No. 87198-1

SUPREME COURT OF THE STATE OF WASHINGTON

ADORA SVITAK, a minor child by and through her guardian, JOYCE SVITAK; TALLYN LORD, a minor child by and through his guardians JUSTIN LORD and SARA WETSTONE; HARPER LORD, a minor child by and through his guardians JUSTIN LORD and SARA WETSTONE; ANNA IGLITZIN, a minor child by and through her guardians DMITRI IGLITZIN and EILEEN QUIGLEY; JACOB IGLITZIN, a minor child by and through his guardians DMITRI IGLITZIN and EILEEN QUIGLEY; COLIN SACKETT, a minor child by and through his guardians BJ CUMMINGS and TOM SACKETT,

Petitioners,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her official capacity as Governor of Washington state; TED STURDEVANT, in his official capacity as Director of the Department of Ecology; PETER GOLDMARK, in his official capacity as Commissioner of Public Lands; PHIL ANDERSON, in his official capacity as Director of the Department of Fish and Wildlife,
Respondents.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Petitioners Adora Svitak, Tallyn Lord, Harper Lord, Anna Iglitzin, Jacob Iglitzin, and Colin Sacket, by and through their respective guardians (collectively "Our Children") respectfully submit this Reply brief for the Court's consideration. For the reasons set forth herein and in Our Children's Opening Brief, Our Children respectfully request that this Court reverse the superior court's decision dismissing the case.

II. ARGUMENT

A. The Washington Constitution Does Not Limit The Public Trust Doctrine to Tidelands and Shorelands

The State claims that the text and legislative history of Washington Constitution Articles XV and XVII illustrate that the Public Trust Doctrine does not apply to the atmosphere. However, the Public Trust Doctrine is also a state common law doctrine that carries Constitutional weight, and is not exclusively defined or limited by the Constitutional text.[1] *Caminiti v.*

[1] Individual states do have the authority to define the limits of lands held in the public trust. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). However, the State inappropriately uses this principle to argue that the public trust doctrine only applies to tidelands and shorelands. Washington has never relinquished its claims to other public trust resources. In fact, the statutory provisions cited in Our Children's Opening Brief show otherwise. Pet. Op. Br. p. 15-18. In addition, this principle does not mean that other state public trust jurisprudence "warrant no attention." State's Resp. Br. p. 16. The out-of-jurisdiction cases can be helpful to this Court when resolving an issue of first impression. *State v. Garland*, 169 Wash. App. 869, 875, 282 P.3d 1137 (2012) (looking to "well-articulated reasoning" in out-of-state case "[b]ecause this is an issue of first impression in Washington, little precedential authority is available to assist us in making our decision."); *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 164 Wash.

Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989 (1987). As Our Children's Opening Brief explained, the Public Trust Doctrine in Washington state is based upon ancient legal principles from Roman and English common law which predate the adoption of the Washington Constitution. *Caminiti*, 107 Wash. 2d at 668-69. The State does not refute that the elements of the Doctrine can be traced back hundreds, if not thousands, of years nor does it deny that historically the Doctrine applied to resources in addition to navigable tidelands and shorelands. Pet.'s Op. Br. p. 13-18.

The Washington case law confirms that this sovereign authority over all public trust resources exists, regardless of whether the authority was explicitly acknowledged in the text of the Constitution. *Eisenbach, et al. v. Hatfield*, 2 Wash. 236, 259, 26 P. 539 (1891) ("But, it did not require any such assertion [in the Constitution] to vest those lands [navigable shorelands and tidelands] in the state . . . ."). As this Court stated in *Caminiti*, Article XVII "was but a formal declaration by the people of rights which our new state possessed *by virtue of its sovereignty*, and which declaration had the effect of vesting title to such lands in the state." 107 Wash. 2d at 666-67 (emphasis added); *see also Rettkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 232, 858 P.2d 232 (1993) (stating that the Public Trust Doctrine is only "partially encapsulated" in Article XVII,

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App. 307, 317, 264 P.3d 268 (2011), *review granted by Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 173 Wash. 2d 1026, 273 P.3d 982 (2012) (same).

Section 1); *Robinson v. Silver Lake Ry. & Lumber Co.*, 153 Wash. 261, 274, 279 P. 1109 (1929) (stating that Article XVII, Section 1 "was but an assertion of a right which the new state had by virtue of its sovereignty"). Nothing about the history of or language in Articles XV and XVII limits or relinquishes the State's sovereign authority over other public trust resources, including the atmosphere.

Even if the Constitutional text or history suggested an intent to give up the State's inherent sovereign authority over other public trust resources (which it does not), such an abdication would be null and void. *See Caminiti*, 107 Wash. 2d at 666 ("The Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands."); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) ("The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."). Therefore, the Public Trust Doctrine in Washington is a legal doctrine that arises by virtue of the State's sovereignty and is not exclusively limited by the constitutional text.[2]

[2] The error in the State's argument is illustrated in the following statement: "Thus, the only constitutional limit on the Legislature's ability to alienate the public's interest in navigable waters relates only to harbor areas and is found in Article XV." State's Resp. Br. p. 11. As discussed above, it is the common law Public Trust Doctrine, *not* simply the constitution, that operates to constrain the Legislature's ability to abdicate its

B. Our Children Have Alleged that the State Has Abdicated Its Sovereign Dominion and Control Over Public Trust Resources

The State erroneously contends that the Public Trust Doctrine hinges on State ownership, i.e. title, of natural resources.[3] State's Resp. Br. p. 15. This claim has been plainly refuted by this Court:

> Thus it is that the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public. It is this principle which is referred to as the "public trust doctrine."

Caminiti, 107 Wash. 2d at 669-70. Therefore, the question is not whether the State "owns" the atmosphere and other public trust resources, but whether the State exerts sovereignty and dominion over these resources. If so, then the State's authority over these public trust resources is circumscribed by the Public Trust Doctrine. There is ample statutory authority that supports Our Children's contention that the Public Trust Doctrine applies to all natural resources over which the State has

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sovereign authority over public trust resources. *Caminiti*, 107 Wash. 2d at 670 (quoting *Ill. Cent. R.R.*, 146 U.S. at 453) ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.").

[3] The State's argument to limit the application of the Public Trust Doctrine to those resources owned by the State actually supports Our Children's position that the Public Trust Doctrine applies to fish and wildlife, in light of RCW 70.04.012 that plainly declares that "Wildlife, fish, and shellfish are the property of the state." This is a clear declaration of ownership. *State v. Moses*, 79 Wash. 2d 104, 113, 483 P.2d 832 (1971) ("[T]he state owns the fish in its sovereign capacity as the representative of and for the benefit of all people in common. This state has affirmed the rule of state sovereign ownership over wild animals, wild birds, and fish freely swimming in this state's waters.").

sovereign dominion and control. Pet.'s Op. Br. p. 15-18.

The State's argument is a classic example of the State having its cake and eating it too. The State asserts broad sovereign authority over all of the State's essential natural resources, but does not want to be held accountable for protecting those resources on behalf of the actual beneficiaries—present and future generations of this state. This Court should not condone this blatant abdication of the State's sovereign obligation to protect public trust resources on behalf of its citizens.

The State incorrectly claims that courts in this State have affirmatively declined to extend the Public Trust Doctrine beyond navigable tidelands and shorelands. State's Resp. Br. p. 13. In *Rettkowski*, the Court only peripherally discussed the Public Trust Doctrine and did not squarely address the question of whether it should apply to non-navigable waters or groundwater. 122 Wash. 2d at 232 n. 5 ("We similarly do not need to address the scope of the [public trust] doctrine."). Similarly, in *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, 570, 103 P.3d 203 (2004), the court stated, "we need not decide whether the public trust doctrine applies here." These cases were decided on grounds other than the Public Trust Doctrine and therefore do not illustrate a "refusal to extend" the Public Trust Doctrine. State's Resp. Br. p. 13. Here, for the first time, this Court is presented

with the issue of whether the Public Trust Doctrine applies to natural resources other than navigable tidelands and shorelands.

C. Navigation Is Not The Only Public Right Protected By The Public Trust Doctrine

On a few occasions, the State erroneously contends that navigation is the "central focus" of the Public Trust Doctrine and "the only right" protected by the Public Trust Doctrine. State Resp. Br. p. 11-13. This is a misstatement of the applicable law. *Phillips Petroleum Co.*, 484 U.S. at 476 ("[s]everal of our prior decisions have recognized that the states have interests in lands beneath tidal waters which have nothing to do with navigation"). While the early cases that the State cites[4] did analyze the public right of navigation (since that was the public right in issue), subsequent Washington (and other state) decisions have clarified that the Doctrine extends beyond the protection of navigation. Pet. Op. Br. p. 18. For example, in *Weden v. San Juan County*, this Court stated that "[t]he doctrine protects 'public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality.'" 135 Wash. 2d 678, 692, 958 P.2d 273 (1998) (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521,

[4] *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913); *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901).

524 (1992)).

Moreover, the "central focus" of the doctrine is not navigation, but public *access* to public trust resources for a variety of trust purposes. *Weden*, 135 Wash. 2d at 698-99 (doctrine entitled to a heightened degree of judicial scrutiny "due to the 'universally recognized need to *protect public access to and use of such unique resources* as navigable waters, beds, and adjacent lands' . . . ." (emphasis added)). Therefore while navigation is certainly a public right protected by the public trust doctrine, it is by no means the "central focus" of the doctrine. *See Orion Corp. v. State*, 109 Wash. 2d 621, 641, 747 P.2d 1062 (1987) (quoting *Wilbour v. Gallagher*, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969)) ("Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects. We have had occasion to extend the doctrine beyond navigational and commercial fishing rights to include 'incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes . . . .'"); *see also Phillips Petroleum Co.*, 484 U.S. at 476 n.5 (internal citations omitted) ("These cases lead us to reject the dissent's assertion that 'the fundamental purpose of the public trust is to protect commerce . . . .").

Importantly, in the Amended Complaint, Our Children allege harm from climate change to nearly all public rights associated with the public

trust resources in this State. In addition to the numerous allegations of harm to the atmosphere, Our Children allege harm to other public trust resources from climate change in the form of decreased water availability, increased stream temperatures, reduced salmon and other wildlife habitat, increased wildfires, decreased food availability for humans and wildlife, and extinction of bird species. CP 15, Am. Compl. ¶¶ 11-24, 28. Our Children also allege significant economic harm due to climate change, including harm to commerce and recreation associated with the waters of the state. *Id*. ¶ 29-30. These allegations, and the hypothetical facts that can be drawn from these allegations, suffice to show that Our Children have adequately alleged harm to public trust resources, and the public rights associated with those resources, in order to state a claim under the Public Trust Doctrine. *Tenore v. AT&T Wireless Servs.*, 136 Wash. 2d 322, 330, 962 P.2d 104 (1998) ("[A] plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record.").

D. The Public Trust Obligation Is More than A Restraint on Alienation

The State acknowledges that it holds particular state resources (tidelands and shorelands) in trust for the public, but asks this Court to define narrowly its trust obligation as simply a restraint on alienation.

State's Resp. Br. p. 15, 19. This argument ignores that the public trust responsibility necessarily includes, among other things, an affirmative duty to act to preserve public trust resources. Otherwise, the role of the trustee would be meaningless. The most basic and fundamental trust duty, as recognized in Washington and other state public trust case law, is the duty of protection of the trust resources. Pet. Op. Br. p. 24-27.

Due to the very limited case law defining the scope of a sovereign's public trust duty, Our Children urge this Court to look to other sources of trust law for guidance in declaring Our Children's rights under the Public Trust Doctrine. *See* note 1, *supra*. There are certain common, general principles of trust law that can be applied in the Public Trust context. For example, the fiduciary duty to ensure that the trust corpus is not substantially impaired thereby denying a trustee's right to access, use, and enjoy the trust corpus. *Ill. Cent. R.R.*, 146 U.S. 453. In the natural resource damages context, the National Association of Attorneys General[5] have acknowledged that the trust obligation includes an affirmative duty to protect the resource:

> [t]he states and the Federal Governments [sic] are trustees for the people, and . . . their trust corpus includes this nation's glorious natural resources. We, as trustees, have an obligation to protect these often irreplaceable resources

[5] Washington Attorney General Rob McKenna is a member of this organization. *See* National Association of Attorneys General, http://www.naag.org/current-attorneys-general.php (last visited November 13, 2012).

> from harm, and those that harm them have the obligation to restore them for all the people.

Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 Utah L. Rev. 141, 189 (internal citation omitted). The scope of Washington State's public trust duties should similarly be interpreted to include an affirmative duty to protect the public's interest in public trust resources.

The *Caminiti* test makes it clear that the State does have a fiduciary obligation to prevent substantial impairment to the public's interest in public trust resources. 107 Wash. 2d at 670. Moreover, one of the public interests protected by the doctrine is environmental quality, which confirms that there must be a duty to protect public trust resources as part of the Public Trust Doctrine. *Weden v. San Juan County*, 135 Wash. 2d 678, 700, 958 P.2d 273 (1998) ("[I]t would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."). Our Children are not seeking a particular level of "chemical content or quality" of the State's public trust resources. States' Resp. Br. p. 23. Rather, Our Children are seeking relief that will ensure that present and future generations have a right to access, use and enjoy the public trust resources in this State.

E. State Agency Defendants Have Public Trust Responsibilities

Our Children do not dispute that "the duty imposed by the public trust doctrine devolves upon the state, not any particular agency thereof." *Rettkowski*, 122 Wash. 2d at 232. The State is a defendant in this action. The State agencies were named as defendants because of the nature of the relief requested in this case and because the public trust jurisprudence makes it clear state agencies do have some public trust duties. The "State" does not generally act as a uniform body, but rather acts through its particular agents, such as the Governor, the Legislature, state agencies, courts, etc. All of these entities must comply with the Public Trust Doctrine.[6] Only these entities, as agents of the State, have the authority to implement the requested relief in this case.

Washington courts have confirmed that the named state agencies have a responsibility to manage natural resources under their jurisdiction in accordance with the Public Trust Doctrine. *Wash. State Geoduck*

[6] The State (through the Legislature) may delegate authority to state agencies to manage public trust resources, while retaining the ultimate responsibility to protect public trust resources. *See Ill. Cent. R.R.*, 146 U.S. at 453-54 ("In the administration of government the use of such [public trust] powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes."). The delegation of authority to manage trust resources to a subordinate agency need not explicitly reference the state's public trust obligation, if it is otherwise clear that the agency is charged with management of trust resources for the good of the public. *See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 799 (Mass. 2010).

Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 452, 101 P.3d 891 (2004) (finding that the public trust doctrine applies to the DNR's regulation of geoduck harvesting); *Lake Union Drydock Co., Inc. v. State DNR*, 143 Wash. App. 644, 658, 179 P.3d 844 (2008) (citations omitted) ("To implement this public trust, the Legislature expressly delegated authority to the DNR to manage state-owned aquatic lands for 'the benefit of the public . . . .'"); *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 99, 11 P.3d 726 (2000) (finding that Ecology can implement state public trust duties in its decision making through the "code provisions intended to protect the public interest").

While no state agency has been expressly delegated the task of creating an emissions reduction plan that fulfills the State's public trust responsibilities to protect all public trust resources from harm due to climate change (Our Children's requested injunctive relief),[7] each named agency respondent must implement their statutorily delegated duties to manage and protect the public trust resources under their jurisdiction in a way that complies with the Public Trust Doctrine. *See* Pet. Op. Br. p. 15-18. Our Children have filed this declaratory judgment action asking the Court to declare their rights as beneficiaries under the Public Trust

[7] This is the reason why Our Children's claims could not properly be pled as "failure to act" claims under the Administrative Procedures Act ("APA"). RCW 34.05.570 (4)(b); Section H, *infra*.

Doctrine. RCW 7.24.010. Each named agency's failures (and there are many) to protect public trust resources from harm due to climate change serve as examples of how the State has abdicated its sovereign dominion and control over these resources. As this case proceeds to the merits, Our Children intend to present evidence to support its allegations that the State has given up its dominion and control of the public trust resources by failing to take meaningful action to address climate change. Am. Compl. p. 21-22. That will necessarily include proof of how each named agency has failed to protect the public trust resources under their jurisdiction. The issue of whether the State has ceded control over public trust resources is a question of fact, and Our Children should have an opportunity to prove their case at the trial court level.

F. This Court is Entrusted with Enforcing, not Implementing, the Public Trust Doctrine

The State claims that Our Children "ask the Court to create a new climate change program . . . ." States' Resp. Br. p. 27. This is a gross misrepresentation of Our Children's requested relief and the Public Trust Doctrine. The judiciary is the branch of government entrusted with reviewing and enforcing the State's compliance with its public trust duties. *See* Pet.'s Op. Br. p. 29-32. Indeed, several Washington courts have adjudicated Public Trust Doctrine claims. *See*, *e.g.*, *Caminiti*, 107 Wash.

2d at 994-95; *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearing Bd.*, 92 Wash. 2d 1, 4, 593 P.2d 151 (1979). This case is unique in that it presents a stand-alone public trust claim. But that novelty should not deter the Court from adjudicating Our Children's claims. Our Children are seeking a form of relief that is perfectly appropriate in cases alleging that the State has failed to fulfill an affirmative duty. *See, e.g., McCleary v. State*, 173 Wash. 2d 477, 519, 269 P.3d 227 (2012) (stating that in the positive rights context, "the court is concerned not with whether the State has done too much, but with whether the State has done enough").

Without judicial review of the State's public trust responsibilities, the State's power to manage trust resources would go virtually unchecked.[8] Indeed, judicial review of the State's public trust obligations is rooted in, not violative of, the separation of powers doctrine that protects the public from political abuses and violations of law by one branch of government. *See Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1092 (Idaho 1983); *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991) (judicial review in the public trust context is rooted in our "constitutional commitment to the checks and balances of a government of divided

[8] That is especially true in this case where Our Children, and the future generations of this State, cannot vote to participate in the political process.

powers"); *see also* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 Eco. L. Quarterly 135, 146 (2000) (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 511 (1970)) ("the judiciary [has] a responsibility to examine whether the legislature has acted within the bounds of its regulatory power [and] to examine whether the state [as trustee] has acted in conformity with its 'special obligation to maintain the public trust.'"). Therefore, the judiciary not only has the ability, but also the duty, to review Our Children's claims that the State has violated its obligations under the Public Trust Doctrine.

G. A Political Issue Does Not A Political Question Make

The State claims that resolution of this case will require the Court "to balance the competing social, governmental, and business concerns involved in responding to global climate change." State's Resp. Br. p. 32. That is simply not the case. In this case, as in all previous public trust cases, this Court is called upon to assess: (1) whether the State has given up its right of control over the *jus publicum*; and if so, (2) (a) has the State promoted the interests of the public in the *jus publicum*, or (b) not substantially impaired it. *Caminiti*, 107 Wash. 2d at 670. Our Children's

requested injunctive relief is narrowly written to ensure that the State, not the Court, will be charged with the responsibility of developing the details and requirements of the emissions reduction plan that complies with the Public Trust Doctrine.

The fact that Our Children's requested injunctive relief includes a particular emissions reductions trajectory does not change this fact. Our Children must later prove to the Court that the requested injunctive relief is a necessary and proper means of bringing the State into compliance with their public trust obligation. This is a task that is plainly within the Court's purview. Just as this Court has been called upon to ascertain the nature of the State's paramount duty to amply fund education, Our Children are seeking a declaration regarding the scope of their legal rights under the Public Trust Doctrine. *McCleary*, 173 Wash. 2d at 485. If the Court finds that the State has in fact breached its fiduciary duty to protect public trust resources from harm due to climate change, the Court has the inherent authority to issue a remedy designed to bring the State into compliance. *Keller v. Keller*, 52 Wash. 2d 84, 88, 323 P.2d 231 (1958).

The State's attempt to conflate Our Children's claims that raise issues of dire public importance with political questions because the issues involve "matters of political and governmental concern" overreaches. State's Resp. Br. p. 31. First, because the Public Trust Doctrine acts as a

constraint on State power, the political question doctrine simply does not apply. *See McCleary*, 173 Wash. 2d at 519. Second, both cases relied upon for this proposition by the State, *Nw. Greyhound Kennel Ass'n v. State*, 8 Wash. App. 314, 506 P.2d 878 (1973) and *Nw. Animal Rights Network v. State*, 158 Wash. App. 237, 242 P.3d 891 (2010), are categorically different. Both cases do not involve the Public Trust Doctrine, which requires judicial enforcement. Furthermore, both cases raised questions that implicate issues that are squarely within the legislature's broad discretion to legislate pursuant to their police powers (professional gambling and animal cruelty, respectively).[9] In contrast, this case involves the State's inalienable sovereign obligation under the Public Trust Doctrine. The State simply does not have unfettered discretion to squander the State's public trust resources. *Caminiti*, 107 Wash. 2d at 670. The State cannot evade the judiciary's role by pointing to the unique nature or scope of the trust violations and obligations alleged. Also, just

[9] The Public Trust Doctrine is distinct from the State's police powers. *Caminiti*, 107 Wash. 2d at 669 (quoting *Ill. Cent. R.R.*, 146 U.S. at 453) (state can no more convey or give away this *jus publicum* interest than it can "abdicate its police powers in the administration of government and the preservation of the peace."). Indeed, some courts have invalidated legislative action that, while taken pursuant to police power, violated the public trust. *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 445 (N.D. Ill. 1990) (invalidating legislative land grant). The Public Trust Doctrine acts as a constitutional limitation on legislative power. *San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (holding that the state legislature cannot remove public trust restraints on its powers by passing a bill to eliminate the public trust doctrine from applying to water rights adjudication).

because "the case arises out of a 'politically charged' context does not transform the [] [c]laims into political questions." *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005). Therefore, because this case does not present a true political question for the judiciary to answer, the Court should deny the State's suggestion that the case is non-justiciable on these grounds.

H. Our Children's Claims Are Not Failure to Act Claims

There are fatal flaws to the State's argument that Our Children's public trust claims can only be pled as an APA failure to act claim or as a mandamus action. State's Resp. Br. p. 37-41. First, the State's argument reads too much into one sentence in the Amended Complaint: "Defendant State of Washington has failed to implement our State's existing laws or mandate additional laws for the benefit of the people of the state of Washington, including Our Children, and to affirmatively protect the vital public trust resources of this state." CP 15, Am. Compl. ¶ 67. This one sentence does not turn this case into a "failure to act"[10] or mandamus claim.[11] Similarly, this one sentence does not transform Our Children's

[10] "A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance." RCW 34.05.570(4)(b).

[11] A writ of mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is

claims into an action to compel government agencies to enforce laws. *Bainbridge Citizens United v. Dep't of Natural Res.*, 147 Wash. App. 365, 198 P.3d 1033 (2008). Unlike the case in *Bainbridge Citizens United*, Our Children's requested relief does not seek to force the named State respondents to enforce any particular laws or regulations because there are no particular laws or regulations that protect all public trust resources from harm due to climate change. Rather, this sentence contains one allegation of how the State has breached its fiduciary duty to protect public trust resources by using its sovereign authority. Our Children intend to present evidence to support this allegation as this case proceeds to the merits. Our Children's actual requested relief does not demand the enactment of new laws, nor does it seek implementation of existing statutory or regulatory laws. CP 15, Am. Compl. ¶¶ 72-98.

Second, and perhaps most importantly, the requested relief in this case cannot be obtained in an APA failure to act case. RCW 34.05.574. Our Children are requesting this Court to declare Our Children's common law and Constitutional legal rights under the Public Trust Doctrine and to "terminate the controversy or remove an uncertainty" regarding the scope of the Public Trust Doctrine in Washington state. RCW 7.24.010; RCW 7.24.120 (UDJA is designed "to settle and to afford relief from uncertainty

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entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person." RCW 7.16.160.

and insecurity with respect to rights, status, and other legal relations."). In light of the legal controversy made clear by the State's position that the atmosphere is not a protected public trust resource, Our Children could not allege that the State has failed "to perform a duty that is required by law to be performed." RCW 34.05.570 (4)(b). Similarly, since there is a dispute regarding the scope of the Public Trust Doctrine, it cannot be alleged that a state official has a "clear duty to act" to protect public trust resources from harm due to climate change, as would be the case if a statute so stated or if this were not a case of first impression. Thus, a mandamus action is not available. *See Paxton v. City of Bellingham*, 129 Wash. App. 439, 444, 119 P.3d 373 (2005) (quoting *In re Dyer*, 143 Wash. 2d 384, 398, 20 P.3d 907 (2001) ("Mandamus is an appropriate means to compel a state official 'to comply with law when the claim is clear and there is a duty to act.'"). Finally, Our Children are not appealing any particular final "agency action." RCW 34.05.020(3) ("'Agency action' means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.").

I. RCW 70.235 Does Not Preclude Judicial Review

The legislature's passage of RCW 70.235, which addresses greenhouse gas emissions reductions, does not limit the Court's ability to

grant the requested injunctive relief in this case. The State cites *Pasado's Safe Haven v. State*, 162 Wash. App. 746, 259 P.3d 280 (2011), for the false proposition that a court will never grant relief that may conflict with an existing statute. State's Resp. Br. p. 34. The State's argument mischaracterizes the nature of Our Children's claims and is refuted by this Court's decision in *McCleary*. 173 Wash. 2d 477. In *McCleary*, the Court had jurisdiction to hear the case, even though the requested relief may have conflicted with existing legislation. *Id*. at 545-46. Similarly here, Our Children are challenging the State's compliance with its affirmative fiduciary duty to protect public trust resources. As this case proceeds to the merits, the State can certainly argue that the passage of RCW 70.235 fulfills its public trust responsibilities (it does not), but the mere existence of RCW 70.235 does not render this case nonjusticiable under the UDJA.

In *Pasado's Safe Haven*, plaintiffs solely sought a declaration that a statute regarding the humane slaughter of livestock was partially (not fully) unconstitutional. 162 Wash. App. at 749. The Court concluded that the relief requested "is not obtainable because partial invalidation of the Act would effect a result not intended by the legislature." *Id.* at 761. But here, the question of whether the State has fulfilled its public trust responsibilities is a question committed to the judiciary. *Caminiti*, 107

Wash. 2d at 670. Moreover, the State omits analysis of a crucial distinguishing factor in the *Pasado's* case:

> Pasado's claim is not justiciable because the relief sought cannot be granted. However, this is not the equivalent of a CR 12(b)(6) failure to state a claim upon which relief can be granted. *Were Pasado's to be determined to be correct on the merits of one or more of its constitutional challenges (a decision we do not make) some form of relief could be granted.* However, Pasado's does not request – and does not want - that relief. Rather, here, it is the specific relief sought by Pasado's – partial invalidation of the Act – that cannot be granted.

162 Wash. App. at 762 n. 10 (emphasis added). Here, Our Children are not asking the Court to partially or wholly invalidate RCW 70.235. If the Court grants Our Children's sole request for injunctive relief,[12] that could only be done after the Court grants Our Children's requests for declaratory relief by finding that the State has not fulfilled its public trust responsibilities. As opposed to the *Pasado's* case, in the instant case there is clearly "some form of relief [that] could be granted." 162 Wash. App. at 762 n. 10. Therefore, Our Children's claims do not run afoul of the separation of powers doctrine.

[12] Our Children "seek a judicial order directing the Defendants to exercise and implement their fiduciary duties to protect public trust resources, including the atmosphere, by developing a plan that promotes the public's interest in public trust resources and does not substantially impair the resources, and that identifies and requires carbon reduction measures of at least 6% on an annual basis, based upon identification of 2012 as the year carbon emissions in Washington peak, sufficient to achieve a target of at least 350 ppm by the end of this century." CP 15, Am. Compl. ¶ 101.

J. A Judicial Determination Would Be Final And Conclusive

The State claims that a court order directing it to protect public trust resources from harm caused by climate change cannot provide final and conclusive relief to Our Children's claims. The relief requested in this case does not require this Court to resolve the global climate crisis. Rather, Our Children are seeking to resolve the parties' dispute regarding the scope and coverage of the Public Trust Doctrine in Washington state. Pet. Op. Br. p. 4. A judicial determination of the issues raised in this case will "conclusively resolve" the parties' dispute. *To-Ro Trade Shows*, 144 Wash. 2d 403, 417, 27 P.3d 1149 (2001).

The requested injunctive relief of an emissions reduction plan based upon best available science is needed for this State to fulfill its public trust responsibilities to protect public trust resources from substantial impairment due to climate change. That there are other sources outside of the State's control that contribute to the harm occurring to public trust resources does not render this Court without jurisdiction to resolve Our Children's claims. As the California Supreme Court noted in another public trust case: "[I]t is in the interest of the parties and the public that a determination be made; even if that determination be but one step in the process, it is a useful one." *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 718 n.14 (Cal. 1983) (internal quotation

omitted). Judicial recognition of a sovereign's responsibility to protect the atmosphere as a public trust resource is a necessary and important step in the climate change crisis. Such recognition is squarely within the province of this Court's power under the UDJA when dealing with common law issues such as the Public Trust Doctrine. The Public Trust Doctrine is the only source of law that can be judicially enforced to ensure that the sovereign governments fulfill their fiduciary duties to present and future generations of their citizens.

K. The State is the Only Proper Party In A Public Trust Enforcement Action

Defendants claim that the Plaintiffs have failed to join indispensible parties "[b]ecause a judgment in favor of Plaintiffs would impair or impede at least some of these [hypothetical] businesses' and individuals' ability to protect their interests . . . ." State's Resp. Br. p. 46. By contending that every Washington state citizen and business must be joined as parties, the Defendants mischaracterize the Plaintiffs' requested relief and ask this Court to apply an unprecedentedly broad standard for joinder that is not justified by the facts or law applicable to this case.

The joinder of every Washington citizen or business is not necessary to resolve this controversy. The cases cited by the Defendants all involve situations in which the real, actual interests of nonparties to the

action would be severely prejudiced or harmed if the Court were to grant the relief requested. *See, e.g., Nw. Animal Rights Network*, 158 Wash. App. at 240 (finding that nonparties' conduct would be criminalized "by judicial fiat"); *Nw. Greyhound Kennel Ass'n*, 8 Wash. App. at 319 (nonparties licensed under the challenged act would have their existing rights "destroyed"). The State's claim that "the emissions reductions Plaintiffs seek *could* impact activities in any sector of the state's economy" shows that their argument is entirely speculative. State's Resp. Br. p. 45 (emphasis added). *See Town of Ruston v. City of Tacoma*, 90 Wash. App. 75, 82, 951 P.2d 805 (1998) (concluding that nonparties were not necessary parties because although the legal relationship of the nonparties could change due to the action, the change was speculative and secondary to the issues at hand).[13]

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein, Our Children respectfully request that this Court accept direct review of this case and overturn the superior court's decision dismissing the case.

[13] Moreover, since the State and State agencies are the named Defendants in this action, presumably the State will act in the best interests of the public when developing a plan that complies with the mandates of the public trust doctrine. *See Smith v. Wash. Ins. Guar. Ass'n*, 77 Wash. App. 250, 260, 890 P.2d 1060 (1994) (failure to join a nonparty need not result in dismissal if the interested party already has a designated representative as a party in the action). Further, no interested parties have sought to intervene in the case.

RESPECTFULLY SUBMITTED this 26th day of November, 2012,

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DECLARATION OF SERVICE

I, Andrea K. Rodgers Harris, hereby declare that on this day I caused this Petitioner's Reply Brief to be served on the Respondents via electronic mail in accordance with the parties electronic service agreement.

Stated under oath this 26th day of November, 2012, in Seattle Washington.

s/ Andrea K. Rodgers Harris
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