The Honorable Hollis R. Hill

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ZOE & STELLA FOSTER, minor children by and through their guardians MICHAEL FOSTER and MALINDA BAILEY; AJI & ADONIS PIPER, minor children by and through their guardian HELAINA PIPER; WREN WAGENBACH, a minor child by and through her guardian MIKE WAGENBACH; LARA FAIN, a minor child by and through her guardian MONIQUE DINH; GABRIEL MANDELL, a minor child by and through his guardians VALERIE and RANDY MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO FILE AMENDED AND SUPPLEMENTAL PLEADINGS

I. RELIEF REQUESTED

In response to the Court's March 29, 2017 order, the Washington State Department of Ecology (Ecology) offers this brief in opposition to Petitioners' December 6, 2016 motion to file supplemental and additional pleadings. Ecology asks the Court to consider this brief as

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well as Ecology's December 29, 2016 Motion for Reconsideration, and Ecology's January 19, 2017 reply.

This case is now and always has been about Petitioners' Petition for Rulemaking and Ecology's response. Petitioners brought this case under the Administrative Procedure Act (APA), asking this court to act in its appellate capacity to determine whether Ecology's denial met the standards of the APA. Now Petitioners seek to append onto this case (which has been resolved at the superior court level) a case that is completely new and entirely different. They wish to add two new, and significant, defendants, Governor Inslee and the State of Washington. They also seek to add an entirely new cause of action calling into play completely different evidentiary and legal standards as well as different arguments and different facts on which to base those arguments. As discussed in Ecology's December 29, 2016 Motion for Reconsideration, Petitioners' motion should be denied because (1) this Court lacks jurisdiction to grant the motion given that this case is on appeal, (2) Petitioners' motion is untimely, (3) Petitioners' amended and supplemental pleading is prejudicial to Ecology, and (4) Petitioners' amended and supplemental pleading does not facilitate resolution of the case on the merits. With this brief, Ecology adds one new argument for denying Petitioners' Motion: that Petitioners' amended and supplemental pleading is futile.

II. FACTS

Washington State is combatting climate change through numerous actions to reduce our state's greenhouse gas emissions. In 2004, Washington enacted a law requiring new electric power plants to mitigate at least 20 percent of their greenhouse gas emissions associated with electricity generation. RCW 80.70.020. Two years later, the voters adopted Initiative 937, which requires large utilities to obtain 15 percent of their electricity from renewable resources such as solar and wind by 2020. RCW 19.285.040. In the following year, Washington became one of the first states in the country to adopt a greenhouse gas emission standard for electric power plants. RCW 80.80.040. And, in 2011, the state Legislature strengthened the greenhouse

gas emission standard to require the state's only coal-fired power plant to shut down one of its two coal units by 2020 and the remaining unit by 2025. RCW 80.80.040(3)(c)(i).

In addition to tackling emissions from the electricity sector, Washington has acted to reduce transportation-related greenhouse gas emissions. In 2005, Washington adopted California's "Clean Car" standards, which embody the most stringent greenhouse gas motor vehicle emission standards in the nation. RCW 70.120A.010.[1] The Legislature also set statewide goals to reduce annual per capita vehicle miles traveled and gave the Washington Department of Transportation various tools to accomplish the goals. RCW 47.01.078(4), .440; RCW 47.38.070, 47.80.023(1). Washington also has renewable fuel standards for diesel fuels and gasoline. RCW 19.112.110, .120.

A report developed for the Legislature and the Governor concluded that a cap-and-trade program would offer the greatest potential for significant greenhouse gas emission reductions. Agency Record (AR) 21 at 4. "Cap and trade" is a market-based pollution reduction program that sets a geographic declining cap on emissions and requires emitting entities to submit one "allowance" per ton of emissions. AR 21 at 28; AR 14 at 60. Governor Inslee submitted a bill to the Legislature in 2015 seeking authority for the Department of Ecology to adopt a cap-and-trade program. House Bill 1314; Senate Bill 5283. Simultaneously, Ecology was developing a low-carbon fuel standard, which the report identified as another promising pollution reduction policy. AR 21 at 4.

The Legislature ultimately failed to enact a cap-and-trade bill. Also, members of the state Senate inserted "poison pill" language in the 2015 transportation budget that would have diverted millions of dollars from public transportation if Ecology adopted its low-carbon fuel standard. Second Engrossed Substitute S.B. 5987, 64th Leg., 3d Spec. Sess., § 202(1)(b)(iii)(B)

[1] 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, is permitted to adopt its own standards if it receives a waiver from EPA and if its standards are at least as stringent as the federal standards. *Id.* § 7543(b). Other states may then choose to adopt California's standards, which is what Washington did here. 42 U.S.C. § 7507.

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(Wash. 2015); Declaration of Stuart Clark, August 6, 2015, Exhibit A. In light of the Legislature's actions, and wanting to take bold action on climate change, Governor Inslee directed Ecology to use its existing authority under the state Clean Air Act to set greenhouse gas emission standards for a broad range of emitting sources. Declaration of Sarah Louise Rees, October 1, 2015, Exhibit B. Ecology then adopted the Clean Air Rule, one of the most progressive rules in the country at limiting greenhouse gas emissions.

III. STATEMENT OF ISSUES

In addition to the issues identified in Ecology's December 29, 2016 Motion for Reconsideration, Ecology adds the following:

> Should the Court deny Petitioners' motion to file supplemental and amended pleadings when the new pleadings are futile?

IV. ARGUMENT

A. Petitioners' Motion to Amend the Pleadings Should Be Denied Under CR 15 Because Petitioners' Amended and Supplemental Pleading Is Futile

In determining whether or not to accept amended pleadings, courts may consider the futility or probable merits of the proposed amendments. *Doyle v. Planned Parenthood of Seattle-King Cty., Inc.*, 31 Wn. App. 126, 131, 639 P.2d 240 (1982) (trial court did not abuse discretion in denying amendment in light of lack of legal support for proposed new claim and untimely filing of motion to amend after summary judgment); *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997) (affirming dismissal of proposed claim that was both untimely and futile).

In this case, Petitioners' new pleading is futile because a judicial resolution would violate the separation of powers doctrine. Under our separation of powers, it is the Legislature's role to set policy and to draft and enact laws. *Hale v. Wellpinit Sch. Dist.* No. 49, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Petitioners' new declaratory judgment action asks the Court to order the Governor, Ecology, and the State of Washington to create an enforceable plan to comprehensively address climate change—a plan that requires eight percent annual

reductions of greenhouse gas emissions in Washington State. Such a new plan would necessarily involve resolution of complex social, economic, and environmental issues that must be resolved by the Legislature. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 494, 378 P.3d 222 (2016) (public trust issues should be sorted out by the Legislature); *see, e.g., Svitak ex rel. v. State,* No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) (unpublished),[2] *Sanders-Reed v. Martinez*, 350 P.3d 1221 (N. Mex. App. 2015). Because Petitioners' claim necessarily reaches the Legislature, their requested relief is precluded by the separation of powers doctrine.

1. Petitioners' requested relief invades the Legislature's policy-making role

Invoking the separation of powers doctrine, courts have refused to "be drawn into tasks more appropriate to another branch[.]" *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009) (declining to interfere with the lieutenant governor's parliamentary and discretionary ruling regarding a supermajority vote requirement). "The legislature's role is to set policy and to draft and enact laws. The drafting of a statute is a legislative, not a judicial, function." *Hale,* 165 Wn.2d at 506 (internal quotations and citations omitted). Thus, separation of powers is violated when the court overtakes the Legislature's discretionary and policy-setting function carried out through lawmaking. Washington courts have appropriately been cautious so as to avoid intruding upon the Legislature's authority. *See id.*; *see also Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994) (refusing to issue mandamus to compel a public official's discretionary acts because doing so would usurp the authority of a coordinate branch of government); *Chelan Basin Conservancy*, 194 Wn. App. 478 (public trust issues, which are merely quasi-constitutional are often best sorted out by the Legislature).

[2] 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.

2. Petitioners' requested relief presents a nonjusticiable political question

Similarly, when an issue presented to the court involves matters of political and governmental concern, courts have considered such questions to be "political questions" which are nonjusticiable. *Brown*, 165 Wn.2d at 712 (citing *Walker*, 124 Wn.2d at 411). Courts have declined to intervene in legal challenges to legislative actions that invoked fundamental public policy considerations and political questions. For example, in *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), plaintiffs claimed that legislation authorizing gambling on horse races, but not on dog races, was unconstitutional. The court recognized that 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. The plaintiffs' lawsuit raised "a legislative policy question concerning how wide the door should be opened to professional gambling. . . . That question is not for the courts and is not justiciable." *Id.* (citation omitted). More recently, on a similar basis, the court 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, 242 P.3d 891 (2010). The court held it had "no authority to conduct [its] own balancing of the pros and cons stemming from the criminalization of various activities involving animals" and that it was "'not the role of the judiciary to second-guess the wisdom of the legislature.'" *Id.* (quoting *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010)). *See also Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (the Legislature, not the court, determines legislative policy and the wisdom of that policy).

The judiciary is likewise not well-situated to balance the competing social, governmental, and business concerns involved in responding to global climate change. "[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." *Burkhart v.*

Harrod, 110 Wn.2d 381, 385, 755 P.2d 759 (1988) (quoting *Bankston v. Brennan*, 507 So.2d 1385, 1387 (Fla. 1987) (internal quotation marks omitted).

In sum, asking the court to require the State to create a climate change response program as requested by Petitioners violates the separation of powers doctrine and the political question doctrine.

3. There is no constitutional basis for Petitioners' claims

In order to avoid encroaching on the legislative role, courts do not order the Legislature to take action on a matter unless the constitution requires such legislative action, and even then, judicial relief is narrowly tailored. *See McCleary v. State,* 173 Wn.2d 477, 541, 269 P.3d 227 (2012) (finding the trial court's remedy "crosses the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty"). In order for Petitioners' case against the Legislature to proceed, this Court must find some language expressed in the constitution, or necessarily implied, requiring the Legislature to take action to protect future generations from climate change. *Cf. McCray v. United States*, 195 U.S. 27, 54, 24 S. Ct. 769, 49 L. Ed. 78 (1904) (a court striking down constitutionally compliant legislation on the basis of it being unwise or unjust would be an "act of judicial usurpation").

Petitioners claim article XVII, section 1 of the Washington State Constitution requires the state to address climate change. Petitioners are mistaken. Article XVII, section 1, asserts the State's ownership of tidelands. This provision is a limitation on state and private action that would alienate (*e.g.,* transfer the state's ownership interest in) navigable waters and their underlying lands and, in so doing, impair the public interest in the use of those resources for navigation. *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987). The provision does not create an affirmative duty requiring the State to act, nor does it create a cause of action against the State based on an alleged failure to take affirmative action.

Petitioners also claim article I, section 3 of the Washington State Constitution supports their claim that the state must address climate change. Again, Petitioners are mistaken. Article I, section 3 provides that no person shall be deprived of life, liberty, or property, without due process of law. As noted in the facts provided in Section II above, Governor Inslee, Ecology, and the State of Washington have taken numerous substantive actions to address climate change. These actions do not constitute "deliberate indifference" to the effects of climate change on future generations, as required to claim the government created the danger complained of in a due process challenge. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). Nor do they "shock the conscience" as required to bring a cognizable due process claim against government action. *Porter v. Osborn*, 546 F.3d. 1131, 1137 (9th Cir. 2008).

No language in the state constitution compels the Legislature to take specific actions to protect future generations from climate change. Because Petitioners' proposed declaration finds no constitutional origins, and granting the remedies proposed in Petitioners' supplemental and amended pleadings would violate the separation of powers doctrine the Court should deny Petitioners' motion to file these new pleadings as futile.

V. CONCLUSION

As outlined above and in Ecology's December 29, 2016 Motion for Reconsideration and Ecology's January 19, 2017 reply on reconsideration, this Court is without jurisdiction to rule on Petitioners' motion to amend the pleading. Moreover, Petitioners' amended and supplemental claims are untimely, futile, and prejudicial to Ecology. Finally, Petitioners' amended and supplemental claims introduce remote issues that will confuse the proceedings and will not facilitate resolution of this case. Therefore, Ecology asks this Court to deny

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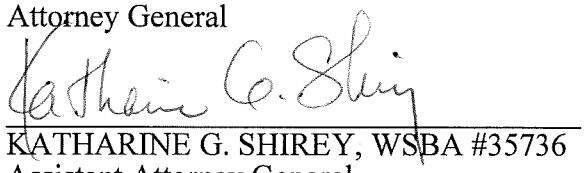
Petitioners' motion to file their amended and supplemental petition.

I certify that this Response contains 2443 words in compliance with local civil rules.

DATED this 5th day of April 2017.

ROBERT W. FERGUSON
Attorney General



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