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

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 MANDELL; 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 SEA

PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE COURT'S DECEMBER 19, 2016 ORDER

1                                   **I.     INTRODUCTION & RELIEF REQUESTED**

2           Youth Petitioners respectfully submit this reply brief in support of their Motion for  
3 Leave to file an Amended and Supplemental Petition for Review filed on December 6, 2017.  
4 This brief supplements, and hereby incorporates by reference, the arguments contained in  
5 Youth’s Opposition to Ecology’s Motion for Reconsideration of this Court’s December 19,  
6 2016 order filed on January 16, 2017.  
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8                                   **II.     STATEMENT OF FACTS**

9           Despite this Court’s finding that the government’s attempts to address climate change  
10 are inadequate,<sup>1</sup> Ecology persists with its claim that “Washington State is combatting climate  
11 change through numerous actions to reduce our state’s greenhouse gas emissions.” Ecy. Resp.  
12 Br. at 2. For the last six years, young people have sought to vindicate their rights being harmed  
13 by climate change. Youth first filed a declaratory judgment action against the State of  
14 Washington in 2011, seeking declaratory and injunctive relief under the public trust doctrine  
15 for the State’s “failure to accelerate the pace and extent of greenhouse gas reduction.” *Svitak*  
16 *ex rel. v. State*, 178 Wn. App. 1020, 2013 WL 6632124 (2013) (unpublished). That case was  
17 dismissed on separation of powers and political question grounds because “Svitak does not  
18 challenge an affirmative state action or the State’s failure to undertake a duty to act as  
19 unconstitutional.” *Id.* at \*2.  
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22           In response to that ruling, youth petitioned Ecology to promulgate a rule capping and  
23 regulating carbon dioxide emissions based on best available science “[t]o protect youth  
24 petitioners’ inherent and constitutional rights.” AR 6 at 2. Although this Court ordered  
25 Ecology to complete the Clean Air Rule, Youth were left without a comprehensive remedy that  
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<sup>1</sup> Nov. 19, 2015 Order at 4.

1 protects their fundamental, constitutional rights. For that reason, Youth seek to amend and  
2 supplement their petition for review in this case.

### 3 III. AUTHORITY

#### 4 A. Allowing Youth To Amend & Supplement Their Pleading Would Not Be Futile.

5 The futility of an amendment is one of the factors a court considers when deciding  
6 whether to grant leave to supplement or amend a pleading. *Watson v. Emard*, 165 Wn.App.  
7 691, 700, 267 P.3d 1048 (2011). “A lawsuit is futile where there is no evidence to support or  
8 prove existing or additional allegations and causes of action.” *In re Estate of Lowe*, 191 Wn.  
9 App. 216, 227, 361 P.3d 789 (2015).

10 Ecology is taking the unreasonable position that Youth must either re-file a petition for  
11 rulemaking, or file an entirely new case, in order to proceed with their constitutional claims.  
12 Forcing Youth to file another petition for rulemaking would not only be futile, “requir[ing]  
13 them to pump oil from a dry hole,”<sup>2</sup> it would also further exacerbate injuries to Youth’s  
14 constitutional rights. In an analogous context, the Washington Supreme Court recognized “that  
15 where no administrative remedy is available, or where such remedy is patently inadequate, a  
16 party may be allowed to raise constitutional issues in a declaratory judgment proceeding  
17 without being required to exhaust administrative channels needlessly or to the party’s injury.”<sup>3</sup>  
18 *Ackerley Comm., Inc. v. City of Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979). Given the  
19 urgency of the climate crisis and this Court’s familiarity with the issues raised in this case,  
20 forcing Youth to file a new case would not serve the interests of justice. The purpose of CR  
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25 <sup>2</sup> *Orion Corp. v. State*, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985) (citations and quotations omitted)

26 <sup>3</sup> *Ackerley Comm., Inc.*, did not involve a motion to amend the pleadings, but rather whether the petitioners had standing to seek declaratory and injunctive relief without first exhausting their administrative remedies. 92 Wn.2d at 908.

1 15(a) is “to facilitate a proper decision on the merits,” “and not to erect formal and  
2 burdensome impediments to the litigation process.” *Caruso v. Local Union 690*, 100 Wn.2d  
3 343, 670 P.2d 240 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

4 **B. Ecology Ignores The Constitutional Basis For Youth’s Legal Claims.**

5 Ecology misrepresents the legal claims that Youth seek to add through the  
6 supplemental and amended petition for review. Youth have alleged that the state, Governor  
7 Inslee, and Ecology have taken affirmative actions and omissions that violate their  
8 constitutionally-reserved rights to life, liberty and property and “to live in a healthful and  
9 pleasant environment.” Wash. Const. Art. I, § 3; Art. I, § 30; RCW 43.21A.010; Nov. 19,  
10 2015 Order at 9. Youth have also alleged violations of the public trust doctrine.  
11

12 Ecology’s claim that it has “taken numerous substantive actions to address climate  
13 change” does not render Youth’s new constitutional claims futile. This Court has already found  
14 that current climate change laws and policies “cannot achieve the GHG reductions necessary to  
15 protect our environment and to ensure the survival of an environment in which Petitioners can  
16 grow to adulthood safely.” Nov. 19, 2015 Order at 4. Furthermore, Youth’s supplemental  
17 allegations, when proven at trial, will show that the state, Governor Inslee and Ecology have  
18 violated and are violating Youth’s constitutional rights to life, liberty, property, and a healthful  
19 and pleasant environment. *See, e.g.*, Supp. & Amd. Pet. For Rev. at ¶ 72. Ecology’s  
20 unsupported statements that there is no “deliberate indifference” on the part of the state that will  
21 “shock the conscience,” without any reference to the supplemental allegations, is insufficient to  
22 demonstrate futility. These are exactly the kind of “conclusory assertions [that] do not rise to  
23 the level of showing actual prejudice.” *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334  
24 (1988).  
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1 Finally, Youth have adequately alleged a violation of the public trust doctrine. Ecology  
2 restates the unsuccessful arguments it raised earlier in this proceeding. Youth’s public trust  
3 claims are hardly futile when they have previously been validated by this Court. Nov. 19,  
4 Order at 7-8. Moreover, Ecology reliance on *Chelan Basin Conservancy v. GBI Holding Co.*  
5 194 Wn.App. 478, 378 P.3d 222 (2016), *rev. granted by Chelan Basin Conservancy v. GBI*  
6 *Holding Co.*, 2016 Wash. LEXIS 1365 (Wash., Dec. 8, 2016), is misplaced. First, the  
7 Washington Supreme Court has accepted review of the court of appeals’ decision. *Id.* Second,  
8 the court of appeals confirmed that the judicial branch has jurisdiction to review public trust  
9 claims, which is sufficient to defeat Ecology’s futility argument. *Id.* at 493.

11 **C. “There Is No Need To Step Outside The Core Role Of The Judiciary To Decide**  
12 **This Case.”<sup>4</sup>**

13 Neither the political question doctrine nor the underlying principle of separation of  
14 powers are a barrier to Youth’s fundamental rights claims. Ecology misrepresents the test as  
15 whether the “claim necessarily reaches the legislature.” Ecy. Resp. Br. at 5. Rather, “[t]o  
16 determine whether a particular action violates separation of powers, we look ‘not to whether  
17 two branches of government engage in coinciding activities, but rather whether the activity of  
18 one branch threatens the independence or integrity or invades the prerogatives of another.’”  
19 *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Zylstra v. Piva*, 85 Wn.2d  
20 743, 750, 539 P.2d 823 (1975)). “[I]nterpretation and construction of the constitution are  
21 exclusively judicial functions.” *Seattle School Dist. v. State*, 90 Wn.2d 476, 504, 585 P.2d 71  
22 (1978); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn. 2d 494, 198 P.3d 1021 (2009) (Purpose of  
23 separation of powers is to “secure liberty.”); *Putman v. Wenatchee Valley Med. Center*, 216  
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26 <sup>4</sup> *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 WL 6661146 at \*8 (D. Or. Nov. 10, 2016).

1 P.3d 374 (2009) (“The very essence of civil liberty consists in the right of every individual to  
2 claim the protection of the laws, whenever he receives an injury.”) (citation and quotations  
3 omitted).

4 Youth do not ask this Court to make legislative policy determinations,<sup>5</sup> but rather to  
5 order Defendants to prepare and implement a climate recovery plan, and take such other  
6 actions as necessary and appropriate to remedy the violations of Youth’s fundamental,  
7 constitutional rights. Such a remedy is well within this Court’s authority. *See, e.g., McCleary*  
8 *v. State*, 173 Wn.2d 477, 540-41, 269 P.3d 227 (2012). Youth do not seek an order directing  
9 Ecology *how* to reduce emissions, only to ensure that such reductions are achieved in a manner  
10 that safeguards fundamental rights. *Seattle School Dist.*, 90 Wn.2d at 520 (“While the  
11 legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general  
12 authority to select the *means* of discharging that duty should be left to the Legislature.”).

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15 Ecology’s claims that addressing climate change “necessarily involve[s] resolution of  
16 complex social, economic, and environmental issues” does not make this case nonjusticiable.  
17 Ecy. Resp. Br. at 5. As the Washington Supreme Court said, “[w]hile we recognize that the  
18 issue is complex and no option may prove wholly satisfactory, this is not a reason for the  
19 judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to  
20 hold the State accountable to meet its constitutional dut[ies] . . . .” *McCleary*, 173 Wn.2d at  
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23 <sup>5</sup> Indeed, the key policy determinations have already been made. What is missing is judicial oversight to ensure  
24 those policies are implemented and fulfilled. The legislature has recognized that “[e]xtreme weather, a warming  
25 Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting  
26 Washington’s economy, environment, and communities.” RCW 80.80.005(1)(a). The legislature has also  
committed to “do its part to reach global climate stabilization levels . . . .” RCW 70.235.020(1)(a)(iii). Ecology  
takes the position that there should be no judicial recourse to hold the executive and legislative branches  
accountable to address climate change, even when their actions and omissions violate fundamental, constitutional  
rights.

1 546. Similarly, the *Juliana* case, which involves claims nearly identical to those alleged  
2 herein, is squarely on point:

3           There is no need to step outside the core role of the judiciary to decide this  
4 case. At its heart, this lawsuit asks this Court to determine whether  
5 defendants have violated plaintiffs' constitutional rights. That question is  
squarely within the purview of the judiciary.

6 *Juliana*, No. 6:15-cv-01517-TC, 2016 WL 6661146 at \*8.

7           **V. CONCLUSION & REQUEST FOR RELIEF**

8           Youth Petitioners respectfully request that the Court grant their motion for leave to file  
9 a supplemental and amended petition for review. Ecology continues to erect unreasonable  
10 barriers to Youths' access to their legal system and to a meaningful remedy to the  
11 constitutional violations, of which Ecology is part, which endanger their lives and futures.  
12 Granting the motion is not only within the Court's legitimate authority, it is the right thing to  
13 do when faced with the growing injustice of delay.  
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16 I certify that this memorandum contains 1738 words, in compliance with the Local Civil Rules.

17  
18 Respectfully submitted this 12<sup>th</sup> day of April, 2017.

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20           *s/ Andrea K. Rodgers*

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