres of forest and agricultural lands granted at statehood, as well as vast tidelands and navigable waters. If the

impacts of climate change are not abated, the public forests are doomed to fire and the public tidelands will be harmed by rising, acidic oceans.[17] Accordingly, protection of the right to a livable climate is a prerequisite to exercise and enforcement of these enumerated rights to public resources.

Having established that the right to a livable climate is essential to exercise enumerated rights, the next step in the analysis is to assess whether the right provides social benefit and reflects long-standing values. Like travel and marriage, recognition of a right to a livable climate is strengthened by its core importance to societal well-being. For the Tribes' members, nothing is more fundamental to history, culture, and heritage than access to natural resources in one's homeland, which relies upon a livable climate. *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[.]"). The individual right to a livable climate is inextricably connected to protection of the family, both immediate and extended, and

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[17] According to the Washington State Department of Natural Resources, Washington is "already experiencing impacts from a changing climate" and DNR projects detrimental impacts to constitutionally-protected state forest, aquatic, and agricultural resources. *See Assessment of Climate Change-Related Risks to DNR's Mission, Responsibilities and Operations, 2014-2016 Summary of Results*, Department of Natural Resources, 1, https://www.dnr.wa.gov/publications/em_climate_assessment010418.pdf?ovn8b8.

the associated benefit to Tribal communities. Access to traditional indigenous foods is critical to knowledge transmission, community cohesion, ceremonies, and food security, activities which are all essential to familial and societal well-being. For example, younger fishermen reserve part of their catch to provide to elders for subsistence, and elders pass down knowledge and teachings through sharing of food gathering and preparation traditions. In learning and performing these activities, individuals fit into roles that support the broader family, and in turn, society. For the sovereign Tribes and their members, the right to a livable climate is "a building block of…community." *Obergefell v. Hodges*, 135 S. Ct. at 2601.

In sum, following the recognized analytical framework for recognition of unenumerated rights fully supports recognition of the constitutional guarantee of a livable climate. The trial court erred by failing to follow the settled method of evaluating unenumerated rights, and by drawing a distinction between individual and shared rights that is without basis. *See* CP 437-38. While the Tribes recognize that modern substantive due process jurisprudence requires a "careful description" of the asserted fundamental liberty interest, *Braam v. State*, 150 Wash. 2d 689, 699, 81 P.3d 851, 857 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), the right to a livable climate is not a vague

"shared aspiration," as expressed by the trial court, CP 437-38, but rather a concrete and basic right that is necessary to the exercise of other constitutional rights.

The Tribes do not understand Plaintiffs to argue that the State must affirmatively provide certain ideal conditions, but rather that the State may not unduly restrain the exercise of a right to a livable climate. *See Harris v. McRae*, 448 U.S. 297, 318 (1980). While climate change law presents a relatively new factual context, at root the Plaintiff youth simply assert the unremarkable and well-established argument that the State must stop harming them, and must not prevent them from the basic human pursuits of creating a home and making a livelihood. "As in all matters dealing with the welfare of children, the court must…act in the best interests of the child." *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wash. 2d 894, 923, 949 P.2d 1291, 1306 (1997).

Plaintiffs' circumstances are similar to other situations when the government is responsible for the care of residents and children. For instance, with respect to foster children, "substantive due process gives foster children a right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety." *Braam v. State*, 150 Wash. 2d 689, 699, 81 P.3d 851, 857 (2003). Where the State and City provide water to residents relying on those

services, it violates their constitutional rights if that water is poisonous. *See Guertin v. Michigan*, 912 F.3d 907, 921 (6th Cir. 2019); ("a government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent") (citation omitted). Here too, the Plaintiff children only seek to prevent the State from impinging on their basic constitutional rights—the right to live, to be free from State-caused bodily harm, to earn a livelihood, and to own property.

V. Conclusion

The Tribes and their ancestors have lived in and cared for their homelands since time immemorial. The ever-increasing impacts of climate change pose the greatest disruption to the Tribal way of life since the settlement of Tribal lands at Treaty time. As a result of the close ties between the natural world and tribal communities, these impacts are being felt already—and they portend the harms facing us all in the absence of an enforceable Constitutional right to a livable climate.

For all the reasons stated herein, the Tribes urge the Court to recognize the constitutional right to a livable climate, and to remand to allow the youth Plaintiffs to prove their case.

Respectfully submitted this 12th day of July, 2019.

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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 July 12, 2019, 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.
4. On July 12, 2019, I also emailed the foregoing document to the parties and amici. It is my understanding that there is an electronic service agreement in this case.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of July, 2019, at Seattle, Washington.

s/ Wyatt Golding
Wyatt Golding, WBSA #44412

ZIONTZ CHESTNUT

July 12, 2019 - 4:09 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80007-8
Appellate Court Case Title:	A. Piper, et al. Appellants v. State of Washington, et al., Respondents
Superior Court Case Number:	18-2-04448-1

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80007-8

No. 80007-8-1

WASHINGTON COURT OF APPEALS, DIVISION 1

A. PIPER, et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

BRIEF OF WASHINGTON BUSINESSES *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

IDENTITY AND INTERESTS OF AMICI CURIAE

Venner Consulting, Coconut Bliss, Transformative Wealth Management, Evergreen Sustainability, Aspen Leaf Wealth Management, Finnriver Cidery, Organically Grown Company, 21 Acres, Grounds for Change, Petal and Pitchfork Farm, Central Farms, Greenside Recreational, Global RX, New Earth Beauty and American Sustainable Business Council submit this *amici curiae* brief pursuant to Washington State RAP 10.6 in support of Plaintiffs-Appellees A. Piper et. al. All a*mici* are or represent Washington businesses in a diverse set of industries. The operations and business interests of these companies are being adversely affected by climate change in various ways and all depend upon a stable climate system to pursue their business interests. The specific interests of *Business Amici* are as follows:

21 Acres, founded in 2006 in Woodinville, WA, is a center for sustainable agriculture and education. Extreme weather patterns, less predictable rainfall patterns and crop disease from varieties of pests have increased in recent years from the impacts of climate change. 21 acres has taken many steps to reduce its impact on the climate, including, but not limited to, the use of on-site compostable toilets, on-site kitchen waste compost, solar panels for electricity generation, on-site greywater

treatment, use of permeable pavers, natural bioswales for on-site water management, cover cropping, crop rotation, and drip irrigation.

Petal and Pitchfork Farm (Petal) is a community farm in Poulsbo, WA. Petal focuses on regenerative agriculture, education and nourishing community through what the farm raises and grows. Extreme weather, increased volatility and unpredictability of rain and increased risk from pests due to climate change are risks that the farm has to account for and manage around in order to survive.

Venner Consulting, based out of Lakewood, CO, doing business in the State of Washington, has performed over fifty national research projects for transportation agencies at all levels, primarily through the National Academies Strategic and Cooperative Research Programs. Transportation infrastructure is threatened in low lands or areas susceptible to flooding and sea level rise. The Transportation sector is both threatened and inextricably linked to the carbon economy. The reliance on carbon for transportation in all sectors of the economy must be broken in order to maintain a sustainable transportation sector. Venner Consulting focuses on decarbonization solutions in the Transportation sector.

Coconut Bliss, based in Eugene, OR and doing business in Washington State, has been making organic certified, dairy-free, coconut milk ice cream in the Pacific Northwest since 2005. Coconut Bliss's

products are sold in retail stores across the United States and Canada. Coconut Bliss identifies itself as a Triple Bottom Line company, working to make sure it takes care of its employees, shareholders, and customers while being good stewards of earth's limited resources. Coconut Bliss's economic well-being is dependent on the availability of ingredients, farmed domestically and beyond, that are negatively impacted by shifting growing seasons and destructive weather events due to climate change.

New Earth Beauty (New Earth) distributes natural and organic wellness products in the State of Washington. New Earth requires a consistent supply of agricultural commodities delivered in a timely and consistent manner. New Earth's supply chain of herbs, oils, and essential oils is becoming insecure with more volatile pricing from the impacts of climate change.

Organically Grown Company (OGC), based in SeaTac, WA, is the largest distributor of organic produce in the Northwest. At the core of OGC is a simple idea that has held steady since the beginning: that organic agriculture is necessary for a healthy environment and healthy people. OGC's goal is to support organic agriculture and help it thrive by doing business in a way that is "good, clean and fair." That goes for the customers, vendors, employees, community, and environment.

Greenside Recreational is a 502 Cannabis retailer with retail stores in Seattle, Kent and Des Moines, WA. Climate change impacts the growing season and potential yield for outdoor cannabis. Disruption of the harvest cycle creates inventory management challenges. Disruptions in yield from extreme weather and pests and/or reduced water availability impact wholesale pricing.

Transformative Wealth Management is an investment management and comprehensive financial and life planning firm that does Socially Responsible Investing that assists individuals, businesses and non-profits, including residents and businesses and non-profits in the State of Washington, to align their investments and financial goals and objectives with their values for the triple bottom line of People, Planet and Profit.

Aspen Leaf Wealth Management works with clients, including residents of Washington State, to design Socially Responsible Investing (SRI) portfolios that reward investors with competitive returns while simultaneously creating positive, measurable impacts on both the environment and social progress. Aspen Leaf strives to get clients to match investment dollars are aligned with their values.

Finnriver Farms is an orchard and cidery on eighty acres in the Chimacum Valley on the north Olympic Peninsula of Washington. Extreme wind and precipitation events pose acute risks to

Finnriver farms. A stable climate is essential to a healthy, productive farm and orchard.

Central Farms is a Tier 3 cannabis producer/processor based in Ellensburg, WA. Extreme weather impacts the growing season and presents risks for the survival of the cannabis crop. Climate change is also increasing pest risks which threaten the crop. Furthermore, cannabis, even more so than other crops, requires a consistent supply of water. Irrigation is a challenge for cannabis growers in eastern WA due to its status under federal law, meaning that no federal water can be used or accessed. As a result, disruptions in rain patterns pose unique challenges for cannabis growers with even greater risk.

GLOBALRx is the premier USA based international pharmacy, wholesale distributor, and pharmaceutical exporter. GLOBALRx exports U.S. brand, generic, and controlled drugs to hospitals, physicians and specialty wholesalers around the world. Its global distribution chain is disrupted by extreme weather and unpredictable weather patterns.

Grounds for Change is a family-owned and operated coffee roasting business located on the Kitsap Peninsula due west of downtown Seattle, WA. All of its coffee is Fair for Life Fair Trade certified and its organic certification meets the stringent Organic Processor Standards enforced by the USDA and the Washington State Department of

Agriculture. Additionally, its coffee is Carbon-Free Certified by CarbonFund.org, which means that the complete carbon footprint (from crop to cup) is offset with tree planting.

Evergreen Sustainability, LLC is a micro business based out of Beaverton, OR with business operations in the State of Washington that believes in doing business in a way that has a beneficial impact on the planet. Evergreen Sustainability believes that everything is being threatened from the impacts from climate change.

The American Sustainable Business Council (ASBC) is a 501 (c) (4) founded in 2009 that is a coalition of two-hundred and fifty thousand (250,000)business organizations and companies, many of which are located in Washington State and conduct business in the State of Washington, advancing market solutions and policies that support a vibrant and sustainable economy. These business organizations include trade associations, local and state chambers of commerce, microenterprise, social enterprise, minority cooperatives, green and sustainable business groups, local and community-rooted business, women business leaders, economic development organizations and investor and business incubators. Most of the businesses and business related organizations in ASBC have been impacted by climate change and see inaction to address

climate change as one of the biggest threats to the national economy and the economy of the State of Washington.

STATEMENT OF THE CASE

Amici concur with and incorporate by reference the statement of the case set forth in the brief of Appellants.

ARGUMENT

Aji Piper et. al. v State of Washington forces consideration, pursuant the Washington State Constitution and theories of public trust, of systemic causes of climate change and the catastrophic impacts of climate change, which are having far-reaching ramifications for the economy and society. Business *Amici* already experience a range of impacts to their businesses from climate change[1] and make two arguments herein to assist the Court in its consideration of the issues in this case. First, Business *Amici* explain how climate change is already impacting their businesses, and the business community in general, and how those impacts are expected to worsen without immediate, comprehensive, systemic, and

[1] *See, e.g.,* Wash. Exec. Order No. 18-01, (Jan. 16, 2018) (stating, "WHEREAS, reducing levels of atmospheric greenhouse gases (GHGs) will support Washington's fight against climate change, which is already costing Washington businesses and governments—and harming citizens—through more severe wildfires, droughts, heat waves, damaging storms and flooding, as well as degraded water supplies, rising sea levels, increased damage from invasive species, greater stresses on agricultural and forestry crops, damage to salmon fisheries, and harm to shellfish from ocean acidification, among other costly impacts").

bold steps by the state of Washington to cease its conduct that is causing and contributing to climate change.

Second, Business *Amici* explain that while they are already taking steps to minimize their contributions to climate change, support from the Washington State government is essential.[2] All business *amici* are consumers of energy, which represents a large part of their carbon footprint.[3] The *amici* are striving to reduce their carbon footprints not only to protect the public health and welfare, but also because it enhances their economic interests.[4] Business *Amici* note that rather than harming businesses, a comprehensive plan by the Washington State government to address climate change, the requested relief in this case, will have a positive benefit on the business community.[5]

I. Climate Change is Already Harming Businesses in a Myriad of Ways

[2] *See, e.g.,* Carbon Emissions Reduction Taskforce, *Report to the Washington State Governor's Office*, 1-3 (2014).
[3] *See generally*, U.S. Energy Info. Admin., *Washington: State Profile and Energy Estimates*, http://eia.gov/state/?sid=WA#tabs-2 (estimating commercial end-use consumption of energy accounts for 18.1% of total energy consumption in Washington State).
[4] *See, e.g,* Climate Leg. & Exec. Workgroup., *A Report to the Legislature on the Work of the Climate Legislative and Executive Workgroup*, 14-15 (2014) [hereinafter *Workgroup*] (concluding that action on climate change would benefit the Washington State economy).
[5] *Id.*

Current and projected climate change impacts are harming the business community and can be disastrous from a business perspective.[6] Beyond the fact that businesses employ and serve citizens that are individually impacted by climate change,[7] Business *Amici* are already being disrupted by climate change in various economic ways.[8]

Businesses in the food and agriculture sector, including Business *Amici*, Coconut Bliss, Finnriver Farms, Greenside Recreational, Grounds for Change, Organically Grown Company, 21 Acres, Petal and Pitchfork Farm and Central Farms, are being impacted by rising temperatures, declining water availability, extreme weather events (e.g., drought and floods), and altered pest pressures, all of which have been linked to climate change.[9]

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[6] Wash. Exec. Order 14-04 ("studies conducted by the University of Oregon found that the effects of climate change on water supplies, public health, coastal and storm damage, wildfires, and other impacts, will cost Washington almost $10 billion per year after 2020, unless we take additional actions to mitigate these effects . . . ."); *See generally,* A.K. Snover et al., Climate Impacts Group University of Washington, *State of Knowledge: Climate Change Impacts and Adaptation in Washington State: Technical Summaries for Decision Makers*, ES-1 – ES-7 (2013) (summarizing climate change impacts on Washington State); *See also, Id.* at 9-4 (projecting permanent inundations of important commercial and industrial sites due to sea level rise); David Wei & Marshall Chase, BSR, *Climate and Supply Chain: The Business Case for Action, 9-11* (2018) (summarizing risks to business supply chains).

[7] *See*, *Id.* at 13-1 – 13-9 (comprehensively summarizing human health impacts of climate change in Washington State).

[8] *See*, Wash. Exec. Order No. 18-01.

[9] *See generally* Clerk's Papers ("CP") 24-41 (summarizing climate change impacts in Washington state); Climate Change Impacts and Adaptation in Washington State, http://cses.washington.edu/db/pdf/snoveretalsok2013sec11.pdf

Among the challenges are changes in water quantity and quality, which pose significant threats to businesses that rely upon irrigation to sustain needed crops.[10] While irrigation can help address certain climate impacts (like drought) when water is available, declining water resources means that irrigated acreage is declining and will decline more in the coming decades, threatening irrigation-dependent crops.[11] Increased reliance on irrigation for agriculture is also not a panacea without causing other negative impacts. Irrigation often results in changes in quantity and quality of soil and water, potentially resulting in: increased salinization of soils that threatens the arability of certain areas in the long-term; increased groundwater levels in irrigated areas; decreased water flow in-stream and downstream of sourced rivers and streams impacting fish and wildlife; and increased evaporation in irrigated areas with general disruption to natural hydrologic cycles. This complexity resulting from climate change to natural resources introduces new business risks into virtually every sector, including communities of workers, economic viability, and supply chain.[12]

[10] CP 6 (describing how Plaintiff India is unable to access their full water rights); 25, 31.
[11] *See*, Elizabeth Marshall et al., U.S. Dep't of Agric., *Climate Change, Water Scarcity, and Adaptation in the U.S. Fieldcrop Sector*, 3-4, 17, 25-27 (2015) (discussing decline of irrigated acreage in the northern pacific region of the U.S.).
[12] *See*, Wei, *supra* note 6, at 9-11 (summarizing impacts of climate change on business supply chains).

Each of these impacts applies to Coconut Bliss, as the ingredients for its vegan ice cream products are grown and processed in many different parts of the world. For example, coconut ingredients are sourced in regions of Thailand and the Philippines. Increased drought cycles, typhoons and other related weather events, can wipe out harvests for one or several seasons.[13] These events are all becoming more common and more destructive as a result of climate change.[14] This disrupts businesses all along the supply chain (growers, manufacturers, trucking, shipping, brokers, and end customers).[15] These disruptions add cost to every ingredient and pose significant challenges for Coconut Bliss. New Earth has the same type of concerns with its supply chain of herbs, oils, and essential oils coming from all over the globe being disrupted by altered climatic conditions.

Similar impacts and disruptions apply to the cannabis industry in the State of Washington on a more local basis entirely within the borders of the State of Washington. Increased drought cycles, with limited access

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[13] *See*, Food & Agric. Org. of the United Nations, *Philippine Coconut Farmers Struggling to Recover From Typhoon* (2014), http://fao.org/news/story/en/item/212957/icode/ (discussing the devastating impact of a single typhoon on coconut crops and farmers)

[14] U.S. Global Change Research Program, National Climate Assessment, Extreme Weather (Nov. 2018), https://nca2014.globalchange.gov/highlights/report-findings/extreme-weather.

[15] *See*, Wei, *supra* note 6, at 9-11 (summarizing impacts of climate change on business supply chains).

to sources of irrigation water as a result of the federal water prohibition for cannabis growers, and weather-related events or pest impacts has the potential to wipe out an entire crop. Cannabis growers are particularly exposed due to an inability to borrow money from traditional banks to re-plant or repair infrastructure.[16] A wiped out crop cannot be recovered and putting new crops in the ground cannot be financed without the income from the lost crop. The disruptions add costs and present an extreme risk to the cannabis supply chain.

Grounds for Change's business relies on coffee, an agricultural product that is completely dependent on a stable climate system.[17] Tragically, due to climate change, farmers are reporting that their coffee trees are dying due to warmer temperatures, highly erratic weather, and lack of water.[18] Farmers are having to find land in a more suitable climate, which means going higher and higher up the mountains, something that creates hardship for cultivators, creates its own impacts to alpine areas, and is not a long-term solution.[19] In fact, current forecasts predict that if

[16] *See*, *e.g.*, Robert McVay, Canna Law Blog, *Washington State's Cannabis Financier Problem* (2017), http://cannalawblog.com/washington-states-cannabis-financier-problem/
[17] *See, e.g.,* Corey Watts, The Climate Institute, *A Brewing Storm: The Climate Change Risks to Coffee*, 1 (2016).
[18] *See, e.g.*, *Id.* at 4-5.
[19] *See, e.g., Id.* at 6-11.

climate change is not addressed, fifty percent (50%) of land currently suitable for growing coffee will not be usable by 2050.[20]

Climate change also impacts every part of Organically Grown's business. Erratic weather patterns wreak havoc on crop planning and financial returns for growers.[21] Unpredictable weather can severely disrupt the marketability of crops that arrive too early or too late, depleting or flooding the market. These market fluctuations create economic disruption at all levels of the food supply chain.[22] Growers that Organically Grown works with are experiencing the loss of natural resources such as water and top soil, the increased pressure of pests and disease, and even the inability to grow items that cannot withstand the newer, oftentimes higher, temperatures in many regions.

Organic practices are proven to be effective towards sequestering carbon,[23] but changes in weather patterns are making it difficult for farmers to implement the practices such as incorporation of cover crops, predictable crop rotations, and other mitigation strategies. Washington

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[20] *Id.* at 1.
[21] *See generally*, Snover, *supra* note 6, at 11-1 – 11-6 (discussing the effects of climate change related weather events on Washington agriculture).
[22] *See generally*, *Id.*
[23] Food and Agric. Org. of the United Nations, *Organic Agriculture*, http://fao.org/organic ag/oa-faq/oa-faq6/en/

State's contribution to climate change[24] is worsening the adverse impacts that are affecting Business *Amici*.

II. Action by the State of Washington to Address Climate Change is Needed and Will Have a Positive Economic Impact on Businesses

As part of the remedy in this case, the Appellants seek an order from the court directing Appellees "to develop and submit to the Court by a certain date an enforceable state climate recovery plan" that is designed to bring the state's energy and transportation system into constitutional compliance.[25] While Business *Amici*, and many other businesses, are already taking steps to reduce their use of fossil fuels and other contributions to climate change, businesses need support and certainty from the Washington State government in the form of a climate recovery plan. Quite simply, no matter how hard they try, businesses cannot solve climate change on their own given the state's control of Washington's energy and transportation systems. It is imperative for the Court to set the constitutional standard that protects the constitutional rights of Youth asserted herein, which will then guide the state's implementation of its energy and transportation system.

[24] CP 41-50
[25] *Id.* at 72.

Importantly, addressing climate change and transitioning to a fossil fuel-free economy will not harm the economy and the interests of Business *Amici*, but will generate new jobs, allow businesses that may be losing jobs as a result of climate change to continue to operate, create more stability and predictability for businesses to plan and operate and will ultimately generate economic growth.[26] Businesses that are already taking steps to reduce reliance on fossil fuels and support sustainable, carbon-sequestering agriculture practices (that will generate immense economy-wide benefit) still have to compete in a predominately fossil-fuel based economy, propped up by government subsidies that do not consider or factor in the social and environmental impact from carbon emissions, the permitting of fossil fuel infrastructure, a co-dependent reliance on fuel taxes for governmental revenue and other means.[27] The certainty that comes with a remedial plan would create a massive potential benefit for society as a whole to transform our economy to a green business model in a timely way.[28] The reality is that Washington State businesses expend a

[26] *See generally*, Forecasting and Research Div. Off. of Fin. Mgmt., *Washington State: Economic Modeling of Greenhouse Gas Emission Reductions*, 1 (2015).
[27] *See*, David Coady et al., IMF, *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estiimates*, 4-6 (2019).
[28] *See, e.g., Workgroup, supra* note 4, at 14-15.

significant amount of capital on the cost of energy to manufacture, produce, process, and ship their products to market.[29]

Government can and must play a substantial role in creating a plan that protects the climate system and leveling the playing field for renewable energy sources that must still compete with the fossil fuel energy sector, which has dominated Washington's energy system for decades.[30] Business *Amici* utilize renewable energy sources wherever possible, but in order to fully transition to renewable sources of energy, the Washington State government must cease conduct that enables fossil fuels to continue as the primary energy source.[31]

As an example, to help mitigate climate change, Coconut Bliss purchases only certified organic ingredients and backs that up by certifying all of its products. Studies have shown organic growing methods sequester more carbon than conventional farming.[32] Supporting regenerative agriculture is a key component of the business model. Additionally, Coconut Bliss has joined like-minded companies as part of the Climate Collaborative. This business-based organization encourages

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[29] *See generally*, *Washington: State Profile and Energy Estimates*, *supra* note 3 (estimating commercial end-use consumption of energy accounts for 18.1% of total energy consumption in Washington State).
[30] *See*, Wash. Exec. Order No. 18-01, (Jan. 16, 2018).
[31] *See, e.g.,* CP 50-56.
[32] *Carbon Sequestration and GHG Measurements in IFS Model* 29 (Debashis Dutta et al. eds., 2018); Union of Concerned Scientists, *Agricultural Practices and Carbon Sequestration*, 1 (2009).

and empowers the natural products industry to be a driver for reversing climate change. But individual businesses do not dictate how the state gets its energy; that is controlled by the Appellees.

While global agriculture is still dominated by large-scale monocultures with conventional petrochemical inputs and mechanization, there is a clear shift toward low-carbon and climate-resilient agriculture that is distinctly different from the prevailing norm.[33] The transition from this type of agriculture is good for a healthy sustainable planet and more healthy human beings.[34] The agriculture industry and the downstream purchasers of agricultural inputs, have identified the benefits that come with good soil stewardship, high-biodiversity farms, and other methods mimicking natural ecosystems.[35] These benefits are both good for the environment, help mitigate climate change, and are good from a business perspective.[36] Supporting regenerative, resilient agricultural practices is already a key component of many companies' business models, including several of Business *Amici*'s. Businesses are pursuing these changes in

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[33] *See, e.g.,* USDA Econ. Research Serv., *Organic Market Overview* (2017), http://ers.usda.gov/topics/natural-resources- environment/organic-agriculture/organic-market-overview (showing rapid sustained growth in demand for organic agricultural products).
[34] *See generally,* U.N. Special Rapporteur, *Report On the Right to Food*, 3-20 (2010) (detailing the necessity of agroecology for increased productivity, better nutrition, poverty reduction, climate change adaptation, etc.).
[35] *See, e.g.*, General Mills, *Global Responsibility*, 24-46 (2019) (analyzing the need for regenerative agriculture and sustainable sourcing to address climate change).
[36] *Id.*

their supply chains largely out of self-interest because a more resilient supply chain is smart from a business perspective (many of these companies are also mission-driven and pro climate).[37] However, the Washington State government must fulfill its role and responsibility pursuant to the State Constitution to provide a healthy and sustainable climate for future generations.

Importantly, Business *Amici* believe that allowing the Appellants' case to go to trial and, if they prevail, entering an order that requires the Washington State government to develop and implement a Climate Recovery Plan to address climate change would actually help businesses and the economy.

For example, there is broad cooperation among some of the largest corporations in the world to transform production, consumption, and policy to protect both the climate and business interests.[38] As the Washington legislature has recognized, climate stability is good business and a goal that the Washington State government must make best efforts to achieve in order to fulfill its Constitutional responsibilities.[39]

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[37] *Id.*
[38] *See, e.g.*, The Ceres Business for Innovative Climate and Energy Policy Network, http://ceres.org/networks/ceres-policy-network (representing over fifty companies, including leading consumer brands and Fortune 500s).
[39] *See,* Wash. Rev. Code § 43.21C.020(3) (2019).

In sum, Business *Amici* support and will flourish in an economy powered by renewable energy, but Appellees are continuing to pursue policies that are resulting in increasing greenhouse gas emissions.[40] Indeed, because businesses increasingly face financial risks and losses due to climate change, the converse, contributing to climate change, poses grave threats to Washington State's economy.[41] Taking action to address climate change is essential for supporting a prosperous business community and Washington State economy.

CONCLUSION

In addition to the overwhelming social, environmental, and economic rationale as alleged in the Complaint, Business *Amici*, and the business community in general, stand to benefit from comprehensive action by the Washington State government to address climate change. Therefore, Business *Amici* respectfully request that this Court return the case to Superior Court for trial.

Respectfully submitted this 12th day of July, 2019.

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[40] *See, e.g.,* Wash. Dep't of Ecology, Wash. State Greenhouse Gas Emissions Inventory, 1990-2015 (Dec. 2018), https://fortress.wa.gov/ecy/publications/documents/1802043.pdf ("Washington's 2015 total greenhouse gas emissions were 7.4 MMT higher than the 1990 baseline of 90.0 MMT" and "Washington's greenhouse gas emissions increased by about 6.1% from 2012 to 2015").

[41] Snover, *supra* note 6, ES-1 – ES-7 (summarizing of climate change impacts on Washington State).

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July 12, 2019 - 3:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80007-8
Appellate Court Case Title:	A. Piper, et al. Appellants v. State of Washington, et al., Respondents
Superior Court Case Number:	18-2-04448-1

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APPENDIX G

Transcript of Oral Argument, Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8-I) (heard Sept. 17, 2020)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

AJI PIPER, et al,)

Appellant,)

vs) No. 80007-8-I

STATE OF WASHINGTON, et al,)

Defendants.)

COPY

VERBATIM REPORT OF PROCEEDINGS

[Stenographically transcribed via digital recording]

Thursday, September 17, 2020 (11AM)
Panel: Bill Bowman, Lori Smith, David Mann
Seattle, Washington

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COURT PROCEEDINGS

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THE COURT: Please be seated. This is Piper, et al v. The State of Washington.

Good morning, counsel. And we are ready to hear argument.

Counsel, would you like to reserve any time?

MS. RODGERS: Two minutes for rebuttal, please, Your Honor.

THE COURT: You may.

MS. RODGERS: Should I approach the podium?

THE COURT: Yes, certainly.

MS. RODGERS: Good morning, Your Honors. May it please the Court. My name is Andrea Rodgers, and I represent the 13 young Washingtonians who filed this constitutional case.

Plaintiff Kailani is a 15-year-old girl who cannot vote. She is a member of the Colville Indian Nation. She lives in Omak near the Colville Indian Reservation where two massive wildfires are burning uncontrollably and out of her control, literally in her backyard.

These are fires Governor Inslee just last week called the climate fires, fires causing deadly air

conditions from which Kailani cannot escape that prevent her from engaging in cultural practices and putting her personal security and safety at risk. This case challenges the actions the State has taken to exacerbate these very climate change conditions that, in realtime, are infringing upon Kailani and the other plaintiffs' constitutional rights to life and liberty.

As we informed the Court last week, Plaintiffs are no longer appealing the dismissal of their sixth claim. We believe it would benefit the Court to receive supplemental briefing as to why these legislative amendments further support the justiciability of Plaintiffs' claims one through five, and we can file that promptly.

This case is justiciable, and any doubts you have about its justiciability must be resolved in favor of the youth at this early stage in the proceedings.

I would like to focus on three points today. First, declaratory relief is the final and conclusive remedy that is available in this case; second, the Political Question Doctrine does not apply to these constitutional claims; third, full development of a factual record is critical to resolving the issues in

this case.

First, Petitioners are entitled to seek declaratory relief. Declaratory relief is always available as a remedy in constitutional cases regarding fundamental rights, but it was completely ignored by the Superior Court and by the respondents in their briefing.

Courts have long acknowledged the important role of declaratory relief in resolving constitutional controversies. For example, while *Brown v. Board of Education* must -- may be most famous for the injunction that it issued, it first issued a declaration and said, quote: The appropriate relief was necessarily subordinated to the primary question; the constitutionality of segregation in public education.

Braam, *Seattle School District* and other constitutional cases similarly illustrate the importance of declaratory relief in the first instance for finally and conclusively resolving constitutional controversies.

At the very least, these children are entitled to have a court decide whether Respondents' historic and continuing endangerment through their affirmative contributions to the climate crisis are infringing

upon their fundamental rights.

This court doesn't need to go any further than that today. You can remand this case simply on the plain error of the Superior Court in ignoring the availability of a declaration of constitutional rights.

I would like to note also, Your Honors, that justiciability can be addressed at any time in the case. So Respondents can raise their justiciability arguments at later stages in the proceedings if that's appropriate, but by denying these youth the right to seek declaratory relief in a constitutional case of this magnitude firmly and perpetually closes the courthouse's door to them.

Second, Plaintiffs' constitutional claims are not political questions. As the U.S. Supreme Court said in *Zivotofsky v. Clinton*, the Court is obligated to hear and decide cases, even those they would gladly avoid.

It is true that climate change, like abortion, same sex marriage and desegregation is a hot button, political issue, but being at the center of considerable discussion does not make it outside of judicial review. If it did, courts would never be able to decide cases involving fundamental rights as

they did in *Roe*, *Obergefell*, *Brown* and countess other cases. Fundamental rights are simply not subject to the will of the majority.

Respondents ask this court to drastically expand application of a Political Question Doctrine to all issues that involve, quote, matters of political and governmental concern. That is not the law. The Superior Court incorrectly relied on *Brown v. Owen* where the issue involved a matter of legislative affairs constitutionally committed to the legislature branch in Article II, Section 9.

Unlike in *Brown v. Owen* here, there is no textual commitment at issue. Energy and transportation policy are simply not textually committed to the political branches, let alone the plaintiffs substantive due process, equal protection, or public trust claims. Resolution of these constitutional claims lies squarely within the province and duty of the judicial branch.

Because the recent amendments to RCW 70.235 align with what the youth have allege -- alleges needed to protect their constitutional rights in the long term, the legislation can serve as a judicially manageable standard against which the Court can gauge the constitutionality of the State's actions.

And that's one reason why I believe supplemental briefing on that issue would be helpful to the Court, nor did the Court ask the -- nor did the youth ask the Court to make a policy determination. Those determinations have already been made. This court, at this case, ask the Court to engage in its traditional, judicial role of reviewing the political branches existing actions and existing policies that have already been developed and are already being implemented.

Third, and perhaps more important today, Your Honor, the development of a factual record is crucial to resolving the claims in this case. The facts need to inform the inquiry -- the legal inquiry at every step of the process. What are the fundamental rights at stake? What is the government conduct at issue, and how does it violate the rights? Does the government have a compelling interest in pursuing this course of conduct? Are there least-restrictive alternatives? What remedy is most appropriate to protect the rights of these children?

The youth have made allegations as to each of those points, but the factual record needs to be developed so that this case can be fully decided.

As was held in *Braam*, which was decided after a

trial on the merits in finding a constitutional violation, the factual context at hand matters greatly. And, quote: In order to preserve constitutional proportions of substantive due process a court must undertake an exact analysis of circumstances before any abuse of power is condemned as conscious shocking.

Similarly, in *To-Ro Trade Shows*, one of the cases my friend cites with respect to the Declaratory Judgment Act, that case went to trial before it was found to be non-justiciable on appeal. If you do have concerns about justiciability in this case, those issues can be decided later on, if necessary.

Again, closing the courthouse doors to the youth at this stage is a miscarriage of justice. The vast majority of cases cited by the parties involving alleged infringements of fundamental rights were decided on the merits, and that should be no different here. The youths' claims should not be prejudged. Their very lives and liberty are at stake, and they deserve their day in court to put on evidence to support their allegations of the harm their government has inflicted upon them. Thank you.

THE COURT: Thank you.

Counsel?

MR. REITZ: Good morning, Your Honor. May it please the Court, Chris Reitz, Assistant Attorney General, for State respondents.

Climate change is the leading environmental challenge of our time. The State does not disagree with Plaintiffs on climate change, its importance, or the urgent need for action. Indeed, the political branches of this state, both the legislature and the executive, have been active in this area, but the State cannot agree that Plaintiffs' claims provide a legal basis for the judiciary to assume the role of setting the State's climate policy and overseeing the State's response.

Plaintiffs' claims are not viable for three reasons. First, Plaintiffs' claims are precluded under separation of powers principles and non-justiciable under the Political Question Doctrine because it is the political branches, not the courts, which have the power to enact legislation and set the State's climate policy.

THE COURT: What about their argument that it's sufficient for us just to issue a declaratory judgment that there is a right and send it back to the trial court to decide whether the rights have been violated?

MR. REITZ: That was an argument that was

recently analyzed by the Ninth Circuit in the recent *Juliana* decision, and there the Ninth Circuit found that it was unsatisfactory because at the end of the day ultimately the Court will have to judge whether the State's actions comply with that -- meet that declaratory judgment order or not, and that would require detailed policy and, you know, weighing and balancing of policy issues by the Court, which are really outside the judicial branch's province.

The -- the other issue with that is that Plaintiffs are asking the Court to step in to determining what the pace and extent of the State's climate reduction should be, and that is essentially a policy issue that is committed to the political branches to determine.

THE COURT: What about the argument that now there is a statute against which we can measure?

MR. REITZ: Yes, the statute was something that the plaintiffs originally challenged as inadequate. It was updated in the last legislative session, and they have now withdrawn that claim, and that is a reason that the legislative branches have actually acted on this issue. They have set a pace and extent which the Court is not in a position to rewrite that statute, so that's not a form of relief available.

And the manner in which the State reduces climate change is also not something that the plaintiffs provide any kind of legal basis for how the State respondents, the governor or the state agencies, would have authority to produce the kinds of additional reductions that the plaintiffs seek.

So it's really the lack of a judicial remedy. Additional legislation is required to provide the mechanisms, and that legislation has been going forward over the previous years. In the last session the House bill, 2311, updated those climate limits. Also the Clean Energy Transformation Act was passed in 2019, which will reduce the State's reliance on carbon-based electricity production and phase that out to be carbon neutral over the next decade and entirely carbon free over the following two decades.

And also the hydrofluorocarbons phase-out law was passed which phases out the use of super polluter -- climate super polluters in refrigeration equipment in the State of Washington. So the legislature is active on these issues.

Also, the State agencies have been active. The Department of Ecology passed the Clean Air Rule, which provided a fairly comprehensive greenhouse gas regulation for large facilities and would have reduced

the carbon emissions from natural gas and transportation fuels as well.

However, in associated -- *Association of Washington Business's* case, the Supreme Court found that the department lacked the necessary statutory authority to regulate those as indirect emissions and set aside a portion of that rule.

So that's -- that's a good example of how the State is doing everything it can under its existing authority, and the legislature is also very active in this area.

THE COURT: If we declared that there is a fundamental right, and we send it back to the trial court, and the trial court determined that the right has been violated and issued a declaratory judgment that the right has been violated, doesn't that give Plaintiffs a heck of a lot of power to go back to the legislature?

MR. REITZ: Well, that -- that would not provide legal relief to the plaintiffs, which is what is necessary.

THE COURT: Declaratory judgment, a statement that they have been violated?

MR. REITZ: It would -- it would not address their claims. I mean, what Plaintiffs are seeking in

this case is a sweeping climate recovery plan, and they ask the Court to take continuing jurisdiction for decades, Your Honor, in order to oversee that plan and judge whether the State's plan is good enough and will achieve those goals. A simple declaratory judgment that would say, hey, the State needs to do more and reduce climate-causing emissions would -- would really not be anything additional to the State's current climate reduction statute which provides --

THE COURT: Could it also say that it has to be done more quickly than it is being proposed in the legislation?

MR. REITZ: Your Honor, if it did that it would essentially be adjusting slightly the pace and extent of climate reductions, which is -- is really squarely within the policy sphere of -- of how the State is determining its climate policy. And -- and there is also not easily discoverable judicial standards for how to judge, you know, exactly what the pace and extent in Washington of climate reduction should be.

With climate change, this issue relates not just to the emissions caused by this state but emissions worldwide, and judging what pace and extent the State should engage in involves numerous policy judgments about other impacts and the economy and society and

changes that are going on and how to optimize those over time.

THE COURT: So would it not be possible for the Court to say it is not being done at the correct pace so determine what pace is correct and go forward with that?

Why do we have to keep looking at it year after year? Can't we just simply say the pace you set is inappropriate; set a faster pace?

MR. REITZ: Well, the premise of this would be finding a constitutional duty that the Court could apply to make that kind of judgment, and that itself is -- is unworkable, Your Honor, because what Plaintiffs cite is they pluck some language from the policy provision of Ecology's Organic Act that provides a right to a healthful environment in statute, but that right does not amend the constitution or even provide a substantive statutory right that can be asserted in court because it is from the policy section of that statute.

THE COURT: Well, let's back up. Article I, Section 30 tells us that we have rights that aren't enumerated. In 1970, the adoption of SEPA, 4321-A, gives us a statement. It says it's a policy, but it says the people have a fundamental and an inalienable

right to a healthful environment.

We come back 20 years later we adopt MTCA, and that was a vote of the people, and the first statement in MTCA is the people have a fundamental right to a healthful environment, and the current generation has a duty to future generations. Why can't those two statutory provisions serve to help enumerate one of the long-existing rights?

MR. REITZ: Your Honor, the -- those statements provide critical direction to the environmental agencies to apply the law and provide direction to the Court in interpreting, you know, MTCA, SEPA and ecology's authority. What they don't provide is a positive, fundamental right under the constitution. They recognize an important right, but it's not necessarily a constitutional right and --

THE COURT: Let me ask you: The last ten days, or seven days, I can't go outside. If I go outside I am threatening my life. I have asthma, so I have to stay inside with the windows shut. I don't have air-conditioning. Why isn't that affecting my life and my liberty?

MR. REITZ: Your Honor -- Your Honor, the climate impacts are very real, and they have wide-spread consequences, as Your Honor notes.

However, they are impacting all of us, and it's a large societal problem that requires large societal solutions.

And those -- those are -- that -- that gets to the way that this is a political question in the sense -- not that it is simply politically charged, because that is not the crux of it. The crux of it is that this issue relates to a common, shared resource, and -- and it is an issue for all of the polity to sort out through the political process in terms of how to address it.

To get to the constitutional issue here, the key thing that would be lacking under substantive due process is -- is the kind of positive right that would be necessary for the Court to -- to impose a duty for the State to go ahead and take affirmative action to develop the kind of legislative scheme that -- that Plaintiffs seek.

The substantive due process clause provides a negative right to restrain government action from taking -- taking actions that infringe on personal liberties, on individual liberties, and it is based in Article I, Section 3 of the State constitution, which is entitled "Personal Rights."

And so a distinction between a positive and a

negative right is critical for understanding the impossibility of -- of announcing a new fundamental right to a healthful environment.

The *Ockletree v. Franciscan Health* case from 2014 from the State Supreme Court recognized that there can be very important rights, but they don't necessarily provide a fundamental, constitutional right. In there they were looking at the Washington law against discrimination, which -- which similarly had a policy statement -- excuse me, Your Honor. We would ask that this court affirm. Thank you.

MS. RODGERS: Thank you, Your Honors.

I think my friend just illustrated why the determination of these facts is so important. He put on a factual presentation explaining that the State is doing everything that it can to address climate change.

The youth have alleged that the affirmative acts of this State are violating the fundamental rights, their fundamental rights. That is a factual question. And they can certainly put on that case at trial, and we can put on our evidence, too, but it does not go to the issue of justiciability.

As to the *Juliana* case, he incorrectly described that ruling. I am counsel of record in that case.

That was a redressability decision. The Court explicitly found that climate change, the substantive due process and equal protection claims, in that case were not political questions. It was a redressability argument, and they said that because our burden -- which we believe was misstated by the Court, which is why there's a petition for en banc review pending in that case -- they said that our burden was we needed to solve climate change.

Now, the State has not argued that that is our redressability burden here. They don't even question redressability in this case. And, in fact, because the legislature has already made the findings that where Washington needs to do its own fair share to adjust climate change, the State can't make that argument in this case, so *Juliana* does not help them in that regard.

With respect to our request for an injunctive relief, we have two requests for an injunctive relief; a negative injunction asking the State to stop what it is doing to continuing the infringements on these youths' rights and an affirmative injunction in the form of a plan; again, that it's premature to determine whether any injunctive relief would even be available without first issuing declaratory relief.

As to the right to the environment, that is the only right that the legislature has declared to be fundamental and inalienable, and that language means something. If you go through the *Glucksberg* analysis, legislative intent is important for purposes of looking at whether the root is deeply rooted in our history.

Thank you, Your Honor. With respect, we ask that you remand this case to the -- back to the Superior Court. Thank you.

THE COURT: Thank you. We are in recess.

[Whereupon, the proceedings adjourned.]

C E R T I F I C A T E

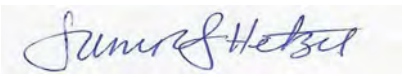
STATE OF WASHINGTON)
) SS.
COUNTY OF PIERCE)

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I, Jami R. Hetzel, am a certified court reporter for the State of Washington. I do hereby certify that the foregoing is a true and accurate transcript of the proceedings transcribed by me via digital audio recording in the above-entitled matter done to the best of my ability;

I received the electronic recording directly from the trial court conducting the hearing; I am in no way related or employed by any party in this matter, nor any counsel in the matter; and I have no financial interest in the outcome or end result of the litigation.

Dated this 6th day of March, 2021.



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JAMI R. HETZEL, CCR, RPR
OFFICIAL COURT REPORTER
CCR NO. 2179

APPENDIX H

Wash. Const. Art. I, §§ 3, 12, 30, Art. II, § 1; RCW 7.24.010; RCW 7.24.050; RCW 7.24.080; RCW 7.24.090; RCW 4321A.010; RCW 43.21F.010; RCW 70A.45.020; RCW 70A.305.010

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 3

§ 3. Personal Rights

Currentness

No person shall be deprived of life, liberty, or property, without due process of law.

Credits
Adopted 1889.

West's RCWA Const. Art. 1, § 3, WA CONST Art. 1, § 3
Current through 11-3-2020.

End of Document

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 12

§ 12. Special Privileges and Immunities Prohibited

Currentness

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Credits
Adopted 1889.

West's RCWA Const. Art. 1, § 12, WA CONST Art. 1, § 12
Current through 11-3-2020.

End of Document

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 30

§ 30. Rights Reserved

Currentness

The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

Credits
Adopted 1889.

West's RCWA Const. Art. 1, § 30, WA CONST Art. 1, § 30
Current through 11-3-2020.

End of Document

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 2. Legislative Department (Refs & Annos)

West's RCWA Const. Art. 2, § 1

§ 1. Legislative Powers, Where Vested

Currentness

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is, the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: *Provided,* That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be

equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment; *Provided*, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: *Provided*, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election.

Credits

Adopted 1889. Amended by Amendment 7 (Laws 1911, ch. 42, § 1, approved Nov. 1912); Amendment 26 (Laws 1951, Sub. S.J.R. No. 7, p. 959, approved Nov. 4, 1952); Amendment 30 (Laws 1955, S.J.R. No. 4, p. 1360, approved Nov. 6, 1956); Amendment 36 (Laws 1961, S.J.R. No. 9, p. 2751, approved Nov. 6, 1962); Amendment 72 (Laws 1981, Sub. S.J.R. No. 133, approved Nov. 3, 1981).

West's RCWA Const. Art. 2, § 1, WA CONST Art. 2, § 1
Current through 11-3-2020.

End of Document

RCW 7.24.010

Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

[**1937 c 14 § 1**; **1935 c 113 § 1**; RRS § 784-1.]

RCW 7.24.050

General powers not restricted by express enumeration.

The enumeration in RCW **7.24.020** and **7.24.030** does not limit or restrict the exercise of the general powers conferred in RCW **7.24.010**, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

[**1985 c 9 § 2**. Prior: **1984 c 149 § 3**; **1935 c 113 § 5**; RRS § 784-5.]

NOTES:

Reviser's note: 1985 c 9 reenacted RCW **7.24.050** without amendment.

Short title—Application—1985 c 30: See RCW **11.02.900** and **11.02.901**.

Purpose—Reenactment—1985 c 9: "The purpose of this act is to make technical corrections to chapter 149, Laws of 1984, and to ensure that the changes made in that chapter meet the constitutional requirements of Article II, section 19 of the state Constitution." [**1985 c 9 § 1**.]

Severability—1985 c 9: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1985 c 9 § 4**.]

Severability—Effective dates—1984 c 149: See notes following RCW **11.02.005**.

RCW 7.24.080

Further relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

[**1935 c 113 § 8**; RRS § 784-8.]

RCW 7.24.090

Determination of issues of fact.

When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions, in the court in which the proceeding is pending.

[**1935 c 113 § 9**; RRS § 784-9.]

RCW 43.21A.010

Legislative declaration of state policy on environment and utilization of natural resources.

The legislature recognizes and declares it to be the policy of this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources. The legislature further recognizes that as the population of our state grows, the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic and other needs will place an increasing responsibility on all segments of our society to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.

[**1970 ex.s. c 62 § 1**.]

NOTES:

Savings—Other powers and rights not affected—Permits, standards, not affected—1970 ex.s. c 62: "The provisions of this act shall not impair or supersede the powers or rights of any person, committee, association, public, municipal or private corporations, state or local governmental agency, federal agency, or political subdivision of the state of Washington under any other law except as specifically provided herein. Pollution control permits, water quality standards, air pollution permits, air quality standards, and permits for disposal of solid waste materials of this state are not changed hereby and the laws governing the same are to be protected and preserved." [**1970 ex.s. c 62 § 61**.]

Effective date—1970 ex.s. c 62: "This 1970 amendatory act shall take effect on July 1, 1970." [**1970 ex.s. c 62 § 64**.]

Severability—1970 ex.s. c 62: "If any provision of this 1970 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, shall not be affected." [**1970 ex.s. c 62 § 65**.]

RCW 43.21F.010

Legislative findings and declaration.

(1) The legislature finds that the state needs to implement a comprehensive energy planning process that:

(a) Is based on high quality, unbiased analysis;

(b) Engages public agencies and stakeholders in a thoughtful, deliberative process that creates a cohesive plan that earns sustained support of the public and organizations and institutions that will ultimately be responsible for implementation and execution of the plan; and

(c) Establishes policies and practices needed to ensure the effective implementation of the strategy.

(2) The legislature further finds that energy drives the entire modern economy from petroleum for vehicles to electricity to light homes and power businesses. The legislature further finds that the nation and the world have started the transition to a clean energy economy, with significant improvements in energy efficiency and investments in new clean and renewable energy resources and technologies. The legislature further finds this transition may increase or decrease energy costs and efforts should be made to mitigate cost increases.

(3) The legislature finds and declares that it is the continuing purpose of state government, consistent with other essential considerations of state policy, to foster wise and efficient energy use and to promote energy self-sufficiency through the use of indigenous and renewable energy sources, consistent with the promotion of reliable energy sources, the general welfare, and the protection of environmental quality.

(4) The legislature further declares that a successful state energy strategy must balance three goals to:

(a) Maintain competitive energy prices that are fair and reasonable for consumers and businesses and support our state's continued economic success;

(b) Increase competitiveness by fostering a clean energy economy and jobs through business and workforce development; and

(c) Meet the state's obligations to reduce greenhouse gas emissions.

[**2010 c 271 § 401**; 1975-'76 2nd ex.s. c 108 § 1.]

NOTES:

Purpose—Effective date—2010 c 271: See notes following RCW **43.330.005**.

Severability—1975-'76 2nd ex.s. c 108: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 108 § 45.]

Effective date—1975-'76 2nd ex.s. c 108: "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect March 15, 1976." [1975-'76 2nd ex.s. c 108 § 46.]

RCW 70A.45.020

Greenhouse gas emissions reductions—Reporting requirements.

(1)(a) The state shall limit anthropogenic emissions of greenhouse gases to achieve the following emission reductions for Washington state:

(i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels, or ninety million five hundred thousand metric tons;

(ii) By 2030, reduce overall emissions of greenhouse gases in the state to fifty million metric tons, or forty-five percent below 1990 levels;

(iii) By 2040, reduce overall emissions of greenhouse gases in the state to twenty-seven million metric tons, or seventy percent below 1990 levels;

(iv) By 2050, reduce overall emissions of greenhouse gases in the state to five million metric tons, or ninety-five percent below 1990 levels.

(b) By December 1, 2008, the department shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions in (a) of this subsection by using existing statutory authority and any additional authority granted by the legislature. Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.

(c) In addition to the emissions limits specified in (a) of this subsection, the state shall also achieve net zero greenhouse gas emissions by 2050. Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 limits any state agency authorities as they existed prior to June 12, 2008.

(d) Consistent with this directive, the department shall take the following actions:

(i) Develop and implement a system for monitoring and reporting emissions of greenhouse gases as required under RCW **70A.15.2200**; and

(ii) Track progress toward meeting the emission reductions established in this subsection, including the results from policies currently in effect that have been previously adopted by the state and policies adopted in the future, and report on that progress. Progress reporting should include statewide emissions as well as emissions from key sectors of the economy including, but not limited to, electricity, transportation, buildings, manufacturing, and agriculture.

(e) Nothing in this section creates any new or additional regulatory authority for any state agency as they existed prior to January 1, 2019.

(2) By December 31st of each even-numbered year beginning in 2010, the department and the department of commerce shall report to the governor and the appropriate committees of the senate and house of representatives the total emissions of greenhouse gases for the preceding two years, and totals in each major source sector, including emissions associated with leaked gas identified by the utilities and transportation commission under RCW **81.88.160**. The report must include greenhouse gas emissions from wildfires, developed in consultation with the department of natural resources. The department shall ensure the reporting rules adopted under RCW **70A.15.2200** allow it to develop a comprehensive inventory of emissions of greenhouse gases from all significant sectors of the Washington economy.

(3) Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

[**2020 c 79 § 2**; **2020 c 32 § 4**; **2020 c 20 § 1398**; **2008 c 14 § 3**. Formerly RCW **70.235.020**.]

NOTES:

Reviser's note: This section was amended by 2020 c 20 § 1398, 2020 c 32 § 4, and by 2020 c 79 § 2, without reference to one another. All amendments are incorporated in the publication of this

section under RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

Intent—2020 c 79: "(1) Global climate change represents an existential threat to the livelihoods, health, and well-being of all Washingtonians. Our state is experiencing a climate emergency in the form of devastating wildfires, drought, lack of snowpack, and increases in ocean acidification caused in part by climate change.

(2) These threats are not distributed evenly across the state. In particular, rural communities with natural resource-based economies, tribes, and communities of lower and moderate incomes will be disproportionately exposed to health and economic impacts driven by climate change.

(3) The longer we delay in taking definitive action to reduce greenhouse gas emissions, the greater the threat posed by climate change to current and future generations, and the more costly it will be to protect and maintain our communities against the impacts of climate change. Unchecked, climate change will bring ever more drastic decline to the health and prosperity of future generations, particularly for the most vulnerable communities.

(4) According to the climate impacts group at the University of Washington, with global warming of at least one and one-half degrees Celsius, by 2050 Washington is projected to experience:

(a) An increase of sixty-seven percent in the number of days per year above ninety degrees Fahrenheit, relative to 1976-2005, leading to an increased risk of heat-related illness and death, warmer streams, and more frequent algal blooms;

(b) A decrease of thirty-eight percent in the state's snowpack, relative to 1970-1999, leading to reduced water storage, irrigation shortages, and winter and summer recreation losses;

(c) An increase of sixteen percent in winter streamflow, relative to 1970-1999, leading to an increased risk of river flooding;

(d) A decrease of twenty-three percent in summer streamflow, relative to 1970-1999, leading to reduced summer hydropower, conflicts over water resources, and negative effects on salmon populations; and

(e) An increase of one and four-tenths feet in sea level, relative to 1991-2010, leading to coastal flooding and inundation, damage to coastal infrastructure, and bluff erosion.

(5) The legislature has taken steps to understand and address the threats posed by climate change as climate change science has continued to evolve. In 2008 with the passage of Engrossed Second Substitute House Bill No. 2815, *chapter **70.235** RCW, the legislature acknowledged Washington's history of national and international leadership in clean energy, and set limits on the greenhouse gas emissions that drive climate change.

(6) *Chapter **70.235** RCW recognizes that the state of climate change science will continue to evolve, and so it directs the department of ecology to consult with the climate impacts group at the University of Washington for the purpose of issuing periodic reports that summarize the current climate change science and that make recommendations regarding whether the state's greenhouse gas emissions reductions need to be updated. As required by *chapter **70.235** RCW, the department of ecology prepared and submitted reviews of current climate change science and the state of global warming trends in both December 2016, Ecology Publication No. 16-01-010, and again in December 2019, Ecology Publication No. 19-02-031. The most recent report underscores the need for Washington to take immediate and aggressive action to reduce greenhouse gas emissions, the primary cause of global climate change.

(7) Based on the current science and emissions trends, as reported by the department of ecology and the climate impacts group at the University of Washington, the legislature finds that avoiding global warming of at least one and one-half degrees Celsius is possible only if global greenhouse gas emissions start to decline precipitously, and as soon as possible. Restoring a safe and stable climate will require mobilization across all levels of government and economic sectors, including agriculture, manufacturing, transportation, and energy production, to reach net zero greenhouse gas emissions by 2050. Washington must therefore further strengthen its emissions reduction targets for 2030 and beyond. In addition, all pathways to one and one-half degrees Celsius rely on some amount of negative

emissions through carbon sequestration. It is therefore the intent of the legislature to strengthen Washington's statutory greenhouse gas emission limits to reflect current science and to align with the limits that other jurisdictions are setting to combat climate change and to encourage voluntary actions that increase carbon sequestration on natural and working lands and storage in the related products from those lands.

(8) In strengthening Washington's statutory greenhouse gas emission limits, it is the intent of the legislature to pursue these limits in a way that:

(a) Reduces the burdens and creates benefits for vulnerable populations and highly impacted communities with long-term and short-term outcomes for public health, economic well-being, local environments, and community resiliency that benefits all Washington residents;

(b) Supports the current skilled and trained construction workforce, retains and creates other high quality employment opportunities, and generates broad, widely shared economic benefits for the state and Washington residents; and

(c) Maintains Washington's manufacturing economy and avoids leakage of emissions to other jurisdictions." [**2020 c 79 § 1**.]

***Reviser's note:** Chapter **70.235** RCW was recodified as chapter **70A.45** RCW by **2020 c 20 § 2052**.

Intent—2020 c 32: See note following RCW **80.28.420**.

RCW 70A.305.010

Declaration of policy.

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

(6) Because releases of hazardous substances can adversely affect the health and welfare of the public, the environment, and property values, it is in the public interest that affected communities be notified of where releases of hazardous substances have occurred and what is being done to clean them up.

[**2002 c 288 § 1**; **1994 c 254 § 1**; **1989 c 2 § 1** (Initiative Measure No. 97, approved November 8, 1988). Formerly RCW **70.105D.010**.]

NOTES:

Severability—2002 c 288: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**2002 c 288 § 5**.]

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