NO. 99564-8

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Petitioner,

v.

STATE OF WASHINGTON, et al.,

Respondent.

STATE'S ANSWER IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The Court of Appeals affirmed the superior court's dismissal of Petitioners' claims pursuant to firmly established legal principles. Petitioners' claims would have required the judiciary to usurp the roles of the legislative and executive branches through the enactment and oversight of a new greenhouse gas regulatory program. The Court of Appeals' unremarkable holding that such a remedy must be pursued through political, rather than judicial action, fails to warrant discretionary review. By opposing discretionary review, the State does not seek to minimize the extreme seriousness of climate change. The remedy for addressing climate change, however, requires innumerable policy decisions that under our constitutional system are not suited for resolution by the judiciary.

The State[1] continues to take many actions to reduce greenhouse gas emissions, including the recent adoption of additional statutory programs to reduce emissions and meet the State's statutory greenhouse gas reduction schedule in RCW 70A.45.020 to reduce emissions to net zero by 2050. Petitioners nevertheless want the judiciary to order the State to develop a greenhouse gas reduction plan that would phase out fossil fuel use within fifteen years and reduce greenhouse gas emissions to a slightly different

[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."

metric. Further, Petitioners ask the judiciary to enforce the plan through decades of continuing jurisdiction. But courts are not greenhouse gas regulatory agencies; the political branches are uniquely situated to weigh the multitude of competing interests and policy considerations in the first instance. The Petitioners' claim of a never-before-recognized fundamental right to a "healthful environment" does not change this result. Nor does their suggestion that declaratory relief alone would somehow be meaningful or avoid the separation of powers issues at the heart of their claims. The Court should deny Petitioners' request for discretionary review.

II. ISSUES PRESENTED FOR REVIEW

1. Whether Petitioners' claims are precluded by separation of powers principles and the political question doctrine.

2. Whether Petitioners' claims are nonjusticiable under the Uniform Declaratory Judgment Act (UDJA).

3. Whether Petitioners failed to identify an individual fundamental constitutional right to a healthful environment.

III. STATEMENT OF THE CASE

Washington State is a recognized leader in addressing the urgent threat of climate change. During Governor Inslee's administration alone, the executive branch initiated or implemented dozens of actions and tirelessly pursued bold action by the Legislature. Governor Inslee proposed,

and the Legislature passed, sweeping climate packages, including a Clean Fuels Standard that will achieve historic reductions in transportation related greenhouse gas emissions, Engrossed Third Substitute House Bill 1091, and a comprehensive cap and invest regulatory regime for non-transportation greenhouse gas emissions, Engrossed Second Substitute Senate Bill 5126.[2] In addition, the 2021 Legislature passed Engrossed Second Substitute House Bill 1050 providing a regulatory program to identify and reduce leaks of hydrofluorocarbons. These and other statutory programs are critical tools to drive down emissions and satisfy the statutory emission reduction schedule under RCW 70A.45.020 to achieve net zero emissions by 2050.

The State has also adopted and implemented numerous other statutes and policies. These include the Clean Energy Transformation Act, Laws of 2019, ch. 288, to phase out all coal-fired power by 2025, achieve a carbon-neutral electricity supply by 2030, and transition to a 100 percent clean electricity supply by 2045. The State also set a schedule to quickly phase out most commercial uses of hydrofluorocarbons, a potent set of greenhouse gasses, Laws of 2019, ch. 284, and is 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

[2] *See* *https://www.governor.wa.gov/news-media/inslee-announces-bold-climate-package-2021%E2%80%932023-biennium*

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 70A.30.010.

Despite these robust actions, Petitioners seek separate additional action by the judiciary. This is not the first time that youth plaintiffs have unsuccessfully sought judicial review on similar claims. In 2012, the same legal counsel filed a similar suit, alleging a public trust doctrine claim and seeking six percent annual emissions reductions through 2100. *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) (unpublished). This Court denied direct review, and the Court of Appeals affirmed the dismissal of the case in an unpublished opinion based largely on separation of powers grounds. *Svitak*, 2013 WL 6632124, at *2.

In 2014, another group of minor plaintiffs with the same legal counsel filed a second suit under the Administrative Procedure Act, 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. *Id.* at *7.

Now, Petitioners seek sweeping changes to the State's climate change policies based on their claim 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 56–67. Petitioners do not challenge any discrete climate policy, but rather seek a declaration that the State has not done enough to reduce emissions and injunctive relief.[3] CP 70–72. Specifically, Petitioners ask the judiciary to take the extraordinary step of ordering the State to develop a "climate recovery plan" to reduce greenhouse gas emissions by ninety-six percent by 2050 and for the judiciary to enforce the plan through continuing jurisdiction for decades to come. *See* CP at 40–41, ¶ 114; CP at 72, ¶ H.

The State moved for judgment on the pleadings under CR 12(c), arguing that the case was nonjusticiable because the court could not grant effective relief to Petitioners without the enactment of new laws and inappropriately inserting itself into the numerous policy decisions at the heart of the State's response to the climate crisis. In addition, the State argued that Petitioners' claims were not actionable under the public trust doctrine or the constitution. *See* CP 127–52. The superior court agreed and dismissed the case. CP 442–53.

[3] In their Complaint, Petitioners also challenged the statutory greenhouse gas reduction schedule as inadequate. CP 69. Petitioners withdrew that claim. Petition for Discretionary Review, Appendix C at 112.

This Court denied Petitioners' petition for direct review, and the Court of Appeals affirmed dismissal of the case. The Court of Appeals recognized that the sweeping relief sought by Petitioners would require the judiciary to legislate an extensive regulatory regime in violation of separation of powers principles. Accordingly, the Court found that Petitioners' claims presented nonjusticiable political questions that must be addressed through the other branches of government. *Aji P. v. State*, 16 Wn. App. 2d 177, 187–94, 480 P.3d 438 (2021). Similarly, the Court found that the claims were nonjusticiable under the UDJA because the relief requested would not be final and conclusive. *Id*. at 196–98. The Court also rejected Petitioners' substantive due process, equal protection, and public trust doctrine claims. *Id*. at 199–211. Petitioners now seek discretionary review.

IV. ARGUMENT AGAINST DISCRETIONARY REVIEW

The Court of Appeals' decision is firmly rooted in established law and does not conflict with any Washington appellate decision. While climate change itself is unquestionably an urgent problem of great public importance, the legal issues presented *in this case* are not and do not merit review by this Court. As the Court of Appeals concluded, Petitioners' claims fail for two independent reasons: the lack of a judicially available remedy *and* the lack a substantive basis in Washington law. Balancing competing policy interests to determine how and at what pace to reduce

greenhouse gas emissions in Washington is a task for the legislative and executive branches, and one at which these branches are hard at work. Because this case does not meet the RAP 13.4 standard, this Court should deny discretionary review.

A. The Court of Appeals Correctly Applied Separation of Powers Doctrine

The Court of Appeals properly found that the relief sought by Petitioners is not available through the judicial branch because it would involve determining a nonjusticiable political question, namely "whether the State's current [greenhouse gas] emissions statutes and regulations sufficiently address climate change." *Aji P.,* 16 Wn. App. 2d at 188. The Court's decision is supported by well-settled law.

Washington courts utilize the political question doctrine to analyze whether a particular claim is justiciable or would result in a separation of powers violation. This Court did so in *Brown v. Owen*, 165 Wn.2d 706, 718–19, 722, 206 P.3d 310 (2009). Petitioners accept that *Brown* applies. Petition for Discretionary Review (Petition) at 11. The primary concern in this inquiry is "that the judiciary not be drawn into tasks more appropriate to another branch and that its institutional integrity be protected." *Brown*, 165 Wn.2d at 719. Whether a case presents a nonjusticiable political question is addressed under the factors set forth in *Baker v. Carr*, 369 U.S.

186, 210, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). *Brown*, 165 Wn.2d at 718–19. Petitioners accept this premise as well. Petition at 12–16 (arguing the *Baker* factors).

The Court of Appeals' application of the *Baker* factors does not warrant review. The Court correctly recognized that all four *Baker* factors counsel against justiciability. *Aji P.,* 16 Wn. App. 2d at 447–49. For example, under the second *Baker* factor, a claim is nonjusticiable where it lacks "judicially discoverable and manageable standards" for resolution. *Baker*, 369 U.S. at 217. The Court of Appeals astutely concluded that Petitioners' claims lacked a judicially manageable standard because setting the pace and extent of emissions reductions and developing a carbon budget and climate recovery plan would require a mix of stakeholder engagement, policy determinations, and scientific expertise that is not available to the courts. *Aji P.,*16 Wn. App. 2d at 189.

Petitioners miss the mark in arguing that the judiciary could take scientific expert testimony to develop a science-based standard. Petition at 14. It is not just scientific evidence, but rather the mix of science, policy, and stakeholder engagement that are all critical components of setting the State's climate policies. As the Court explained, "it would be inappropriate for the judiciary to assume it can discern the appropriate [greenhouse gas] 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." *Aji P.,*16 Wn. App. 2d at 191 (quoting the United Nation's Joint Statement on "Human Rights and Climate Change").

Similarly, the Court properly applied the third *Baker* factor, related to "the impossibility of" resolving a claim "without an initial policy determination of a kind clearly for nonjudicial discretion," *Baker,* 369 U.S. at 217. As the Court of Appeals observed that Petitioners ask the judiciary to make its own initial determination of the State's climate policies when the political branches have already made the initial policy determination on how to set a greenhouse gas regulatory regime, in the form of the Clean Air Rule, WAC 173-442. *Aji P.,*16 Wn. App. 2d at 189. Moreover, the Legislature has now authorized a more extensive greenhouse gas regulatory regime with the Climate Commitment Act and the Clean Fuels Standard. And the pace and extent of emission reductions is already set in statute. RCW 70A.45.020. The Court of Appeals' reasoning is sound in that the judiciary "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." *Aji P.*, 16 Wn. App. 2d at 190.

Petitioners argue that the judiciary could look to the greenhouse gas schedule in RCW 70A.45.020 to address the second and third *Baker* factors

because this statutory schedule provides an initial policy determination and a judicially management standard by which to judge the State's actions and issue meaningful relief. Petition at 14–15. But this is decidedly *not* what Petitioners have sought in this lawsuit. Far from seeking to enforce the statutory greenhouse gas limits, Petitioners' sixth claim for relief expressly challenged those limits as inadequate. CP 67–70. Then, after the Legislature amended the limits pursuant to Department of Ecology's recommendation, Petitioners withdrew that claim. Petition App. C at 112; Laws of 2020, ch. 79, § 1 (6)–(7). Petitioners' argument is thus directly contradicted by their complaint and was properly rejected by the Court of Appeals.

Petitioners' claims are nonjusticiable under the first *Baker* factor as well because their claims would require the Court to legislate the State's climate policies and the greenhouse gas regulatory regime Petitioners seek. *Aji P*., 16 Wn. App. 2d at 189. Similarly, under the fourth *Baker* factor, the Court determined that setting and overseeing the State's climate policy "necessarily involves policing the political branches' policymaking decisions and, thus, inherently usurps those branches' legislative authority." *Id*. at 191. The Court's analysis under these factors is sound as well.

Petitioners' heavy reliance on *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), and *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), is misplaced. As this Court explained

in *McCleary*, those cases are distinguishable because they involve interpretation of a positive constitutional right. *McCleary,* 173 Wn.2d at 518–19. The Court of Appeals correctly recognized this distinction. *Aji P*., 16 Wn. App. 2d at 193–95.

Rather than seeking to enforce an established "positive constitutional right," as in *McCleary*, Petitioners here seek to enforce a silent, unestablished constitutional right for the community to a healthful environment. Far from requiring the Legislature to provide sufficient funding to fulfill its express paramount constitutional obligation, Petitioners ask the Court to require the State to enact a comprehensive greenhouse gas regulatory regime tuned to specific emission reduction requirements. The Court cannot accept this invitation without violating the separation of powers doctrine.

The Court of Appeals' conclusion that Petitioners' claims are not redressable through the courts is consistent with prior state and federal caselaw on similar youth climate claims. *Aji P.,* 16 Wn. App. 2d at 191–93 (discussing *Svitak*, 2013 WL 6632124, at *2, and *Juliana v. United States*, 947 F.3d 1159, 1169–72 (9th Cir. 2020)).[4] The fact that the Legislature

[4] Petitioners argue in a footnote that the Ninth Circuit rejected the political question doctrine on similar claims in *Juliana*. Petition at 16 n.20. While the *Juliana* court considered justiciability through an article III standing lens, it analyzed the very same separation of powers and political question doctrine issues. *Juliana*, 947 F.3d at 1173. ("Because it is axiomatic that the Constitution contemplates that democracy is the

would need to pass new laws to provide relief to the Petitioners is amply demonstrated by the numerous new laws that the Legislature *has* passed to address aspects of the climate challenge in recent years. *See supra* at 2–3.

This recent legislation contains exactly the kinds of policies and programs the Petitioners seek, and they must be accomplished through legislative, not judicial action. Indeed, it is the role of the Legislature, not the judiciary, to set policy and enact laws, as courts are not well-equipped to conduct their own balancing of the pros and cons associated with legislative policy. *Hale v. Wellpinit Sch. Dist. 49*, 165 Wn. App. 2d 494, 506, 198 P.3d 1021 (2009); *Rousso v. State*, 170 Wn.2d 70, 74, 239 P.3d 1084 (2010). Accordingly, the Court of Appeals properly concluded that "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," in order to address Petitioners' claims in this case would violate well-settled separation of powers principles and require the judiciary to usurp the authority and responsibility of the other branches. *Aji P.,* 16 Wn. App. 2d at 191.

This is neither a controversial conclusion nor one in conflict with prior decisions. The Court's decision is firmly rooted in Washington's

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appropriate process for change, some questions—even those existential in nature—are the province of the political branches.") (quoting *Brown*, 902 F.3d at 1087) (internal quotation marks omitted)).

separation of powers principles. This Court has consistently 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." *Rousso*, 170 Wn.2d at 88. Because the Court of Appeals applied the correct law and reached the correct result, this Court should decline review.

B. Petitioners' Claims are Nonjusticiable Under the UDJA

Petitioners attempt to avoid the fundamental separation of powers issues at the heart of this case by making a technical argument related to the UDJA. Petition at 4–6. But the procedural vehicle chosen by Petitioners cannot bypass this Court's constitutionally-rooted justiciability doctrines. Relief on Petitioners' claims would not be final and conclusive for purposes of the well-established test for justiciability under the UDJA. Petitioners do not take issue with the legal test applied by the Court of Appeals, but rather disagree with the result of the Court's analysis. Petition at 5–6. *Aji P.,* 16 Wn. at 196. That is not enough to justify this Court's review.

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 v. Collins*, 144 Wn.2d 403, 410–11, 27 P. 3d 1149 (2001). To be justiciable under the UDJA a plaintiff must establish:

> (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." *Id*. at 416.

Petitioners cannot meet this standard. The fourth justiciability requirement is not satisfied because judicial determination cannot provide final and conclusive relief. *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 761–62, 259 P.3d 280 (2011) (holding claim for declaratory relief nonjusticiable where the remedy is unavailable due to separation of powers limits on judicial action).

As the Court of Appeals properly held, meaningful relief on Petitioners' claims, "is inextricably tied to the retention of jurisdiction and to the order to implement the climate recovery plan." *Aji P.,* 16 Wn. App. 2d at 197. This is because unlike cases where resolution of a legal issue

would provide relief in and of itself to a party, a declaratory judgment here that the State is not doing enough to reduce its residents' emissions would not be final and conclusive without injunctive relief and continuing oversight. *Aji P.,* 16 Wn. App. 2d 191–93; *see Juliana*, 947 F.3d at 1171–72 (discussing need for injunctive relief to redress similar claims and the unavailability of the "broad range of policymaking," required to judge and oversee such relief). Such a remedy, the Court held, "is necessarily provisional and ongoing, not final or conclusive." *Aji P.,* 16 Wn. App. 2d at 197. This conclusion is correct and consistent with Washington case law.

Petitioners contend that the Court of Appeals' decision contradicts *Seattle School District*. Petition at 4–8. However, *Seattle School District* is inapposite. A judicial declaration that the State's climate policy is inadequate will not provide a conclusive remedy for Petitioners' claims. *Seattle School District* dealt with the second element of UDJA justiciability—whether the parties had genuine opposing interests—not the fourth element at issue here. Moreover, *Seattle School District* addressed a positive constitutional right. As this Court recognized in *McCleary*, this is a material distinction; positive constitutional rights require government action, making the typical separation of powers considerations "inappropriate." *McCleary,* 173 Wn.2d at 518–19. And Petitioners' claims could only be redressed through additional legislation, a fact that

demonstrates the non-final nature of a declaratory judgment alone, and implicates the separation of powers concerns recognized by this Court. Petitioners' request for injunctive relief in their Complaint implicitly recognizes the necessity of intrusive judicial oversight as part of a final and conclusive remedy.[5]

At base, Petitioners seem to argue that if they could amend their complaint to exclusively seek declaratory relief, the case would be justiciable. *See* Petition at 8. Not so. Simply put, a declaration that the State's regulatory actions to date have not adequately reduced its residents' emissions would not provide final or conclusive relief. Only where a specific legal question is in dispute regarding the rights of parties, can declaratory relief alone be final and conclusive under the UDJA. *See Ronken v. Bd. of Cty. Comm'rs of Snohomish Cty.*, 89 Wn.2d 304, 310–11, 572 P.2d 1 (1977); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 549, 556–58 (1972).

Unlike cases seeking a determination of specific rights and duties between parties that resolves a dispute, in this case Petitioners seek to

[5] Petitioners' request for injunctive relief is a central feature of their complaint—they request a court order requiring a climate recovery plan and then ask the court to maintain continuing jurisdiction for years to evaluate and supervise its implementation. *See* CP 40–41, 72 ¶ H. Petitioners cannot now amend their complaint though briefing. *Southern Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy.").

establish broad new community rights and sweeping government duties that would require legislative implementation. And they do so in the context of rapidly evolving regulation of residents' greenhouse gas emissions reductions. Far from resolving the dispute, a declaratory judgment would raise numerous additional questions and disputes. This is not similar to a typical UDJA claim involving the validity of a law, procurement procedure, or innumerable other types of cases involving specific rights and duties of parties under law, where declaratory relief under the UDJA can provide a final and conclusive resolution of the parties' dispute.

As the Court of Appeals properly recognized, relief on Petitioners' claims would require the court to step into the role of the Legislature by setting the State's climate policy and ordering and reviewing a massive regulatory program—in violation of the separation of powers doctrine. *Aji P.*, 16 Wn. App. 2d at 188–91.[6] As detailed in Section IV (A) above, such a climate policy requires participation by stakeholders, delicate policy balancing, and scientific expertise, and would ultimately have to be accomplished through a new regulatory regime enacted by the

[6] Petitioners argue in a footnote that the Court of Appeals "cherry picked" their complaint and focused on "a concocted mischaracterization of the requested injunctive relief." Petition at 12 n.15. Not so. In fact, the Court of Appeals accurately recognized that Petitioners ask the judiciary to order the State to develop a "climate recovery plan" to reduce greenhouse gas emissions by ninety-six percent by 2050 and for the judiciary to enforce the plan through continuing jurisdiction for decades to come. *Aji P.*, 16 Wn. App. 2d at 190 n.9; CP 40–41, 72 ¶ H.

Legislature—a remedy unavailable in the courts under the separation of powers doctrine.

Contrary to Petitioners' argument, the Court of Appeals' conclusion that declaratory judgment would not be final and conclusive in the instant case is fully consistent with *Seattle School District* and UDJA justiciability case law. *See Pasado's Safe Haven*, 162 Wn. App. 746. Petitioners' argument for discretionary review on UDJA justiciability fails.

C. Petitioners have not Articulated a Cognizable Constitutional Claim[7]

The Court of Appeals correctly rejected Petitioners' due process claims under article I, section 3 of the Washington Constitution. Petitioners claim error based on their assertion that the state constitution silently creates a fundamental right to a healthful environment. Petition at 16–18. The State agrees that a healthful environment is vitally important. Petitioners have failed, however, to establish a legal basis to conclude that there is a constitutionally protected, individual fundamental right to a healthful environment. Nor is this case an appropriate one in which to determine whether such a right exists or not, since there is no effective relief the court could provide even if it found such a right.

[7] Respondent Governor Inslee does not join subsection C of this brief. In not joining this section 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 issue raised by Petitioners.

Here, Petitioners offer no new arguments to refute case law that declined to find a judicially enforceable constitutional right similar to what the Petitioners seek here. *See, e.g.*, *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426 (8th Cir. 1992). The fact that the Legislature has recognized the right to a healthful environment in the Department of Ecology's Organic Act, RCW 43.21C.020(3), is not determinative of this question because this Court has repeatedly held that legislative policy statements do not create legal obligations, let alone constitutional ones. *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). Petitioners themselves acknowledge that there is no express reference to such a right in the constitution. Petition at 13. The Court of Appeals properly rejected Petitioners' substantive due process claims as unsupported by the Washington Constitution or applicable case law. *Aji P.*, 16 Wn. App. 2d at 198–203.

Petitioners cite no authority for their claim that the Court of Appeals erred by refusing to allow factual development of the record before ruling on the substantive due process claims. Petition at 16, 18–20. They offer only examples of constitutional cases that were decided on summary judgment, rather than on a motion to dismiss. Petition at 18–20. *See Aji P.*, 16 Wn. App. 2d at 195. In fact, whether Petitioners established the existence of a

constitutional right is a legal question that can be decided as a matter of law, as it was here, based on a CR 12 motion to dismiss. *E.g.*, *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–53 (E.D. Pa. 2019) (dismissing similar unenumerated environmental substantive due process claims on CR 12 motion to dismiss); *Concerned Citizens of Nebraska*, 970 F.2d at 423, 427 (affirming trial court's dismissal of claim of a fundamental right to be free from non-natural radiation on a CR 12 motion to dismiss). As the Court of Appeals recognized, Petitioners' failure to state a substantive due process claim as a matter of law was properly dismissed by the superior court under CR 12. *Aji P.*, 16 Wn. App. 2d at 195, 198–204.

While protecting against climate change necessitates a swath of critically important policy goals, Petitioners have not shown that these goals have been converted into the existence of a constitutional right that would support the relief they seek. Nor do Petitioners raise a "significant constitutional question" meriting discretionary review. Ultimately, the Petitioners ask the Court to simply compel the Legislature to legislate in their favor, which is not an appropriate basis on which to grant review.

V. CONCLUSION

Petitioners fail to meet the standard for discretionary review. The State therefore respectfully asks this Court to deny review.

RESPECTFULLY SUBMITTED this 25th day of May 2021.

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