
THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals: No. 80007-8-I

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER AND DECISION BELOW

Thirteen Washington youth petition for discretionary review of the Published Opinion of Division I of the Court of Appeals, *Aji P. v. State*, No. 80007-8-I (Wash. Ct. App. Feb. 8, 2021) (App. A).[1]

II. ISSUES PRESENTED FOR REVIEW

1. Is declaratory relief regarding the constitutionality of government conduct final and conclusive under the Uniform Declaratory Judgment Act?

2. Did the Court of Appeals err in expanding the political question doctrine beyond its narrow scope to preclude review of a constitutional controversy involving government conduct that causes climate change?

3. Did the Court of Appeals err in holding the right to a healthful and pleasant environment, which has been recognized by vote of the people and the legislature as "fundamental and inalienable," is not a fundamental right?

III. STATEMENT OF THE CASE

This case presents a constitutional challenge to the State's energy and transportation policies and practices that result in high levels of greenhouse gas ("GHG") emissions that directly harm children. For over a decade the State has had a statutory mandate to reduce its GHG emissions, *see* RCW 70A.45.020 (formerly RCW 70.235.020 (2008)), and has spent

[1] The Youths' names are set forth on the caption of the Court of Appeals' decision. App. A at 1.

four decades studying the climate crisis, App. B ¶¶ 115–42. Yet Respondents persist in a systemic course of conduct that causes climate change.[2] The crux of this case is whether courts have the power to declare rights and wrongs under the constitution. Specifically, have Respondents "overstepped [their] authority under the constitution"[3] by causing climate change in a manner that infringes upon Petitioners' negative constitutional rights?[4] The Complaint details how Respondents control the State's energy and transportation system, the GHG emissions that result therefrom, and how Respondents' systemic affirmative actions in operating the State's energy and transportation system cause climate change. App. B ¶¶ 29–47, 143–48. The Complaint alleges how the youth are harmed by Respondents' conduct, such as Petitioners James and Kylie of the Quinault Indian Nation, who must relocate from their Taholah home because of climate change-

[2] Respondents recognize they are not on track to meet the 2020 GHG emissions reductions mandate, and according to the latest State-published data, emissions have steadily increased. App. B ¶ 142. Between 1990 and 2018, Washington GHGs increased from 90.49 MMT CO_2e to 99.57 MMT CO_2e. Dep't of Ecology, Pub. No. 20-02-020, *Wash. State Greenhouse Gas Emissions Inventory 1990–2018* at 13 (Jan. 2021), available at https://apps.ecology.wa.gov/publications/documents/2002020.pdf.

[3] *McCleary v. State*, 173 Wn.2d 477, 518–19, 269 P.3d 227 (2012) (the court's role is "to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries").

[4] Petitioners allege violations of enumerated due process rights to life, liberty, and property and unenumerated rights to reasonable safety, personal security, and bodily integrity under Wash. Const. art I, § 3 (claims 1, 2); and to a healthful and pleasant environment that includes a stable climate system that sustains human life and liberty under Wash. Const. art. I, §§ 3, 30 (claim 3). App. B ¶¶ 149–73. Petitioners alleged violation of rights under the public trust doctrine (claim 4), and to equal protection under Wash. Const. art. I, § 12 (claim 5). App. B ¶¶ 174–95. While the appeal was pending, Petitioners voluntarily dismissed claim 6, challenging the constitutionality of RCW 70.235. App. C.

induced flooding and sea level rise, and Petitioner India who evacuated her farm in Eastern Washington multiple times due to wildfires, the smoke from which exacerbates her asthma. *Id.* ¶¶ 12–28. The complaint also details how Respondents' conduct violates Petitioners' constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment which includes a stable climate system that sustains human life and liberty. *Id.* ¶¶ 143–95. While this case involves matters of weighty public importance, the need for review is much narrower—to address legal errors with broad jurisprudential implications.

First and foremost, Petitioners seek declarations of law pursuant to RCW 7.24.010 to resolve the controversy that Respondents' have violated and continue to violate their constitutional rights. App. B pp. 70–71; RCW 7.24.050 (declaratory relief intended to "terminate the controversy or remove an uncertainty."). Petitioners seek further relief in the form of an injunction to constrain Respondents "from acting pursuant to policies, practices, or customs that violate" Petitioners' constitutional rights consistent with RCW 7.24.080. App. B p. 71. Lastly, Petitioners seek an order requiring Respondents to prepare an inventory of GHG emissions and a remedial plan of their own devising "to implement and achieve science-based numeric reductions of GHG emissions." *Id.* at p. 72.

After filing an answer disputing that Petitioners have constitutional

rights infringed by Respondents' conduct, Respondents filed a Rule 12(c) motion for judgment on the pleadings. Without affording Petitioners an opportunity to present evidence in accordance with RCW 7.24.090 or leave to amend, the Superior Court dismissed the case with prejudice. App. D. The parties submitted briefing on appeal, App. E, and a number of Indian tribes and organizations filed seven *amicus curiae* briefs supporting Petitioners.[5] On February 8, 2021, the Washington Court of Appeals affirmed by published opinion erroneously finding the claims nonjusticiable political questions and ruling that declaratory relief was unavailable solely because Petitioners requested potential further relief. App. A at 19. Compounding its errors, the panel improperly proceeded to and rejected the merits of some of the claims without applying strict, or any other level of, scrutiny and without factual evidence. *Id*. at 20.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

A. The Panel's Decision Contradicts Seattle Sch. Dist. and the UDJA

Over forty years ago, this Court affirmed the long-standing principle that "[d]eclaratory procedure is peculiarly well suited to the judicial determination of controversies concerning constitutional rights[.]" *Seattle*

[5] (1) Sauk-Suiattle Indian Tribe; (2) the faith community; (3) the League of Women's Voters; (4) environmental groups; (5) Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish Tribe; (6) public health officials, public health organizations, and medical doctors; and (7) Washington businesses. App. F
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Sch. Dist. v. State, 90 Wn.2d 476, 490, 585 P.2d 71 (1978). Though the plaintiffs' requests for injunctive relief and to retain jurisdiction were ultimately rejected, this Court confirmed that claims for "a declaratory judgment to resolve a question of constitutional interpretation" are justiciable. *Id*. at 490. This Court's recognition that declaratory relief alone resolves systemic constitutional controversies aligns with the plain language of the UDJA and long-standing Washington precedent. RCW 7.24.010 (allowing declaratory relief "whether or not further relief is or could be claimed"); RCW 7.24.080; Wash. Sup. Ct. Civ. R. 8(a) ("Relief in the alternative or of several different types may be demanded.").

Here, the panel found that "declaratory relief would be final," which should have been sufficient under the UDJA.[6] App. A at 19. However, contrary to this Court's precedent and the plain language of RCW 7.24.010, the panel rejected declaratory relief as "inextricably tied to the retention of jurisdiction and to the order to implement the climate recovery plan*." Id.* In essence, Petitioners were punished with a finding of nonjusticiability for seeking "further relief," even though such relief is authorized by RCW

[6] On appeal, Respondents did not contest that there is an actual controversy under the UDJA, they only argued that the Court cannot provide a final and conclusive remedy through *injunctive* relief. App. E (State's Resp. Br. at 20). As such, this Court need not address the other UDJA requirements. *Wash. State Housing Finance Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 711 n.4, 445 P.3d 533 (2019). Declaratory relief would not constitute an advisory opinion because it would resolve the admitted controversy. *Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341 (1937).

7.24.080. The panel's finding directly conflicts with *Seattle School District,* which confirms declaratory relief alone can finally and conclusively resolve constitutional controversies, even if further relief is requested. 90 Wn.2d at 538. Here, a declaration would be final and conclusive because it would end the dispute that Respondents admit exists: whether their energy and transportation policies and practices keep GHG emissions at dangerous levels, infringing Petitioners' fundamental rights and causing immediate and long-lasting harms to their physical and mental wellbeing. If Petitioners can show this conduct violates their fundamental rights, such a declaration would be a final and conclusive determination of the controversy irrespective of whether any other relief is requested or granted.[7] *Id.*; *Ronken v. Bd. of Cty. Comm'rs of Snohomish Cty.*, 89 Wn.2d 304, 311, 572 P.2d 1 (1977); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 556–58, 496 P.2d 512 (1972); RCW 7.24.010.

This Court and the U.S. Supreme Court have long acknowledged the important role of declaratory relief in resolving constitutional controversies, *e.g.*, *Seattle Sch. Dist.*, 90 Wn.2d at 490 (collecting cases); *McCleary*, 173 Wn.2d at 539; *League of Educ. Voters v. State*, 176 Wn.2d 808, 816–18,

[7] *Found. on Economic Trends v. Watkins*, 731 F. Supp. 530, 531 (D.D.C. 1990) ("Although this Court may not be able to provide all the relief that the Plaintiffs request, a fair reading of the Complaint amply demonstrates that the Plaintiffs are challenging specific programs and projects upon which this Court can act . . . .").

295 P.3d 743 (2013), particularly in cases involving negative fundamental rights.[8] *See, e.g., First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (en banc) (controversy is justiciable because "the Court can reach a conclusive determination on the constitutionality of the" challenged ordinance). For purposes of justiciability, declaratory relief can stand on its own. *McCleary*, 173 Wn.2d at 540 ("[i]n *Seattle School District*, we deferred to ongoing legislative reforms and simply declared the funding system [unconstitutional]."); *Ronken*, 89 Wn.2d at 311 ("we find the declaratory aspect of the order declaring the rights and liabilities of the parties under applicable law is final."); *Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (court has a "duty to decide the appropriateness and the merits of [a] declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction.").[9]

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[8] *See also Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (declaratory relief changes the legal status of the challenged conduct); *Evers v. Dwyer*, 358 U.S. 202, 202–04 (1958) (ongoing governmental enforcement of segregation laws create actual controversy for declaratory judgment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("the consideration of appropriate relief was necessarily subordinated to the primary question – the constitutionality of segregation in public education."); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 Duke L. Journal 1091, 1120 (2014) ("Many of the most momentous and controversial decisions of constitutional law over the last century have been declaratory judgments, including *Powell v. McCormack*, *Roe v. Wade*, *Buckley v. Valeo*, *Bowers v. Hardwick*, *U.S. Term Limits, Inc v. Thornton*, and most recently *National Federation of Independent Business v. Sebelius*. No critic of any of these decisions has ever contended that it had less effect because it took the form of a declaratory judgment.")

[9] *See also* Harvard L. Rev. Ass'n, *Substantive Limits on Liability and Relief*, 90 Harv. L. Rev. 1190, 1248–49 (1977) (in systemic constitutional cases, "[t]he court's first step should be to issue a form of declaratory judgment, placing the defendants on notice of the

As a freestanding remedy, a declaratory judgment is effective relief because it terminates the controversy and carries an expectation that government officials will abide by the Court's interpretation of the constitution. *Seattle Sch. Dist.*, 90 Wn.2d at 506, 538 (court assumes "the other branches" will "carry out their defined constitutional duties" in response to declaratory relief); *Ronken*, 89 Wn.2d at 311–12; *Wash. State Coal. for the Homeless v. Dep.t of Soc. & Health Servs.*, 133 Wn.2d 894, 918, 949 P.2d 1291 (1997) ("a judicial determination [of] the authority and responsibility of the Department and of the juvenile court when involved with homeless children will be final and conclusive[.]").[10]

The panel mischaracterized Petitioners' justiciability burden by stating that the trial court would need to "stabilize the future global climate" to establish a final and conclusive remedy. App. A at 19. This is an absurd conclusion that is contrary to countless cases resolving fundamental rights. *See e.g. Brown v. Bd. of Educ.*, 347 U.S. at 495 (declaring school segregation unconstitutional even though such an order could not resolve issues of racism in schools). The panel's reasoning would lead to disastrous

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constitutional violation" so they can "remed[y] the violations on their own initiative;" further relief should only be considered if defendants fail to abide by declaratory relief).

[10] *Brown v. Vail* is not to the contrary. 169 Wn.2d 318, 237 P.3d 263 (2010) (declaration that lethal injection protocol violated *statute* would not bind Department of Corrections because agencies not before the Court had prosecutorial discretion whether to enforce violations of statute, even if declared). Here, it is presumed Respondents will comply with a declaration their conduct violates the *constitution*. *Seattle Sch. Dist.*, 90 Wn.2d at 506.

results for children where elimination of all contributing sources of injury is impossible. For example, courts cannot wholly eliminate child sexual abuse imagery online, but declare it illegal where found, just as courts cannot wholly eliminate racism against children in schools or child homelessness, but declare government conduct unconstitutional where found. The panel's reasoning disregards the court's "core function" "to safeguard the individual liberties . . . in our constitution's Declaration of Rights," which by their nature prevent *government* from harming individuals, irrespective of whether parties not bound by Washington's Constitution also cause harm.[11] Petitioners' do not ask Respondents to *solve* climate change; nor is that their burden. *See Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (a mere reduction in GHG emissions satisfies redressability even if requested relief "will not by itself *reverse* global warming"); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (Staton, J., dissenting). Petitioners have a right to be free from harms caused and exacerbated by *their* state government. This decision, if left standing, insulates any government conduct from review when full redress is not possible and ignores U.S. Supreme Court precedent that "the ability 'to effectuate a

[11] Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U. L. Rev. 695, 699 (Winter 1999).

partial remedy' satisfies the redressability[12] requirement." *Uzuegbunam v. Preczewski*, ___ U.S. ___, 2021 WL 850106 (Mar. 8, 2021) at *6 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

Underlying the panel's flawed justiciability analysis is a presumption that Petitioners' request for injunctive relief is somehow extraordinary or improper. Even aside from its mischaracterization of the requested injunctive relief as requiring new legislation,[13] without the benefit of evidence establishing the scope of the constitutional violation, it is impossible to predict what injunctive relief, if any, may ultimately be appropriate. *Baker v. Carr*, 369 U.S. 186, 198 (1963) ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate . . . ."); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation"). As in

[12] "The requirements for standing often overlap with the requirement that the lawsuit present a justiciable controversy." *Wash. State Housing Fin. Comm'n*, 193 Wn.2d at 711 n.4.

[13] The panel's reliance on *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 242 P.3d 891 (2010), and *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), is misplaced. Both asked the court to criminalize conduct deemed lawful by the legislature, which is not requested here. Furthermore, no new legislation is required for Respondents to develop a remedial plan. Respondents already have ample statutory authority, both express and implied. RCW 70A.45.020(b); RCW 43.21F.010; *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124–25, 864 P.2d 1382 (1994); App. B ¶¶ 29–45. Moreover, no additional statutory authority is needed for the Court to declare Petitioners' rights or to enjoin Respondents' ongoing unconstitutional conduct.

Seattle School District, the trial court may opt to order declaratory relief and leave it to Respondents to comply. *McCleary*, 173 Wn.2d at 547–48 (Madsen, C.J., concurring/dissenting) (court's job is to interpret the constitution, order compliance, and defer to the government for implementation). Even so, "[t]rial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it," including remedial plans and orders to reform unconstitutional state systems. *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174 (2015); *McCleary*, 173 Wn.2d at 546. This Court must grant review to correct the panel's legal error and clarify for all Washington courts that declaring what is right and wrong under the constitution "will be final and conclusive." *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157 (2016); *Acme Finance Co.*, 192 Wash. at 107.

B. The Panel Erroneously Expands the Political Question Doctrine

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid'" and the political question doctrine is a "narrow exception to that rule[.]" *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012). "[T]here should be no dismissal" on political question grounds unless one of the factors identified in *Baker v. Carr* is "inextricable from the case at bar." 369 U.S. at 217; *Seattle Sch. Dist.*, 90 Wn.2d at 507 (applying *Baker* factors); *Brown v. Owen*, 165 Wn.2d 706, 718–19, 722,

206 P.3d 310 (2009) (same). "The political question cases in Washington have fallen into several broad categories: initiatives, recall, political organizations, and gambling," none of which are presented here.[14] The panel's analysis turns the political question doctrine on its head, broadly forecloses constitutional claims and creates a conflict with U.S. and Washington Supreme Court case law.[15]

Looking under the first *Baker* factor to whether there is an exclusive and "textually demonstrable constitutional commitment of the issue" to another branch, 369 U.S. at 217, the panel egregiously found the general dedication of legislative authority to the legislature sufficient to foreclose Petitioners' constitutional claims. App. A at 9 (citing Wash. Const. art. II, § 1). To rule that this provision implicates the first *Baker* factor would broadly bar constitutional challenges to *all* legislation, eviscerating Article IV authority and the separation of powers. *Contra Rousso*, 170 Wn.2d at 75 (recognizing that while "[i]t is not the role of the judiciary to second-guess the wisdom of the legislature," the Court must still decide whether

[14] Talmadge, *supra* n. 11, at 713–14; *but see Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010) (reviewing the constitutionality of legislative ban on gambling and suggesting gambling is no longer a political question category).

[15] The panel cherry picked allegations to improperly focus its political question analysis on a concocted mischaracterization of the requested injunctive relief, *see Baker*, 369 U.S. at 198, while disregarding Petitioners' request for declaratory relief, which would suffice on its own. *Compare* App. A at 9 (citing App. B ¶ 114 alleging what experts opine is feasible with respect to decarbonizing Washington's energy and transportation systems, an essential allegation for a strict scrutiny analysis, not Petitioners' requested relief) *with* App. B pp. 70–72 (actual relief requested).

legislation violates the constitution). Moreover, the constitution contains no clear reference to the issue in this case: whether Respondents, by contributing to climate change through their energy and transportation policies and practices violate Petitioners' constitutional rights. As the panel itself acknowledged, "'our state constitution does not address state responsibility for climate change.'" *Id.* at 19 (quoting *Svitak v. State*, 178 Wn. App. 1020, 2013 WL 6632124 (2013) (unpublished)).[16]

Under the second *Baker* factor, the panel ruled there is no judicially manageable standard to resolve Petitioners' claims because "scientific expertise is required to make a determination regarding appropriate GHG emissions reductions[.]" App. A at 10. However, "the judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution," *Seattle Sch. Dist.*, 90 Wn.2d at 87; *Wyatt v. Aderholdt*, 503 F.2d 1305, 1314 (5th Cir. 1974) (the judiciary can formulate "workable standards" to declare systemic due process violations), and cannot avoid claims because they are complex or involve science. *Alperin v. Vatican Bank*, 410 F.3d 532, 555 (9th Cir. 2005);

[16] The panel reframed the legal issue to "whether the State's current GHG emissions statutes and regulations sufficiently address climate change." App. A at 8. This improper alteration is important because Petitioners framed their constitutional claims directly in response to *Svitak*'s admonition that a failure to act claim is nonjusticiable and that, as alleged here, there must be an "allegation of violation of a specific statute or constitution" for a claim to be justiciable. 2013 WL 6632124 at *1. GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) (en banc).[17] Moreover, the Court need only look to the standards the legislature set in RCW 70A.45 defining mandatory GHG emission reductions; standards to which Respondents' conduct is not aligned. App. B ¶¶ 44, 132, 142; App. G at 11 (Transcript of Ct. App. Oral Argument, "The Court: What about the argument that now there is a statute against which we can measure [Respondents' conduct]?").

Addressing the third *Baker* factor, the panel barred Petitioners' claims because "respondents have already made an initial policy determination" on GHG emissions through Ecology's Clean Air Rule. App. A at 10–11 (citing WAC Ch. 173-442).[18] Again the panel gets it backward: the third *Baker* factor is only applicable "in the *absence of a yet-unmade* policy determination," because courts review policy, not set it in the first instance. *Zivotovsky*, 566 U.S. at 204 (Sotomayor, J. concurring) (emphasis added); *Rousso*, 170 Wn.2d at 75. By the panel's reasoning, no challenge to any law would be justiciable, since each involves an "initial policy determination" the state "already made." In RCW 70A.45, the

[17] *See also*, Breyer, J., *Science in the Courtroom*, Issues in Science and Technology (2000) ("Scientific issues permeate the law . . . . [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm[.]")

[18] The panel omitted that this Court invalidated portions of the rule. *Ass'n of Wash. Bus. v. Ecology*, 195 Wn.2d 1, 455 P.3d 1126 (2020).

legislature mandated emissions reductions, yet emissions are increasing and exacerbating Petitioners' injuries, and determining whether Respondents' ongoing causation of climate change, contrary to that statutory directive, violates Petitioners' constitutional rights is consistent with the court's proper role. *Baker*, 369 U.S. at 217; *Seattle Sch. Dist.*, 90 Wn.2d at 496.

Under the fourth *Baker* factor, focusing only on Petitioners' request to retain jurisdiction—further relief that may never be ordered, as in *Seattle School District*—the panel held resolving Petitioners' claims[19] would disrespect coordinate branches because it "involves policing the legislative and executive branches' policymaking decisions." App. A at 11. Again, the panel's reasoning inverts Washington's separation of powers:

> [Constitutional] [i]nterpretation and construction . . . are traditional judicial functions and involve no disregard for or lack of respect due a coordinate branch of government. While the judiciary occasionally may find it necessary to interpret the State Constitution in a manner at variance with a construction given it by another branch, the cry of alleged 'conflict' cannot justify courts avoiding their constitutional responsibility.

Seattle Sch. Dist., 90 Wn.2d at 508. Here, the legislature recognized the

[19] Petitioners do not ask the court to determine "what policy approach to take" and "how to balance all implicated interests to achieve the most beneficial outcome[.]" *Contra* App A. at 12. They ask the court to use established frameworks for resolving constitutional challenges to review Respondents' existing energy and transportation policies and practices to determine whether they exceed constitutional limits. *Yim v. City of Seattle*, 194 Wn.2d 682, 688–90, 451 P.3d 694 (2019) (articulating "the proper standard to analyze a substantive due process claim under the Washington Constitution"); *In re Detention of Morgan*, 180 Wn.2d 312, 324 (2014) (detailing tiers of scrutiny).

right to a healthful and pleasant environment as "fundamental and inalienable" and mandated emissions reductions consistent with preserving a safe climate. RCW 43.21A.010; 70A.45. Determining whether, contrary to the Legislature's direction, Respondents are violating Petitioners' rights by exacerbating climate change is not only the courts' duty, it fully respects existing legislative policy. The *Baker* factors confirm that Petitioners' claims present no political question.[20] The panel's analysis to the contrary upends separation of powers and would broadly foreclose review of *all* constitutional claims in Washington.

C. This Case Raises A Significant Question of Washington Constitutional Law

After finding Petitioners' claims nonjusticiable, instead of putting their pens down, the panel erroneously dismissed "the merits" of two of Petitioners' three substantive due process claims without assuming the truth of Petitioners' allegations or affording Petitioners an opportunity to present evidence.[21] Ignoring Petitioners' alleged infringements of explicitly

[20] The panel's reliance on *Juliana v. United States*, which explicitly found that similar claims did not raise a political question, further highlights how its analysis conflicts with *Baker*. 947 F.3d at 1174 n.9. Indeed, all five judges (Federal Magistrate, District Court, and the three Court of Appeals judges) who considered whether the *Juliana* claims implicated the political question doctrine rejected its applicability.

[21] The panel's improper foray into the merits further highlights its erroneous conception of justiciability: if a case is nonjusticiable, it violates separation of powers to reach the merits, particularly without an evidentiary record. *See, e.g., In re Elliot*, 74 Wn.2d 600, 610, 446 P.2d 347 (1968) (there "cannot be decisional law on the question"); *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (declining to reach merits of nonjusticiable declaratory judgment action).

enumerated rights and recognized unenumerated liberty interests,[22] the panel summarily and erroneously concluded there is no fundamental right to a "healthful and pleasant[23] environment, which includes a stable climate system that sustains life and liberty." App A. at 20–27; App. B at 70.

The right to a healthful and pleasant environment is the *only* right the legislature and the electorate have enshrined as "fundamental and inalienable[,]" a status the Governor does not dispute here. *See* RCW 43.21A.010 ("it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment"); RCW 70A.305.010 (approved by citizen initiative Nov. 8, 1988, stating "[e]ach person has a fundamental and inalienable right to a healthful environment"); App. E (Governor declined to join sections of brief arguing there is no fundamental constitutional right to a stable climate). While this does not act as the final word on the right—only this Court's declaratory judgment will do that—it shows it has been subject to "public debate and legislative action," and is a vital part of Washington's social fabric.[24] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The people's

[22] *See* note 4, *supra*.

[23] For reasons unknown, the panel correctly identified the right in the beginning of its analysis, but later mischaracterized it as one to a "healthful and peaceful environment." App. A at 21, 23–27.

[24] Whether a constitutional right is "true" or "positive or negative" does not dictate whether the right exists or is justiciable, *contra* App. A at 22, it simply "informs the proper orientation for determining whether the State" violated the Constitution (i.e. the standard of review, such as strict scrutiny or rational basis). *See McCleary*, 173 Wn.2d at 518–19;

and legislature's enshrinement of the right assuages the concern that recognition "would transform substantive due process rights into the policy preferences of the court." App. A at 24. Furthermore, the use of the terms "fundamental and inalienable" is of constitutional import.[25] *See Leschi Imp. Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 280, 525 P.2d 7774 (1974) (en banc) (reference to the fundamental and inalienable right to a healthful and pleasant environment "indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state.").

Against this backdrop, it is legal error to assume, without affording Petitioners an opportunity to present evidence, that there is "no legal or social history" supporting the right to a healthful and pleasant environment. App. A at 25. Ecology, "the first agency in the country dedicated to environmental protection and improvement," recently celebrated "50 years of protecting Washington's land, air, and water."[26] Washington, and the

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Seattle Sch. Dist., 90 Wn.2d at 513 n.13. The panel's grave constitutional error on this point wrongly suggests that only "true," positive constitutional rights are protected and the State can run roughshod over negative constitutional rights.

[25] Black's Law Dictionary 674 (6th ed. 1990) (defining "fundamental law" as "the law which determines the constitution of government in states and prescribes and regulates the manner of its exercise; the organic law of a state; the constitution."); Black's Law Dictionary 903 (4th ed. 1957) (defining "inalienable" as "not subject to alienation; the characteristic of those things which cannot be bought or sold or transferred from one person to another, such as rivers and public highways, and certain personal rights; e.g. liberty.").

[26] Dep't of Ecology, *Ecology's first 50 years - a celebration*, https://ecology.wa.gov/About-us/Our-role-in-the-community/50-years [https://perma.cc/UN7R-KMR8] (last visited Jan. 17, 2021).

Indian tribes who have co-managed natural resources in the state from time immemorial, have a long legal tradition of protecting the environment.[27] *See State v. Dexter*, 32 Wn.2d 551, 556 202 P.2d 906 (1949) (state must not "stand idly by while its natural resources are depleted" and "where natural resources can be utilized and at the same time perpetuated for future generations, what has been called 'constitutional morality' requires that we do so."); *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 117, 508 P.2d 166 (1973) (SEPA "recogniz[es] the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environment and biosphere" and "promote[s] the welfare of humans."); *SAVE v. City of Bothell*, 89 Wn.2d 862, 871, 576 P.2d 401 (1978) (en banc) (connecting the right to a healthful environment with the welfare of people). The right's social history must be assessed on the basis of expert evidence, not judicial assumptions and citations to cases interpreting federal, not Washington, law. App. A at 23.

A proper and thorough fundamental rights analysis involves an empirical inquiry, decided on a full factual record. *See, e.g., Braam v. State*, 150 Wn.2d 689, 704, 81 P.3d 851 (2003) (affirming fundamental right after

[27] *See, e.g.*, Rachael Paschal Osborn, *From Loon Lake to Chuckanut Creek*: *The Rise and Fall of Environmental Values in Washington's Water Resources Act* ("1971 was a major year for environmental law in Washington State."); Rodgers, et al, *The Si'lailo Way: Indians, Salmon and Law on the Columbia River* (Carolina Academic Press 2006) (describing the long legal history of tribal efforts to protect salmon on the Columbia River).

trial and acknowledging courts must undertake "an exact analysis of circumstances"); *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 600–01, 192 P.3d 306 (2008) (finding no fundamental right to smoke based on factual summary judgment record); *Brown v. Bd. of Educ.*, 347 U.S. at 486 n.1 (four district court records); *Obergefell*, 576 U.S. 644 (2015) (three merits decisions and one preliminary injunction ruling). Given that this case concerns state conduct that "may hasten an environmental apocalypse," "an existential crisis to the country's perpetuity" that harms the lives and liberties of these children,[28] Petitioners should be permitted to present evidence supporting their constitutional claims.

V. CONCLUSION

Youth have now brought three cases to Washington courts seeking to protect their fundamental rights from Respondents' conduct. App. E (Appellants' Op. Br. at 6–10). At this late moment in our youths' struggle to slow the hastening of the environmental apocalypse and seek a judicial declaration of the constitutional wrongs against them, it is time this Court join the high courts around the world to hear this case and reverse the panel's legal errors that will not stand the test of time. For the foregoing reasons, this Court should accept review and reverse the panel's decision

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[28] *See Juliana*, 947 F.3d at 1164; *id.* at 1177 (Staton, J., dissenting).

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