80007-8

No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

This Court should reverse the dismissal of Appellants' (the "Youth's") complaint. Respondents provide no basis to close the courthouse doors on the Youth's constitutional claims. Instead, Respondents attempt to escape accountability for their affirmative infringements of the Youth's constitutional rights by mischaracterizing their claims and requested relief. But Respondents cannot refute that they continue to operate a fossil fuel-based energy and transportation system resulting in increasingly dangerous greenhouse gas ("GHG") emissions that, by their admission, disproportionately harm the Youth. The Youth allege viable infringements to their constitutional due process, equal protection, and public trust rights that can and should be resolved by a court of law.

A. The Youth's Claims Are Justiciable

Without engaging in the requisite analysis under *Baker v. Carr*, 369 U.S. 186 (1962), Respondents manufacture a separation of powers problem by mischaracterizing the justiciability inquiry, the nature of the Youth's claims, and the requested relief. In reality, the Youth's claims call upon the judiciary to fulfill its core duty to interpret the constitution, "even when that interpretation serves as a check on the activities of another branch . . . ." *In re Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (en banc) ("*Juvenile Dir.*").

1. Separation of Powers Compels Justiciability of the Youth's Constitutional Claims

Respondents misstate the justiciability inquiry as barring any claims that "involve[] matters of political and governmental concern." Resp. at 10. Such a broad formulation would bar any case against the government and runs entirely contrary to the judiciary's responsibility "to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (citation omitted).[1] The doctrine does not categorically bar any matter with political overtones. *See, e.g.*, *id.* at 204-05 (Sotomayor, J., concurring)*; I.N.S. v. Chadha*, 462 U.S. 919, 942-43 (1983). Respondents' interpretation eviscerates the doctrine of checks and balances, which has "evolved side-by-side with and in response to the separation of powers concept" *Juvenile Dir.*, 87 Wn.2d at 242-43.

The justiciability inquiry here *requires* Washington courts to hear and decide the Youth's constitutional claims. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffuse power the better to secure liberty.'") (citation omitted). As the Court made clear:

> Thus, even in enforcing the separation of powers, courts must intervene in the operation of other branches. This is no inconsistency in constitutional theory, since complete

[1] *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (Washington's political question doctrine is "similar to the federal political question doctrine").

> separation was never intended and overlapping functions were created deliberately . . . . It is an oversimplification to view the doctrine as establishing analytically distinct categories of government functions.

Juvenile Dir., 87 Wn.2d at 242; *id.* at 243 (recognizing "judicial authority to declare legislative and executive acts unconstitutional").

Erroneously attempting to frame this case as a policy dispute and to equate the Youth's claims with those in the unpublished decision *Svitak ex rel. Svitak v. State*, 178 Wn. App. 1020 (2013),[2] Respondents repeatedly mischaracterize the Youth's claims as "a complaint that state agencies have not done enough to address climate change through agency action." *See, e.g.*, Resp. at 9, 25, 3. However, *Svitak* presented a single-count public trust claim challenging "the State's failure to accelerate the pace and extent of greenhouse gas reduction" that was dismissed for its failure to challenge affirmative state action or allege a constitutional violation. 178 Wn. App. at *1-2; Op. Br. at 6-7. Here, following the guidance of the *Svitak* court, the Youth challenge the State's *affirmative actions* in creating and effectuating "systemic policy, practice, and customs [that] have materially caused, contributed to, and/or exacerbated climate change" as violative of their constitutional rights. CP 71-72; *see also* CP 1, 26, 45, 50-58. These claims

[2] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

clearly invoke Washington courts' obligation to assess the constitutionality of the political branches' conduct.

2. Justiciability Focuses on the Claims, Not the Relief Requested

Respondents attempt to focus the justiciability inquiry on speculation of the propriety of an apocryphal version of the Youths' requested relief. Resp. 14, 20-22. However, justiciability is determined by the claims asserted, not assumptions as to what remedy might be appropriate should plaintiffs prevail. *Baker*, 369 U.S. at 198; *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976). In *Rousso v. State*, while cautioning that it was not the judiciary's role to decide "whether Internet gambling . . . should be illegal," the Washington Supreme Court still proceeded to determine "whether Washington's ban on Internet gambling is an unconstitutional infringement . . . ." 170 Wn.2d 70, 74-75, 239 P.3d 1084 (2010) (en banc). Similarly here, the justiciable question is not what specific climate policy measures should be adopted, but whether Respondents' challenged affirmative conduct violates the Youth's constitutional rights. While premature to speculate as to what relief may ultimately be appropriate, the judicial branch has ample authority to remedy constitutional violations in a manner that does not usurp legislative or executive authority. *See, e.g. McCleary v. State*, 173 Wn.2d 477, 545-46, 269 P.3d 227 (2012); *Hills*, 425 U.S. at 297 (constitutional violation

"provided the necessary predicate for the entry of a remedial order against [the agency] and, indeed, imposed a duty on the District court to grant appropriate relief.").

3. The Youth's Requested Injunctive Relief is Appropriate

Deciding the Youth's constitutional claims would not require a balancing of "the pros and cons associated with legislative policy." Resp. at 10. Courts are well-equipped to measure governmental conduct against constitutional provisions, even when the inquiry involves factual or technical analysis.[3] *See McCleary*, 173 Wn.2d at 545-46; *In re Flynn*, 52 Wn.2d 589, 592 n.1, 328 P.2d 150 (1958) (en banc) (collecting cases "applying substantive due process standards"); *see also Juliana v. United States*, 217 F.Supp.3d 1224, 1239 (D. Or. 2016), *interlocutory appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018) (determining whether government's affirmative actions in contributing to climate change violate the constitution "can be answered" solely by reference to standards governing protection of constitutional rights, and "without any consideration of competing interests.").

[3] *See* Justice Stephen Breyer, *Science in the Courtroom*, Issues in Science and Technology (2000), https://issues.org/breyer/ (detailing the duty of the judiciary to confront scientific and technical analysis in deciding "basic questions of human liberty").

In arguing the Youth's claims are not justiciable under the UDJA,[4] Respondents erroneously assume new laws would "be necessary to enforce Plaintiffs' proposed plan." Resp. at 21. No new laws are necessary to remedy past and ongoing constitutional violations, and in any case, that inquiry is premature until the scope of any constitutional violations are determined. *Baker*, 369 U.S. at 198. Respondents cite no authority that would prevent them from using their existing statutory authority to develop a plan to operate Washington's energy and transportation system in a fashion that does not violate the Youth's constitutional rights. In fact, Respondents admit, they have ample existing authority to prepare and implement plans to reduce GHG emissions and to set energy and transportation policy.[5] Resp. at 21; *see also* CP 16-23, 50-56 (detailing Respondents' extensive authority and control over Washington's energy and transportation system, including development of state energy strategy and 20-year transportation plan). A declaration that Respondents' affirmative actions resulting in dangerous levels of GHGs infringe the Youth's constitutional rights would be final, conclusive and justiciable. *See*

[4] Respondents argued below that the parties lack genuine and opposing interests under the UDJA, CP 134, but have not preserved that argument on appeal.

[5] Even if new laws were required to bring Washington's energy and transportation system into constitutional compliance, that does not divest courts of jurisdiction to hear and decide the Youth's claims. *See McCleary*, 173 Wn.2d at 546-47 (ordering legislature to devise and implement a plan to come into constitutional compliance).

Ronken v. Bd. of County Comm'rs. of Snohomish County, 89 Wn.2d 304, 310-12, 572 P.2d 1 (1977) (en banc).

After finding constitutional violations, it is well within the courts' authority to issue an order leaving it to Respondents, not the court, to articulate and identify the specific actions needed to come into constitutional compliance.[6] "Once a right and a violation have been shown, the scope of a . . . court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); Wash. Const. Art. IV, Sec. 6; *Ronken*, 89 Wn.2d at 312, (citing RCW 7.24.080); CP 24, 72. Our Nation's canon of constitutional cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *Brown v. Plata*, 563 U.S. 493 (2011); *Hills*, 425 U.S. 284; *Milliken*, 418 U.S. at 723; *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Bolling v. Sharp*, 347 U.S. 497 (1954).

[6] Contrary to Respondents' representations, a remedial plan is not the Youth's sole requested remedy. The Youth also seek declarations of law and other forms of injunctive relief to bring Respondents into constitutional compliance. CP 70-71.

The Youth's requested relief does not require the court "to craft the State's approach for reducing greenhouse gases."[7] Resp. at 2. Rather, the Youth request a declaration of their constitutional rights and Respondents' infringement thereof, and an order directing Respondents to prepare an implement a remedial plan *of their own devising*. *See* Substantive Limits on Liability and Relief, 90 Harv. L. Rev. 1190, 1248 (1977) ("[I]n each of the [institutional reform] cases . . . the court sought a proposed plan from the defendant officials before being forced to consider shaping one of it[s] own over their objections."). In *McCleary*, this Court retained jurisdiction while ordering the legislature to fully fund and "develop a basic education program geared toward delivering the constitutionally required education. . . ." 173 Wn.2d at 546-47.[8] The Court did not draft the education policies; it ordered the State to do so in a constitutionally compliant manner.

[7] Nothing in the Youth's requested relief asks the court "to force every Washingtonian to surrender their natural gas furnace and petroleum-fueled vehicle." Resp. at 13. None of the plans that have been prepared to decarbonize Washington's energy system across all sectors call for such draconian measures and Respondents' inflammatory assertion contradicts well-pleaded allegations in the Complaint. *See, e.g.,* CP 56, ¶ 148.

[8] Respondents attempt to distinguish *McCleary* on the grounds that it involved a "positive constitutional right." Resp. at 14-15. The public trust doctrine does confer positive rights on the Youth. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 259, 413 P.3d 549 (2018) (describing the rights protected by the public trust doctrine). Respondents' distinction is also irrelevant to the courts' authority to remedy the rights asserted here that encompass negative rights preventing the government from affirmatively harming the Youth. *See McCleary*, 173 Wn.2d at 518-19 (distinguishing positive and negative constitutional rights and stating that "[w]ith respect to those [negative] rights, the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries."). This Court has never said it lacks jurisdiction to enter a remedy in a negative rights case.

These cases demonstrate that the systemic violations alleged fully justify the systemic remedy the Youth request and further illustrate the necessity of injunctive relief. *See McCleary*, 173 Wn.2d at 540-41 (explaining how the Court's decision in *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), to "defer[] to ongoing legislative reforms and simply declare[] the funding system inadequate" resulted in "30 years of an education system that fell short of the promise of article IX, section 1 and that ultimately produced this lawsuit."). These Youth do not have thirty years to wait.[9] CP 24, 39-41.

4. The Youth's Challenge to RCW 70.235.020 and .050 Is Justiciable

The Youth challenge the GHG emissions targets in RCW 70.235.020 and 70.235.050 as unconstitutionally legalizing and authorizing dangerous levels of GHG emissions through 2050. CP 67-70. Respondents' spurious claim that the targets limit rather than authorize GHG emissions is belied by Washington's increasing emissions and misses the point.[10] Even if Respondents were abiding by the targets, which they are not, the targets still authorize *dangerous levels* of GHG emissions through 2050 that

[9] Even if part of the requested injunctive relief were unavailable, that says nothing as to the *justiciability* of the Youth's claims because declaratory and other injunctive relief would be within the court's power to order. *Id.* (citing RCW 7.24.080); CP 24, 72.

[10] *See* Wash. Dep't of Ecology, *Washington State Greenhouse Gas Emissions Inventory: 1990-2015: Report to the Legislature* (2018), https://fortress.wa.gov/ecy/publications/documents/1802043.pdf (Washington's emissions have increased 6.1% from 2012-2015).

discriminate against the Youth and cause constitutional deprivations, facts which will be proven at trial and must be taken as true at this stage.[11] CP 67-70.

Respondents erroneously assert that "invalidation of the statute would result in the State having no greenhouse gas limits and state agencies would no longer be obliged to reduce . . . emissions." Resp. at 15. First, the Youth seek invalidation of the targets, not the duty to reduce GHG emissions. Second, Respondents' argument ignores their vast authority to protect the environment and shape the state's energy and transportation system. *See, e.g.,* CP 16-23; *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976) (en banc) (Ecology has "very broad authority and responsibility for managing this state's environment."); RCW 43.21F (comprehensive energy planning process); RCW 47.01.071 (describing statewide transportation system). If the targets are deemed unconstitutional, Respondents would no longer be statutorily enabled to pursue energy and transportation policies resulting in dangerous buildup of GHGs.

[11] Respondents also completely ignore the Youth's claim that by adopting the targets, the state has abdicated its control of public trust resources resulting in substantial impairment to trust resources, a question over which this Court has clear jurisdiction. *Chelan Basin Conservancy*, 190 Wn.2d at 267.

Relying on *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 259 P.3d 280 (2011), Respondents argue courts cannot rewrite statutes, but that is not what the Youth seek.[12] Resp. at 16. *Pasado's* does not stand for the proposition that courts cannot partially invalidate statutes, but rather that doing so must align with legislative intent. 162 Wn. App. at 753-54; *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002) (en banc). Moreover, the *Pasado's* plaintiffs did not alternatively seek full invalidation of the statute challenged, as the Youth do here.[13] *Id.* at 749; CP 309-10.

5. Mandamus is Not Required for Relief Against the Governor

Respondents concoct a strawman argument that this case violates separation of powers because a mandamus action against the Governor is improper. This is not a mandamus action and Respondents provide *no* support for the proposition that claims against the Governor must be brought as such. Resp. at 17. The Youth seek review of the Governor's affirmative actions in implementing a fossil fuel-based energy and transportation system that is harming them and an order requiring

[12] The Youth are not asking the courts to re-write the targets in the statute. Rather, they seek invalidation of the targets (RCW 70.235.020(1)(a) and RCW 70.235.050) because they enable and perpetuate conduct that is causing them harm. *See, e.g.,* CP 49, ¶ 140.

[13] Respondents' reliance on *NW Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973) and *NW Animal Rights Network v. State*, 158 Wn. App. 237, 244, 242 P.3d 891 (2010), is similarly misplaced. The court found both cases nonjusticiable under the UDJA for failing to join indispensable parties and for seeking relief that required the court to dictate legislative policy regarding the extent to which professional gambling and animal cruelty should be criminalized. In essence, the requested relief would have criminalized activity deemed lawful by the legislature.

Respondents to cease those actions. Both U.S. and Washington Supreme Court precedent are clear that the Executive's actions are subject to review for constitutional compliance. *See Wash. State Legislature v. State*, 129 Wn.2d 129, 985 P.2d 353 (1999) (en banc); *Clinton v. City of New York*, 524 U.S. 417 (1998). *If* a violation is found and *if* the court orders development of a remedial plan, Respondents, including the Governor, would maintain discretion on *how* to achieve constitutional compliance. However, compliance with the constitution itself is not discretionary.[14] *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000).

6. The APA Does Not Govern the Youth's Claims

In cases involving systemic violations of children's rights to be free from an unreasonable risk of harm, the Washington Supreme Court has allowed constitutional claims against state agencies to proceed outside of the APA. *See, e.g.*, *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003); *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 949 P.2d 1291 (1997). The Youth clearly alleged, as in *Braam* and *Washington State Coalition*, that "the state's

[14] Respondents reliance on *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994), for the notion that mandamus is not available to order a state official to "adhere to the constitution" is misplaced and taken out of context. Not only is this not a mandamus action, the Youth seek to enforce *specific* provisions of the constitution and do not seek, as opposed to the plaintiffs in *Walker*, general compliance with unspecified constitutional provisions. *Id.* ("Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.").

specific practices," CP 50-56, are "causing harm to children." *Contra*, Resp. at 25; CP 5-16. These cases make clear that systemic challenges to agency conduct can proceed independently of the APA when necessary to protect constitutional rights.

Braam challenged the systemic placement of foster children in multiple homes. 150 Wn.2d at 694. Even though individual DSHS agency actions could be reviewed under the APA, the *Braam* children's systemic substantive due process claim proceeded independently of the APA. Similarly, in *Washington State Coalition*, the Court permitted a systemic challenge under the UDJA, rather than requiring case-by-case review under the APA. 133 Wn.2d at 916-17 n.6. Because the plaintiffs requested a declaration of their constitutional rights in the context of a systemic challenge, *id.*, the Court rejected the dissent's view that "the APA provides the exclusive means for judicial review," *id.* at 947 (Durham, C.J., dissenting). These cases demonstrate that the APA, does not apply when necessary to protect constitutional rights from systemic government conduct.

Respondents claim the Youth "acknowledge that they can bring their constitutional claims under the APA," Resp. at 25, but the Youth thoroughly explained that application of the APA's strictures here would violate their procedural due process rights by preventing meaningful review

of their challenge to Respondents' systemic conduct, including the acts of the State and Governor, who are not subject to the APA. Op. Br. at 47-50.[15] Respondents did not even *mention* the procedural due process factors.

The Youth challenge systemic conduct, which, by definition, includes a multitude of discrete actions and policies, such as those identified as examples by the Youth, the collective effect of which is harming them. CP 50-56. The full contours of Respondents' energy and transportation system is a factual matter,[16] and the Youth's allegations describing the system, the types of actions comprising it, and the harms that result therefrom, are to be taken as true. Further, the specific agency actions in the Youth's Complaint bely Respondents' argument that the Youth "do not identify any specific actions by the agencies that constitute this alleged 'systemic conduct.'" Resp. at 24 n.14. Perplexingly, what Respondents now call "vague and conclusory allegation[s]" of systemic conduct, they classified as "extensive allegations related to specific agency actions" in briefing below. CP 395. Respondents do not dispute that they control and

[15] *See also Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 355, 271 P.3rd 268 (2012) (courts interpret Washington's APA consistent with federal APA); *Webster v. Doe*, 486 U.S. 592, 603 (2004) (Federal APA's explicit limitations not applicable where they would otherwise prevent review of constitutional claims).

[16] *Nurse*, 226 F.3d at 1002 (the question of "whether the acts of the policy-making defendants violated the Constitution, and, if so, what constitutional mandates they violated" "are questions that will be fleshed out by the facts as this case proceeds towards trial" and are not always appropriate for a motion to dismiss).

operate the state's energy and transportation system and admit that it is through "environmental permits, construction designs, and long-term plans and strategies that the State's impact on climate change is implemented." Resp. at 26; CP 50-56. In *Ronken*, the Court explicitly rejected the argument that systemic challenges to government action must proceed in isolated administrative appeals, like those required under the APA. 89 Wn.2d at 309-310. The Court reasoned that, as here, the plaintiffs:

> [W]ere not parties to the record of any of the . . . decisions challenged by them in this lawsuit. . . . Neither were they harmed by a single decision of the county commissioners, such that appeal would be an appropriate remedy. Rather, it was a continuing policy . . . and ongoing series of decisions . . . which adversely affected [them], thus the [systemic declaratory and injunctive] remedy was well-suited.

Id. The APA does not govern the Youths' constitutional claims.

B. The Youth Alleged Viable Due Process Claims

1. Washington's Constitution Protects the Fundamental Right to a Healthful Environment, Including A Stable Climate

The Youth alleged a viable claim to violation of their unenumerated due process right to a healthful environment, *specifically* the right to a stable climate that sustains human life and liberty. CP 57-61.[17] Respondents

[17] The Youth's right to a stable climate system is also "constitutionally reserved through Article I, Section 30 of the Washington Constitution." *See, e.g.*, CP 61. The Youth rely on this provision as support for their unenumerated substantive due process rights. *See* Resp. at 38. Respondents recognize this section preserves "fundamental, 'immutable'" rights, yet seek to drain all meaning from the provision. *Id.*

nakedly assert that the right to a stable climate is not "deeply rooted in this Nation's history and tradition," but offer no support or analysis for this position. Resp. at 31. Respondents argue that protecting a constitutional right to a stable climate system would "move[] the liberty interest 'outside the arena of public debate and legislative action," Resp. at 28 (citation omitted). That argument is easily refuted; the right to a "healthful environment" has already been, and indeed is the only right recognized by the legislature as "fundamental and inalienable." RCW 43.21A.010; 43.21C.020(3); 70.105D.010. Such legislative recognition also confirms the right's roots in Washington's history and tradition. *See In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007) (liberty interest may arise from state law).

Respondents attempt to corner the principle that fundamental rights can arise in statute to the criminal justice context, while conveniently ignoring cases that apply the principle elsewhere. *See, e.g.*, *State v. Jorgenson*, 179 Wn.2d 145, 170, 312 P.3d 960 (2013) (right to bear arms); *King County Dep't of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 353, 254 P.3d 927 (2011) (public records); *Coal. of Chiliwist v. Okanogan Cty.*, 198 Wn. App. 1016, at *7 (2017)[18] (order to vacate road).

[18] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

The legislature declared without any such qualification "each person has a fundamental and inalienable right to a healthful environment . . . " RCW 43.21C.020(3); *see also* RCW 43.21A.010; 70.105D.010.

A fundamental liberty interest can arise "'from an expectation or interest created by state laws or policies.'" *In re McCarthy*, 161 Wn.2d at 240 (citation omitted). The Youth have not filed suit to enforce RCW 43.21A.010, but cite this provision as proof and support for the unenumerated fundamental right they assert. Neither of Respondents' cited cases involved an express legislative declaration of a "fundamental and inalienable right" and both support the principle that policy statements are indicative of legislative intent. *Int'l Union of Operating Engineers Local No. 286, AFL-CIO v. Sand Point Country Club*, 83 Wn.2d 498, 500, 505, 519 P.2d 985 (1974);[19] *see also Kilian v. Atkinson*, 147 Wn.2d 16, 24, 50 P.3d 638 (2002). The legislature's explicit recognition of a "fundamental and inalienable right" to a healthful environment can and does have constitutional implications, and at the very least supports the notion that such a right is "'implicit in the concept of ordered liberty'" under

[19] The plaintiffs in *Int'l Union of Operating Engineers* were asking the court to read an unwritten provision into the policy statement. 83 Wn.2d at 503-04.

Washington law.[20] *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008).

All of the cases Respondents cite in urging rejection of the fundamental right pled here—"a healthful and pleasant environment, including a stable climate system that sustains human life and liberty" are inapposite.[21] Both the rights analyzed and the contextual circumstances of those cases present substantial distinctions. *Clean Air Council v. United States*, for example, like the superior court in this case, improperly grounded its decision in a conflation of "the right to a climate system capable of sustaining human life" with the "right to a pollution-free environment."[22]

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[20] Development of a full factual record will further demonstrate the history and tradition of this fundamental right in Washington. Many important fundamental rights cases were decided on appeal of merits decisions, not on motions to dismiss. *See, e.g., Obergefell*, 135 S. Ct. 2584; *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Furman v. Georgia*, 408 U.S. 238 (1972); *Brown v. Bd. of Educ*., 347 U.S. at 486 n.1.

[21] Respondents claim that the Youth did not narrowly define the fundamental right, but the Youth alleged that a stable climate system can be defined according to the best available science, currently as atmospheric concentrations of carbon dioxide no greater than 350 parts per million. CP 39-40. The application of this standard to Respondents conduct is a question to be resolved at trial based upon the evidence. *Braam*, 150 Wn.2d at 700-04 (remanding for application of culpability standard). Respondents' claim that the Youth seek a broader right than that found in *Juliana* is false. Resp. at 32. 217 F.Supp.3d at 1247-48, 1250 (recognizing "right to climate system capable of sustaining human life" tied to lowering carbon dioxide levels to less than 350 parts per million by 2100).

[22] Respondents' other comparisons are equally unhelpful. *See* Resp. at 29 n. 16 (citing cases that are factually distinct and do not involve the same "fundamental and inalienable" right alleged here). Supporting recognition of the right to a stable climate, a vast body of foreign jurisprudence recognizes a fundamental right to a healthful environment. *See, e.g., Asghgar Leghari v. Fed'n of Pakistan*, (2015) W.P. No. 25501/2015, ¶6 (Lahore High Court) (Pak.) (climate change is "a legal and constitutional . . . clarion call for the protection of fundamental rights"); *Minors Oposa v. Sec'y of the Dep't of Envt'l & Natural Res.*, G.R. No. 101083, 33 I.L.M. 173, 187-88 (S.C., Jul. 30, 1993) (Phil.) (without "a balanced and healthful ecology," future generations "stand to inherit nothing but parched earth incapable

See No. CV 17-4977, 2019 WL 687873, at *8 (E.D. Pa. Feb. 19, 2019). Most importantly, *none* of the cases cited by Respondents involved a legislatively-recognized "fundamental and inalienable" right. A finding that the Youth have no right to a stable climate system necessary for their lives and liberties "would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breath or the water its citizens drink." *Juliana*, 217 F. Supp.3d at 1250.

Without analysis, Respondents endorse the superior court's error that the right to a stable climate system is "the goal of a people, rather than the right of a person." Resp. at 32. However, not all inalienable rights are about exercising intimate personal choices—take the rights to be free from unlawful restraint, unreasonable government-imposed fines, and unreasonable risks of harm. Further, one could classify virtually any already-recognized fundamental right, such as the right to free assembly, as a society-wide aspirational goal. That does not negate their extension to individuals as fundamental rights upon which the government cannot

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of sustaining life."); *Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 SCC 520 (India) (right to life encompasses right to healthy environment); Note by the Secretary-General, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶ 54, U.N. Doc. A/73/188, (July 19, 2018) ("155 States have a binding legal obligation to respect, protect and fulfill the right to a healthy environment").

infringe. Even so, the Youth alleged that Respondents' conduct has harmed them in ways implicating intimate personal choices. CP 5-16.

Respondents also erroneously claim the fundamental right to marriage recognized in *Obergefell* fell "within an individual right of privacy." Resp. at 31. As retired Justice John Paul Stevens wrote, "[t]he *Obergefell* majority, furthermore, correctly framed the right to marriage in terms of the Fourteenth Amendment's protection of liberty rather than 'privacy.'"[23] Respondents' arguments dismantle the concept of inalienable rights settled since the Declaration of Independence (U.S. 1776), which recognized that inalienable rights like "Life, Liberty and the pursuit of Happiness," are natural rights, not bestowed by the laws of people, but "endowed by their Creator." Decl. of Independence, ¶ 2 (U.S. 1776); Wash. Const. Art. I, § 30. The right of these Youth to live with the climate system that nature provides, free of government-sanctioned destruction, is the very foundation of, and preservative of, all of their fundamental, inalienable natural rights. It is, in fact, the prerequisite to life itself.

Finally, Respondents attempt to escape accountability for their affirmative contributions to climate change by framing the problem as one caused by "billions of human beings and millions of businesses." Resp. at

[23] Justice John Paul Stevens (Ret.), *Two Thoughts About* Obergefell v. Hodges, 77 Ohio St. L.J. 913 (2016).

29. However, because of Respondents' creation and control of the energy and transportation system, the majority of Washington's GHG emissions are contemplated, authorized, and sanctioned by Respondents. CP 50-56. Regardless of the conduct of third parties, the government has a constitutional obligation refrain from engaging in activities knowingly injurious to children under its jurisdiction. The Youth are not asking Respondents to solve climate change, but to stop affirmatively contributing to it and causing them harm.[24]

C. The Youth Alleged a Viable State-Created Danger Claim

There are *two distinct DeShaney* exceptions implicating the positive governmental duty to take affirmative action to protect life, liberty, and property: the "special relationship" exception and the "state-created danger" exception. *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 200-01 (1989); *Triplett v. Washington State Dep't of Soc. & Health Servs.*, 193 Wn. App. 497, 513-14, 373 P.3d 279 (2016). Respondents conflate the two. Resp. at 35. The Youth bring a "state-created danger" challenge, under

[24] Respondents improperly limit due process rights to the narrow circumstances in which they have been previously recognized. Resp. at 39. Such an approach is contrary to the nature of constitutional rights and the role of precedent in legal analysis. When government conduct infringes an existing liberty interest, there is a claim for relief regardless of whether an infringement has previously occurred in that exact factual scenario. *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 848, (1992) ("Liberty . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.") (citation omitted).

which government is "liable for failing to protect a person's . . . personal security or bodily integrity" if it "affirmatively and with deliberate indifference placed that person in danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

Focusing on the "special relationship" standard, Respondents erroneously conclude that cases involving foster children are inapposite because the state "assumed responsibility for [the foster children's] care and safety." Resp. at 36. However, the parallels between the State's role in the energy and transportation system and in the foster system "in creating or exposing plaintiffs to danger they otherwise would not have faced," is clear. *Pauluk*, 836 F.3d at 1122. Just as in the foster cases, Respondents' knowingly harmful implementation of a state-controlled system is injuring the Youth. CP 1-5; CP 50-56 (describing how dangerous GHG emissions have resulted from Respondents' energy and transportation system); CP 56 (describing feasible alternatives to existing system); CP 47; CP 41-50 (Respondents' long-standing knowledge of climate danger); CP 5-16 (the Youth's substantial individual harms stemming from Respondents' actions). Respondents' own documents acknowledge that Youth are particularly vulnerable to climate change and the State's role in accentuating that danger. CP 47. As such, the Youth have properly pled a state created danger claim and have justified application of the professional

judgment standard to determine Respondents' culpability. *See Braam*, 150 Wn.2d at 703-04 ("Something more than refraining from indifferent action is required to protect these innocents.").

D. The Youth Alleged Viable Equal Protection Claims

The Youth are members of a *distinct* class—children born into dangerous climate change—who will suffer disproportionately from climate change impacts. CP 65-67. Even though these children will grow up, the Youth's generation was born into a climate crisis contributed to by Respondents' knowing decisions systematically favoring previous generations' convenience over the Youth's wellbeing. CP 65-70; *cf. State v. Schaaf*, 109 Wn.2d 1, 19, 743 P.2d 240 (1987) (previous hesitancy to declare youth as a suspect class was based on belief that minors "tend to be treated in legislative arenas with full concern and respect."). Under the facts of this case, the Youth therefore "have immutable age and generational characteristics that they cannot change."[25] CP 65; CP 24-41 (summarizing scientific evidence that Youth will face climate catastrophe, while prior generations benefited from unrestrained emissions for decades).

[25] To minimize the disproportionate harm the Youth suffer, Respondents claim that "[f]or equal protection purposes, the harm being suffered must impact a population that is vulnerable due to current, and not future or aggregate, impacts." Resp. at 41-42 (citing *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014)). The *Schroeder* case says no such thing. Even so, while the Youth certainly will continue to disproportionately suffer from climate change in the future, Respondents ignore the Youth's *current* and *ongoing* injuries and more vulnerable status. CP 2-3, 15; 38, ¶ 104-05.

Even if, after a proper analysis of *all* substantive due process rights pleaded and the Youths' asserted protected status, it is determined neither strict nor intermediate scrutiny applies, the Youth are *still at least* entitled to rational basis review. *See Am. Legion Post #149*, 164 Wn.2d at 609 ("If a suspect classification or fundamental right is not involved, rational basis review applies."). The superior court erred by not, at the least, allowing the Youth to present evidence and analyzing whether Respondents' systemic actions fail rationality review.

E. The Youth Alleged Viable Public Trust Claims

Respondents present no viable argument as to why courts lack jurisdiction to hear the Youth's claim of impairment to traditional public trust resources (tidelands, shorelands and navigable waters). As to extending the doctrine to the atmosphere, the Washington Supreme Court has purposely avoided limiting the doctrine when addressing a proposed expansion has been unnecessary to resolve presented claims. *See, e.g.*, *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232 n.5, 858 P.2d 232 (1993); *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004); *see also In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Were

the doctrine strictly limited to traditional trust resources, surely the Court would have taken one of these opportunities to say so and justify its departure from the doctrine's ancient roots. Op. Br. at 39-40.

Respondents argue the existence of air and water quality regulatory regimes means *ipso facto* that claims implicating those resources are to be resolved "under those regimes, not under the public trust doctrine." Resp. at 46. To the contrary, "[b]ecause of the doctrine's constitutional underpinning, any legislation [or regulatory action] that impairs the public trust remains subject to judicial review." *Chelan Basin Conservancy*, 190 Wn.2d at 266; *Wash. State Geoduck Harvest Ass'n v. Washington State Dep't of Nat. Res.*, 124 Wn. App. 441, 451, 101 P.3d 891 (2004) ("[W]e must determine whether DNR has violated the doctrine through its management regime."). Further, while the Youth allege impairment to public trust resources through Respondents' affirmative actions, CP 64, 69, the public trust doctrine also imposes on Respondents an affirmative duty to protect public trust resources. Op. Br. at 40-42. The Youth have alleged a viable public trust claim.

II. CONCLUSION

The Youth respectfully request that this Court reverse the Superior Court's erroneous dismissal of their Complaint.

Respectfully submitted this 24th day of April, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, I served one true and correct copy of the foregoing on the following individuals using electronic mail in accordance with the parties' electronic service agreement:

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APPENDIX

Washington State Constitution

Article I, Section 3
PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

Article I, Section 12
SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Article I, Section 30
RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

RCW 43.21A.010

Legislative declaration of state policy on environment and utilization of natural resources.

The legislature recognizes and declares it to be the policy of this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources. The legislature further recognizes that as the population of our state grows, the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic and other needs will place an increasing responsibility on all segments of our society to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.

RCW 43.21C.020(3)

The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RCW 70.105D.010

Declaration of policy.

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

(6) Because releases of hazardous substances can adversely affect the health and welfare of the public, the environment, and property values, it is in the public interest that affected communities be notified of where releases of hazardous substances have occurred and what is being done to clean them up.

RCW 70.235

70.235.005
Findings—Intent.

(1) The legislature finds that Washington has long been a national and international leader on energy conservation and environmental stewardship, including air quality protection, renewable energy development and generation, emission standards for fossil-fuel based energy generation, energy efficiency programs, natural resource conservation, vehicle emission standards, and the use of biofuels. Washington is also unique among most states in that in addition to its commitment to reduce emissions of greenhouse gases, it has established goals to grow the clean energy sector and reduce the state's expenditures on imported fuels.

(2) The legislature further finds that Washington should continue its leadership on climate change policy by creating accountability for achieving the emission reductions established in RCW 70.235.020, participating in the design of a regional multisector market-based system to help achieve those emission reductions, assessing other market strategies to reduce emissions of greenhouse gases, and ensuring the state has a well trained workforce for our clean energy future.

(3) It is the intent of the legislature that the state will: (a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020; (b) minimize the potential to export pollution, jobs, and economic opportunities; and (c) reduce emissions at the lowest cost to Washington's economy, consumers, and businesses.

(4) In the event the state elects to participate in a regional multisector market-based system, it is the intent of the legislature that the

system will become effective by January 1, 2012, after authority is provided to the department for its implementation. By acting now, Washington businesses and citizens will have adequate time and opportunities to be well positioned to take advantage of the low-carbon economy and to make necessary investments in low-carbon technology.

(5) It is also the intent of the legislature that the regional multisector market-based system recognize Washington's unique emissions portfolio, including the state's hydroelectric system, the opportunities presented by Washington's abundant forest resources and agriculture land, and the state's leadership in energy efficiency and the actions it has already taken that have reduced its generation of greenhouse gas emissions and that entities receive appropriate credit for early actions to reduce greenhouse gases.

(6) If any revenues that accrue to the state are created by a market system, they must be used to further the state's efforts to achieve the goals established in RCW 70.235.020, address the impacts of global warming on affected habitats, species, and communities, and increase investment in the clean energy economy particularly for communities and workers that have suffered from heavy job losses and chronic unemployment and underemployment.

70.235.010
Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Carbon dioxide equivalents" means a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential.

(2) "Climate advisory team" means the stakeholder group formed in response to executive order 07-02.

(3) "Climate impacts group" means the University of Washington's climate impacts group.

(4) "Department" means the department of ecology.

(5) "Director" means the director of the department.

(6) "Greenhouse gas" and "greenhouse gases" includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and any other gas or gases designated by the department by rule.

(7) "Person" means an individual, partnership, franchise holder, association, corporation, a state, a city, a county, or any subdivision or instrumentality of the state.

(8) "Program" means the department's climate change program.

(9) "Western climate initiative" means the collaboration of states, Canadian provinces, Mexican states, and tribes to design a multisector market-based mechanism as directed under the western regional climate action initiative signed by the governor on February 22, 2007.

70.235.020
Greenhouse gas emissions reductions—Reporting requirements.

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state:

(i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels;

(ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels;

(iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.

(b) By December 1, 2008, the department shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions in (a) of this subsection by using existing statutory authority and any additional authority granted by the legislature. Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.

(c) Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 limits any state agency authorities as they existed prior to June 12, 2008.

(d) Consistent with this directive, the department shall take the following actions:

(i) Develop and implement a system for monitoring and reporting emissions of greenhouse gases as required under RCW 70.94.151; and

(ii) Track progress toward meeting the emission reductions established in this subsection, including the results from policies currently in effect that have been previously adopted by the state and policies adopted in the future, and report on that progress.

(2) By December 31st of each even-numbered year beginning in 2010, the department and the *department of community, trade, and economic development shall report to the governor and the appropriate committees of the senate and house of representatives the total emissions of greenhouse gases for the preceding two years, and totals in each major source sector. The department shall ensure the reporting rules adopted under RCW 70.94.151 allow it to develop a comprehensive inventory of emissions of greenhouse gases from all significant sectors of the Washington economy.

(3) Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

70.235.030
Development of a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas—Information required to be submitted to the legislature.

(1)(a) The director shall develop, in coordination with the western climate initiative, a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020(1).

(b) By December 1, 2008, the director and the director of the *department of community, trade, and economic development shall deliver to the legislature specific recommendations for approval and request for authority to implement the preferred design of a regional multisector market-based system in (a) of this subsection. These recommendations must include:

(i) Proposed legislation, necessary funding, and the schedule necessary to implement the preferred design by January 1, 2012;

(ii) Any changes determined necessary to the reporting requirements established under RCW 70.94.151; and

(iii) Actions that the state should take to prevent manipulation of the multisector market-based system designed under this section.

(2) In developing the design for the regional multisector market-based system under subsection (1) of this section, the department shall consult with the affected state agencies, and provide opportunity for public review and comment.

(3) In addition to the information required under subsection (1)(b) of this section, the director and the director of the *department of community, trade, and economic development shall submit the following to the legislature by December 1, 2008:

(a) Information on progress to date in achieving the requirements of chapter 14, Laws of 2008;

(b) The final recommendations of the climate advisory team, including recommended most promising actions to reduce emissions of greenhouse gases or otherwise respond to climate change. These recommendations must include strategies to reduce the quantity of emissions of greenhouse gases per distance traveled in the transportation sector;

(c) A request for additional resources and statutory authority needed to limit and reduce emissions of greenhouse gas consistent with chapter 14, Laws of 2008 including implementation of the most promising recommendations of the climate advisory team;

(d) Recommendations on how projects funded by the green energy incentive account in **RCW 43.325.040 may be used to expand the electrical transmission infrastructure into urban and rural areas of the state for purposes of allowing the recharging of plug-in hybrid electric vehicles;

(e) Recommendations on how local governments could participate in the multisector market-based system designed under subsection (1) of this section;

(f) Recommendations regarding the circumstances under which generation of electricity or alternative fuel from landfill gas and gas from anaerobic digesters may receive an offset or credit in the regional multisector market-based system or other strategies developed by the department; and

(g) Recommendations developed in consultation with the department of natural resources and the department of agriculture with the climate advisory team, the college of forest resources at the University of Washington, and the Washington State University, and a nonprofit consortium involved in research on renewable industrial materials, regarding how forestry and agricultural lands and practices may participate voluntarily as an offset or other credit program in the regional multisector market-based system. The recommendations must ensure that the baseline for this offset or credit program does not disadvantage this state in relation to another state or states. These recommendations shall address:

(i) Commercial and other working forests, including accounting for site-class specific forest management practices;

(ii) Agricultural and forest products, including accounting for substitution of wood for fossil intensive substitutes;

(iii) Agricultural land and practices;

(iv) Forest and agricultural lands set aside or managed for conservation as of, or after, June 12, 2008; and

(v) Reforestation and afforestation projects.

70.235.040
Consultation with climate impacts group at the University of Washington—Report to the legislature.

Within eighteen months of the next and each successive global or national assessment of climate change science, the department shall consult with the climate impacts group at the University of Washington regarding the science on human-caused climate change and provide a report to the legislature summarizing that science and make recommendations regarding whether the greenhouse gas emissions reductions required under RCW 70.235.020 need to be updated.

70.235.050
Greenhouse gas emission limits for state agencies—Timeline—Reports—Strategy—Point of accountability employee for energy and climate change initiatives.

(1) All state agencies shall meet the statewide greenhouse gas emission limits established in RCW 70.235.020 to achieve the following, using the estimates and strategy established in subsections (2) and (3) of this section:

(a) By July 1, 2020, reduce emissions by fifteen percent from 2005 emission levels;

(b) By 2035, reduce emissions to thirty-six percent below 2005 levels; and

(c) By 2050, reduce emissions to the greater reduction of fifty-seven and one-half percent below 2005 levels, or seventy percent below the expected state government emissions that year.

(2)(a) By June 30, 2010, all state agencies shall report estimates of emissions for 2005 to the department, including 2009 levels of emissions, and projected emissions through 2035.

(b) State agencies required to report under RCW 70.94.151 must estimate emissions from methodologies recommended by the department and must be based on actual operation of those agencies. Agencies not

required to report under RCW 70.94.151 shall derive emissions estimates using an emissions calculator provided by the department.

(3) By June 30, 2011, each state agency shall submit to the department a strategy to meet the requirements in subsection (1) of this section. The strategy must address employee travel activities, teleconferencing alternatives, and include existing and proposed actions, a timeline for reductions, and recommendations for budgetary and other incentives to reduce emissions, especially from employee business travel.

(4) By October 1st of each even-numbered year beginning in 2012, each state agency shall report to the department the actions taken to meet the emission reduction targets under the strategy for the preceding fiscal biennium. The department may authorize the department of enterprise services to report on behalf of any state agency having fewer than five hundred full-time equivalent employees at any time during the reporting period. The department shall cooperate with the department of enterprise services and the department of commerce to develop consolidated reporting methodologies that incorporate emission reduction actions taken across all or substantially all state agencies.

(5) All state agencies shall cooperate in providing information to the department, the department of enterprise services, and the department of commerce for the purposes of this section.

(6) The governor shall designate a person as the single point of accountability for all energy and climate change initiatives within state agencies. This position must be funded from current full-time equivalent allocations without increasing budgets or staffing levels. If duties must be shifted within an agency, they must be shifted among current full-time equivalent allocations. All agencies, councils, or work groups with energy or climate change initiatives shall coordinate with this designee.

70.235.060
Emissions calculator for estimating aggregate emissions—Reports.

(1) The department shall develop an emissions calculator to assist state agencies in estimating aggregate emissions as well as in estimating the relative emissions from different ways in carrying out activities.

(2) The department may use data such as totals of building space occupied, energy purchases and generation, motor vehicle fuel purchases and total mileage driven, and other reasonable sources of data to make these estimates. The estimates may be derived from a single methodology using these or other factors, except that for the top ten state agencies in occupied building space and vehicle miles driven, the estimates must be

based upon the actual and projected operations of those agencies. The estimates may be adjusted, and reasonable estimates derived, when agencies have been created since 1990 or functions reorganized among state agencies since 1990. The estimates may incorporate projected emissions reductions that also affect state agencies under the program authorized in RCW 70.235.020 and other existing policies that will result in emissions reductions.

(3) By December 31st of each even-numbered year beginning in 2010, the department shall report to the governor and to the appropriate committees of the senate and house of representatives the total state agencies' emissions of greenhouse gases for 2005 and the preceding two years and actions taken to meet the emissions reduction targets.

70.235.070
Distribution of funds for infrastructure and capital development projects—Prerequisites.

Beginning in 2010, when distributing capital funds through competitive programs for infrastructure and economic development projects, all state agencies must consider whether the entity receiving the funds has adopted policies to reduce greenhouse gas emissions. Agencies also must consider whether the project is consistent with:

(1) The state's limits on the emissions of greenhouse gases established in RCW 70.235.020;

(2) Statewide goals to reduce annual per capita vehicle miles traveled by 2050, in accordance with RCW 47.01.440, except that the agency shall consider whether project locations in rural counties, as defined in RCW 43.160.020, will maximize the reduction of vehicle miles traveled; and

(3) Applicable federal emissions reduction requirements.

70.235.900
Scope of chapter 14, Laws of 2008.

Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 alters or limits any authorities of the department as they existed prior to June 12, 2008.

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