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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