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,

Plaintiffs/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 & Wildlife,

Defendants/Respondents.

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

Through an unprecedented common law theory, Plaintiffs request that the Court legislate new climate change policy in Washington and impose that policy on the legislative and executive branches. For reasons that fall into three categories, Plaintiffs have not carried their burden to state a claim for relief and cannot invoke the Court's subject matter jurisdiction.

First, Plaintiffs have failed to state a claim because their public trust doctrine theory is not based on existing law. Washington's public trust doctrine applies only to navigable waters and lands beneath them, not the atmosphere. Even if it applied to the atmosphere, the doctrine only limits state actions that alienate the public's interest in the use of the resource. The doctrine cannot be used to compel affirmative state action to reduce carbon dioxide emissions.

Second, Plaintiffs' request fails to state a claim because it violates the separation of powers doctrine. Plaintiffs ask the Court to create a new regulatory program that would either require the Legislature to enact new laws or involve the Court in making legislative decisions. In the absence of a constitutional mandate compelling legislative action, a judicial order granting the requested relief improperly invades the role of the legislative branch.

Third, Plaintiffs' claims are not actionable under the Uniform Declaratory Judgment Act (UDJA). They do not seek a declaration of rights under existing law, but instead complain of the government's "failure to act." Such claims must be brought under the Administrative Procedure Act and the mandamus statute. Additionally, the relief sought would not redress their alleged harms, and they fail to join indispensable parties, thereby failing to properly invoke the Court's subject matter jurisdiction.

At its core, Plaintiffs' complaint is that the State is not doing enough to remedy global climate change impacts. By arguing that Plaintiffs' claim should be dismissed, the State does not minimize the seriousness of global climate change. Indeed, the Legislature has enacted numerous statutes establishing standards and reductions for carbon dioxide emissions. The Governor has issued executive orders declaring the State's response to climate change a priority for the State and state agencies are taking a number of actions to respond to climate change. However, Plaintiffs' declaratory judgment action is not the correct vehicle to address their grievance. Because Plaintiffs fail to state a claim for relief and fail to properly invoke the Court's subject matter jurisdiction, the trial court did not abuse its discretion when it declined to exercise jurisdiction over this case. The Court should affirm the trial court's dismissal.

II. ISSUES PRESENTED

1. Do Plaintiffs fail to state a claim for relief where the public trust doctrine does not apply to the atmosphere or require that the State take affirmative actions to protect the atmosphere?

2. Do Plaintiffs fail to state a claim for relief under the separation of powers doctrine where they ask the Court to create a new carbon dioxide emissions reduction program?

3. Did the trial court act within its discretion when it dismissed Plaintiffs' declaratory judgment action because the case seeks to compel government action, the requested judicial relief cannot redress the complained-of injuries, and Plaintiffs do not join indispensable parties?

III. STATEMENT OF THE CASE

The State has taken numerous actions to respond to global climate change. The Legislature has enacted statutes and the Governor has issued executive orders addressing Washington's carbon dioxide emissions.[1] A 2008 statute established greenhouse gas emission reduction levels for Washington intended to achieve emissions equal to 1990 levels by 2020, 25 percent below 1990 levels by 2035, and 50 percent below 1990 levels

[1] *See, e.g.,* RCW 70.235; RCW 70.120A; RCW 47.01; Executive Orders 07-02 and 09-05, a*vailable at* http://www.governor.wa.gov/execorders/eo_07-02.pdf and http://www.governor.wa.gov/execorders/eo_09-05.pdf (last visited Sept. 26, 2012).

by 2050.[2] As a result, Department of Ecology (Ecology) adopted a plan describing actions necessary to achieve these reductions and adopted rules to require greenhouse gas sources to report their annual emissions.[3] Ecology uses these emissions reports to monitor and track progress toward meeting the statewide reductions.[4] Every other year, Ecology also compiles an inventory of greenhouse gas emissions from all significant sectors in Washington.[5]

In addition, Washington's state agencies have taken other actions to respond to climate change. For example, Ecology and the Department of Licensing have implemented motor vehicle greenhouse gas emissions standards for certain passenger cars and trucks to address the transportation sector (the sector with the largest amount of greenhouse gas emissions in Washington).[6] The Department of Transportation has also developed strategies to reduce vehicle miles traveled under statutory benchmarks.[7] To address major industrial source emissions, Ecology and the Energy Facility Site Evaluation Council have implemented a federally

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[2] RCW 70.235.020(1)(a).
[3] RCW 70.235.020(1)(b), (1)(d)(i); RCW 70.94.151(5)(a); WAC 173-441.
[4] RCW 70.235.020(1)(d)(ii).
[5] RCW 70.235.020(2).
[6] *See* RCW 70.120A.010; WAC 173-423. Transportation emissions represent 44.8 percent of Washington's 2008 greenhouse gas emissions. *See* Ecology, *Washington State Greenhouse Gas Emissions Inventory 1990-2008*, December 2010, *available at* https://fortress.wa.gov/ecy/publications/publications/1002046.pdf (last visited Sept. 26, 2012).
[7] *See* RCW 47.01.078(4), .440; RCW 47.80.023(1); RCW 47.38.070.

delegated program that requires major new or modified stationary sources of carbon dioxide (and other pollutants) to obtain permits and reduce emissions using best available control technology.[8] Ecology has also adopted a regulatory program to ensure new energy plants meet strict greenhouse gas emissions performance standards.[9] These standards include a schedule for substantially reducing emissions from the Centralia Coal Plant, Washington's largest single source of carbon dioxide emissions.[10]

Plaintiffs brought their case because they believe that these (and other) state actions are insufficient and because they want the Court to remedy climate change impacts in Washington State. Plaintiffs allege that the State has failed to implement existing laws and failed to enact new laws. Yet, their case does not directly challenge any specific state action or inaction.

Instead, Plaintiffs filed a declaratory judgment action against the Governor, the directors of the state Departments of Ecology and Fish and Wildlife, the Commissioner of Public Lands, and the State of Washington. CP 1.[11] In their UDJA case, Plaintiffs seek a declaration that the public

[8] *See* RCW 70.94.860; WAC 173-400-720; WAC 463-78-005.
[9] RCW 80.80.040.
[10] RCW 80.80.040(3)(c).
[11] Plaintiffs also intend to seek relief against the State Legislature. Opening Brief at 47.

trust doctrine applies to the atmosphere. They also seek a holding that the State has a fiduciary duty to reduce carbon dioxide emissions according to best available science by 6 percent per year to achieve global atmospheric carbon dioxide concentrations of 350 parts per million (ppm) by the year 2100.[12] CP 35–36, ¶ E. Because they believe the State has breached the fiduciary duty they describe, Plaintiffs seek creation of a regulatory program to achieve these reductions, with the court retaining continuing jurisdiction over the matter for the next 88 years. CP 35–36, ¶¶ E, G.

The State moved to dismiss Plaintiffs' declaratory judgment action for failure to state a claim and for lack of subject matter jurisdiction. The superior court granted the State's motion to dismiss without explicitly stating which of the State's arguments it had adopted, and Plaintiffs seek direct review in this Court. CP 57.

[12] In the complaint, Plaintiffs use "carbon", "carbon dioxide" (or "CO_2"), and "greenhouse gases" (or "GHG") interchangeably when referring to emissions and/or atmospheric concentrations. For simplicity's sake and because the distinction is not relevant to the legal arguments made herein, we uniformly use "carbon dioxide" when referring to emissions and atmospheric concentrations. Plaintiffs describe their requested relief in two different ways. *Compare* CP 2, ¶ 1 (seeking carbon dioxide emissions reductions of 6 percent per year through 2100) with CP 20, ¶ 44 (seeking carbon dioxide emissions reductions of 6 percent per year through 2050, and 5 percent per year through 2100). Again, for simplicity's sake and because the distinction is not relevant to the legal arguments made herein, we uniformly describe Plaintiffs' requested relief as seeking 6 percent per year reductions through 2100.

IV. ARGUMENT

A. Standard Of Review

A trial court's dismissal for failure to state a claim upon which relief under CR 12(b)(6) can be granted is a question of law reviewed de novo. *Cutler v. Phillips Petroleum Co*., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is also reviewed de novo. *Todric Corp. v. Dep't of Revenue*, 109 Wn. App. 785, 788 n.2, 37 P.3d 1238 (2002).

Under the UDJA, courts have discretion to determine whether to entertain a declaratory judgment action. A trial court's decision not to consider such an action is reviewed for an abuse of discretion, except that questions of law are reviewed de novo. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001); *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). An abuse of discretion exists only when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Gildon*, 158 Wn.2d at 493.

B. The Public Trust Doctrine Does Not Apply To The Atmosphere Or Require The State To Take Affirmative Actions To Regulate Carbon Dioxide Emissions

Plaintiffs assert that Washington's public trust doctrine is the source of law that warrants declaratory judgment in their favor. They claim that the public trust doctrine applies to all "essential natural

resources," in particular the atmosphere, and that the doctrine further requires state "protection for natural resources" in America. Opening Brief at 1–4. This claim fails as a matter of law for several reasons. First, in making their sweeping assertion that the doctrine applies to every natural resource in Washington, Plaintiffs ignore controlling precedent that applies the public trust doctrine only to navigable waters and lands beneath them. *Caminiti v. Boyle*, 107 Wn.2d 662, 668–70, 732 P.2d 989 (1987). Second, where it applies, the doctrine operates only to restrict alienation of the resource where alienation impairs the public's traditional interest in using the resource. It does not create an affirmative or fiduciary duty for the State to act. It does not impose obligations to ensure a particular quality of the resource and it does not provide authority for executive branch officials to act in reliance on the doctrine, absent express statutory authority. Because the public trust doctrine cannot support their claim, Plaintiffs have failed to state a claim for declaratory and injunctive relief.

1. The Public Trust Doctrine Exists Purely As A Matter Of State Law, Requiring A Focus On The Origin Of The Doctrine In Washington State

Over the past 100 years, the United States Supreme Court has repeated the principle that the public trust doctrine develops on a state-by-state basis, subject only to the paramount "federal power to regulate

vessels and navigation under the Commerce Clause and admiralty power." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012). All fifty states "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) (citing *Shively v. Bowlby*, 152 U.S. 1, 26, 14 S. Ct. 548, 38 L. Ed. 331 (1894)). Because the public trust doctrine is defined on a state-by-state basis, the scope of the public trust doctrine in Washington depends solely on the Washington Constitution, Washington statutes, and Washington case law.

The origins of the public trust doctrine in Washington begin with adoption of the state constitution. Policy choices over the management, control, and disposition of harbors and tidelands presented the "most vexing and politically sensitive problem confronting the [constitutional] convention." *Hughes v. State*, 67 Wn.2d 799, 804, 410 P.2d 20 (1966), *rev'd on other grounds*, 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967).

Delegates to the constitutional convention were presented with the option of preserving in perpetuity the State's title in all tidelands and shorelands to manage in trust for the public, or allowing the sale of such lands into private ownership to expand the local tax base, and for

reclamation and development.[13] *State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035 (1913), *rehearing denied twice in reported opinions* at 78 Wash. 158 (1914), and 86 Wash. 1 (1915). The delegates first reached agreement on Article XV regarding harbor areas. Section 1 directs the Legislature to provide for the appointment of a commission whose duty is to designate harbor areas wherever navigable waters lie in front of the corporate limits of any city.[14] This section contains an absolute restriction: "The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines . . . ." Const. art. XV, § 1. Sale or relinquishment of the state's control of the water area inside the harbor is similarly prohibited, and "forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce", *id.*, except that harbor areas may be leased for up to 30 years for purposes of navigation or commerce. Const. art. XV, § 2. [15]

For all other aquatic lands not in and beyond harbor areas (extending out into the water along harbor lines), the delegates ultimately

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[13] For a more detailed analysis of these debates s*ee* Charles K. Wiggins*, The Battle for the Tidelands in the Constitutional Convention* (three-part article), 44 Wash. St. B. News 15 (Mar. 1990), 44 Wash. St. B. News 15 (Apr. 1990), 44 Wash. St. B. News 47 (May 1990).

[14] The Harbor Line Commission designates a harbor area by drawing an inner harbor line closer to the shore and an outer harbor line further out in the water. RCW 79.115.010.

[15] *See* diagram attached as Appendix A describing lands in and beyond harbor areas.

agreed upon a compromise in Article XVII. *Hughes*, 67 Wn.2d at 805. Article XVII, section 1 asserts the State's ownership of beds and shores of navigable waters, but does not place any restrictions on the State's disposition of these lands, leaving that policy determination up to future legislatures. *Id*. 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.

Early Washington courts considering the State's management of aquatic lands established that "[t]he *only right* which the state has ever undertaken to maintain in trust for the whole people is the right of navigation." *See Sturtevant*, 76 Wash. at 165 (emphasis added) (citing *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904)); *see also City of New Whatcom v. Fairhaven Land Co*., 24 Wash. 493, 503, 64 P. 735 (1901) (the State reserved the right to regulate the waters of Lake Whatcom and to grant the bed of the lake to private ownership, "subject to the paramount right of public use for navigation").[16] These early cases

[16] In cases where private or public projects complied with existing statutory limits, large areas of navigable waters have been developed and reclaimed to the exclusion of the public without relinquishing the public's overall navigational rights. *See*, *e.g.*, *Hill v. Newell*, 86 Wash. 227, 231–32, 149 P. 951 (1915) (the State's abandonment of a section of the former Duwamish River bed after a river straightening project extinguished the public's ability to navigate the former river section); *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 776, 505 P.2d 457 (1973) (allowing the filling of private tidelands in front of abutting landowner's property blocking access over that property to the water and explaining "[t]he notion that all tidelands must be left in their

set the stage for more modern cases discussing the public trust doctrine in Washington State. As explained below, Plaintiffs' arguments that Washington's public trust doctrine already includes, or should be extended to include, the atmosphere (Opening Brief at 12) ignore this established body of case law.

2. The Public Trust Doctrine In Washington Applies Only To Navigable Waters And Underlying Lands

a. Washington's Case Law And Statutes Apply The Public Trust Doctrine Exclusively To Navigable Waters And Underlying Lands

Washington's public trust doctrine provides that the public has an interest in the use of navigable waters and underlying lands for navigation, and the State, as sovereign over those waters and lands, holds the public's interest in trust and (in most cases) cannot alienate it. *Caminiti*, 107 Wn.2d at 669. In recognizing that the doctrine applies exclusively to this public interest, *Caminiti* also acknowledged that the doctrine applies to activities incidental to navigation, including fishing, boating, swimming, water skiing, and other recreation corollary to navigation and the use of public waters. *Caminiti*, 107 Wn.2d at 669 (citing *Wilbour v. Gallagher,* 77 Wn.2d 306, 316, 462 P.2d 232 (1969)). *Caminiti's* reference to activities incidental and corollary to navigation

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natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood").

did not, however, expand the doctrine beyond its central focus on navigable waters and underlying lands. It simply described the traditional public uses of such waters and lands. Neither *Caminiti* nor *Wilbour* referenced, or in any way hinted, that the doctrine applies outside the singular context of navigable waters and underlying lands.

No Washington cases support expanding the public trust doctrine beyond navigable waters and underlying lands. With one exception, all of the Washington cases cited by Plaintiffs involve navigable waters, including geoduck clams that are part of the fishery corollary to the public's interest in navigation. Opening Brief at 11–18. In the single cited case not involving navigable waters, the Court refused to extend the doctrine, finding that the public trust doctrine was not germane to regulation of non-navigable water or groundwater. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993) (invalidating Ecology's regulatory enforcement order to irrigators to stop groundwater withdrawals that impaired ranchers' senior water rights). Further, in a case not cited by Plaintiffs in the relevant section of their brief, the court of appeals declined to extend the public trust doctrine beyond its specific focus on navigable waters, stating that no case in Washington had applied the public trust doctrine to terrestrial wildlife or resources. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d

203 (2004). Plaintiffs point to no Washington authority for applying the public trust doctrine beyond navigable waters and underlying lands.

Beyond case law, none of the state statutes cited by Plaintiffs are evidence of a public trust doctrine that includes the atmosphere. The purpose section of the State Environmental Policy Act expresses the Legislature's desire to coordinate actions so "that the state and its citizens may . . . [f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations." RCW 43.21C.020(2)(a). This aspirational statement does not reference the public trust doctrine and cannot be said to evince legislative intent to extend the doctrine to the atmosphere.

The legislative findings and policies section of the Shoreline Management Act (SMA) recites goals related to limiting reduction of public rights in navigable waters. RCW 90.58.020. The SMA, however, solely regulates state shorelines. *See* RCW 90.58.080, .140. The SMA has no findings or policies that extend the public trust doctrine to the atmosphere, and the atmosphere is nowhere addressed in the Act.

Similarly, the Legislature's declaration of public policies and purpose in the Washington Clean Air Act establishes the policy goal of preserving, protecting, and enhancing air quality. RCW 70.94.011. However, the Act implements those policies through, among other things,

regulatory permitting and the application of air quality and emission standards. *See*, *e.g.*, RCW 70.94.331(2), .152. Not one of the state statutes cited by Plaintiffs mentions the public trust doctrine, let alone assigns to any state agency a specific responsibility to apply the public trust doctrine to the atmosphere.[17] Nor do any of the cited statutes include language creating a cause of action under the public trust doctrine.[18]

Plaintiffs argue that the State's alleged dominion and control over "essential natural resources" supports the public trust doctrine's application to those resources. Opening Brief at 12–18. Plaintiffs' argument is based on a misconception of the doctrine and fails for two reasons. First, the doctrine hinges on the State's ownership of particular state resources (navigable waters and underlying lands) that the State holds in trust for the public. *Caminiti*, 107 Wn.2d at 668–69. No case in Washington holds that the public trust doctrine applies to a resource based upon the State's dominion and control of the resource. Second, Plaintiffs fail to point to any authority in Washington suggesting the State

[17] Another statute Plaintiffs cite, RCW 77.04.012, creates general mandates for the Fish and Wildlife Commission to provide for conservation of wildlife and fish, to authorize taking of these resources at specified times and places, and to maximize fishing and hunting opportunities. There is no mention of the public trust doctrine or creation of claims under the doctrine applicable to the atmosphere.

[18] If these statutes were a viable source of authority for applying the public trust doctrine to the atmosphere in Washington, Plaintiffs would need to plead their case under the statutory provisions.

has ownership of the global atmosphere.[19]

In sum, there are no cases or statutes in Washington that authorize the public trust doctrine's application to the atmosphere.

b. Out-Of-State Sources Are Not Relevant To The Scope Of Washington's Public Trust Doctrine, And Even If They Were, None Of The Cited Sources Supports Plaintiffs' Argument

As discussed above, each state independently defines the scope of its own public trust doctrine subject only to federal navigational interests. *See supra* section IV.B.1. Given this principle, the out-of-state sources cited by Plaintiffs warrant no attention.[20] Even if these sources had

[19] Because the global atmosphere is shared by the entire world, the State questions whether any state can claim ownership of the atmosphere in a manner similar to its ownership of navigable lands and waters (or other natural resources) within the State's jurisdiction.

[20] Plaintiffs cite United States Supreme Court cases, federal statutes, state cases from other jurisdictions, law review articles, and the United Nations Framework Convention on Climate Change (UNFCCC) in support of their argument that the public trust doctrine applies to the atmosphere. Two cited Supreme Court cases from the 1800s focus on the doctrine's restrictions on colonial and statutory grants of tidelands in other states. Opening Brief at 2, 11, 13. Another addresses Connecticut's authority to regulate wild game. *Id*. at 2. These cases do not address the recent history, development, and scope of the doctrine in Washington. Nor do they mandate a particular application of the doctrine in Washington. Similarly, Federal Clean Water Act, 33 U.S.C. § 1370, and federal Clean Air Act, 42 U.S.C. § 7416, savings clauses do not mention the public trust doctrine, or determine the scope of state common law claims. In addition, none of the law review articles cited appear to point to a single published case that has applied the public trust doctrine to the atmosphere. *See In re Marriage of Pape*, 139 Wn.2d 694, 721 n.2, 989 P.2d 1120 (1999) (Madsen, J., dissenting) (while treatises, law review articles, and reports "may make for interesting reading, they are certainly not law"). Finally, the UNFCCC applies to the United States, imposes no binding greenhouse gas reduction requirements, and makes no statements that would support extending Washington's unique common law public trust doctrine to the atmosphere. UNFCCC, adopted May 9, 1992, 31 I.L.M. 849.

precedential value (which they do not), none of the sources applies the public trust doctrine to the atmosphere.[21]

Plaintiffs do not cite a single appellate case applying the public trust doctrine to the atmosphere. Instead, Plaintiffs cite a recent letter ruling by the 201st District Court in Texas that affirmed the dismissal of a rulemaking petition seeking to have Texas respond to climate change in a particular manner. *See Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-002194 (Dist. Ct. Tex. Aug. 2, 2012) (200th Dist. Ct. Judge G. Triana presiding). Opening Brief, Appendix B. There, *Bonser-Lain* requested that the Texas Commission on Environmental Quality adopt a regulation under Texas's public trust doctrine that would reduce carbon dioxide emissions by at least 6 percent per year. *Bonser-Lain* Plaintiffs' Original Petition at 2, attached as Appendix B. The district court found the commission's refusal to rulemake a reasonable exercise of discretion. But in its letter ruling, the court opined, based upon a Texas constitutional provision, that the scope of Texas's public trust doctrine covered all of the state's natural resources (not just water). *Bonser-Lain*, No. D-1-GN-11-002194 at 1.

[21] Four of the five cases cited involve issues related to the navigational water resource. Opening Brief at 13, 18–19. The fifth relates to the applicability of California's public trust doctrine to wildlife. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 597, 599, 166 Cal. App. 4th 1349 (2008) (dismissing action for declaratory and injunctive relief against a windfarm for wind turbines' impacts on birds).

Plaintiffs seize upon the *Bonser-Lain* opinion as purported support for this case. However, the Washington Constitution nowhere establishes a state duty to protect the state's natural resources. In sharp contrast, the Texas constitution contains an express positive mandate to the Texas legislature to pass laws to develop, conserve, and preserve the public's right in *all* natural resources. *See* Texas Const. art. XVI, § 59(a).

Other recent out-of-state trial court decisions that address legal theories similar to those advanced here do not persuasively support Plaintiffs' claims in this case. Those decisions have either dismissed the comparable claims or the trial court has not made a final determination, and, therefore, they do not support application of Washington's public trust doctrine to the atmosphere.[22]

3. The Public Trust Doctrine Operates Only To Restrict Alienation That Impairs The Public's Interest In Using The Resource

Even if the public trust doctrine were to apply to the atmosphere, Plaintiffs still cannot state a claim for relief. The doctrine operates to restrict alienation that impairs the public's interest in use of the resource. But, it does not impose an affirmative or fiduciary duty upon the State to

[22] The State is aware of 13 actions seeking application of the public trust doctrine to the atmosphere where a court has issued a decision. Though none of these cases have precedential value in Washington, and all but one of them resulted in dismissal of plaintiffs' claims, a summary of those cases is attached to provide a complete picture of the current legal landscape for these claims. *See* Appendix C.

act. It does not impose obligations to ensure a particular quality of the resource, and executive branch Defendants cannot act under the doctrine absent express statutory authority.

a. The Public Trust Doctrine Does Not Create An Affirmative Duty For State Officials To Act To Protect The Resource

The public trust doctrine is a *limitation on* state and private *action* that would alienate (*e.g.*, transfer the State's ownership interest in) navigable waters and their underlying lands and, in so doing, impair the public interest in the use of those resources for navigation. *Caminiti*, 107 Wn.2d at 670. The doctrine does not create an affirmative duty to act. Nor does it create a cause of action against the State based on an alleged failure to take such affirmative action. Indeed, under the controlling test for whether the doctrine has been violated, the Court analyzes:

> (1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* [right of navigation and the fishery] and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.

Id. at 670 (emphasis added).

Plaintiffs argue the *Caminiti* test applies to the State's alleged failure to act because the test focuses on "whether" the State has given up control, not "how" the State has given up control. Opening Brief at 23.

This argument distorts the plain language of the test. The test asks "whether the state, *by the questioned legislation*, has given up its right of control . . . ." *Caminiti*, 107 Wn.2d at 670 (emphasis added). Therefore, to apply the test, the Court must ask whether the State's *action* has given up the State's right of control over the public's interest in navigation.

In *Caminiti,* the Court scrutinized a specific state action—a statute that allowed private docks to be installed over public tidelands without payment of rent—and determined that the State had not given up its right of control. *Id.* at 665–66. All of the other Washington cases cited by Plaintiffs similarly apply the test to an action that allegedly forfeits control over the public interest, not to an alleged *failure* of the State to act. *See, e.g., Orion Corp. v. State*, 109 Wn.2d 621, 641–42, 747 P.2d 1062 (1987) (holding a private developer's proposal to fill second class tidelands could have violated the public trust doctrine); *Wilbour*, 77 Wn.2d at 309 (private landowner's filling shorelands on Lake Chelan);[23] *Wash. State Geoduck Harvest Ass'n v. Dep't of Natural Res.*,

[23] Plaintiffs rely on *Wilbour* to encourage this court to engage in a "logical extension of establish[ed] law" to create an affirmative State duty. Opening Brief at 26–27. However, apart from noting the doctrine's application to incidental activities related to navigation, *Wilbour* did not extend established law. *Wilbour* required removal of fill from shorelands that blocked access to Lake Chelan across the shorelands. *Wilbour*, 77 Wn.2d at 313–16. There is nothing in *Wilbour* that provides a basis for extending Washington's public trust doctrine to require the State to affirmatively act to protect the atmosphere. And even if applied to the atmosphere, *Wilbour* might at most support a suit against entities blocking the use of navigable airspace, but it would not support a suit seeking to compel affirmative State action to address climate pollution.

124 Wn. App. 441, 444, 101 P.3d 891 (2004) (State's affirmative management of geoduck harvests). Opening Brief at 24–25.

Similarly, cases Plaintiffs cite from other jurisdictions do not support use of the public trust doctrine as a basis for a failure to act claim. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–54, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) (reviewing the State of Illinois' statutory grant of the entire harbor fronting Chicago to a railroad company); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.*, 33 Cal. 3d 419, 452, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (reviewing a state agency's water right permit approvals and finding the state was required to consider public trust doctrine restrictions when making water allocation decisions).[24] In sum, even if Washington's public trust doctrine applied to the atmosphere, Plaintiffs fail to point to any authority for applying the doctrine to require affirmative state actions based upon the State's alleged failure to act.

[24] Cases cited at pages 24–27 of Plaintiff's Opening Brief have no precedential value in Washington because they do not address Washington's public trust doctrine nor do they support use of the public trust doctrine to require the State to take affirmative acts to protect the atmosphere. Of those cited cases, only one involved a claim against governmental entities seeking to require action under the public trust doctrine. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006). In *Kelly*, the plaintiffs argued that the state agency failed to enforce its water quality permit and violated the public trust doctrine by allowing a development company to discharge pollutants into the water. *Id*. at 211–12. Even there, in finding for the state because of a lack of evidence, the court appeared to focus on the affirmative permitting actions of the agency instead of relying on the public trust principles uniquely embodied in Hawaii's constitution. *Id.* at 228–34.

b. General Principles Of Trust Law Do Not Apply To Washington's Public Trust Doctrine

The affirmative financial obligations and fiduciary duties embodied in general trust principles do not apply to the public trust doctrine. *See* Opening Brief at 27. The common law doctrine, for instance, does not create financial obligations that might give rise to a failure to act claim. The doctrine does not require the State to maximize income for the benefit of the public or to refrain from imprudent or speculative investments, as is the case in other settings where the State's fiduciary duties derive from explicit laws. *See*, *e.g.*, Washington's Enabling Act, ch. 180, 25 Stat. 676, § 11 (1889), and Const. art. XVI (requiring the state to manage school and grant lands in trust and prohibiting disposal of trust lands below market value). *See also Skamania Cnty. v. State*, 102 Wn.2d 127, 132–33, 136, 685 P.2d 576 (1984) (finding the Legislature violated its trust obligations imposed by the Enabling Act, Const. art. XVI, and RCW 76.12.030 when it enacted legislation that excused defaulting timber purchase contracts). No Washington law mandates that the State manage the atmosphere as a fiduciary or maximize the profit from use of the atmosphere.[25] Thus,

[25] One other state that considered this question recognized the inherent conflict between a general trustee's fiduciary obligation to maximize profit versus the public's interest in using natural resources subject to a public trust. *See*, *e.g.*, *Brooks v. Wright*, 971 P.2d 1025, 1032–33 (Alaska 1999) (finding general trust principles do not control

there is no legal support to conclude that Washington's public trust doctrine imposes a fiduciary duty or somehow invokes general trust principles.[26]

c. The Public Trust Doctrine Does Not Impose Obligations To Ensure A Particular Quality Of The Resource

Even if the public trust doctrine applied to the atmosphere, the doctrine protects the public's interest in the *use* of the navigational resource. There are no cases in Washington that apply the doctrine to protect the *chemical contents or quality* of a resource. So, even if the doctrine applied to the atmosphere (and it does not), it would presumably apply in the same way it applies to navigable waters and underlying lands. It would limit alienation of the use of the navigable airspace, but it would not impose obligations to ensure a particular quality of the state's air resources. *Caminiti*, 107 Wn.2d at 670.

Alaska's management of natural resources, which must be managed for the benefit of all people under the state constitution).

[26] Neither of the two cited out-of-state cases actually applied general trust law principles to the issues before those courts. *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist*., 733 P.2d 733, 739–40 (Idaho 1987) (remanding action against state to determine whether the public trust doctrine applied and making only passing reference to trust administration principles); *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169, 174 (Ariz. Ct. App. 1991) (in action to invalidate portions of a statute allowing the sale of river bed lands, court compared state duty to that of private trustee to emphasize that the actions of both are judicially reviewable, but made no reference to positive fiduciary duties).

d. The Public Trust Doctrine Does Not Provide Independent Authority For Agency Heads To Regulate Emissions Absent Express Statutory Authority To Do So

Absent express statutory authority, the public trust doctrine does not provide independent authority for state officials to act. Thus, it cannot provide a basis for a failure to act claim in this case.

The executive branch Defendants have only those powers granted them by the constitution or statute.[27] *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 813, 6 P.3d 30 (2000) (citing *Young v. State*, 19 Wash. 634, 637, 54 P. 36 (1898)); *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.,* 121 Wn.2d 776, 780, 854 P.2d 611 (1993). This Court has repeatedly recognized that state agencies cannot rely on the public trust doctrine as an independent source of regulatory authority, absent express statutory authorization. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 98–99, 11 P.3d 726 (2000) (finding public trust doctrine did not authorize Ecology's denial of groundwater appropriation permits independent of code provisions governing the appropriations; and, resolving the case based upon those code provisions); *R.D. Merrill Co. v. State*, 137 Wn.2d 118, 133–34, 969 P.2d

[27] The Commissioner of Public Lands is a statewide-elected position created by the Constitution, but his powers are defined by the Legislature just as with the other Defendant state agency heads. *See* Const. art. III, § 23. The Commissioner acts as the administrator of the Department of Natural Resources. *See* RCW 43.30.105¶¶.

458 (1999) (finding public trust doctrine provides no guidance on Ecology's authority to render decisions regarding water right change applications because the only allowable guidance is that found in the water code); *Rettkowski,* 122 Wn.2d at 231–33 (finding Ecology's order precluding groundwater appropriation is not supported by public trust doctrine where enabling statute does not give Ecology statutory authority to assume the state's public trust duties and regulate in order to protect the public trust). This conclusion is further supported by the principle that absent an express statutory statement to the contrary, "the duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof." *Id.* at 232.

Plaintiffs have pointed to no constitutional or statutory authority directing the Governor or agency heads to regulate carbon dioxide emissions under the public trust doctrine. Absent such authority, Plaintiffs have failed to state a claim against Governor Gregoire, Commissioner Goldmark, Director Anderson, or Director Sturdevant.

4. Plaintiffs' Allegations Do Not State A Claim Under The Test In *Caminiti*

Recognizing the public trust doctrine has not been applied to the atmosphere, Plaintiffs try to fit their claim under the traditional doctrine. They allege that sea level rise, attendant changes to shorelines, and ocean

acidification, which are caused by global warming, harm the public's interest in the traditional navigational resources. CP 93; Opening Brief at 37. However, these alleged harms to navigation fail to warrant relief under *Caminiti* for two reasons. First, *Caminiti* allows relief only if the State has given up control of the public's interest in navigable waters, and then only if the State's giving up that control impairs the public's interest *in navigation*. *Caminiti*, 107 Wn.2d at 670. Plaintiffs baldly assert adverse impacts to commerce and recreation, CP 15, ¶ 30, but they fail to allege that the State has given up control of the public's interest in the use of navigational resources. Second, even if Plaintiffs had alleged some State action that gives up control, they do not allege how sea level rise or acidification would impair the public's ability to use the waters for navigation. Plaintiffs' allegations are not sufficient to state a claim for relief under the traditional public trust doctrine.

Even if *Caminiti* applied to a broader scope of resources, Plaintiffs' legal theory that the State has given up control of air resources by failing to act is not supported by their factual allegations. Plaintiffs acknowledge in their complaint that the Legislature has in fact established statewide carbon dioxide reduction levels, and the Governor and state agencies are taking actions to control sources of carbon dioxide emissions in Washington. CP 21, ¶ 45; 12, ¶ 25. Rather than show that

the state has relinquished control over Washington's air resources, these actions illustrate the opposite—the exercise of state control. *See Citizens for Responsible Wildlife Mgmt.*, 124 Wn. App. at 568, 570 (finding that even if the public trust doctrine did apply to state wildlife, the State did not give up control because the initiatives and numerous other statutes and regulations showed the State's exercise of control).

Plaintiffs point to no legislative or executive action that has transferred ownership or control to private parties of the State's air resources, let alone the Earth's atmosphere, as required by the test in *Caminiti*. Therefore, as a matter of law, they have failed to state a claim for relief, and the trial court's decision should be affirmed.

C. The Declaration And Relief Sought Would Violate The Separation Of Powers Doctrine

Plaintiffs' declaratory judgment action asks the Court to create a new regulatory program that would either require the Legislature to enact new laws, or involve the Court making legislative decisions. The trial court did not err when it dismissed Plaintiffs' case because the requested declaration and relief would violate the separation of powers doctrine.

1. No Language In The State Constitution Compels The Legislature To Take Specific Actions To Protect The Atmosphere

Plaintiffs ask the Court to create a new climate change program—

one that requires 6 percent annual reductions of carbon dioxide emissions in Washington State. The nature of the declaration and relief sought anticipates either that the Court itself will create this new program, or the Court will somehow order the Legislature to create the new program. Either way, Plaintiffs' requested declaration and relief are precluded by the separation of powers doctrine.

The power of the Legislature is "practically absolute," except where either the United States Constitution or state constitution imposes limits on legislative power. *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 225, 191 P.2d 241 (1948) (quoting Thomas Cooley, 1 *A Treatise on the Constitutional Limitations* 345 (8th ed. Carrington 1927)). The judiciary's role over the Legislature is limited to ensuring *constitutional* compliance:

> The courts are not the guardians of the rights of the people of the State, *except as those rights are secured by some constitutional provision which comes within the judicial cognizance*. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when its conflicts with the Constitution.

Id. (quoting 1 *Constitutional Limitations* 345) (emphasis added); *see also State ex rel. Webster v. Super. Ct. of King Cnty.*, 67 Wash. 37, 46, 120 P.

861 (1912) ("Within the limits of its constitutional warrant the Legislature is supreme.").

Judicial authority to *compel* legislative action is certainly no broader than the authority to limit action. Thus, in order to avoid encroaching on the legislative role, courts do not order the Legislature to take action on a matter unless the constitution requires such legislative action, and even then, judicial relief is narrowly tailored. *See McCleary v. State*, 173 Wn.2d 477, 541, 269 P.3d 227 (2012) (finding the trial court's remedy "crosses the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty"). In order for Plaintiffs' case against the Legislature to proceed, this Court must find some language expressed in the constitution, or necessarily implied, requiring the Legislature to take action to protect the atmosphere against climate change. *Cf. McCray v. United States*, 195 U.S. 27, 54, 24 S. Ct. 769, 49 L. Ed. 78 (1904) (a court striking down constitutionally compliant legislation on the basis of it being unwise or unjust would be an "act of judicial usurpation").

No language in the state constitution compels the Legislature to take specific actions to protect the atmosphere. Plaintiffs argue that the Legislature's alleged public trust duty to protect the atmosphere "is akin to a positive constitutional right: a right that flows from a constitutionally

imposed duty on the State and one that the State cannot 'invade[] or impair[].' " Opening Brief at 33 (quoting *McCleary*, 173 Wn.2d at 518). Plaintiffs' attempted analogy to the State's public education duty fails. While the Washington Constitution imposes an affirmative and "paramount" duty on the Legislature to make "ample provision" for public education under article IX, section 1, it imposes no duty on the Legislature to manage the atmosphere as a public trust asset. Because Plaintiffs' proposed declaration finds no constitutional origins, granting Plaintiffs' proposed remedy would violate the separation of powers doctrine.

2. Plaintiffs' Requested Relief Invades The Legislature's Policy-Making Role

Even in cases where plaintiffs have raised actual constitutional issues, courts have invoked the separation of powers doctrine in refusing to "be drawn into tasks more appropriate to another branch[.]" *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009) (declining to interfere with the lieutenant governor's parliamentary and discretionary ruling regarding a supermajority vote requirement). "The legislature's role is to set policy and to draft and enact laws. The drafting of a statute is a legislative, not a judicial, function." *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (internal quotations and citations omitted). Thus, separation of powers is violated when the court

overtakes the Legislature's discretionary and policy-setting function carried out through lawmaking, and this Court has appropriately been cautious so as to avoid intruding upon the Legislature's authority. *See id.*; *see also Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994) (refusing to issue mandamus to compel a public official's discretionary acts because doing so would usurp the authority of a coordinate branch of government).

Similarly, when an issue presented to the court involves matters of political and governmental concern, courts have considered such questions to be "political questions" which are nonjusticiable. *Brown*, 165 Wn.2d at 712 (citing *Walker*, 124 Wn.2d at 411). Courts have declined to intervene in legal challenges to legislative actions that invoked fundamental public policy considerations and political questions. For example, in *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), plaintiffs claimed that legislation authorizing gambling on horse races, but not on dog races, was unconstitutional. The court recognized that the requested relief "is primarily a political question in an area of almost complete legislative discretion and in an area vitally affecting public safety and morals." *Id*. at 321. The plaintiffs' lawsuit raised "a legislative policy question concerning how wide the door should be opened to professional gambling. . . . That question is not for the courts

and is not justiciable." *Id*. (citation omitted). More recently, on a similar basis, the court declined to hear a lawsuit by animal rights activists who challenged the legality of the exemptions contained within the animal cruelty statutes. *See Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 239, 242 P.3d 891 (2010). The court held it had "no authority to conduct [its] own balancing of the pros and cons stemming from the criminalization of various activities involving animals" and that it was " 'not the role of the judiciary to second-guess the wisdom of the legislature.' " *Id.* at 245 (quoting *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010)). *See also Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (the Legislature, not the court, determines legislative policy and the wisdom of that policy).

The judiciary is likewise not well-situated to balance the competing social, governmental, and business concerns involved in responding to global climate change. "[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." *Burkhart v. Harrod*, 110 Wn.2d 381, 385, 755 P.2d 759 (1988) (quoting *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987) (internal quotation marks omitted).

In sum, the state constitution does not address state responsibility for climate change. Therefore, it is up to the Legislature to decide whether to act as a matter of public policy. Asking the Court to create a climate change response program as requested by Plaintiffs violates the political question doctrine.

3. Plaintiffs' Proposed Judicial Relief Conflicts With Existing Statutes, Further Violating The Separation Of Powers

In 2008, the Legislature enacted RCW 70.235 to address climate change.[28] RCW 70.235.020(1)(a) establishes specific emission reduction levels for total statewide greenhouse gas emissions at: (1) 1990 levels by 2020; (2) 25 percent below 1990 levels by 2035; and (3) 50 percent below 1990 levels, or 75 percent below expected emissions that year, by 2050. These reduction levels may be revised in the future based on updated science. RCW 70.235.040. Plaintiffs' complaint asks the Court to establish statewide carbon dioxide emissions reductions that are different from these emissions reductions. *See* CP 28, ¶ 67 (alleging State has failed to "mandate additional laws").[29] If the Legislature had intended to

[28] This chapter is one of many statutes enacted by the Legislature to address climate change issues. *See supra* section III.

[29] Specifically, Plaintiffs seek carbon dioxide emissions reductions of 6 percent per year—using 2012 as the peak year to count from—until 2100 in order to achieve a global atmospheric carbon dioxide concentration of 350 ppm by 2100. CP 34, ¶ 101. Plaintiffs' requested relief differs from RCW 70.235 by using a different year to measure against (2012 compared to 1990), by requiring different reduction standards (6 percent per year compared to specified reductions by 2020, 2035, and 2050), and by specifying a

require 6 percent per year reductions until the year 2100, it would have said so. Because Plaintiffs' requested relief differs from the emissions reductions scheme set forth in RCW 70.235, a court order granting such relief would effectively invalidate or revise existing statutes.

Courts will not grant relief when a plaintiff seeks to rewrite a statute. *See Pasado's Safe Haven v. State*, 162 Wn. App. 746, 754–55, 259 P.3d 280 (2011). In *Pasado's*, the court of appeals refused to declare unconstitutional provisions of an animal cruelty statute that exempted from its restrictions slaughters performed for religious rituals. *Id.* at 761–62. The court found that excising those portions of the statute would encroach upon the Legislature's authority by criminalizing a means of slaughter that the Legislature expressly defined as lawful, and would bring about a result that the Legislature never contemplated nor intended to accomplish. *Id.* at 755, 759.

Plaintiffs' requested relief would rewrite existing statutes in the very manner rejected in *Pasado's*. Because Plaintiffs seek the creation of an emissions reduction scheme that is significantly different from the

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different end date (annual reductions through 2100 compared to the Legislature's end goal of 2050). Plaintiffs acknowledge that their approach requires greater carbon dioxide emissions reductions than the statutory reductions. CP 21, ¶ 46. Further, Plaintiffs' predetermined endpoint for reductions fails to include flexibility to revise reduction levels (CP 19, ¶ 40), whereas the Legislature calls for future adjustments of reduction levels based on updated science. *See* RCW 70.235.040.

scheme established under existing statutes, their request violates the separation of powers doctrine.

D. Plaintiffs' Case May Not Be Pursued Under The UDJA Because It Seeks To Compel Government Action, The Requested Judicial Relief Cannot Redress The Complained-Of Injuries, And Plaintiffs Fail To Join Indispensable Parties

A court lacks jurisdiction under the UDJA if no justiciable controversy exists. *To-Ro Trade Shows*, 144 Wn.2d at 411. A justiciable controversy requires that the following four factors be present:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involve interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Id. (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Courts also decline to exercise jurisdiction under the UDJA when another remedy is available to a plaintiff, *Seattle-King Cnty. Council of Camp Fire v. Dep't of Revenue*, 105 Wn.2d 55, 57–58, 711 P.2d 300 (1985); when the case does not raise a question regarding the construction or validity of a law, RCW 7.24.010; *Bainbridge Citizens United v. Dep't of Natural Resources*, 147 Wn. App. 365, 375, 198 P.3d 1033 (2008); or when a plaintiff fails to join indispensable parties. RCW 7.24.110.

A decision to decline UDJA jurisdiction is reviewed under an abuse of discretion standard except that legal determinations are reviewed de novo. *To-Ro Trade Shows*, 144 Wn.2d at 410; *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990); *see also Gildon*, 158 Wn.2d at 493 (dismissal for failure to join indispensable party reviewed for abuse of discretion, except legal conclusions underlying decision reviewed de novo).

Independent of the public trust and separation of powers arguments, Plaintiffs' case is not actionable under the UDJA for three reasons. First, Plaintiffs ask the Court to create new laws and to compel the State's exercise of discretion in administering existing laws. The nature of Plaintiffs' case is to compel government action. If it can be pursued at all, Plaintiffs case must be pursued in the context of a writ of mandamus or an Administrative Procedure Act (APA), RCW 34.05, "failure to act" case.[30] Second, Plaintiffs' case is not justiciable under the UDJA because Plaintiffs do not articulate how the relief they seek would redress their alleged harms. In particular, they do not allege that carbon dioxide emissions reductions from sources *in Washington* can either reduce the *global atmospheric concentration* of carbon dioxide or remedy

[30] RCW 34.05.570(4)(b) authorizes judicial review of a state agency's "failure to perform a duty that is required by law" (referred to as an APA "failure to act" claim throughout this section).

local climate change impacts. Third, Plaintiffs have failed to join the individuals and businesses that would be required to implement the judicial relief they seek. In light of these defects, the trial court neither abused its discretion nor erred when it declined to exercise jurisdiction over Plaintiffs' declaratory judgment action.

1. The True Nature Of Plaintiffs' Claim Is Not A Declaratory Judgment Action But A "Failure To Act" Claim

Declaratory judgment actions are intended to declare legal rights and responsibilities; they are not meant to compel governmental action. RCW 7.24.010; *Bainbridge Citizens United*, 147 Wn. App. at 375. A claim addressing the State's failure to act should be pled either as an APA "failure to act" claim or as a mandamus action under RCW 7.16. While declaratory judgment actions are intended to declare rights under a law or other legal instrument, they are not intended to determine whether a governmental entity or official, in the exercise of discretion, has correctly applied or administered the law. *Council of Camp Fire*, 105 Wn.2d at 58; *Bainbridge Citizens United*, 147 Wn. App. at 374–75.

Plaintiffs contend that their complaint does not seek to compel a mandatory duty, but instead seeks only a declaration of rights, making the UDJA an appropriate vehicle to seek judicial relief. Opening Brief at 48. However, Plaintiffs' case is not a simple request that the Court declare

legal rights. Plaintiffs expressly allege that the State has failed to implement existing laws and that the State (through the Legislature) should be required to enact additional laws. CP 28, ¶ 67. Plaintiffs seek a precise declaration: that the atmosphere is a public trust resource; that the State has a duty to take affirmative action to protect the atmosphere from impacts associated with climate change; that this duty is defined by best available science; and that the State has violated this duty. CP 35, ¶¶ A–D. Plaintiffs also seek specific relief: a court order determining that best available science requires the State to identify and require 6 percent annual reductions of Washington's carbon dioxide emissions in order to achieve a global atmospheric concentration of 350 ppm carbon dioxide by the year 2100. CP 34, ¶ 101.

Plaintiffs make these allegations and seek this relief despite failing to point to any law or legal instrument that establishes the legal right or duty they allege. *See generally* section IV.B, *supra* (no Washington constitution, statute, or common law theory confers the legal right pled); *Bainbridge Citizens United*, 147 Wn. App. at 374 (case that does not question the construction or validity of a law falls outside scope of UDJA). Plaintiffs' allegation that the State has failed both to implement

existing laws and to enact new laws is not appropriately pursued in a declaratory judgment action.[31]

Plaintiffs argue that the State's objection to the nature of this case can be boiled down to an argument that injunctive relief is not appropriate under the UDJA. Opening Brief at 46–47. Plaintiffs miss the point of the State's argument. Injunctive relief is certainly available in a *properly-pled* UDJA case, where the true nature of a plaintiff's case is declaratory rather than mandamus. However, where, as here, Plaintiffs' action seeks to compel enactment of new laws as well as implementation of existing laws in a particular manner (CP 28, ¶ 67), the case is not a proper declaratory judgment case. *Bainbridge Citizens United*, 147 Wn. App. at 374–75 (finding UDJA action did not lie where sole question presented was whether agency properly applied or administered law through its exercise of discretion).

Finally, Plaintiffs try to justify their use of the UDJA by saying that an APA "failure to act" claim would not be available against either the Governor or the Legislature. RCW 34.05.010(2) (Governor and Legislature not considered state agencies under APA). Opening Brief at

[31] The State does not contend that a court may never grant declaratory relief interpreting issues of common law. Opening Brief at 43–45. Here, however, a UDJA action does not lie because the nature of Plaintiffs' case is not declaratory. Plaintiffs do not seek construction or interpretation of common law. Rather, they unabashedly ask the Court to create new law and to compel the exercise of discretion in administering the law.

47. While an APA "failure to act" case does not lie against the Governor or the Legislature, Plaintiffs do not explain why such a case does not lie against the three agency heads they named as Defendants.[32] Nor do they address the fact that the UDJA expressly recognizes the APA as the exclusive avenue for challenges to agency action *and* inaction. RCW 34.05.510; RCW 7.24.146.

Furthermore, mandamus is the proper action within which to bring Plaintiffs' claims against the Governor and the Legislature. *Council of Camp Fire*, 105 Wn.2d at 58 (plaintiff not entitled to relief by way of declaratory judgment if other adequate remedy available). Plaintiffs' argument that their case could not be pursued in a mandamus action, Opening Brief at 48, ignores the core allegations and requested relief in the complaint.[33] Because they ask the Court to order the Legislature to create new laws and to compel the Governor's exercise of discretion in

[32] Plaintiffs suggest an APA action against the agency head Defendants would not lie because Plaintiffs "are not appealing any discrete agency action." Opening Br. at 47. Plaintiffs' complaint reveals otherwise. *See, e.g.,* CP 21, ¶ 46 (alleging that strategies adopted by the State to meet RCW 70.235 are inadequate); 28, ¶ 67 (alleging State Defendant failed to implement existing laws); 28–30, ¶¶ 69–71 (alleging Defendants director of State Department of Ecology, Commissioner of Public Lands, and director of State Department of Fish and Wildlife have failed to implement existing laws). These allegations expressly relate to actions and alleged inaction by state agencies.

[33] As with the allegations involving the state agency heads, Plaintiffs' allegations against the Governor and the Legislature also reveal that they are complaining about specific actions and alleged inaction by the Governor and the Legislature rather than construction or interpretation of common law. *See, e.g.*, CP 21, ¶¶ 45–46 (alleging provisions of RCW 70.235 are inadequate); 21, ¶ 46 (alleging that strategies adopted by the State to meet RCW 70.235 are inadequate); 28, ¶ 67 (alleging State Defendant failed to implement existing laws and failed to enact new laws).

administering existing laws, the nature of Plaintiffs' claim is to compel government action. If their case can be pursued at all, it must be pursued as a writ of mandamus.

Plaintiffs may have chosen to pursue a UDJA claim because they recognize that both traditional mandamus and APA "failure to act" claims may only be used to compel *non-discretionary* duties and their case asks the Court to compel the exercise of discretion. As explained in section IV.C.2 *supra,* any form of action (UDJA or otherwise) that seeks to compel *discretionary* government action offends the separation of powers doctrine. While separation of powers would ultimately preclude the Court from granting the requested remedy no matter the chosen procedural path, it is also true that a UDJA action is purely unavailable here because the UDJA may not be used to compel enactment of new laws or require implementation of existing laws in a particular manner. Therefore, the trial court neither abused its discretion nor erred when it dismissed this case.

2. Plaintiffs' Claim Is Not Justiciable Because Plaintiffs' Requested Relief Will Not Remedy The Complained-Of Injury

Plaintiffs' case is not justiciable because a judicial determination will not be final and conclusive. For a case to be justiciable, the language of the UDJA and case law both require that a court be able to provide

relief that will address the complained-of harms. RCW 7.24.060 (the court may refuse a request for declaratory judgment if it "would not terminate the uncertainty or controversy giving rise to the proceeding"); *To-Ro Trade Shows*, 144 Wn.2d at 411 (fourth justiciability factor requires that judicial determination be final and conclusive).[34]

Plaintiffs' case is not justiciable because they have failed to allege how the judicial relief they seek can remedy the harm about which they complain. The State does not dispute that global climate change impacts natural resources, including natural resources within the state of Washington. Nor does the State dispute that carbon dioxide emissions from Washington sources contribute to global climate change.[35] The flaw in Plaintiffs' case, however, is that Plaintiffs ask the Court to assume that *Washington* emissions have caused climate change related impacts in Washington, and reductions of *Washington* emissions will lead to reductions in *global atmospheric* concentrations that will remedy those

[34] In the superior court proceedings, Plaintiffs cited *State ex rel. Yakima Amusement Co. v. Yakima Cnty.,* 192 Wash. 179, 183, 73 P.2d 759 (1937), *overruled on other grounds, Schneidmiller & Faires, Inc. v. Farr*, 56 Wn.2d 891, 355 P.2d 824 (1960), a case involving the mootness doctrine, for the proposition that courts may overlook certain justiciability defects if a case presents a matter of great public interest. CP 110-11. Whereas consideration of a moot case involving a matter of broad public import might be appropriate where the issue is likely to recur, the same cannot be said for matters that are not justiciable because a court order cannot finally resolve the dispute.

[35] Statements made by executive and legislative branch officials explaining decisions to take action to respond to climate change have no bearing on whether Plaintiffs' *judicial* cause of action is justiciable under the UDJA. Opening Brief at 41–42.

impacts (like snow pack loss) in Washington. Plaintiffs' case is not justiciable because Plaintiffs present no allegations in support of their assumptions.[36]

As Plaintiffs recognize in the allegations they do make, climate change, including global atmospheric concentrations of carbon dioxide and local Washington-specific impacts from climate change such as decreased snowpack, increased temperatures, and salmon habitat reductions, are a result of natural and man-made actions *across the globe*, including emissions of carbon dioxide from sources located *throughout the world.* CP 5–8, 16, ¶¶ 7, 8, 12, 16, 34. Plaintiffs also recognize that climate change can only be addressed through *global steps*. *See, e.g.*, CP 11, ¶ 23; 23, ¶ 38.

While the science of climate change and the possible responses thereto are indeed complex, the State is not arguing that the complexity of the issues is what renders this case non-justiciable. Opening Brief at 43 n.16. What renders this case non-justiciable are the core facts alleged by Plaintiffs in their complaint, including: the global character of the

[36] Plaintiffs contend that it is irrelevant that the vast majority of sources of climate change are outside of Washington because the source of the harm, they argue, is immaterial to their case and because Plaintiffs are not asking the Court to resolve global climate change. Opening Brief at 42. The flaw with these arguments is that the harm Plaintiffs seek to address (Washington State impacts) and the remedy they propose (change in the global atmospheric concentration of carbon dioxide) would require actions across the globe. *See, e.g.*, CP 19–20, ¶¶ 39, 40, 44. For purposes of determining whether a judicial action in Washington State can address the harms complained of, the nature of the alleged problem and alleged solutions are material.

atmosphere, the non-localized nature of the mechanisms that have given rise to climate change, and the non-localized nature of the actions that are projected to be necessary to address climate change impacts. CP 8–11, ¶¶ 17–24; 15–16, ¶¶ 31–34; 20, ¶¶ 43–44. Given these allegations, the relief sought (6 percent annual reductions in Washington) could not terminate the controversy or avert the complained of harms. Because Plaintiffs have failed to allege that their requested relief will remedy their complained-of injuries (global atmospheric concentrations of carbon dioxide and Washington-specific impacts), Plaintiffs' case is not actionable under the UDJA.

3. Plaintiffs' Claim Is Not Justiciable Under The UDJA Because They Have Not Joined Indispensible Parties

A party seeking declaratory relief must join "all persons . . . who have or claim any interest which would be affected by the declaration . . . ." RCW 7.24.110. A trial court lacks jurisdiction over a declaratory judgment action if all necessary parties are not joined. *Town of Ruston v. City of Tacoma,* 90 Wn. App. 75, 82, 951 P.2d 805 (1998); *Branson v. Port of Seattle*, 152 Wn.2d 862, 878 n.9, 101 P.3d 67 (2004).

Courts engage in a three-step analysis when applying the civil rules related to "necessary" and "indispensable" parties.[37] *Auto. United Trades*

[37] Indispensable party analysis under CR 19 is provided, although consideration of the issue in declaratory judgment actions may involve application of a more relaxed

Org. v. State, No. 85661-3, 2012 WL 3756308, at *2, ¶ 10 (Wash. Aug. 30, 2012). First, the court determines whether absent parties are "necessary" for a just adjudication. *Id.* Second, if the absent parties are "necessary," the court determines whether it is feasible to join them. *Id.* Third, if joining the necessary parties is not feasible, the court determines "whether, 'in equity and good conscience,' the action should still proceed without the absentees . . . ." *Id.*

An absentee is "necessary" when "he claims an interest relating to the subject of an action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest . . . ." CR 19(a)(2)(A). Here, Plaintiffs ask the Court to order statewide carbon dioxide emissions reductions of 6 percent per year until the year 2100, yet they name only state officials and the State (including the Legislature) as Defendants. They do not specify who would make the reductions. However, the emissions reductions Plaintiffs seek could impact activities in any sector of the state's economy. *See* CP 8, ¶ 13 ("burning fossil fuels, driving cars, raising livestock . . . , and cutting down forests" all alleged to impact the atmosphere); 11, ¶ 23 (alleging that the remaining fossil fuel carbon on this planet should not be emitted into

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standard under RCW 7.24.110. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 155, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) ("courts may refuse declaratory relief for nonjoinder of interested parties who are not, technically speaking, indispensable").

the atmosphere). Businesses and individuals that emit carbon dioxide through their activities (such as through power generation, farming, and driving cars) would be impacted by the court order Plaintiffs seek. Because a judgment in favor of Plaintiffs would impair or impede at least some of these businesses' and individuals' ability to protect their interests, those who would be impacted are necessary parties.

When joinder of necessary parties is not feasible, the court next determines whether the absentees are "indispensable" considering the following factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the absent party or current parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. CR 19(b).

Indispensable parties "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Auto. United Trades*, 2012 WL 3756308, at *5, ¶ 31 (citation omitted). Parties who are merely necessary are those whose

"interest[s] are separable from those of the parties before the court, so that the court can proceed to a decree, and *do complete and final justice*, without affecting [absentees]." *Id.* (citations omitted).

As to the first "indispensable party" factor (extent of prejudice), because businesses and individuals that emit carbon dioxide through their activities (such as through power generation, farming, and driving cars) would be impacted by the court order Plaintiffs seek, these individuals would be directly prejudiced by an order they would have no opportunity to defend against. CR 19(b)(1); *Nw. Animal Rights Network*, 158 Wn. App. at 244 (declaratory relief denied where constitutional challenge to animal cruelty statute would criminalize actions by ranchers, veterinarians, fishermen, and others who were not parties to the action).

Plaintiffs argue that these other parties' interests can be considered after the Court issues its ruling when the State implements the Court's order. Opening Brief at 49–50. This argument addresses the second factor under CR 19(b)(2) that examines whether a court's relief can avoid prejudice to the absent parties. *Auto. United Trades*, 2012 WL 3756308, at *7, ¶ 40. The premise of Plaintiffs' argument is that, if the Court were to grant the requested relief, the State will have discretion regarding what actions it will require to implement a plan ordered by the Court. Yet the court order Plaintiffs seek would leave state decision-makers little, if any,

discretion. Had Plaintiffs pled a case that sought a court order directing only that the State develop a plan, leaving the State the discretion to determine the level and timing of emissions reductions, Plaintiffs' argument might have traction. But, because the court order Plaintiffs seek asks for very specific relief (6 percent annual reductions in Washington State carbon dioxide emissions), the obligations of absent parties would be determined by the Court's order, and after-the-fact participation in the state's implementation of such a court order would be meaningless.

The third and fourth factors of CR 19(b) (adequacy of a judgment without the absent parties; absence of remedy for Plaintiffs) also weigh in favor of concluding that Plaintiffs' failure to join absent parties justifies dismissal of their case. As to the adequacy of a judgment, the Court cannot grant the relief sought because those citizens whose activities contribute to greenhouse gas emissions would necessarily be impacted by a court-mandated emissions reduction plan. As to the absence of a remedy, as discussed in section IV.D.2 *supra*, to the extent Plaintiffs desire to challenge a specific governmental action or inaction, they are not without a remedy (they can pursue relief under the APA or under the mandamus statute).

For all of these reasons, Plaintiffs' failure to join these absent

parties supports the trial court's dismissal of this case.[38]

In sum, the Court lacks jurisdiction to grant Plaintiffs the declaratory judgment they seek. The UDJA cannot be used to compel government action or compel the exercise of government discretion in a particular way, the relief the Plaintiffs seek would not resolve the controversy, and Plaintiffs have not joined indispensible parties.

V. CONCLUSION

The State respectfully asks this Court to affirm the superior court's dismissal of Plaintiffs' complaint. The public trust doctrine does not apply to the atmosphere, and the requested declaration and remedy would require the Court to violate separation of powers and is outside the Court's UDJA jurisdiction.

RESPECTFULLY SUBMITTED this 28th day of September 2012.

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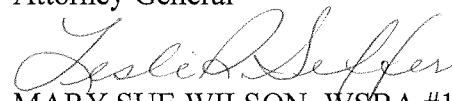

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[38] Nor can the State effectively represent the interests of these absent parties. Opening Brief at 50. Because one of the State's functions is to regulate sources of air pollution (*see, e.g.*, RCW 70.94.331), the interests of the State and these absent parties cannot be presumed to be aligned.

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 28th day of September 2012, I caused to be served State's Response Brief in the above-captioned matter upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of September 2012 in Olympia, Washington.

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