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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.

STATE OF WASHINGTON'S ANSWER TO ADDITIONAL AMICUS BRIEFS

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I. INTRODUCTION

Since the State of Washington filed its answer to the amicus brief submitted by the Sauk-Suiattle Indian Tribe, six additional amicus briefs were filed, to which the State now responds in this consolidated answer brief.

The additional amici describe ways in which climate change affects broad interests, ranging from environmental groups and tribes to faith groups and an ice cream company. The State does not disagree. Climate change is one of the greatest challenges facing humanity. That is why, in *this* state, the political branches have already taken significant steps to address this existential threat. *See* State of Washington's Response Brief (State's Resp. Br.) at 3–4; State of Washington's Answer to Brief of Amicus Curiae Sauk-Suiattle Indian Tribe at 2–3; CP 97–100 (Defendants' Answer to Plaintiffs' Complaint for Declaratory & Injunctive Relief at 16–19). In other words, the parties do not dispute the importance of addressing climate change. Rather, the parties disagree over the proper means for doing so. In this regard, amici simply repeat arguments made by the Plaintiffs to try to urge the Washington judiciary to take control of the climate change crisis. On the issues of justiciability and separation of powers, amici downplay the critical unavailability of the inherently legislative relief that Plaintiffs request: a new greenhouse gas

regulatory regime that would require the enactment of new laws by the Legislature.

Amici also urge the Court to declare a new fundamental right to a healthful environment and recognize children as a protected class under equal protection analysis, thereby triggering heightened scrutiny. But decades of case law neither support the new right sought by amici nor support the unprecedented recognition of children as a protected class for equal protection purposes.

Finally, expanding on arguments made by Plaintiffs, the Environmental Group amici suggest that this case provides an opportunity for the Court to extend the public trust doctrine to the atmosphere. But such an extension would contravene firmly-rooted case law. First, as Environmental amici appear to agree, the public trust doctrine *limits* state action. The doctrine does not compel state action, as would be necessary for the relief sought by Plaintiffs. Second, contrary to amici's suggestion, Washington's public trust doctrine applies only to navigable waters and there is no legal basis to extend the doctrine to the atmosphere.

In sum, King County Superior Court properly dismissed Plaintiffs' lawsuit. That decision should be affirmed by this Court.

II. ARGUMENT

A. Plaintiffs' Claims are Nonjusticiable Because the Remedy Sought by Plaintiffs Would Require Enactment of New Laws

The League of Women Voters (the League) repeats Plaintiffs' arguments that this case is justiciable under the political question doctrine, because courts can resolve cases that are politically charged. Amicus Curiae Brief of League of Women Voters of Washington (League Amicus Br.) at 10–20. However, the question is not whether the issues presented by climate change policy are politically charged. Such issues clearly *are* politically charged, but that has not prevented courts from resolving a variety of climate change related cases that were appropriately brought to the judiciary.[1] Instead, the question is whether the relief sought by Plaintiffs *in this case* would force the judiciary to intrude into functions constitutionally assigned to the political branches of government. The answer is yes, because the relief sought by Plaintiffs necessarily requires legislative and executive policymaking and the enactment of a new greenhouse gas regulatory regime through new laws—a remedy not available under separation of powers principles.

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[1] *See, e.g., Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014); *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

See State's Resp. Br. at 9-15. This lack of an available remedy also renders Plaintiffs' claims nonjusticiable under the Uniform Declaratory Judgment Act, under which Plaintiffs pled their case. *See* State's Resp. Br. at 19–22.

The League tries to skirt this issue by arguing that the court need not make legislative policy determinations, because the court can simply determine "whether the State's already existing policies and actions comport with the constitution." League Amicus Br. at 16. However, as detailed in the State's Response Brief, this is not the nature of Plaintiffs' case, which seeks a court-enforceable "climate recovery plan" to dismantle the state's current energy and transportation systems. CP 40–41 (¶ 114), 72 (¶ H). *See* State's Resp. Br. at 12–14. As recognized by the superior court, neither the defendant agencies nor the Governor currently have authority to create and implement such a wide-ranging program. Rather, the Legislature would need to pass new laws after weighing the numerous delicate policy determinations inherent in creating a new regulatory regime to address climate change. CP 447–48.

The League also attempts to distinguish two Washington cases, cited by the State, by arguing that these precedents are limited to the zone of criminal law. League Amicus Br. at 17–20. *See* State's Resp. Br. at 11. However, *Northwest Greyhound Kennel Ass'n, Inc. v. State* dealt with the

licensing of horse racing betting facilities under RCW 67.16, not solely with criminal law. Moreover, the nonjusticiability of the claims in *Northwest Greyhound* flowed from the fact that resolution of the case would require the court to wade into legislative policy judgments. *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 321, 506 P.2d 878 (1973).

Similarly, in *Northwest Animal Rights Network v. State*, the court declined to rewrite statutory exemptions contained within the criminal animal cruelty statutes based on respect for the role of the Legislature in crafting public policy. *Nw. Animal Rights Network v. State,* 158 Wn. App. 237, 245–46, 242 P.3d 891 (2010) (*NARN*). Such bedrock separation of powers principles drive the justiciability analysis, whether the issue at hand deals with public safety and morals as in *Northwest Greyhound* and *NARN*, or other types of legislative policy judgments and balancing of interests. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506–09, 198 P.3d 1021 (2009) (legislative judgment to make amendment of the definition of "disability" retroactive); *Brown v. Owen*, 165 Wn.2d 706, 712, 206 P.3d 310 (2009) (parliamentary ruling).

In the present case, Plaintiffs seek a judicially imposed regulatory regime for greenhouse gasses, but Washington courts are clear: the judiciary is not the branch of government that will impose a regulatory

regime. *Rousso v. State*, 170 Wn.2d 70, 88, 239 P.3d 1084 (2010); *Hale*, 165 Wn.2d at 506; *Brown v. Owen*, 165 Wn.2d at 712; *Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997); *Nw. Greyhound*, 8 Wn. App. 314; *NARN*, 158 Wn. App. at 244. *See* State's Resp. Br. at 9–11. As the superior court noted, the courts 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. These are not questions of law; we lack the tools." CP 448 (quoting *Rousso*, 170 Wn.2d at 88).

B. Amici Have Not Demonstrated the Existence of a Fundamental Right to a Healthful Environment

The amicus briefs that address due process argue for judicial action based on their flawed assumption that there is a fundamental constitutional right to a healthful environment.[2] But amici add no additional arguments to support the creation of a fundamental environmental protection right.

The League of Women Voters primarily argues that it is the duty of the courts to protect the constitutional rights of children. League

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[2] Several amici try to redefine the right sought by Plaintiffs as a right to a stable climate. League Amicus Br. at 10, 15, 17; Brief of Amici Curiae Environmental Groups (Env. Amicus Br.) at 1. *See also* Amicus Brief of the Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish Tribe in Support of Plaintiffs (Tribes Amicus Br.) at 13–20 ("livable" climate). However, Plaintiffs are actually seeking a much broader right to a healthful environment, of which the right to a stable climate is only one aspect. CP 56–61 (¶¶ 149–73), 67–70 (¶¶ 196–207); Appellants' Opening Brief (App. Op. Br,) at 13; Appellants' Reply Brief (App. Rep. Br.) at 15.

Amicus Br. at 6–9. This argument misses the mark. The issue presented on review is not whether children are being singled out and deprived of their right to a healthful environment; it is whether an environmental protection right is "fundamental" for purposes of constitutional analysis. *See* App. Op. Br. at 2. As explained in the State's Response Brief, it is not. State's Resp. Br. at 29–34.

Additionally, the League's examples of courts extending constitutional protections to children are far afield from the rights sought by Plaintiffs in this case. *See* League Amicus Br. at 7–8. The League relies on several cases where a court recognized its role in enforcing rights explicitly conferred by the constitution, not unenumerated rights falling under the due process clause. *See Seattle Sch. Dist. No. 1 of King Cty. v. Wash.*, 90 Wn.2d 476, 585 P.2d 71 (1978) (the right to an education under article IX of Washington's Constitution); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (First Amendment); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d (2005) (Eighth Amendment).

Finally, the League relies on *Obergefell* for the proposition that Plaintiffs have asserted "a claim to liberty that must be addressed" because the nature of the injustice that may not fully reveal itself to generations currently living. League Amicus Br. at 9. It is true that the full effects of

climate change may not be recognized for decades. However, *Obergefell*'s recognition of society's evolution on marriage equality (which the superior court recognized was an expansion of an individual right "deeply rooted in our nation's history and tradition" CP 449) does not provide a basis to carve out a new, unenumerated right to a healthful environment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d 609 (2015).

Taking a slightly different tack, the Swinomish, Quinault, and Suquamish Tribes (Tribes) argue that the right to a healthful environment is fundamental because it is the "prerequisite to the free exercise of specific, enumerated rights." Tribes Amicus Br. at 13. In doing so, the Tribes compare such an environmental right to the right to travel. Tribes Amicus Br. at 14–16. However, while the right to travel is an unenumerated right recognized under the equal protection clause, it is not analogous to the environmental right sought here.

The right to travel recognizes that freedom of movement is necessary for individual citizens to earn a living or simply to go where they please, and as such is "an important aspect of the citizen's liberty." *Kent v. Dulles*, 357 U.S. 116, 126–27, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958). In *Kent, v. Dulles*, the United States Supreme Court held that the Secretary of State could not deny an individual a passport because that individual was a Communist or had participated in Communist activities

in the past. *Id.* at 117–119. And in *Eggert v. City of Seattle*, our state's Supreme Court held that a government cannot impose a durational residency requirement on applicants for city employment, as doing so would violate the right to travel. *Eggert v. City of Seattle*, 81 Wn.2d 840, 845, 505 P.2d 801 (1973).

The Tribes and Plaintiffs urge the Court to liken an environmental protection right to the right to travel because it enables citizens to exercise all their other constitutional rights. But that argument fails to recognize that the right to travel is an *individual liberty* right. While everyone benefits from a healthy environment, a government cannot curb carbon emissions on behalf of one individual in the same way it can grant that individual a passport, or permit a city resident and non-resident to compete fairly for a city job. The nexus between government action and individual rights is not present with the environmental right that Plaintiffs seek here. Amici, like the Plaintiffs, present no legal basis for declaring a new fundamental right.

C. Children Do Not Comprise a Semi-Suspect Class for Equal Protection Purposes

The State does not dispute that children are entitled to equal protection of our laws. As the superior court recognized, however, children are not entitled to special status as a semi-suspect class.

Amici rely upon *In re Gault* in support of their argument. Brief of Amici Curiae Public Health Officials, Public Health Organizations, and Medical Doctors (Med. Prof Amicus Br.) at 16; League Amicus Br. at 8. But that case is unhelpful to amici, primarily because it is not an equal protection case. In *Gault*, the United States Supreme Court held that minors who were charged in state juvenile delinquency proceedings were entitled to due process, including notice of the charges and a right to counsel. *In re Gault*, 387 U.S. 1, 30, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). While the *Gault* court recognized that the Fourteenth Amendment is not solely for adults, it did not view children as an overarching "class" for equal protection purposes, nor did it hold that children were afforded greater constitutional protections than adults.

Levy v. Louisiana is also inapposite. *See* Med. Prof. Br. at 17. That case recognizes that illegitimate children are persons and cannot be classified as "nonpersons" by a state in determining whether they can seek relief under a wrongful death statute. *Levi v. Louisiana*, 391 U.S. 68, 70-71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). To do so would constitute an "invidious" classification that does not even clear the relatively low hurdle of rational basis review. *Id.* at 72. The *Levy* court did not suggest children are a semi-suspect class; it simply held that legitimate and illegitimate children could not be subject to different classifications.

Sadly, children and future generations *will* experience greater consequences of climate change than we are currently experiencing today. The State does not dispute that policymakers must act with all appropriate urgency to lessen these future effects, and that states themselves must accept a higher burden for climate mitigation due to the callous inaction of the current federal government. This unfortunate dynamic, however, does not provide a basis to overturn well-settled law. *See* State's Resp. Br. at 40–43. Children simply are not a protected class for equal protection purposes.

D. Washington State Does Not Have an Atmospheric Trust Doctrine

Mirroring Plaintiffs' arguments, Environmental Group amici urge the Court to expand the public trust doctrine beyond its application to navigable waters. Not only would this dramatically depart from the roots of the public trust doctrine in Washington, such an expansion would not provide support for Plaintiffs' requested relief in this case. Even if the doctrine were expanded to cover a global natural resource like the atmosphere, the doctrine cannot compel state action, or provide an independent source of authority for gubernatorial or agency action to enact and implement the aggressive climate recovery plan Plaintiffs seek. *See* State's Resp. Br. at 47–49.

Indeed, Environmental amici split with Plaintiffs and agree with the State that the public trust doctrine cannot *compel* affirmative state action, but instead acts only as a *limit* on state action. *Compare* Env. Amicus Br. at 9 ("The PTD Acts as a Limit on State Action") *with* App. Rep. Br. at 25 ("the public trust doctrine also imposes on Respondents an affirmative duty to protect public trust resources"). *See also* State's Resp. Br. at 47–48.

Environmental amici's subsequent argument that the Court should nevertheless apply the public trust doctrine here fundamentally misunderstands the nature of the case. Plaintiffs do not seek invalidation of specific state actions or regulations. Rather Plaintiffs seek affirmative action by the state to develop and implement an aggressive greenhouse gas regulatory regime under court supervision that would span several decades. CP 40–41 (¶ 114), 72 (¶ H). Such affirmative relief is unavailable under the public trust doctrine, which limits, but cannot compel, state action. *See* State's Resp. Br. at 47–48.

In trying to make their case, Environmental amici detail the history of the public trust doctrine, based largely on out-of-state cases, to argue that the doctrine has evolved over time and urge the Court to extend it now to the atmosphere. Env. Amicus Br. at 9–14. However, Washington courts look "solely to Washington law" to determine the scope and application of

the public trust doctrine. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 259–60, 413 P.3d 549 (2018) (citing numerous cases). Indeed, natural resource public trust rights vary considerably between states, due in part to differences in state constitutions.[3]

In addition, many of the out-of-state authorities relied on by Environmental amici are inapposite. For example, amici cite *Geer v. Connecticut* to support their arguments, Env. Amicus Br. at 11, but *Geer* did not apply the public trust doctrine to the atmosphere, and has since been overruled. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). Similarly, the United States Supreme Court's recognition of the State of Georgia's interest in protecting its air in *Georgia v. Tennessee Copper Co.*, did not arise in the context of the public trust doctrine, but rather as a basis for the state's interest in bringing a tort-type action under the original jurisdiction of the United States Supreme Court. *Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 237–38, 27 S. Ct. 618, 51 L. Ed. 1038 (1907).

Nor does Environmental amici's discussion of Washington public trust doctrine case law provide a foundation for extending the doctrine to

[3] Some states have recognized other natural resources public trust rights, based closely on those states' constitutions; not on English and American common law. *See, e.g.*, Haw. Const. art. XI, § 11; Mont. Const. art. IX, § 1; Pa. Const. art. I, § 27; Ill. Const. art. XI, § 1.

the atmosphere. *See* Env. Amicus Br. at 11–15. As explained recently by our Supreme Court in *Chelan Basin Conservancy v. GBI Holding*, the public trust doctrine "recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities." *Chelan Basin Conservancy*, 190 Wn.2d at 259. All the Washington cases cited by amici characterize the scope of the public trust doctrine as tied directly to navigable waters and their uses.

Environmental amici claim that the atmosphere has already been judicially recognized as a public trust resource, citing *Foster v. Department of Ecology*. That decision, however, was a superior court order in a case that was ultimately reversed by the Court of Appeals. *See Foster v. Dep't of Ecology*, 200 Wn. App. 1035, 2017 WL 3868481 (unpublished). No Washington court has extended the public trust doctrine to the atmosphere, and to do so would represent a major departure from established precedent in Washington.

Finally, Environmental amici argue that protection of navigable waters, and protection of the atmosphere, cannot be separated because of the interactions between these two media. Env. Amicus. Br. at 15–20. Plaintiffs also made this argument, App. Op. Br. at 40, but it is unavailing. As noted in the State's Response Brief, all environmental law concerns the impact of human activity on natural resources that are shared in common

and interact with each other. This recognition, however, does not transfer policy-making on all such environmental issues to the judiciary to undertake regulation under the name of the public trust doctrine. States Resp. Br. at 46–47.

In Washington, the public trust doctrine is "partially encapsulated" in article 17 of our state constitution. *Rettkowski v. Dep't of Ecology,* 122 Wn.2d 219, 232, 858 P.2d 232 (1993). Article 17 deals with tideland ownership, not air quality. The public trust doctrine, in Washington, limits the state's ability to alienate certain aspects of tideland property and thereby forsake its duty to regulate navigable waters in the public interest. *Chelan Basin Conservancy*, 190 Wn.2d at 259. *See* Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 212–17 (2002) (chapter on Article XVII – tidelands). The foundation of the public trust doctrine in Washington does not support extending the doctrine to the atmosphere.

III. CONCLUSION

While the broad range of amici demonstrate the importance of addressing climate change as a society, this case is not a proper vehicle for doing so. Plaintiffs' claims lack a basis in the law and fundamentally seek legislative, not judicial action. For the reasons described above and the

reasons set forth in the State's response brief, this Court should affirm the superior court's dismissal of Plaintiffs' claims.

RESPECTFULLY SUBMITTED this 11th day of September 2019.

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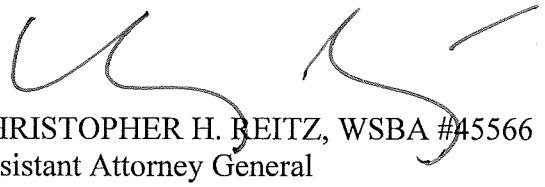

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Pursuant to RCW 9A.72.085, I certify, under penalty of perjury under the laws of the state of Washington, that on September 11, 2019, I served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

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