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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause CDV 20–307 Hon. Kathy Seeley **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** [Oral Argument Requested]

INTRODUCTION

This case has been an expensive and time-consuming exercise in futility from the outset, with no realistic prospect of Plaintiffs obtaining the outcome they seek. That reality has become only more apparent after extensive discovery. Plaintiffs' remaining claims for relief principally consist of requests for declarations invalidating two Montana statutes—Section 90-4-1001, MCA

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(the "State Energy Policy Goal Statements") and Section 75-1-201(2)(a) (the "MEPA Limitation")—as well as a declaration that Plaintiffs' state constitutional right to a clean and healthful environment includes the right to a "stable climate system." However, as explained below, Plaintiffs' remaining claims fail as a matter of law because: 1) Plaintiffs' cannot satisfy constitutional standing requirements; 2) prudential policy considerations weigh heavily in favor of requiring Plaintiffs to engage in the proper democratic process; 3) the requested expansion of the right to a clean and healthful environment would lead to absurd results; 4) Plaintiffs failed to join necessary parties; and 5) Plaintiffs' claims are meritless. Defendants accordingly seek summary judgment on Plaintiffs' remaining claims.

APPLICABLE STANDARDS

Summary judgment is proper where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). As the Court noted in its August 4, 2021 Order on Motion to Dismiss ("8/4/21 Or."), Plaintiffs must establish injury, causation, and redressability to demonstrate the requisite "case or controversy" standing to maintain their claims herein. (*Id.* at 7–8); *see also Heffernan v. Missoula City Counsel*, 2011 MT 91, ¶¶ 32–33, 360 Mont. 207, 255 P.3d 80; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187. "Standing is a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law and related prudential policy considerations." *Larson v. State*, 2019 MT 28, ¶ 45, 394 Mont. 167, 434 P.3d 241 (internal citations omitted). "Standing narrowly focuses on whether, at the time of assertion of a claim, a particular claimant is a proper party to assert the claim regardless of whether the claim is otherwise cognizable or justiciable." *Id.* (internal citations omitted). "Though substantively cognizable, a claim for declaratory judgment is nonetheless not justiciable if the plaintiff lacks personal standing to assert the claim." *Id.* (internal citations omitted).

Montana courts presume that enacted laws are constitutional. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a toothless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. Plaintiffs must demonstrate that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If Defendants show any constitutional applications, Plaintiffs' facial challenge fails. *Id.* at ¶ 29. In reviewing Plaintiffs' constitutional challenges to the State Energy Policy and the MEPA Limitations statutes, this Court must uphold the statutes unless they conflict with the Constitution beyond a reasonable doubt. *Satterlee*, ¶ 10. If any doubt exists, it must be resolved in favor of the statute. Plaintiffs—as the parties challenging the constitutionality of these statutes—bear the burden of proof. *Mont. Cannabis Indus. Assn.*, ¶ 12. Plaintiffs fail to prove that these statutes are facially unconstitutional.

ARGUMENT

I. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE THEY LACK "CASE OR CONTROVERSY" STANDING.

Facts obtained through discovery confirm that Plaintiffs lack standing. The Montana Supreme Court has made clear that "the 'cases at law and in equity' language of Article VII, Section 4(1) *embodies the same limitations* as are imposed on federal courts by the "case or controversy" language of Article III [of the U.S. Constitution]." *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 (emphasis added) (internal citations omitted); *see also Advocates for Sch. Trust Lands*, ¶ 18. Plaintiffs must demonstrate case-or-controversy standing—at every stage of litigation—by distinctly showing "a past, present, or threatened injury" that can be "alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. To demonstrate standing, Plaintiffs must show that (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at ¶ 32 (citing *Lujan,* 504 U.S. at 560 (1992)). Plaintiffs must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S at 561. To survive summary judgment, "the plaintiff can no longer rest on 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'...." *Id.* (quoting Fed. Rule Civ. Proc. 56(e)). *See also* Mont. R. Civ. P. 56(e).

A. PLAINTIFFS' CLAIMED INJURIES FAIL TO SATISFY STANDING REQUIREMENTS AT THE SUMMARY JUDGMENT STAGE.

While Plaintiffs' alleged injuries need not be exclusive to them for standing purposes, the injuries "must be distinguishable from the injury to the public generally[.]" *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶ 41, 296 Mont. 207, 988 P.2d 1236. *See also Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (a plaintiff "must show that he has sustained, or is in immediate danger of sustaining some direct injury. . . and not merely that he suffers in some indefinite way in common with people generally"). Plaintiffs have alleged a wide range of injuries—including physical, mental, emotional, aesthetic, cultural, and economic injuries—which they claim are attributable to climate change caused by the challenged statutes. (*See* 8/4/21 Or. at 2). However, if Plaintiffs' claims are true, every single member of the general public suffers those very same injuries. (*See* Expert Report of Kevin Trenberth at 12 (opining that "continued production of fossil fuels...constitutes... harm to the citizens of Montana as well as the rest of the world."), attached as **Exhibit A**; Depo. Kevin Trenberth, 12:11–13 (Jan. 11, 2023), relevant excerpts attached as **Exhibit B** (describing climate change as a "potentially existential threat to humanity"); Depo. Steven Running, 39:2–40:9 (Oct. 25, 2022), relevant excerpts attached as **Exhibit C** (acknowledging the difficulty of realistically distinguishing the impacts of climate change on Plaintiffs from those impacts on the rest of the public)). Plaintiffs' pleadings allege specific and personalized injuries (*see* Compl. at 5–26), but discovery is replete with examples of the alleged individual injuries being inaccurate, mischaracterized, or not otherwise demonstrating standing;[1] including the alleged harms to hunting, fishing, and recreation opportunities;[2] alleged

[1] E.g.: Montana law limits the size of solar panel arrays (cf. Compl. at 23:10–16 to Depo. Claire V., 53:24–55:21 (Dec. 20, 2022), relevant excerpts attached as **Exhibit D**); extreme heat and melting of asphalt in Montana (cf. Compl. At 22:18–23 to Ex. D at 69:21–70:24); oral tradition of storytelling could not take place (cf. Compl. at 11:1–4 to Depo. Sariel S., 41:18–25 (Jan. 5, 2023), relevant excerpts attached as **Exhibit E**); bison hunting on the reservation (cf. Compl. at 11:10, 17–19 to Ex. E at 45:7–14, 52:16–20); Plaintiff's "annual Mother's Day" bike ride (cf. Compl. at 26:3–4 to Depo. Taleah H., 48:10–24 (Jan. 5, 2023), relevant excerpts attached as **Exhibit F**); "closing of fisheries" (cf. Compl. at 8:12–16 to Depo. Lander B., 48:10–49:6 (Dec. 29, 2022), relevant excerpts attached as **Exhibit G**, Depo. Badge B., 54:3–55:20, 57:4–59:16 (Dec. 29, 2022), relevant excerpts attached as **Exhibit H**, and Depo. Kian T., 53:15–24, 55:19–25, 57:23–58:3 (Dec. 28, 2022), relevant excerpts attached as **Exhibit I**); hunting season in the summer (cf. Compl. at 8:18–20 to Ex. G at 65:6–25); canceled camping trip in Montana (cf. Compl. at 13:11–12 to Ex I at 67:15–68:9); Plaintiffs depend on fish as an important food source (cf. Compl. at 8:3–8 to Ex. H at 46:12–47:4).

[2] E.g.: catching and harvesting animals (cf. Compl. at 8:9–16 to Ex. G at 35:18–36:23, 53:4–56:21, Ex. H at 59:23–61:7; cf. Compl. at 12:20–13:2 to Ex I at 53:15–24, 55:19–25, 57:23–59:9); access to game as food source impaired when plaintiffs testify that they usually do not need to eat store-bought meat (cf. Compl. at 8:3–8 to Ex H at 45:14–48:8, 49:17–50:7, 51:4-11, Ex. G at 35:18–36:23); ability to ice skate on Flathead Lake when plaintiff quit trying to (cf. Compl. at 25:17–20 to Ex. F at 33:25–36:9).

economic injury;[3] and alleged psychological injuries,[4] just to name a few. Such mischaracterizations debunked through discovery do not suffice to establish the required injury element of constitutional standing at the summary judgment stage.

B. PLAINTIFFS FAIL TO ESTABLISH THE REQUISITE CAUSATION TO MAINTAIN STANDING.

Plaintiffs also fail to establish that their claimed injuries were caused by the statutes challenged here. Plaintiffs must demonstrate causation by showing "a fairly traceable connection" between their alleged injuries and the challenged statutes. *Heffernan*, ¶ 32; *see also*; *Lujan*, 504 U.S. at 560 (the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.")[5]. The chain of causation must not be "hypothetical or tenuous." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020); *see also Larson* at ¶ 46 ("a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent a ***direct causal connection*** between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff.") (emphasis added). Plaintiffs must also prove that the challenged statutes were a "substantial factor" in causing their alleged injuries. *Juliana*, 947 F.3d at 1169.

Plaintiffs' alleged injuries hinge on attenuated inferences, not provable facts. Even if Plaintiffs could prove that greenhouse gas ("GHG") emissions caused their alleged injuries, Plaintiffs must still demonstrate a direct causal link to 1) GHG emissions from Montana, and 2) each challenged statute. But they can't. *Cf.* Plaintiffs' causation allegations *with Williamson v. Mont. Pub. Serv. Commn.*, 2012 MT 32, ¶ 37, 364 Mont. 128, 272 P.3d 71 ("[t]he climate-related consequences alleged by Complainants ... do not even bear a *close* logical, causal, or consequential relationship to the use of HPS lights rather than LED lights...."). Plaintiffs cannot prove that the abstract State Energy Policy Goal Statements directly caused their alleged injuries—

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[3] Plaintiff working at Big Sky while attending high school and private college in California (cf. Compl. at 22:13–17 to Ex. D at 6:3–5, 11:1–12:22, 16:2–23, 26:7–28:19, 31:18–32:25, 66:6–14, 97:15–98:12).

[4] E.g.: fears about the future (cf. Compl. at 16:1–3 to Depo Grace. S., 58:24–60:1 (Jan. 6, 2023), relevant excerpts attached as **Exhibit J** (plaintiff is anxious about "her future and fearful that her generation may not survive the climate crisis," while admitting that she is "fortunate to be in a place that has not been impacted in any sort of life-threatening way" and that "it's quite unlikely that every person of my generation dies."); cf. Compl. at 10:15–16 to Ex. E at 31:12–33:20 (Plaintiff worries that her tribe's activities, practices, and beliefs of cultural significance will be entirely lost, but could not provide concrete examples)).

[5] GHG emissions resulting from fossil fuel extraction and combustion implicate the actions of private actors not parties to this suit. *See* Section IV, *infra.*

particularly considering that other, specific, substantive statutes directly regulate fossil fuel development, transportation, storage, and use, etc. *See e.g.* MCA §§ 82-4-201 et seq. (permitting for coal mines); § 82-15-105 (licensing for petroleum dealers); §§ 82-10-301 et seq. (underground gas storage reservoirs).[6] Plaintiffs don't challenge any of those substantive statutes. Plaintiffs simply ignore and bypass these numerous intervening steps and actions—many of which are independently taken by third parties not present in this litigation[7] (*see Lujan*, 504 U.S. at 560), in their broad assertion of causation. This only highlights the absence of this necessary element of standing.

Plaintiffs also attempt to link their alleged injuries to the MEPA Limitation by generally asserting that it prevents state agencies from considering a permitting action's resulting GHG emissions, but this is likewise insufficient to establish causation. Plaintiffs cannot point to even one agency action that directly caused the harms they allege. Plaintiffs instead fill in the gap in logic between unspecified or theoretical agency actions and their claimed injuries with the unsupported assumption that GHG emissions would not have occurred but for the MEPA Limitation. This likewise ignores the many substantive laws scattered throughout Montana's statutes that affirmatively authorize agencies to take particular actions. Plaintiffs also fail to acknowledge the exceptions to the MEPA Limitation that explicitly allow for the consideration of actual or potential impacts beyond Montana's borders when that review is required by a specific law, rule, regulation, or federal agency. *See* § 75-1-201(2)(b)(ii), (iii).[8] Perhaps they think the true cause of their alleged injuries is the absence of any such statutory requirement—relief the Court has already agreed it cannot grant. (*See* 8/4/21 Or. at 19.) Plaintiffs fail to establish a nexus between the challenged statutes and their claimed injuries sufficient to confer standing.

C. THE COURT CANNOT FASHION ANY RELIEF THAT WOULD REDRESS PLAINTIFFS' CLAIMED INJURIES.

To meet the redressability requirement for standing, Plaintiffs must show that the invalidation of the State Energy Policy Goal Statements and the MEPA Limitation would alleviate those injuries. *Larson*, ¶ 46. This Court previously found that a favorable ruling could sufficiently

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[6] *See* Defendants' 4/24/20 Brief in Support of Motion to Dismiss, at 9, for more examples.
[7] *See* Section IV, *infra*.
[8] *See also* MCA § 75-1-104 (stating that Section 75-1-201 does not "affect the specific statutory obligations of any agency of the state to: (1) comply with criteria or standards of environmental quality; (2) coordinate or consult with any local government, other state agency, or federal agency; or (3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.").

alleviate Plaintiffs' claimed injuries under the facts alleged and relief requested by Plaintiffs (*see* 8/4/21 Or. at 17), but information obtained in discovery has only confirmed the opposite for the same reasons that Plaintiffs cannot establish causation.

First, as explained above, the challenged statutes do not contain any substantive provisions that authorize or facilitate the production or consumption of fossil fuels. This means that this Court's invalidation of those statutes would not achieve the effect that Plaintiffs seek: drastic reduction of Montana's GHG emissions. Indeed, Section 90-4-1001 is merely an aspirational statement of goals and factors. None of the substantive statutes identified above are predicated or dependent on the existence or validity of that challenged statute. In other words, removing subsections (1)(c)—(g) from the policy statement would not render any substantive statute, related rule, or regulation unenforceable or inoperative.

The introduction of HB 170 in the 2023 Montana Legislature is further evidence of this fact. If successfully passed, the State Energy Policy Goal Statements set forth in Section 90-4-1001 would be repealed in their entirety.[9] One would reasonably expect that representatives from the fossil fuel industries with interests in Montana would be stumbling over themselves to testify in opposition to HB 170 if it actually threatened those interests. But no such opposition was raised during the hearings on that bill before the House Energy, Technology, and Federal Relations Committee and the Senate Energy and Telecommunications Committee.[10] Notably, however, representatives from environmental interest groups did oppose the repeal of Section 90-4-1001.[11] Paradoxically, environmental interest groups apparently want the State Energy Policy Goal Statements declared unconstitutional by this Court, but not repealed by the Legislature.

Plaintiffs also cannot demonstrate that this Court's invalidation of the MEPA Limitation would amount to sufficient redress. In particular, Plaintiffs cannot show that, in the absence of the MEPA Limitation, state agencies would—or even could—measure and consider the incremental impact of any given project in Montana on global climate change and then determine how or to

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[9] *See* the full text and current status of HB 170 at http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=170&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=

[10] *See* the video and/or audio from those hearings at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46941?agendaId=245107 and https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230131/-1/47033, respectively.

[11] *Id.*

what extent, if any, that discrete impact on global climate would affect Montana. Even if this were possible, state agencies would not be required to perform such an analysis absent the MEPA Limitation. The Montana Legislature would have to amend MEPA to require this analysis, but this Court cannot order the Legislature to craft such an amendment. Furthermore, Plaintiffs have not alleged that, if state agencies could and would attempt to perform this speculative "butterfly effect" analysis, it would somehow lead to a reduction in Montana's GHG emissions and thereby alleviate Plaintiffs' claimed injuries in any meaningful way.

Second, it's undisputed that Montana's contribution to climate change is *de minimis*, and even if all of Montana's GHG emissions were eliminated entirely, there would be no appreciable alleviation of Plaintiffs' claimed injuries or impact on global climate change. (*See* Depo. Cathy Whitlock, 13:23–14:11, 18:25–19:6 (Nov. 29, 2022), relevant excerpts attached at **Exhibit K**); Depo. Jack Stanford, 20:12–20 (Nov. 8, 2022), relevant excerpts attached as **Exhibit L**)). This is in no small part due to the fact that Montana's GHG emissions would just be replaced by other sources. (Ex. B at 26:10–18; Ex. C at 21:12–17; Depo. Daniel Fagre, 16:23–17:9 (Oct. 27, 2022), relevant excerpts attached as **Exhibit M**). Also, Montana's contribution to global warming via GHG emissions is simply too insignificant, and both Defendants' and Plaintiffs' experts acknowledge the reality that climate change is a global problem requiring global action. (*See* Expert Report of Judith Curry, 27, attached as **Exhibit N**; Depo. Judith Curry, 139:19–140:11 (Dec. 16, 2022), relevant excerpts attached as **Exhibit O**); Ex. B at 26:2–3 ("...it becomes fruitless to take unilateral action."). This is exactly the conclusion the Washington Court of Appeals reached in determining that nearly identical claims asserted by Our Children's Trust plaintiffs were not justiciable under the Uniform Declaratory Judgments Act. *See Aji P. v. State*, 16 Wn. App. 2d 177, 197, 480 P.3d 438, 451–452 (Wash. App. 2021) ("[A] trial court order would not result in the atmospheric carbon levels required to either stabilize the future global climate or protect the Youths' asserted right because the world must act collectively in order to stabilize the climate.") (citing *Juliana*, 947 F.3d at 1173); *see also Wash. Envt. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013) ("It is undisputed that GHG emissions is not a localized problem endemic to Washington, but a global occurrence. Because the effect of collective emissions from the Oil Refineries on global climate change is 'scientifically indiscernible,' ... Plaintiffs' injuries are likely to continue unabated even if the Oil Refineries have RACT controls."). Simply put, this Court is not able to fashion a remedy to the problem of global climate change, and granting

Plaintiffs' requested relief does nothing to reduce GHG emissions in Montana, the region, or the world.

This leads to the final point regarding redressability—the Uniform Declaratory Judgments Act ("UDJA") does not independently confer standing. *Mitchell*, ¶ 42 ("Without an independent ground for standing, [plaintiffs] cannot assert a claim under the [UDJA]."). In other words, Plaintiffs cannot establish redressability simply by arguing that their alleged injuries will be at least partially alleviated by a declaration that the challenged statutes are unconstitutional. *See Juliana*, 947 F.3d at 1170 ("A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action.") (citing *Clean Air Counsel v. United States*, 362 F.Supp.3d 237, 246 (E.D. Pa. 2019)); *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 107, (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier[, b]ut...that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.") (emphasis in original)). To conclude otherwise would be to accept the circular argument that redressability is established because declaratory relief is available, and declaratory relief is available because redressability is established. Ultimately, declaratory judgment in Plaintiffs' favor has no realistic chance of alleviating Plaintiffs' claimed injuries in any meaningful sense. "Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (Scalia, J. concurring) (emphasis in original). Plaintiffs' claims lack justiciability.

II. PRUDENTIAL CONCERNS WEIGH AGAINST GRANTING PLAINTIFFS' REQUESTED RELIEF.

Beyond the minimum "case or controversy" standing requirements, prudential limits proscribe courts from adjudicating "generalized grievances more appropriately addressed in the representative branches[.]" *Heffernan*, ¶ 32. Plaintiffs' allegations are more accurately described as a policy dispute, rather than an actual case or controversy. Prudential considerations also underly the Court's exercise of discretion under the UDJA. *See* MCA § 27-8-206 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."); *Miller v. St. Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 8, 337 Mont. 67, 155 P3d

1278 (holding that, absent a justiciable controversy, a declaratory judgment is inappropriate.). "The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). As is particularly relevant here, "[b]roadly determining the constitutionality of a 'statutory scheme' that may...involve [many] separate statutes, is contrary to established jurisprudence." *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

The Court should dismiss Plaintiffs' claims on prudential standing grounds because the declaratory relief Plaintiffs seek would do anything but "terminate the uncertainty or controversy giving rise to [this] proceeding." MCA § 27-8-206. The invalidation of the State Energy Policy Goal Statements and the MEPA Limitation would have absolutely no effect on the actions of state agencies as explained above, nor would it resolve the issue at the core of Plaintiffs' claims—Montana's GHG emissions and their alleged contribution to "climate instability." State permitting for coal mines and air quality, and other State decisions regulating energy and, transportation, are separately governed by specific statutes which carefully balance the requirements of the Montana Constitution with the use of natural resources. *See, e.g.* The Montana Strip and Underground Mining Act, § 82-4-202(1) (coal permitting), §§ 75-2-201 et seq. (air quality permitting).

> The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Strip and Underground Mining Reclamation Act. It is the legislature's intent that the requirements of this part provide adequate remedies of the protection of the environmental life support system from degradation and provide adequate remedies to preen unreasonable depletion and degradation of natural resources.

MCA § 82-4-202(1). It is these specific statutes—not the aspirational State Energy Policy Goal Statements—which implement the Montana Constitution's environmental protections. These statutes are the only vehicle for challenging constitutionality through the contested case process in the Montana Administrative Procedures Act ("MAPA"). Plaintiffs seek to impermissibly end-run the required MAPA procedure by directly challenging Section 90-4-1001. But because Section 90-4-1001 has no regulatory authority, a judicial declaration voiding it will have no effect on any specific permitting statutes.

Plaintiffs' Complaint is clear that their primary motive in initiating this litigation was to implement their remedial plan via a complete restructuring of Montana's energy policy and the

elimination of fossil fuel extraction, transportation, and consumption in Montana. (*See generally* Compl. and at 102–104). However, that relief is not within reach, not only because it is practically infeasible, but also because the Court has already dismissed the vast majority of that requested relief in recognition that separation of powers deprived it of the requisite authority. (*See* 8/4/21 Or. at 19). Plaintiffs must seek the recourse they truly desire through the democratic process at the Montana Legislature. *Juliana*, 947 F.3d at 1173 ("Because it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change, some questions—even those existential in nature—are the province of the political branches.").

Analyzing the same issue in a functionally identical case, the Alaska Supreme Court explained that the sought declaratory relief, alone, "would have no immediate impact on [carbon] emissions, would not compel the State to take any particular action, and would not protect the plaintiffs from the injuries they allege." *Sagoonick v. State*, 503 P.3d 777, 799 (Alaska 2022) (internal quotations omitted) (brackets in original). "It also would not tell the State how to fulfill its constitutional obligations or help plaintiffs determine when their constitutional rights have been violated." *Id.* "Without judicially enforceable standards, which the political question doctrine prevents us from developing, declaring the existence or even violation of plaintiffs' various purported constitutional rights would not settle the parties' legal relations." *Id.* The *Sagoonik* Court accordingly affirmed the trial court's dismissal of the plaintiffs' claims. *Id.* at 805. This Court should dismiss Plaintiffs' remaining claims for declaratory relief in this case based on the exact same reasoning employed in *Sagoonik.*

Moreover, the uncertainty and controversy currently present would be exacerbated by orders of magnitude if the Court were to grant Plaintiffs' request for a declaration that the Montana constitutional right to a clean and healthful environment "includes a stable climate system that sustains human lives and liberties and that said right is being violated[.]" (Compl. at 103). This is in no small part due to the wide-open question of what exactly constitutes a "stable climate system," particularly considering that climate is ever-changing by its very nature. Plaintiffs themselves do not define a "stable climate system" or "climate instability." Would this be premised on a certain acceptable rate or degree of variation in the climate? How would that be measured, and how could an intertwined fundamental right possibly be enforced? These are just a few serious questions that would stem directly from such a declaration—previously nonexistent "controversies...which revolve around policy choices and value determinations constitutionally

committed for resolution to other branches of government or to the people in the manner provided by law." *Larson*, ¶ 39. In other words, by issuing a declaration so drastically expanding Article II, Section 3, the Court would open a Pandora's box of political questions it is ill-equipped—and not constitutionally authorized—to answer. This, alone, is a compelling reason to grant summary judgment on Plaintiffs' remaining claims for declaratory relief.

III. PLAINTIFFS' SOUGHT EXPANSION OF THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT WOULD LEAD TO ABSURD RESULTS.

"In the construction of constitutional provisions, [Montana courts] apply the same rules which are applicable to the construction of statutes." *Grossman v. Dept. of Natl. Resources*, 209 Mont. 427, 451, 682 P.2d 1319, 1331 (1984) (internal citation omitted); *see also* MCA § 1-2-101("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."). "In construing broad and general provisions of the constitution which tend in measure to conflict with specific ones, [Montana courts] are controlled by specific provisions, and an interpretation that achieves a reasonable result is favored." *Grossman*, 209 Mont. at 451 (internal citations omitted). "Neither statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it." *Id.* (internal citation omitted). *See also Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 9, 389 Mont. 270, 405 P.3d 88 ("Courts should strive whenever possible to avoid interpreting a statute in a way that causes it to be unconstitutional.").

As an initial matter, Article IX, Section 1(2)–(3) charges the Montana Legislature with implementing the constitutional directive. At the time of the 1971–1972 Montana Constitutional Convention that enacted Articles II and IX, the delegates did not contemplate global climate change as an issue the new Articles were designed to address. The plain text of the Constitution directs the State and each person to "maintain and improve a clean and healthful environment *in Montana*." Const. Art. IX, § 1(1) (emphasis added). The concepts of global climate change or climate stability do not appear anywhere in the text of the Constitution or in the proceedings of the Convention. Moreover, the delegates repeatedly emphasized that the new constitutional provision was intended to protect the environment of Montana from the types of environmental deterioration that had occurred in other states—not solve global problems that might incidentally affect

Montana. *See, e.g.*, Mont. Constitutional Convention, Verbatim Tr., March 1, 1972, Vol. V, 1227, 1232, 1235–1237. Ensuring a "stable climate system" was simply not on the Convention's radar, and Plaintiffs will be hard-pressed to demonstrate otherwise.

One need not engage in wild speculation to imagine the massive and confounding implications of such a declaration considering Article IX, Section 1's mandate that "the State *and each person* shall maintain and improve a clean and healthful environment in Montana for present and future generations..." *Id.* (emphasis added). *See also Cape-France Enters. v. In re Estate of Peed*, 2001 MT 139, ¶ 32, 305 Mont. 513, 29 P.3d 1011 (noting the Montana Supreme Court's previous acknowledgment "that the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well[]" and invalidating a contract between private parties on that basis). Plaintiffs' sought expansion of the existing right to a clean and healthful environment could give rise to seemingly endless litigation against all manner of public and private entities and individuals for any given emission of GHGs—from electrical generation to driving a car or using wood-burning stoves. Such a scenario is further complicated when considering the inevitably conflicting rights of Montanans "pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. Art. II, § 3. It strains the bounds of credulity to assume that the Framers of the Montana Constitution had any intention of the right to a clean and healthful environment to be construed so broadly, and this illustrates why the Montana Supreme Court "avoids deciding constitutional issues whenever possible." *Donaldson*, ¶ 10. "[D]eclaring the parameters of constitutional rights is a serious matter[,]" indeed. *Id.* The Court should reject Plaintiffs' claims for these reasons as well.

IV. PLAINTIFFS FAILED TO JOIN INDISPENSABLE PARTIES.

Furthermore, assuming the declaratory relief Plaintiffs seek could and would result in the reduction of GHG emissions through the destruction of Montana's fossil fuel industry and the injunction of related activities, Plaintiffs failed to join the necessary parties for such relief to be properly granted. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." MCA § 27-8-301; *see also* Mont. R. Civ. P. 19(a)(1) (requiring the joinder of a party if that party's absence would prevent the court from according complete relief or would prevent that party from protecting its interests). Plaintiffs

would surely reverse and prohibit the permitting of all manner of fossil-fuel related activities on a unilateral basis if they had their druthers (*see* Compl. at 38–43), but the Court could not properly grant this relief without first affording affected parties (e.g. energy companies, landowners/mineral interest holders, etc.) the opportunity to have their positions and interests heard and considered. Such a scenario is exactly the type that Section 27-8-301 and Mont. R. Civ. P. 19(a)(1) aim to prevent, and the Court should dismiss Plaintiffs' remaining claims accordingly.

V. PLAINTIFFS' CLAIMS FAIL ON THE MERITS.

If this Court determines it may reach the merits of Plaintiffs' constitutional challenge, that challenge still fails. Neither the State Energy Policy Goal Statements nor the MEPA Limitation offend the Montana Constitution.[12] The Constitution guarantees the right to a clean and healthful environment *in Montana*, and it directs the Legislature to administer, enforce, and provide adequate remedies for the violation of that right. Mont. Const. Art. IX, § 1. The Legislature has fulfilled those duties by considering and balancing competing rights and interests in the proper exercise of its general police powers.[13] To succeed in a facial challenge, Plaintiffs must prove beyond a reasonable doubt that "no set of circumstances exist under which the [challenged sections] would be valid." *Mont. Cannabis*, ¶ 14; *Satterlee*, ¶ 10. Plaintiffs cannot sustain their burden with respect to their facial challenge to either statute at issue.[14]

A. THE STATE ENERGY POLICY GOAL STATEMENTS DO NOT VIOLATE THE MONTANA CONSTITUTION.

To maintain their facial challenge to Sections (c)—(g) of the State Energy Policy Goal Statements, Plaintiffs must demonstrate that *all* applications of those sections are unconstitutional. *Advocates for Sch. Trust Lands*, ¶ 29. Those sections state as follows:

> (c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;

---

[12] This likewise applies to the Public Trust Doctrine because that doctrine is derived from Article IX, Section 3 of the Montana Constitution. *See Galt v. State*, 225 Mont. 142, 144, 731 P.2d 912, 913 (1987).

[13] The Legislature—not the courts, and not these litigants—balances the competing interests to determine how best to serve the public interest. See *Berman v. Parker*, 348 U.S. 26, 32–33 (1954). "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power..." *Billings Properties v. Yellowstone Cnty.*, 144 Mont. 25, 31, 394 P.2d 182 (1964)(quoting *Berman*, 348 U.S. at 32).

[14] To the extent that Plaintiffs may attempt to assert or revive an argument that any of their remaining claims for relief actually constitute as-applied challenges, those claims nonetheless fail for lack of administrative exhaustion. (*See* Defs.' 4/24/20 Br. in Support of Mot. to Dismiss at 16–19; Defs.' 6/11/20 Reply Br. in Support of Mot. to Dismiss at 15–18.) Defendants hereby incorporate the same by reference.

> (d) increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the mitigation of greenhouse gas and other emissions;
> (e) increase local oil and gas exploration and development to provide high-paying jobs and to strengthen Montana's economy;
> (f) expand exploration and technological innovation, including using carbon dioxide for enhanced oil recovery in declining oil fields to increase output;
> (g) expand Montana's petroleum refining industry as a significant contributor to Montana's manufacturing sector in supplying the transportation energy needs of Montana and the region;

MCA § 90-4-1001(1)(c)—(g). Perhaps the most salient portion of these sections with Plaintiffs' burden in mind is section (d), which expressly advocates for action that is "environmentally sound" and includes the "mitigation of greenhouse gas and other emissions[.]" *Id.* This language is entirely consistent with Plaintiffs' aims on its face, yet Plaintiffs seek its invalidation. This alone defeats Plaintiffs' facial challenge even if Article II, Section 3 included a nebulous right to a stable climate system given the express goal of GHG reduction. Nevertheless, Plaintiffs must demonstrate that all other applications of these sections are unconstitutional beyond a reasonable doubt, but they cannot do so. The very fact that these sections merely recite goals with respect to energy policy—rather than authorize or permit any specific agency or private action—only emphasizes that Plaintiffs' disagreement is political in nature.

Furthermore, it is apparent that the policy goal statements at issue are the Legislature's balancing of the competing interests contained within Article II, Section 3. It is not for Plaintiffs or the judiciary to strike a proper balance between Montanans' right to a clean and healthful environment and their rights to "pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. Art. II, § 3. Again, this is solely the Legislature's prerogative. *Berman*, 348 U.S. at 32—33. Plaintiffs' efforts to facially invalidate the State Energy Policy Goal Statements accordingly fail as a matter of law.

B. THE MEPA LIMITATION DOES NOT VIOLATE THE MONTANA CONSTITUTION.

Plaintiffs must also prove the unconstitutionality of the MEPA Limitation in *all* its applications to maintain their facial challenge, but they cannot sustain this burden. The MEPA Limitation states:

> Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts

> beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

§ 75-1-201(2)(a). Many of the State's environmental reviews are only for State action with strictly local actual or potential impacts. For example, in permitting opencut materials (gravel, sand, etc. under § 82-4-401 *et seq.*), DEQ's Opencut Section issues an environmental assessment. (Aff. Christopher Dorrington, ¶¶ 3—10 (Feb. 1, 2023) (attached as **Exhibit P**)). Because these opencut operations are inherently local with rarely, if ever, potential or actual impacts beyond Montana's borders, each Opencut environmental review is a constitutional application of Section 75-1-201(2)(a). *See, especially*, § 82-4-432(14) (permitting for sites which do not affect ground water or surface water). DEQ's Opencut Section issued approximately 68 environmental reviews in 2019, 66 environmental reviews in 2020, 99 environmental reviews in 2021, and 76 environmental reviews in 2022. (*Id.* at ¶ 7).

Similarly, DEQ's Solid Waste Section performs a MEPA analysis when a licensed septic pumper seeks to add a new land application disposal site to its license under Section 75-10-1211(2). For many of the decisions that DEQ makes under the Solid Waste Laws, there are no potential or actual impacts beyond Montana's borders. (*Id.* at ¶¶ 9—10). *See* MCA § 75-10-221 (solid waste management system (including composting facilities) licensing requirements). In these applications, the MEPA Limitation is patently constitutional.

Moreover, considering the explicit exception contained within the MEPA Limitation, it logically follows that Plaintiffs must also establish the unconstitutionality of *all* applications of the following exception:

> An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:
>
> (i) the department of fish, wildlife, and parks for the management of wildlife and fish;
>
> (ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or
>
> (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

§ 75-1-201(2)(b). Rather than attempt to establish the invalidity of the MEPA Limitation in all applications—or even acknowledge or address the stated exceptions to the MEPA Limitation—Plaintiffs simply allege that Section 75-1-201(2)(a) "has been interpreted to mean that Defendants

cannot consider the impacts of climate change in their environmental reviews." (Compl. at ¶ 111). But even if this were true, it does not render the MEPA Limitation unconstitutional in all applications, as clearly demonstrated above.

Additonally, by limiting a MEPA review to "actual or potential" impacts in Montana, not impacts that are "regional, national, or global in nature[,]" the Legislature reasonably advanced Montanans' right to a clean and healthful environment. MCA § 75-1-201(2)(a). Plaintiffs have not demonstrated any scientifically trustworthy method that would allow the State to measure accurately how any discrete agency action in Montana affects the infinitely complex global climate. Montana's government, moreover, doesn't have power to regulate the environment beyond the Montana's borders. The State of Montana lacks power—in both legal and practical terms—to regulate the environment of Beijing, Mumbai, Los Angeles, or Wyoming, for example. The 1972 Constitutional Convention Delegates enacted the Constitution's environmental provisions to protect *Montana*'s unique environment, not to create a panacea that would cure all national and global climate ills. Montana simply lacks the authority to regulate the environments of other sovereign entities like other states and countries. The environmental provisions in Montana's Constitution do not—and cannot—empower state agencies to cure all perceived global environmental problems. Montana has sovereign power only within its own borders.

When interpreting constitutional provisions, this Court must "apply the same rules as those used in construing statutes." *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. This Court must determine the meaning of a constitutional provision "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.* (citations omitted). In this case, the plain language of the Constitution's environmental provisions and the historical and surrounding circumstances under which the Framers drafted these provisions, all point clearly in one direction: the Montana Constitution's environmental provisions protect *Montana*'s environment. Article IX, section 1, approved by the Constitutional Convention before Article II, section 3, provides that "[t]he state and each person shall maintain and improve a clean and healthful environment *in Montana* for present and future generations." Mont. Const., art. IX, § 1(1) (emphasis added). This plain language makes clear that the Constitution's environmental provisions apply only to Montana's environment. To the extent that Plaintiffs want declaratory relief that the Legislature

should have exercised its exclusive Article IX, Section 1 authority in a different way, that presents a nonjusticiable political question as addressed above. Plaintiffs' facial challenge to the MEPA Limitation fails as a matter of law.

C. PLAINTIFFS CANNOT SHOW ANY VIOLATION OF THE EQUAL PROTECTION AND DIGNITY CLAUSE.

Plaintiffs also allege that the two challenged statutes violate the equal protection and inviolable dignity clauses of the Montana Constitution, but again, these claims fail. Article II, Section 4, of the Montana Constitution provides, in relevant part, "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." *Id.* "The function of the equal protection clause is to measure the validity of classifications created by state laws" and "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Gazelka v. St. Peter's Hosp.* 2018 MT 152, ¶¶ 7, 10, 392 Mont. 1, 420 P.3d 528 (citation omitted).

When analyzing an equal protection challenge, courts engage in a three-step analysis. *Id.*, ¶ 15. First, the court must "identify the classes involved and determine if they are similarly situated. *Id.* (citation omitted). Second, the court determines the appropriate level of scrutiny. *Id.* Third, the court then applies the appropriate level scrutiny to the challenged laws. *Id.* "To assert a viable equal protection claim, a plaintiff must demonstrate that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Id.* (citation and quotations omitted). Groups are "similarly situated" for equal protection purposes only if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.*, ¶ 16. If "the challenged statute does not create classes of similarly situated persons" the equal protection claim fails, and the court ends its analysis at step one. *Id.*, ¶ 15.

Here, Plaintiffs' equal protection claim never makes it past step one of the analysis. Neither the State Energy Policy Goal Statements nor the MEPA Limitation classify at all, much less classify in a manner that discriminates between similarly situated groups. Plaintiffs cannot adduce evidence at this stage to establish to the contrary, and their claim therefore fails as a matter of law.

CONCLUSION

Of the various substantially similar cases Our Children's Trust has brought in state and federal courts, only this case has survived a motion to dismiss.[15] As explained above, the Court

[15] *See, e.g., Chernaik v. Brown*, 367 Ore. 143, 475 P.3d 68 (Or. 2020), attached as **Exhibit Q**; *Funk v. Wolf*, 144 A.3d 228 (Pa. 2016), attached as **Exhibit R**; *Sagoonick v. State*, 503 P.3d 777, 799 (Alaska 2022), attached as **Exhibit S**;

should grant summary judgment to the Defendants on Plaintiffs' remaining claims for relief because Plaintiffs lack constitutional standing, prudential policy concerns weigh in favor of dismissal, the sought expansion of the right to a clean and healthful environment would lead to absurd results, Plaintiffs failed to join necessary parties, and Plaintiffs cannot sustain their claims on their merits. The Court allowed this litigation to proceed to discovery after paring Plaintiffs' claims down primarily to those for declaratory relief, but it has only become more apparent through discovery that Plaintiffs' remaining claims can only be meaningfully addressed by Montana's political branches. Courts do not exist to create an end-run around the democratic process, and if Plaintiffs dislike the environmental policy the Legislature has enacted, the Legislature is the forum in which they must press their disagreement. *See, e.g.*, Mont. Const. art. III, §§ 1, 4–5. They may not impose their policy views on all other Montanans via the courtroom, and this Court should rule accordingly by dismissing Plaintiffs' remaining claims. For these reasons, Defendants respectfully request that the Court grant them summary judgment on all Plaintiffs' remaining claims.

DATED this 1st day of February, 2023.

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Aji P. v. State, 16 Wn. App. 2d 177, 480 P.3d 438 (Wash. Ct. App. 2021), attached as **Exhibit T**; *Reynolds v. State of Florida*, Case No. 2018-CA-819 (Fla. Cir. Ct., Jun. 9, 2020), attached as **Exhibit U**; *Natalie R. v. State of Utah*, Case No. 220901658 (3rd Jud. Dist. Ct., Ut., Nov. 9, 2022), attached as **Exhibit V**; *Layla H. v. Commonwealth of Virginia*, Case No. CL22-0632 (Va. Cir. Ct., Sept. 29, 2022), attached as **Exhibit W**; *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), attached as **Exhibit X**.

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Date: February 1, 2023

Dia C. Lang

EXHIBIT A

REBUTTAL EXPERT REPORT
OF
KEVIN E. TRENBERTH, Sc.D.

Distinguished Scholar, National Center for Atmospheric Research and Honorary Academic in the Department of Physics, Auckland University, Auckland, New Zealand

Held et al.,

v.

The State of Montana et al.,

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

(Case No. CDV-2020-307)

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change. However, it is my expert opinion that much of what is in her report does not use the scientific method and is not grounded in peer-reviewed science about how climate change is already causing significant harms and the projections for worsening consequences in the future if fossil fuel policies do not shift quickly.

3. Montana's Emissions Do Matter

On page 27 of Dr. Curry's report, she writes: "Reducing 0.09% of global emissions will not make a meaningful difference in atmospheric CO_2 or improve Montana's climate." Of course, Montana's contribution is much greater than that through exports of coal and natural gas. Each of the 50 U.S. States can argue the same thing, yet if each were responsible for 0.09%, the total would be 4.5%. Indeed, the U.S. is responsible for 5% of global emissions in 2022, second only to China, and it all adds up.

Whether an amount of pollution is meaningful depends on the health of that which is receiving the pollutant, and its capacity to handle additional pollution without adverse effect. As the accumulation of GHGs emitted into the atmosphere exceeded a safe threshold for climate stability in the late 1980s based on accumulation of trapped heat on the planet (von Schuckmann et al., 2020), there is already too much GHG pollution in the atmosphere. As the IPCC recently said: **"Every tonne of CO_2 emissions adds to global warming."** (AR6 SPM p 28). Every ton of fossil fuel CO_2 emissions for which Montana is responsible adds to global warming and prevents the restoration of our climate system. It is my expert opinion that continued promotion of fossil fuels is extremely reckless and constitutes willful endangerment and harm to the citizens of Montana as well as the rest of the world.

To climate scientists, ongoing high levels of GHG emissions and attendant heating of the planet have created a state of emergency: "the climate crisis". The inherent latency and slow response-times built in to both our infrastructure and climate systems means that, absent rapid actions to reduce emissions, we are already approaching an existential crisis where the very continuation of life on the planet in anything like the current state in which humans created their global society over the last four to five thousand years becomes less likely after mid-century. Some may say this is alarmist, but this is what the science is telling us: the world has more GHGs in its atmosphere than at any time since human's evolved on this planet more than 240,000 years ago.

Everyone has to play a role and some places will lead. While the following statement exceeds my scientific expertise, I offer it as a scientific elder with some accumulated wisdom: These young Montana citizens should be proud of what they are doing, going to court with science on their side, and fighting for their rights.

CONCLUSION

In her report, Judy Curry has consistently overstated uncertainties and failed to adequately recognize the certainties related to climate change. There are many certainties: that humans have changed and continue to change the composition of the atmosphere, that the increasing greenhouse gases cause warming, that the planet (and Montana) are observed to be warming, and that human

activities are the cause. There is indeed also natural variability that is important at any time, but whose signal is small in the longer term. Actually, that is not quite right, because the climate change effects play off of the natural variability and weather systems, and the combined consequences are much greater extremes of weather, greatly inflated damage, and much bigger impacts on the environment and human society. Montana is part of the problem. The children and youth of today are the ones most profoundly affected by these ongoing changes, and their calls to stop and do something about it should rise to the highest levels. Montana should take note and could be a leader in renewable energy. There are viable ways forward that benefit everyone.

Signed this 29th of November, 2022, in Auckland, New Zealand.

Kevin E. Trenberth

EXHIBIT B

Rikki Held, et al. v
State of Montana, et al.

Kevin Trenberth
January 11, 2023

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A. No.
Q. Did you do anything today or in recent history to prepare for this deposition, and, if so, what did you do?
A. Well, I continued to be active as a climate scientist and stay up to date. In fact, I'm very much involved at the moment with a report, which is coming out today, on ocean heat content. And as soon as -- almost as soon as this is over, I'm involved in a press conference about that particular report, which is announcing that the ocean heat content, the oceans, are the warmest ever on record. And so -- for 2022. And so, you know, generally keeping up with what is going on in the world and all of the events that are going on associated with climate change.
Q. Specifically with regard to this deposition, did you meet or confer at all with attorneys for the Plaintiffs? With Phil or anybody --
A. With Phil and Julia, yes.
Q. Okay. When you prepared your report for this case, did you do a draft that was reviewed by counsel for the Plaintiffs?
A. Yes.

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Q. I'll just go right to the report. Toward the end of your report, not the attachments, but the report itself, and specifically page 12 -- if you would go to page 12 -- there's a section there titled, "Montana's Emissions Do Matter."
A. Yes.
Q. Okay. In the second paragraph, the end of the second -- well, second paragraph of that section, you say, "It is my expert opinion that continued promotion of fossil fuels is extremely reckless and constitutes willful endangerment and harm to the citizens of Montana as well as the rest of the world."
Is that your -- have you used that description, that is, "extremely reckless and willful endangerment," previously in any of your work to describe the conduct of a government?
A. No, I don't believe so.
Q. So what -- let me ask you this then. What is it about Montana that makes it stand out from the world as extremely reckless and willfully endangering Montana and the rest of the world?
A. Nothing in particular, other than the fact that Montana is the first example that I've been involved with like this.

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So all of my previous involvement -- well, there was the Juliana involvement, which was focused a bit on Oregon, but the focus has always been much more on global aspects in my work. And so I've been very much involved in the IPCC, for instance.
Q. I mean, you've got almost, you know -- I mean, voluminous and incredible experience, and you must have reviewed -- and tell me if this is wrong -- climate -- the greenhouse gas emissions of a particular political entity such as a nation, right?
A. There are national assessments by the U.S. that occur, but I have not been involved in those at all really. They're primarily done by NOAA, but I'm familiar with some of them.
Q. So except for Juliana -- well, let me back up.
In Juliana, did you render an opinion that Oregon or -- yes, Oregon or the federal government, let's put it that way, that their conduct was extremely reckless and constituted willful endangerment?
A. I didn't use those -- that particular language, but there was very clear language to say

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that climate change was indeed potentially existential threat to humanity.
Q. In your draft of this report, did you use those terms?
A. Not exactly, no. I think it was suggested to me by the -- by the counsel or their -- the people working with them. So the exact language probably did not come from me.
Q. What is your understanding of the -- of the goal of this lawsuit?
A. Well, you know, climate change, as I mentioned, is a potentially existential threat to humanity the way we're going because of the changes in composition of the atmosphere and the fact that we're not globally coming to grips with increasing greenhouse gases, carbon dioxide, and the emissions associated with those, which is the primary cause of climate change.
And, therefore, it affects my children, our children, and their children, the future generations.
And so this is the -- future generation filing a lawsuit against the state in which they live in Montana, the State of Montana, and its energy policies in order to try to get a change in

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United States, and around the world.
Q. I guess my question is, if it turns out here that no one is questioning the anthropogenic causes of climate change, then it would leave much of your report as unnecessary, wouldn't it?
MR. GREGORY: Objection, calls for a legal conclusion, incomplete hypothetical.
THE WITNESS: I would certainly disagree that it's irrelevant because of the Curry report.
Q. (By Mr. Stermitz) Now, do you have any impression at all about what -- let's say, Montana, if we eliminated Montana's .09 percent or whatever the percentage is, if that just went away, what that would do to alleviate the concerns that the Plaintiffs have expressed here?
MR. GREGORY: The question calls for a legal conclusion.
THE WITNESS: It certainly calls for conclusions related to values and a whole lot of other things because Montana would not be able to simply eliminate that without interacting with surrounding states. And indeed this is one of the big issues that if one state -- let's make it a different state for the sake of argument. Say California increases their regulations and maybe taxes emissions in some fashion, then an industry may well just hop across

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the border and go to Nevada or somewhere else.
And so it becomes somewhat fruitless to take unilateral action. One has to actually work with surrounding states to make sure that suddenly all of your industry and so on doesn't just go across the border to the next state.
And so it -- it does require, therefore, political -- well, all kinds of interactions with other states and with the U.S. as a whole.
Q. (By Mr. Stermitz) In your work, Kevin, have you looked at, kind of in the same vein, what the countries who use Montana's coal would do if Montana no longer exported coal?
A. There are plenty of other sources of coal within the U.S. and in places like Australia and Indonesia who are the largest exporters of coal, for instance. So you can certainly get it from elsewhere, but the question is, you know, shouldn't there be a tax on those and -- because of the downstream of consequences of burning fossil fuels.
And so the thing that is apt to happen is that, if they start buying from somewhere else, suddenly it may become a whole lot more expensive. You can see examples of this sort of thing happening in Europe with the war between Russia and the

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Ukraine.
Q. Because of having to find other sources that are --
A. Yes.
Q. -- farther away or something or what?
A. Yes. And they may be more expensive in some fashion, or they may get more expensive because of other changes that are occurring in society.
Q. At some place in your report you address international negotiations or international cooperation or lack thereof, and -- well, we can find it, I think. Page 11 -- page 11 and -- I just need to find a specific -- oh, kind of in the middle of the page. Are you on page 11?
A. Yes, I am.
Q. There's that paragraph that begins, "For purposes of these children's lives well into the end of the century" -- at the end of that paragraph, it says, "Unfortunately, international negotiations show no promise of reining in future climate change."
Without those negotiations bearing fruit, I'm going to ask sort of the corollary here, does that mean that there will be no improvement in global warming or climate change?

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A. No. What it suggests is that the COP process, which involves the United Nations and involves, what is it, some nearly 200 countries, is very, very cumbersome and ineffective in terms of really making major changes.
The Paris Agreement was remarkable in late 2015, and the U.S. was very much involved in that through the Obama administration.
But the -- my own view is the main way forward is either through the G7 or more likely the G20. And, you know, these are the countries that are probably producing the most emissions and -- and, in fact, if the U.S. and China could really get together, all of the other countries would sort of have to go along, I think. And so it relates to global-scale politics, but, you know, not necessarily the COP process.
MR. GREGORY: Mark, is this a convenient point to take a quick break?
MR. STERMITZ: Sure. Let's see, what time is it?
MR. GREGORY: It's 3:44.
MR. STERMITZ: Our time. And we can do 10 minutes or something like that.

(Whereupon, a recess was taken)

DEPONENT'S CERTIFICATE

I, Kevin Trenberth, Deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the correction sheet and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

Kevin Trenberth, Witness

SUBSCRIBED AND SWORN to before me this day of , 20___.

NOTARY PUBLIC
Residing at
My Commission Expires

ROE - Held v. State of Montana

C E R T I F I C A T E

STATE OF MONTANA)
:ss
COUNTY OF BEAVERHEAD)

I, Robyn Ori English, Freelance Court Reporter and Notary Public for the State of Montana, residing in Dillon, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of Kevin Trenberth, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness has been expressly [waived reserved].

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by notarial seal on this, the 19th day of January, 2023.

EXHIBIT C

Rikki Held, et al. v
State of Montana, et al.

Steven William Running
October 25, 2022

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the raw data stream is global, and that raw data stream is beamed down to processing centers on earth, and the full global dataset is processed in a -- in a consistent fashion.

At that point, then, different teams look more in more targeted ways in different locations, but the -- the -- the raw data stream is -- is global and continuous, and, of course, it's very important scientifically that it's repeated in a very high precision way so -- so we can detect changes.

Q. And I've seen, I think, in your report and elsewhere that -- and tell me if -- if I'm saying this right -- that, say, a ton of -- of greenhouse gas into the atmosphere in one place is the same as anywhere -- it's a global issue.

A. Correct.

Q. Is that right?

A. Yeah. As we call it, the atmosphere is well mixed in very short timeframe.

Q. Do -- Do we -- Do you have data on how much of that mix Montana contributes to? Or, yeah, contributes?

A. I'm sure that's been computed many times. I think in the complaint they had even done that

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calculation, and so I know people have done that in the past for every different state, for every different country.

Q. Do you have any kind of recollection of what those figures look like on a -- say a percentage of the whole or some other way we could -- we could measure that?

A. I'm sure -- I'm sure it would be easily found, but it's something I don't keep track of because my part of the -- of the science is the full global -- global dataset.

Q. Do -- Do you have people that you've worked with or could you tell me who, if anyone, might be more up to date on Montana's specific contribution to the global greenhouse gas problem?

A. I think there may be other expert witnesses for this case that work only in Montana and so are focused only in Montana, but since I work globally, I don't focus my work only on Montana.

Q. Okay. And -- And you would agree, I take it, just from reading your report, that the effects of climate change are experienced in different ways in different parts of the globe. Is that right?

A. Mm-hmm. Yes.

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Q. Do we know how Montana -- I assume we know how Montana's being impacted now. Right?

A. Correct.

Q. Is that a fairly well established body of information or -- or is it something that is in flux?

A. Well, the -- the impacts are certainly in flux. The most recent comprehensive summary has been our Montana climate assessment of 2017, which is referenced in my expert testimony, and most of those figures of -- in the testimony for Montana come from that Montana Climate Assessment.

Q. Okay. I've read in your report that -- the -- the following: Global annual temperature increased at an average rate of .07 degrees centigrade per decade since 1880 and over twice that rate since 1981.

Let me stop there. How is -- How is that measured globally? Is that through these NASA platforms or does the data come from some other sources?

A. Most of those references, certainly since 1880, come from the ground weather station network that -- that -- we have the World Meteorological Organization in Switzerland a long time ago found

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the -- the most valuable summary of daily weather was the daily maximum and minimum temperature and daily rainfall, and so every weather station, pretty much around the world, has collected and reported those basic measures every day from the time the station started, and so that's why we can go back to 1880 for some of -- well, certainly for places like Europe that -- and -- and -- and eastern -- well, we even had them here by then. I think some of our stations had started here.

So when you see any temperature trend that goes back that far, you know it's not the satellites because our satellites really didn't start before about 1980. So those long historical records are all from surface weather observations.

Q. Do you have a -- an opinion or a feel for how Montana's being affected by the climate change in particular on this, like, spectrum of good to bad, so to speak?

A. There's a couple of principles that have become clear. One -- One is that near the equator, so the lower latitudes are changing more slowly in temperature, the higher latitudes are changing faster.

The other basic principle that is very

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done that or who could do that if it hasn't been done?
A. I'll bet the Montana Environmental Information Center is probably where I would -- where I would call first.
Q. Okay. And I think somebody's going to take Anne Hedge's deposition, so maybe we'll --
A. Yes.
Q. -- find out. Okay.
A. They specialize in the state level calculations.
Q. The -- The report talks about Montana's energy policy, and it also talks about the Montana Environmental Protection -- or Policy Act, excuse me, MEPA. Are you familiar with how MEPA works in Montana?
A. All -- I'm familiar --
Q. Can I stop you? As, of course, I mean as regards, you know, what the climate change and what we're talking about here.
A. I think so.
Q. Okay. And do you believe there's a problem with it?
A. As -- As I understand what that states is that any Montana policy around energy can only

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include material from inside the state. And so you -- you exclude all national and global level scientific information and policy information is the way I understand it so it -- it forces them to look only at internal state material information.
Q. Do you know whether from a -- I'm trying to avoid asking for a legal conclusion, so let me put it this way: As far as your knowledge is concerned, does Montana have the ability to regulate the conduct outside its borders?
A. I don't think it has the authority to regulate outside -- Well, I don't think it has the ability to regulate outside its borders. I think it can have influence, but I don't think -- I think its regulatory authority stops at the border.
Q. I know we haven't been going at it very long, but I need to use the bathroom. Can we take a break for about ten minutes?
A. Okay. Good idea.
(Recess taken from 10:02 a.m. to 10:24 a.m.)
EXHIBIT:
(Deposition Exhibit 23 marked for identification.)

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BY MR. STERMITZ:
Q. Dr. Running, have you met any of the plaintiffs in -- in the case -- in this case?
A. No.
Q. Are you familiar with their individual circumstances other than what you've read in the complaint?
A. All my understanding of the plaintiffs and their background comes from the complaint.
Q. Do you know, then, whether if, again, going back to the hypothetical that Montana could somehow prohibit the emission of any greenhouse gasses how that would impact any of the plaintiffs individually differently from one another or from the rest of the public? Do you have any feel for that?
A. Not specifically, and -- and, of course, there's such a time domain in all of these questions.
Q. Right.
A. That is -- is so unknowable that makes it just hard -- hard to answer in a very specific way.
Q. And -- And I can -- I don't think this will -- I'm going to guess it's not going to change

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the answer any, but rather than make it the hypothetical elimination of all greenhouse gasses, let's -- let's say the court were to declare Montana's energy policy unconstitutional, which I think is one of the goals of the lawsuit, do -- do you know how that would impact any of the plaintiffs individually, a ruling like that?
A. I don't -- I do not know specifically with regards to any of the individuals.
Q. Let me see here. One of the statements -- again, this is on -- if you need to refer to it, it's on page 4, the executive summary of your report, let's just go there.
A. Okay.
Q. In the middle of the third paragraph on page 4, there's a sentence that starts "These impacts pose an unusually serious risk."
A. Okay.
Q. Do you see that sentence?
A. Yeah. Yep.
Q. The sentence goes on to read that "an unusually serious risk to the health and well-being of these youth Plaintiffs and future generations and are causing substantial degradation and depletion of Montana's environment and natural

DEPONENT'S CERTIFICATE

I, STEVEN WILLIAM RUNNING, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true, and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

STEVEN WILLIAM RUNNING, Deponent

Subscribed and sworn to before me this day of , 2022.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Rikki Held, et al. vs. State of Montana, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of STEVEN WILLIAM RUNNING in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on November 6, 2022.

EXHIBIT D

Rikki Held, et al. v
State of Montana, et al.

Claire V.
December 20, 2022

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WHEREUPON, the following proceedings were had and testimony taken, to-wit:

* * * * * * *

CLAIRE V.,

called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. SAUER:

Q. All right. Well, Claire, good to see you this morning. Is it okay if I call you Claire?

A. Yeah. That's fine.

Q. Okay. Great. Thank you.

My name is Selena Sauer. So we'll just start by going through some procedural items. But before I even do that, can you please go ahead and tell us your full name and spell it out for the record?

A. Sure. Claire Vlases, C-L-A-I-R-E. My last name is V, as in Victor, L-A-S-E-S.

Q. Okay. Thank you. And what is your age, Claire, at this time?

A. I'm 19.

Q. And what is your date of birth?

A. February 23rd, 2003.

Q. Happy almost birthday.

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A. Thanks.

Q. I know you're a couple months out.

So you turned 19 on February 23rd, 2002 [sic]; correct?

A. I turned 19 last year, so 2022, yeah.

Q. Okay.

A. Okay.

Q. And have you ever had this experience of being in a deposition, having your deposition taken before?

A. No, I have not.

Q. All right. Well, I'm going to walk through, like I mentioned, a couple of procedural things. And I told you my name is Selena Sauer, and I represent the State of Montana in this case. And I'll be primarily asking you questions today.

And one thing that -- this is like a list of items that I want to cover. So with people especially who aren't very familiar with having their deposition taken, sometimes there's a tendency to try to talk over each other a little bit. So it's really important that we each talk separately so the court reporter can get that down.

Does that make sense to you?

A. Yeah. That makes sense.

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Q. Okay. And I'll make sure to try to do my best to not interrupt you, and I know I have this problem, so I'm going to apologize ahead of time if that occurs, to the court reporter and to you. But I'll do my best to not interrupt you, and if you can try to not interrupt me, that would be really fantastic.

A. Okay.

Q. And then second, I want to get your assurance that if you don't completely understand any of the questions that I'm asking you, that you let me know immediately so I can try to rephrase it for you.

A. Okay.

Q. Okay. And then another thing to be careful of that really bothers the court reporters, especially like in these Zoom meetings, is if you don't answer verbally, like if you just nod or shake your head, then, you know, they can't take down what the answer is. So it's really important that you answer with a yes or a no or whatever you would like to say. Do you understand that?

A. I do.

Q. Great. And then so you know, I think that this deposition should only take a couple of hours. And so given that, I'll try to stop about every hour

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for a short break or even sooner, but if you ever need a break at all or would like to -- you know, if you need to use the restroom or whatever, just let me know. Once you finish the answer to your question, we can take that break at any time. Okay?

A. Okay. Sounds good.

Q. All right. And then my goal here is to get as much information as I can about your case, what you know about it, what your feelings are about it, and so forth. So this -- of course, you were sworn in so this is like sworn testimony just as if you were a witness on the witness stand. Do you understand that?

A. Yeah.

Q. All right. Very good. And I wanted to mention objections. Nate may make an objection to one of my questions, and if he does, most of the time you will still need to try to answer that question. But he's putting his objection on the record, so to speak, and it's there and it will be dealt with later.

So I'm hoping that I can ask questions where Nate doesn't have to object, of course. And -- but usually it's a rare deposition if there aren't any objections. So I just wanted to warn you about

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that. Does that sound reasonable?
A. Yeah. That's fine.
Q. Okay. Great. And then in the end after everything is all over, you'll have a chance to review your testimony, and you'll sign it and then basically make any corrections if you feel that something was wrong and -- and, you know, make sure that in your mind it's good to go with any issues that you may run into when you read it. Does that make sense?
A. Yes.
Q. Sorry. That was a little confusing probably. But in terms of the process here, any questions that I ask you, please understand that I'm not asking about what you may have talked with with your attorney -- with any of your attorneys. So that's off limits and I don't intend to ask about that. So don't tell me what you and your attorneys talked about.
But just because you talked with your attorney about something -- like maybe you told your attorney how old you were. Right? That doesn't mean that when I ask how old you are, you can't respond. Does that make sense to you? Does that kind of difference make sense to you?

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A. Yes.
Q. Okay. Great. All right. That sounds good. Well, let's go ahead and dive in.
And I know I asked if you had ever been deposed before. So have you ever been in a lawsuit before other than the one we're dealing with here today?
A. No, I have not.
Q. Okay. And I'm just going to start by getting some information about, you know, your past.
So where were you born?
A. I was born in Portland, Oregon.
Q. Okay. Great. And where else besides -- do you live in Bozeman, Montana, right now?
A. I do.
Q. Okay. Fantastic. And where else have you lived besides Portland where you were born and Bozeman where you live now?
A. I live in Claremont, California, for college.
Q. All right. Anywhere else?
A. No. That's all.
Q. Okay. When did you move from Portland to Bozeman?
A. I can't remember. I think I was 1 or 2.

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Q. Okay. And then when did you go to Fairmont for college?
A. Claremont.
Q. Oh, Claremont. Sorry.
A. And I moved two years ago.
Q. And so tell me about that. Do you go spend your semesters in Claremont?
A. Yes.
Q. Okay. And when you're not actually in classes, do you -- what has been your pattern? Do you stay in Claremont or do you travel somewhere else?
A. I usually come back home to Montana.
Q. Since you have been in college, have you ever gone anywhere else, taken any vacations, or done any traveling?
A. Yes. I, last summer, spent a month in New York and a month in Europe.
Q. What part of Europe?
A. I went all over, into five different countries.
Q. Do you remember which ones?
A. I'm not totally sure. I think Portugal, Italy, Ireland, France, and Spain.
Q. Okay. Did you -- when you went around to

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the different countries, what was your mode of transportation?
A. Train or airplane.
Q. All right. Who did you take that vacation with?
A. I went with my friends from college.
Q. Okay. So besides Portland and Bozeman and Claremont, have you ever spent any extended time -- and your trip, of course, over the summer, apologies, have you ever spent any other extended time traveling anywhere else or kind of an extended vacation over a month long, anywhere else maybe with your family?
A. No.
Q. Okay.
A. Actually, I think -- I haven't gone anywhere with my family, but I have traveled other places longer than a month.
Q. Sure. Can you remember where those places are?
A. Yes. I went to Europe for a month a few years ago, and I also traveled around the United States for over a month a few years ago as well.
Q. Did you -- when you traveled around the United States, how did you get around?
A. Via bicycle.

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Q. And who would you go with when you did that?
A. I went with a group, kind of like a summer camp.
Q. All right. Well, thank you. I guess I should back up. I apologize. I should have done this first.
Do you have Exhibit 175 in front of you? I think it hasn't been marked as 175. That's the notice -- Defendants' Amended Notice of Taking Deposition of Plaintiff Claire V.
A. I do.
Q. Okay. Great.
(Whereupon, Exhibit 175 was marked for identification.)
BY MS. SAUER:
Q. And that's you, right? You're Claire V.?
A. I am.
Q. All right. Fantastic. Sorry about that. And then Exhibit 1, I don't know if it's marked as such, but it's very thick. It's the complaint.
A. Yes.
Q. Do you have that in front of you as well?
A. Yes, I do.
Q. And if you can turn -- it's about three or

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four pages in to page number 1 of the complaint.
A. Okay.
Q. And it's in paragraph 1. Do you see about midpage it says Claire V., comma, by and through her guardian Michael Vlases?
A. I do.
Q. Am I pronouncing Michael's last name correctly?
A. Yeah. That's correct.
Q. Okay. Fantastic. And is Michael Vlases your father?
A. He is.
Q. All right. And who is your mother?
A. Katie Brandis, B-R-A-N-D-I-S.
Q. Fantastic. And are they currently still married?
A. They are.
Q. Okay. And do you have any siblings?
A. I do. I have a younger sister.
Q. What is her name?
A. Ursula Vlases.
Q. How old is she?
A. 17.
Q. And what do your parents do for a living?
A. My dad works at Bozeman Health, and my mom

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works a couple different jobs.
Q. Can you provide a little bit more details about your mom's jobs?
A. Sure. She works as a professor at Montana State University, and she also works as a substitute judge. And she also works for the State of Montana. I can't remember her job title.
Q. Okay. Let's walk through these a little bit. So first of all, did you say Watkins State University?
A. No. Montana State.
Q. Oh, got it. What does she teach?
A. I can't remember exactly, but she's taught a lot of different classes over the years. Usually -- I think the class she is teaching next semester is law and the profession.
Q. Apologies. Can you restate that?
A. Yeah. The class she's teaching next semester is called law and the profession.
Q. And then you mentioned the second job is as a substitute judge. Correct?
A. Correct.
Q. Do you, by chance, know where she would -- where she sits?
A. She's a municipal court judge. She

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sometimes substitutes for Bozeman and Belgrade.
Q. Does your mom have a law degree?
A. She does.
Q. Okay. Do you know where she got it from?
A. I can't remember, but I think Gonzaga.
Q. And then you had mentioned she works for the State, but you -- you're not sure what her title is. Is that correct?
A. Yes. It's a new job.
Q. Okay. Do you know what department she works in?
A. No.
Q. How long has she had the job?
A. I can't remember. Probably a few weeks.
Q. Congratulations to her.
A. Thanks.
Q. All right. And then your father, you mentioned that he works at -- was it Bozeman Health?
A. Yes.
Q. Okay. And what does -- what does he do?
A. He is an internal medicine doctor, and he also works, I think, in IT or management, something like that.
Q. Okay. And what kind of patients does he work with? Do you know?

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A. I don't remember exactly, but I believe that the water from Bozeman Creek comes from Hyalite Reservoir, which is a big reservoir up in the mountains, and, yeah. That is filled up with snowpack every year.

Q. Okay. Do you know which mountain range that is in?

A. I can't remember.

Q. Have you ever hiked in -- done any of those hiking trails up Bozeman Creek or hiked up into those mountains?

A. Yes. Plenty of times.

Q. Okay. And then your statement about glaciers -- hang on a second. Let's see. Let me see if I get this correct. It says "She feels threatened and is concerned that with melting glaciers, declining snowpack, and increasing summer drought conditions, all as a result of climate disruption, water scarcity will impact her and her family in the future."

And can you please address the melting glaciers, what those have to do with climate disruption and then with water scarcity?

A. Sure. I can't remember exactly, but I believe that a glacier is snow that lasts all

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year-round, and as those melt, then that contributes to declining snowpack as well. And as there's less cold snow frozen in the mountains in the spring, then in the summer when it melts away there's greater drought, and that will impact my family's water rights.

Q. Okay. Thank you. So I'm going to move on a little bit to talk about your high school years. And so you were going to high school there in Bozeman at the time of the lawsuit. Is that correct?

A. That's correct.

Q. Which high school was that?

A. Bozeman High School.

Q. Is that the one downtown?

A. Yes.

Q. Got it. All right. And I think we kind of have been over this, but I'm going to ask you again. What year did you graduate?

A. 2021.

Q. And we know you're going to college. What college are you going to?

A. Claremont McKenna College.

Q. And what are you studying?

A. Computer science.

Q. Can you please list -- let's see. First

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of all, how many semesters have you been in college so far?

A. I just finished my third semester.

Q. Okay. So are you -- are you taking any science courses?

A. I'm taking a science course next semester.

Q. What will it be?

A. It's called science -- sorry. It's called land, air, and ocean science.

Q. Okay. And what are you interested in doing with that computer science degree?

A. I'm interested in building programs that help people in underrepresented areas when it comes to technology. Growing up in Montana I think there's a little bit less access to technology than there is in some other places, and it's my goal as a computer science major to help bring computer and technology access to people who need it most.

Q. So you would like to be a programmer?

A. Yes. I think so. I'm not totally sure yet, though.

Q. Sure. But right now you're spending your winter vacation back up in Bozeman. Correct?

A. Yes. That's correct.

Q. Okay. And where do you stay when you're

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in Bozeman?

A. I spend most of my time at my house in Bozeman, and I also spend some time in Big Sky because I work at the ski resort.

Q. So you -- okay. You're working at the ski resort right now?

A. I am.

Q. Not right-right now, but --

A. Yeah. Today is my day off.

Q. Okay. And how much do you work up there?

A. I work as much as I can. I think around 25 days out of this month.

Q. Great. How many years have you been working on and off at Big Sky, like how many seasons?

A. This is going to be my sixth season.

Q. Wow. So when did you start working at Big Sky this season?

A. My first day was a few days ago. I think the 17th, but I can't remember.

Q. Okay. And what do you think about the snowpack up in Big Sky this year?

A. This year the snowpack is a little bit different because it's a la nina event which only happens 100 or so years, I think. So because of that there's a lot more snow than normal. However, in

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past years not counting this la nina event, there's been less snow.
Q. Oh, talk about the la nina event. That's exciting to me. You said that there's a la nina event. Can you please explain what la nina is?
A. I don't know the specifics exactly.
Q. Where did you hear about this la nina event?
A. I don't really know a lot about it. I just know all my friends that are ski instructors, they bring it up about once every couple hours.
Q. And you heard them say that it only happens once every 100 years?
A. Something like that. I don't know the specifics behind the weather event, though.
Q. Okay. So you wouldn't necessarily stand by that as a fact, would you, from what you know?
A. I don't know if it's an exact fact at this moment. I can't remember.
Q. Fair enough. Fair enough. But in your opinion the snowpack is pretty good this year so far?
A. This season so far it's been pretty good, yes.
Q. And do you ski or snowboard?
A. I do both, but I mostly ski.

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Q. Okay. And are you a ski instructor?
A. I am.
Q. Okay. And what age group do you give lessons for?
A. I teach all ages from age 2 to adult.
Q. Okay. Do you just do whatever they -- you know, whatever classes are available or do you teach beginning classes or advanced classes? Do you have a specialty?
A. I -- since I've been working there for so long, I usually just get, you know, whatever -- whatever they need help with just because I can do it all.
Q. And is it -- while we're on the subject, is it snowing there in Bozeman right now?
A. Not right now.
Q. Have you guys gotten a lot of snow in the past since you've been back? Have you -- have you gotten -- like how many times do you think it snowed? And take your time to think about it.
A. Since I've come back from college?
Q. Yeah.
A. I don't think that it's snowed more than like an inch or a couple of inches since I've been back, so basically none.

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Q. Not much. Is there -- what is their snowpack down there?
A. In Bozeman?
Q. On the valley floor like in Bozeman.
A. I do not know the specifics of that.
Q. Have you walked out -- like walked out off of the pavement at all while you've been there?
A. Yes.
Q. Okay. Can you just give -- you don't have to be specific. What is your best guess as to how much snow is on the valley floor right now?
A. I would say a few inches.
Q. Okay. And is that normal for this time of the year? Is this about the normal amount of snow coming into Christmas?
A. I can't remember, but it seems the same as last year.
Q. Okay. And then as far as your job, will you just work there until school starts again?
A. Yes, I will.
Q. Okay. And what -- when does your semester start back up?
A. Mid-January.
Q. And then when you go back to Claremont, California -- is that correct?

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A. That's correct.
Q. When you go back to Claremont, California, do you do any -- do you work at all down there while you're in school?
A. I do. I work at -- I'm the manager of the campus mailroom.
Q. All right. How many hours per week do you think?
A. Probably around ten. And I also work at an internship at a tech startup, although that's unpaid. And I just finished a job working as a graphical analysis for -- analyst for the campus facilities as well.
Q. That sounds exciting. Did you enjoy that job?
A. The graphical analyst?
Q. Yeah.
A. Yeah.
Q. Can you explain it?
A. Sure. Well, I broke something in my foot a few months ago and was on crutches, and so as a replacement for my mailroom job, since you have to walk around for that, I worked for campus facilities, going through the graphs of like the heating and cooling systems in all the rooms and making sure

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Q. Okay. But is there -- so does that actually limit the size of a solar array that you can have on your house?

A. I can't remember, but I do know that it's a large deterrent, if not a complete limit.

Q. Okay. Just kind of from a logical perspective, if a large building required more than 50 kilowatts of energy to run it, then explain why it would be a deterrent that it couldn't sell back any extra energy.

A. I think that it's a deterrent because then the solar panels cannot be at their maximum efficiency because their energy cannot be contributing to the grid.

Q. Could the extra energy go into a battery?

A. I don't understand exactly how all of the specifics of solar panel energy buyback works. I'm not an expert on this, and so because of that, I can't answer that question.

Q. Understood. Let's go ahead and look at the complaint really quickly, which is Exhibit 1. If you could turn to 69, paragraph 69.

A. Sure.

Q. And there is a statement -- can you please just read that first sentence?

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A. Sure. "Despite Claire's work to raise money to install solar panels on her school, Montana law limits the size of solar panel arrays."

Q. Okay.

A. This is referencing the 50 kilowatt cap.

Q. Okay. But -- and I realize it's been awhile. Is it your understanding, then, that Montana law actually limits the size of solar panel arrays?

A. On --

Q. On -- let's say on a school.

A. I think that the wording is a little bit vague, but in my understanding it is limiting the size of the 50 kilowatt hour limit. I mean, if you mean size as in overall amount of solar panels, I don't remember the specifics.

Q. Okay. But what you believe that statement, Montana law limits the size of solar panel arrays, to mean, to the best of your knowledge, is that Montana law limits the amount -- the size of the solar panel array, the amount of energy, 50 kilowatts, that it will be willing to buy back and put back into the electrical grid. Is that a correct way to state it and if not please restate that?

A. Sure. My understanding of what this sentence means when it comes to the size of solar panel arrays is that we measure solar panels in their capacity of 50 kilowatt hours. So the size of it is the amount of kilowatt hours it produces.

And so right now we do have a cap on, I believe, unless there was the law, of course, of 50 kilowatt cap. And so the size of the array is limited by this law, yes.

Q. Does the size of the amount of energy that could be sold back into the system is limited by the law? And the law was in place -- just to be clear, the law was in place when the complaint was filed.

A. Correct.

Q. Okay. Again, let's just go over this one more time because I probably have been speaking a little bit of gobbledygook on it. So to be clear for the record, could you please restate what you believe the statement in the complaint, quote, Montana law limits the size of solar panel arrays, unquote.

A. Sure. Montana law limits the 50 kilowatt hour cap on the amount of solar panels that can be bought back into the energy grid.

Q. Okay. Thank you. Now, give me a second please. So going back to the fundraising.

A. Sure.

Q. Can you describe a little bit of all the things that you did to raise the funds?

A. Yeah. Well, the first thing that I did was go to the school board and explain to them my idea and explain to them the limitations of the cost of solar panels, and immediately they gave me $25,000 in seed money to get started. And that was the great -- first step that I needed to know that there was support in my community for this, and it wasn't just me alone for this idea.

And so after that, I started campaigning by going -- I gathered a team of other students that were interested. We created the solar club in my middle school. We went to local businesses, set out little jars for people to donate. We did a variety of different fundraising techniques.

Created a website. I created a cloud -- or crowd sourcing platform. And then I also went to individual donors, the high rollers of our community, and asked them for their support. And most of my money came from one person in particular, the Candida Fund, and that was enough to put us over the edge.

Q. Okay. So you had a group of fellow students that you -- did you start kind of an official school group, or was it --

A. I'm not sure if it was an official school

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all of its needs.
Q. Sure.
A. But okay. Hypothetically, that they were able to do that, I think that it would save them thousands of dollars a month, and that money could go into programs to help students in a variety of different ways.
Q. But are you aware of any law -- I'm not saying -- I'm not asking you is there any law. I'm saying are you aware of any law that would prevent a high school anywhere in the Bozeman area from installing any -- a larger solar panel array than 50 kilowatts, installing one and using it?
A. I can't remember if there's a specific law that, you know, puts a limit on the exact number of solar panels that a school can have, although I do know that the 50 kilowatt system is a huge deterrent from actually being a fully solar electric facility.
Q. Okay. Great. And turning back to the other things that you were up to in high school, what other activities -- besides all this work with the solar club, what other things were you involved in? Let's start with school activities.
A. Sure. I took really hard classes. I think I took over ten AP classes. I always took

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extra classes. I graduated with way more credits than I needed. School, I -- I was on a couple different school clubs. I can't remember exactly which ones. I ran cross-country. I was on speech and debate. Yeah. To name a few.
Q. Okay. And then outside of school what other activities were you involved in?
A. I worked a lot. I worked -- well, I worked on a our small farm business in the summers. I worked as a laundromat attendant for summer school. I worked at the ski resort, you know, consistently the whole time. And I also had, you know, some obligations to some of the environmental work that I did outside of school as well.
Q. And can you talk about that environmental work outside of school?
A. Sure. Like for example, I -- being on part of the Bozeman climate team, I spent time helping plan the City of Bozeman's reaction to climate change and goals for sustainable development until 2050. That was, you know, a bit of a time commitment.
Q. Sounds like it. Sounds like it. Did you -- and was there a report that came out of that?
A. I believe so. I believe there was.

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Q. Okay. Did you work on that at all?
A. I think so, yes. I can't remember exactly which report you're referencing.
Q. And I can't remember either what report I'm referencing, so we'll move on.
And as far as -- you were talking about kind of your activism outside of school. Did you also participate in any climate change demonstrations or marches or in any other groups besides those that you have already mentioned?
A. I don't remember.
Q. Okay. Any other big fundraising events besides the ones for the middle school and then I imagine you did -- and you did do fundraising in high school. Was there anything else?
A. Yes. There was fundraising for my high school solar club. I don't remember if there was other events beyond that.
Q. So that seems like it's a lot of community organizing which -- is that a fair statement?
A. Sure. Yeah.
Q. Okay. And how do you see -- do you see the community organizing as a positive path to informing people of climate change and making a difference?

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A. Can you explain exactly what you mean by community organizing?
Q. Sure. I'm kind of talking about the things that you were involved in -- fundraising, working in groups, working in the community in groups, all of the things that you have kind of been doing since you were in middle school, that I'm going to frame as community organizing. Is that a fair term to use right now, or do you prefer a different term?
A. That seems fine. I think -- I think that it is one positive way of achieving a goal. At least in my case with the solar panel project, it was the best way for it. I don't think that it is the best way in all situations, and I don't know -- I don't think it's the best way in this case either.
Q. And when you say "in this case," what are you referring to?
A. I mean Montana's unconstitutional promotion of fossil fuels. I don't believe that community organizing is the best way to ensure that this is prevented.
Q. Okay. And so that is why you -- or can you explain then why you are in the lawsuit?
A. I'm in the lawsuit because when I was 17,

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I didn't have a right to vote, and I had tried and failed to pass legislation that, you know, represented my and the other students of my town's views on climate change. And so because there are three branches of government and I was not heard in the other two, I believe that this was the best way forward to ensure that there is, you know, the necessary change to ensure that my rights are protected.

Q. Okay. However, in all circumstances do you believe that there are other ways to make a positive difference than a lawsuit?

A. Yes. There are a lot of different ways to make positive differences generally.

Q. We'll come back to the -- to that a little bit later, but I want to back up because we skipped some stuff having to do with all your activities. And let's see. You had mentioned that you bicycled a lot, and I believe you mentioned you had bicycled around the United States.

If you will go to, looking back at the complaint, paragraph 66.

A. Yes.

Q. And there on the last line, line 23, of page 22 in paragraph 66, it starts out with "Claire

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recalls." Can you please read that?

A. Sure. "Claire recalls that in one instance of cycling, the extreme heat melted the asphalt."

Q. Okay. Can you please describe what happened, what you saw, where you were at, what time of the year, the temperature, all of that --

A. Sure.

Q. -- with regard to --

A. This was when I was biking across the United States. I was in the southern United States, so not in Montana in this case. But yeah. The road melted our tires and it was almost impossible to bike.

Q. Wow.

A. And it was quite hot.

Q. Yeah. Do you remember what -- what time of year it was?

A. It was during the summer, likely July. I can't remember.

Q. And you said it was in the south. Do you remember the state by chance?

A. I can't remember. Probably Texas or Arizona.

Q. Oof.

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A. Yeah. Not the place to be.

Q. When you were biking, would you like carry a bunch of gear with you?

A. Yes.

Q. And where would you guys stay at night?

A. Biking across Montana and, I guess, across the United States, we would stay at like community centers or schools, like set up a tent, you know, in like the school yard or something or stay in like a, you know, basement of a community center, that kind of thing, generally speaking.

Q. Sure. Sure. Okay. So that statement about the asphalt melting, the -- can you please relate it to the lawsuit in Montana? Why would that statement be in the complaint if -- if the incident didn't occur in Montana? Can you please explain why it is in the complaint, do you think?

A. Sure. I think that the -- the emissions from Montana's promotion of fossil fuel industries has an impact on the state, and it also has an impact on neighboring states. And because of that, although perhaps an indirect relation, there has -- Montana's fossil fuels contribution is contributing to climate change across the country.

Q. All right. Thank you. So you biked

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across the country. But you were also in cross-country, big difference, in high school?

A. Yeah.

Q. Let's go ahead and look at that paragraph about cross-country. Sorry. I'm just -- I'm looking for it. Oh, okay. So I think that's 67. It's on the top of page 23.

Now, are you -- are you participating in any sports in college?

A. I am in some intramural sports, but I'm not running cross-country competitively in college.

Q. All right. What are you up to?

A. I'm in -- well, I didn't do any this past semester because I broke my foot, but I did play intramural soccer and intramural innertube water polo, so --

Q. What position do you play in soccer?

A. It's kind of all over the place. Usually left wing.

Q. But you broke -- when did you break your foot?

A. I broke my foot a little while ago, but I got surgery to fix it just like three months ago.

Q. Are you going to be able to -- apparently you are skiing on it?

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A. Climate change is changing the environment that we have -- that we know as Montanans. It's impacting our everyday life. It's impacting, you know, my right to water. It's impacting my job as a ski instructor.

And so because our environment is changing, it's no longer the clean and healthful one that we have been working to preserve so long since this constitution has been made. Climate change is the reason which I'm worried about my future. I'm worried about the future of my kids, and I am worried about the state of Montana and what it would look like -- what our environment will look like in years to come.

Q. Okay. So do you think it will impact your job as a ski instructor in the future?

A. Yes.

Q. Do you plan on being a ski instructor?

A. Yes. I'm going to my sixth season right now. I'm going to continue working for as long as I can. I love my job. However, with, you know, decreased snowpack and shorter seasons, my job is threatened.

Q. Okay. And the computer programming stuff?

A. That's -- I mean, that is what --

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Q. Is that going to be a job of yours? Sorry. I apologize.

A. Yeah. Of course. Of course.

Q. My bad.

A. You know, I am studying computer science. I hope to pursue a field in, you know, the field of tech and find a job there, but I don't have a job there right now. And my job is a ski instructor right now, and it's been a ski instructor for the past five years. This is my sixth. And I don't see, you know, anything changing in the coming years as I continue through college.

Q. Okay. And as far as -- we talked a lot about solar power. Obviously, the weather isn't great. Up here in Montana right now it is Christmastime. Do you think -- do you foresee a time -- do you believe that right now we would have enough solar panel to heat everybody's houses in Montana?

A. I'm sorry. Can you explain your question again?

Q. Sure. Let me rephrase that. Do you believe that right now we have enough solar power infrastructure in Montana to heat everybody's houses on a cold winter day like today?

A. If everyone in Montana had solar panels, I

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mean, the energy that is made by solar panels, while, you know, perhaps variant considering weather conditions, it's still sunny outside. It's not -- I mean, the sun is a consistent energy source. And with the buyback program that we have in place for anything less than a 50 kilowatt system, then yes. We have energy on the grid to power the houses of Montana. And no. I don't believe that we have the infrastructure right now to, you know, just immediately convert everyone to solar panels, because that's just not the way our system is working right now. But I believe in the future like if we had the -- if the State had dedicated or will dedicate time to, you know, pursuing alternative energy productions beyond oil, natural gas, and coal, then perhaps, yes, we will have the infrastructure in the coming years. We just need the state to recognize what we have been pursuing right now is not protecting the constitutional right of Montanans and thus needs to be amended.

Q. Okay. Is that your full answer?

A. It is.

Q. Have you read the energy policy -- the state energy policy goal statements? Did you get a chance to read all of those?

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A. I've read the ones that are in the -- in the complaint. I haven't read all of the ones that are in Exhibit 9.

Q. Okay. Can you go ahead and look at Exhibit 9 and read out loud (I), which is at the bottom of the page?

A. Sure. "Promote the generation of low cost electricity with large-scale utility wind generation and small-scale distributed generation."

Q. Okay. Have you ever heard of that term small-scale distributed generation?

A. I have not, no.

Q. All right. To me, small-scale distributed generation means solar power. But if you hadn't read that term, you may not -- I mean, I can't guarantee that's what that means. That's what I think it means.

But do you -- overall do you think this is a positive state energy policy goal statement?

A. Are you referencing (I) or are you referencing all of them?

Q. Nope. Just (I).

A. Can you repeat your question?

Q. Sure. Do you think that (I) is a positive state energy policy goal statement as in do you -- do

that the world has used and that includes oil and gas and plastics, do you see any good at all coming from the use of fossil fuels, including the burning of fossil fuels in -- with the way that our world has developed?

A. I recognize that much of the world's production and development and innovation is rooted in fossil fuel industries. However, I believe that the detriments of the fossil fuel industries have caused to our natural world contributing to climate change and impacting, you know, the environment in which I know, those detriments are more -- are significant enough that the progress that we have made due to fossil fuel industries comes -- is -- while perhaps beneficial in the way that the progress has been made because of fossil fuel industries, the detriments that have come because of the fossil fuel industry harming the environment, those are significant enough that the progress that we have made is questioned in my mind. And I fear what the future will look like if we continue on this path.

I also believe that we have made enough progress as a world to recognize that we don't need to use fossil fuel industries to the same level, to the same extent we do now in order to maintain the

same or higher level of progress. And I think it is a necessary switch that we change away from fossil fuel industries and towards the renewable energies that we have put so much work into uncovering and discovering and actually utilize the technologies that we have in order to ensure that our world continues at this rate of development and at this rate of progress in a sustainable way so that the future can actually reap the benefits of the progress that we have made from fossil fuel industries as a transition into a more sustainable development.

MS. SAUER: Okay. Thank you, Claire. I have no more questions.

THE WITNESS: Thank you.

MR. BELLINGER: I have no questions.

(Whereupon, the deposition concluded at 12:23 p.m.)

SIGNATURE RESERVED.

* * * * * * * * *

DEPONENT'S CERTIFICATE

I, CLAIRE V., the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 118 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

_____

CLAIRE V.

Subscribed and sworn to before me this _____day of_____, 2023.

_____

PRINT NAME: _____

Notary Public, State of Montana

Residing at: _____

My commission expires: _____

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of CLAIRE V., in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 16th day of January, 2023.

EXHIBIT E

Rikki Held, et al. v
State of Montana, et al.

Sariel Sandoval
January 5, 2023

Charles Fisher Court Reporting
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Min-U-Script® with Word Index

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"Climate change is threatening Sariel's culture, which is already in jeopardy and at risk of being lost. The environment is one of the remaining connections Sariel and her community have to their culture; Sariel is worried that her and her community's activities, practices, and beliefs of cultural significance will be entirely lost if climate change continues. The threat of losing her community's important connection to the environment and losing her culture because of climate change is extremely stressful on Sariel and her community."

Q. Do you agree with that?

A. Yes.

Q. Okay. Can you explain a little bit what -- Besides climate change how your community -- how your culture is in jeopardy and at risk of being lost?

A. Unrelated to climate change?

Q. Yes.

A. That's a -- That's a loaded question. Culture and -- Our culture is deeply tied with the environment, like I said, but it's also deeply tied with the language. But because of ongoing -- past and ongoing forms of colonialization, our

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culture is threatened.

Like, for example, our language, which I said is deeply tied to our culture, we have about 8,000, 9,000 tribal members and less than a dozen fluent speakers, so it's in -- it's in jeopardy, it's, you know, endangered. So, yeah.

Q. I know you said you went to school at the immersion school --

A. Mm-hmm.

Q. -- to speak. Are you pretty good at speaking your language?

A. No. I know, you know, the basics, I know how to introduce myself, I know my colors, I know my shapes and whatnot. And when there is an elder speaking, I can kind of get the gist of what they're saying. But for the most part, no, I'm not -- I'm not fluent, but -- Yeah.

Q. Besides losing your language, which is no small -- is there anything else that is putting your culture in jeopardy right now?

A. Yes. Once again outside of climate change, you know, just community involvement. There's just a lot of practices that aren't being practiced by the community, and just one of the ongoing, yeah, threats.

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Q. Okay. Thank you. Okay.

And then do you see on line 16? I know you read it. Let me reread it and put it in -- in quotes for the record.

Quote, "Sariel is worried that her and her community's activities, practices, and beliefs of cultural significance will be entirely lost if climate change continues."

Can you please explain how climate change could, I guess, if climate change -- how -- if -- Apologies. Let me restart.

Can you please explain how, if climate change continues, your community's activities will be entirely lost?

A. Yeah. Yes.

Q. Okay.

A. As it says in this paragraph, my -- me and my community's culture is deeply tied with the environment, and climate change significantly impacts the environment, and, therefore, impacts my culture. Our culture is tied to the environment through the seasonal changes; through, you know, what we use to harvest, what we use for clothing, what we use for every aspect of our lives, and when that's negatively impacted, that

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negatively impacts our culture.

Q. And so that's activities. Your cultural activities now as -- as with regards to practices, can you please explain how, if climate change continues, your cultural practices will be entirely lost?

A. Yes. Again, our culture is deeply tied to the environment, so some of our practices, you know, our -- our ceremonies and our -- you know, stories and just our way of life is tied with the environment. Like, again, out -- the seasonal changes, the, you know, features of those seasons, and when those are lost or disrupted, it impacts my community and my -- our culture and those practices, sorry, to clarify.

Q. That's okay. And then we are going to -- let me ask you this final one similar question.

With regard to your beliefs of cultural significance, how will those be entirely lost if climate change continues? I'm just wondering about that word "entirely," if it's --

A. Oh, yeah. Excuse me.

Q. Yeah.

A. I'm just -- I'm just rereading 'cause I'm

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dense.
I think my answer remains pretty much the same again. Our -- Our culture is deeply tied with the environment. So when that changes, our culture changes, and as does -- Yeah. I'm sorry.
Q. No, you're fine. Just taking a moment.
Okay. I guess what do you foresee that will happen if climate change, at the pace it is right now, persists, like, what specific visible, tangible things do you foresee will happen that will cause your entire culture to be lost?
A. I'm unsure of any specific, like, scenarios of how my culture will be lost, but I just -- I do know that it is being threatened because the environment is being threatened, but because climate change is such a -- it -- it's a process, I can only hope, you know, that my -- my culture and people will adjust, but these are, you know, traditions and practices that have been practiced for, you know, centuries.
Q. Okay. Okay. Let's look at paragraph 29. I guess I -- I apologize. Let me ask you a couple more questions about 28.
Do you know of anything that the tribe is doing with regard to climate change as a tribe?

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A. Yes. My tribe owns the CSKT dam --
Q. Mm-hmm.
A. -- which is a renewable energy source.
Q. Mm-hmm.
A. They also have, you know, other programs occurring such as, like, the food sovereignty program where they find food that is locally sourced and distribute to tribal members, but also provide tribal members with their own resources to grow their own foods. And then I do believe that the housing authority takes into consideration the energy consumption of the tribal members.
Q. And do you -- Are you currently or do you have plans to address this -- really serious concerns you have with regard to climate change and your culture, plans to do anything else about it besides, like, this lawsuit?
A. Outside of this I would try to do everything that one person could possibly do, you know, within a reasonable doubt, you know. I believe the food sovereignty program is a good program, it's a -- it's great, but when I see opportunities in the future to, you know, address climate change in any way that I can do -- in a way I could help, I do believe I would take those

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opportunities.
Q. Okay. All right. Now let's look at paragraph 29. If you could please read the sentence that starts on line 20. If you look down the side, the lines, that says "The Flathead Lake depends," and if you could please read --
A. Yes.
Q. -- that sentence.
A. "The Flathead Lake depends on the runoff from the snow but the lack of snow creates low water levels, which impacts Sariel's aesthetic and recreational opportunities, and impacts her community's abilities to fish for bull trout and rainbow trout."
Q. Okay. How does the lack of snow and the low water levels, how does that -- how do the low water levels impact your aesthetic opportunities?
A. I believe, again -- sorry, this was three years ago -- I believe, but aesthetic opportunities would be impacted by the lack of snow levels or low -- yeah, lack of snow creates low water levels because it -- like, as, you know, the snow melts, drips down, you know, the mountain, it impacts the trees and, you know, thinking of vegetation on the trees -- well, not

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the trees, the mountain, but also the lake too. So we spend a lot of time at the lake, and to not see that water come up, you know, every summer like it used to, it's kind of disheartening, I would say.
Q. And the same question, how does low water levels affect your recreational opportunities?
A. Yeah. So, again, like every summer, you know, not seeing the -- the water come up as fast, it -- recreational I would -- I would take as, you know, spending time at the lake, you know. Every year my family and I would, you know, go to the lake and hang out on the docks and whatnot and jump off of them, and that's pretty fun, but when the water's too low, you can't really jump off the docks or -- and whatnot, but... And again, as it says, fishing is also another recreational opportunity that's affected, so...
Q. Do you fish?
A. Personally I don't fish, but I have family members who do fish.
Q. Okay. And then if you could please read on the next page, just that next -- next sentence.
A. "Snow is also a necessary component of certain traditional ceremonies, like Coyote

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storytelling when it snows next?"
A. Oh, okay. Yeah, yes, I have. Actually there is a -- a coyote story class at SKC. I did dual enrollment, so I took classes there, and, you know, conversations about whether or not we could even have the class because there was no snow. It was really, I guess, worrisome 'cause it wasn't just a class, it -- I mean, you know, it was, you know, friends and community members. And then even the teacher, he was my cousin, so just, you know, community concerns about that.
Q. And did climate change get brought up in those specific discussions about the class?
A. I guess just acknowledging that there was no snow at the time when there should have been snow was -- which is, yeah, related to climate change.
Q. And since you can remember, how many times -- and take your time to think about this -- how many times can you -- individual winters that you can recall that you did not get to hear your coyote and creation stories?
A. I don't recall a specific number, but I believe every year we've been able to at least exchange coyote stories and creation stories, just

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not for a longer period of time.
THE COURT REPORTER: We're just over an hour, if you wanted to know.
MS. SAUER: Let's take a break.
(Recess taken from 2:01 p.m. to 2:07 p.m.)
BY MS. SAUER:
Q. Sariel, can you please look at paragraph 30 now.
A. Yes.
Q. And would you mind reading that one sentence?
A. Yes. "There has been an increase in wildfires on the Flathead Reservation where Sariel lives, and she is forced to remain indoors when the smoke is concentrated in the area to preserve her overall health and safety."
Q. Okay. So you -- do you agree with this?
A. Yes.
Q. Okay. So in your lifetime, you believe that there's been an increase of wildfires on the Flathead reservation?
A. Yes.
Q. Okay. And what are you basing that on?
A. Just my observation. Every year we have

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a lot of wildfires, so they're hard to miss.
Q. Mm-hmm. And how far back do you remember being a kid? Like, how far back do you remember there being wildfires on the reservation?
A. When I was younger I don't recall a lot of wildfires. It was -- It's just been within recent years have I noticed a lot going on.
Q. Any other information besides observation?
A. No.
Q. Okay.
A. Well, observation and conversations with family. Sorry.
Q. Oh, okay. Yeah?
A. Yeah.
Q. Okay. But you haven't read any -- haven't heard any, like, news or read any news articles or heard the tribe talk about it or anything like that?
A. Oh, yeah, for sure. Like, the tribe has talked about it. I mean, last year during the summer there was a big fire out by Elmo, which is, like, northern -- well, the north part of the reservation, and they had to evacuate a lot of homes during that time. It got really big.

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And then I believe the summer prior to last year, so two years ago, there was a fire out by my work at Blue Bay, and they had to evacuate Blue Bay, the entire campsite. All the workers had to go home, homes were burned, and there was a -- what do they call them -- where they house the people who had to be evacuated.
Q. Like, a shelter --
A. Yeah.
Q. -- for an evacuation?
A. Yeah. Both at the Polson -- for both events at the Polson High School for school area and then also at the SKC gymnasium.
Q. And do you know how these fires started?
A. I don't recall how they started. I just know that because it was really dry, they spread really fast.
Q. Okay. Okay. Let's look at paragraph 31. Sariel, can you read -- see if you need to read the whole thing. Oh, read -- I guess it's the first two sentences, please.
A. Okay. "Sariel's family members hunt wild game on the Flathead Reservation, including bison. Sariel and her family rely on this food source for the rest of the year."

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Q. Okay. Who in your family hunts bison?
A. I have cousins and uncles. I'm -- I have a lot of cousins and uncles, but --
Q. Do they --
A. Oh, I'm sorry, go ahead.
Q. No, if you're not done.
A. Oh, it's okay. But, yeah, it says here that they hunt bison on the reservation, but since this deposition, I have come to learn that they actually go down to Yellowstone and hunt bison. But I do have family members that do go down and -- when they come back, you know, successful with bison, they tend to share their, you know, success.
Q. Yeah. So the bison meat, does it usually get, like, kind of divvied up amongst family members and such?
A. Yeah. Just depending on who, you know, gets the bison, it gets divided up. But for the most part, we get bison almost -- I think almost every year or not almost every year, but a good amount of the time. My uncle -- my uncle Shane, he brings a lot of bison through, so...
Q. Do -- Do your family members, are you -- do anything else with the -- with the animal, with

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the --
A. I do believe that they do use other things, like, you know, the hide.
Q. Mm-hmm.
A. They use the hide and the bones, but I'm not sure what the specific people do with their bison.
Q. Okay.
A. Yeah.
Q. Do they ever hunt bison -- I don't -- I don't know if this is possible, but at the bison range there in, like, south of -- in the southern part of the Flathead reservation?
A. No. I do believe they're protected.
Q. Okay. And do you know how they -- is it a special thing that the Salish Kootenai tribe can hunt bison in Yellowstone? Is -- Or can anyone do it?
A. I believe it's a special -- Like, you have to have a permit for it, you have to go through, like, a specific class to get that permit, but my understanding is that native people -- I don't think it's exclusive to just Salish and Kootenai, but have the right to hunt bison.

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Q. Okay. And now would you please read starting on line 13?
A. Mm-hmm.
Q. The -- Yeah. The sentences -- Maybe just read the rest of the paragraph.
A. Okay.
Q. Please.
A. [As Read]: "Sariel and her family pick huckleberries, which they dry, freeze, and then make into jam, syrup, and other foods, such as cheesecake for Sariel's birthday. However, Sariel has to travel farther up to pick huckleberries, and the huckleberry picking season has been pushed later into the -- into the year because the berries are not ripe due to fluctuating and extreme temperatures. Sariel is concerned that as the climate crisis worsens, traditional food sources and cultural practices may be lost with the declining access to bison, berries, and other foods."
Q. Okay. Thank you.
Do you agree with that?
A. Yes.
Q. Okay. So do you guys go out, like, regularly to pick huckleberries?

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A. Yes, during the season.
Q. Okay. What is huckleberry season over there?
A. Well, it gets -- as it says right here, it gets pushed further back into the year, so, you know, when -- I think I -- not I think -- I remember as a kid going huckleberry picking, like, beginning of July, maybe even the end of June, but now we don't even go huckleberry picking 'cause they're not ready until, you know, maybe end of July, mid August, so...
Q. And do you have, like, your special spots that you can go huckleberry -- like your patches?
A. Yes.
Q. How many quarts or gallons do you get, generally speaking, in a year?
A. Maybe a few gallons every year, or at least we try. I think this last year we didn't even get maybe two gallons, yeah.
Q. That's a lot of huckleberry cheesecakes, though.
A. That's my favorite.
Q. Mine too.
And you can remember picking huckleberries way back into your childhood?

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A. Yeah.
Q. Okay. So explain to me what the sentence, quote, "Sariel has to" -- or what this portion of the sentence, quote, "Sariel has to travel farther to pick huckleberries," end quote.
What is -- What do you mean by that? What does that mean, "travel farther"?
A. Farther up into the mountains.
Q. Okay.
A. Every year the -- the huckleberries get farther and farther up into the mountains because it's really -- it gets really dry. It's just the -- I don't -- They just get farther up the mountains, so every year we have to go farther and farther up just to get, you know, decent huckleberries that are, you know, not dried out and that are ripe enough to be picked.
Q. When you mean "dried out," do you mean the berry itself is dried out or the plant or...
A. Both of them. They're -- They're, like -- I don't know how to describe it, but they're both, yeah, like, dried out. Sometimes even huckleberries, like, even when you go farther up, you find huckleberries, there's not even a lot on there. But, yeah.

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Q. Can you tell if they've been pre-picked by someone else?
A. Usually you can, but we have secret spots.
Q. Have your -- Since -- Let's just say -- Let's, see. You're 19. Maybe about -- ten years back, since you can kind of really picking huckleberries --
A. Mm-hmm.
Q. -- have those secret spots, have you gone to those secret spots and the huckleberry patch was -- was, like, not there anymore?
A. Yeah. I could say that. I remember going up, it's near Dixon, and maybe traveling up the mountain, I feel like 15 minutes, 20 minutes, and finding a really nice spot, and then just last year we had -- it was, like, an hour or more just, you know, going up the mountain to find, just, a decent size and decent amount of huckleberries.
Q. Do you know, though, if the -- the same spots, if the plants are actually dying or?
A. I am not sure.
Q. Okay.
A. Yeah.
Q. Okay. So you have to travel farther up the mountain and the huckleberry picking season has been pushed later into the year.
So let me ask you this: In what you recall from your memory as a really really -- as a warmer year, are the huckleberries -- is the huckleberry season pushed later in the year in a -- in a really warmer year?
A. I don't know if it's necessarily -- Yes, actually. Or I am not sure on the specifics. I am -- I just know that the berries are not ready at the time that they were usually ready, and so that has been pushed back. So I'm not sure of any specifics on the -- Sorry. Could you repeat the question.
Q. That's fine. Maybe -- I can try to rephrase it. I mean, generally berries ripen with heat, they ripen sooner. So I'm just curious, the sentence doesn't make sense to me, so I'm trying to figure out if you can explain it better why the season has been pushed later in the year due to fluctuating and extreme temperatures, which temperatures those are that would cause the season to be pushed later in the year.
So my question is what temperature -- what extreme temperatures would cause the season to be pushed later into the year?
A. I'm not sure about the science behind the -- like the specific science behind the interaction between the weather and the huckleberries, which would possibly be addressed by experts on the case, but I just know from my personal experience and my family's experience that the berries aren't ready at the time that they should be ready.
Q. Okay. Okay. So then with regard to the final sentence, which states "Sariel is concerned that as the climate crisis worsens, traditional food sources and cultural practices may be lost with the declining access to bison, berries, and other foods."
Can you talk a little bit about the declining access to bison that maybe -- has your family talked about that or where did -- where does that information come from?
A. I am not entirely sure.
Q. As -- I'm sorry, are you --
A. Yeah, I'm sorry.
Q. I didn't want to interrupt your...
And as far as the berries go, this declining access references the fact that you have

this lawsuit will help.
Q. Is -- Is it your hope that bringing this lawsuit will, like, affect, like, the global problem of climate change in a meaningful way?
A. Yes. I -- I do hope that this lawsuit will help on a global scale. Not specifically, like, individually, I just hope that Montana will begin again to take these steps and other people -- or other states and other, you know, nations will follow suit, and we can, you know, address climate change as a -- as a -- as one.
Q. How will a positive result in this lawsuit change the chance that you will be able to continue to learn about your culture and carry out your cultural traditions?
A. I believe that climate change will still affect my culture and my people when Montana -- if this lawsuit goes through. But, again, I hope that this will help. It will help the process of reversing climate change and that it will help, you know, our end goal of a healthier lifestyle, in a healthier environment which would, you know, ultimately affect my people and my culture.
Q. Okay. Give me half a second. I think I'm done. Let me check my notes.

I do have one follow-up. You know, when we were talking about the coyote and the creation stories, do you -- could you tell them yourself now? Are you -- Do you know them well enough to tell them?
A. Yes. I mean, I -- I share them with my little brothers, it's always something that I enjoy doing, but, yeah, I -- I do tell them myself, so...
Q. Okay. All right. Thank you. That's everything.
MR. SULLIVAN: Thank you. I don't have any questions. We'll reserve.
(Deposition concluded at 3:27 p.m. Deponent excused; signature reserved.)

DEPONENT'S CERTIFICATE

I, SARIEL SANDOVAL, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true, and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

SARIEL SANDOVAL, Deponent

Subscribed and sworn to before me this day of , 2023.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Rikki Held, et al. vs. State of Montana, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of SARIEL SANDOVAL in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 17, 2023.

EXHIBIT F

Rikki Held, et al. v
State of Montana, et al.

Taleah Hernandez
January 5, 2023

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to ice-skate on the lake?
A. Late fall, winter. Depends on the ice conditions.
Q. If you had to, like, state the months, what would those months be for normal -- like, under normal conditions?
A. I'm not sure of the months when I was a kid. Now I don't think I can skate past February. Maybe early February. Maybe December to February.
Q. How do you know that it's safe to skate out there?
A. Generally I just look for if there's water on top of the ice, if the ice cracks when you throw a rock, if we skate with my mom's friends. They're a lot more knowledgeable about ice safety.
Q. Are you ever scared, like, that it's unsafe and then skate anyway, or how does that, like, work for you? Like, when do you decide it's safe to skate?
A. If the ice is thick. It's got to be at least a couple inches thick. And if there's holes or parts of the ice with water on it, then you know to stay far away from that -- that ice.
Q. All right. Okay. So the complaint

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mentions in 2019 you could not ice-skate on the lake at all. Is that correct?
A. I do believe so.
Q. Okay. When was the -- Before 2019 when was the last time that you could not skate on the lake because there was not enough ice?
MR. SULLIVAN: I'm -- I'm going to just interject an objection to form because that's literally not a quote. If you were intending to quote, it doesn't accurately quote, so I would object on that basis.
MS. SAUER: Okay.
A. I can't recall the years. Yeah. They're kind of a blur.
BY MS. SAUER:
Q. Do you -- Do you remember -- Before 2019, do you remember years where you could not skate on the lake? A year that you could not skate on the lake?
A. I can't recall exact years, but I know there were years where the ice just wouldn't form thick enough or stay long enough for us to skate.
Q. After 2019, in 2020 -- Let's see. So 2019 would go to December, and then do you remember being able to skate January,

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February 2020?
A. I couldn't say for sure, but we would skate on a smaller reservoir nearby with some friends --
Q. Okay.
A. -- because that froze easier.
Q. And did you want -- get out to skate, like, December 2020 at the end of the year that year?
A. I couldn't tell you. With COVID, things changed a lot with who we could go skate with.
Q. Do you remember ice-skating during 2020?
A. Yes. I'm pretty sure I did.
Q. Okay. Do you remember ice-skating on Flathead Lake in 2020?
A. No. I think we were only able to skate on the reservoir.
Q. And do you remember -- Okay. So now 2021, like, January, February, 2021 --
A. Mm-hmm.
Q. -- do you remember skating on Flathead Lake?
A. I haven't been able to skate on Flathead Lake for I don't think a couple of years, and I haven't tried. I have better luck with the

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reservoir.
Q. Are you aware or have you seen people skating out on the lake in the last -- since, like, in 2021, this year 2022?
A. Sometimes it's hard to tell if people are ice fishers or skaters.
Q. Okay. Have you seen ice fishermen out there?
A. Yes.
Q. This -- So that would be this winter?
A. I haven't been home for -- for a while, so I haven't seen ice fishers towards the latter half of 2022.
Q. Do you go ice-skating in Bozeman?
A. Yes.
Q. Where do you go down there?
A. At the fairgrounds, and they have some makeshift rinks that they make after Christmas in the parks.
Q. Okay. So you haven't been ice-skating -- Have you been ice-skating this winter?
A. Yes.
Q. Where at?
A. Bozeman.
Q. Okay. Okay. Going back to the

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Q. Where do you think you heard that?
A. I've heard it from my parents and from teachers since I was very young.
Q. So would you agree that wildfires are a natural part of the Montana environment?
A. I agree that some wildfires are.
Q. Would you think it would be a good thing if there were no more wildfires in Montana so you would never have to inhale smoke?
A. No, because I recognize that wildfires are a necessary part of the landscape.
Q. All right. Is this a good time to take a break?
A. That sounds great.
Q. Okay.
MS. SAUER: Let's take a ten-minute break.
MR. SULLIVAN: Mm-hmm.
MS. SAUER: Is that okay with everyone?
MR. SULLIVAN: That's fine.
MS. SAUER: Okay. Thank you.
(Recess taken from 10:03 a.m. to 10:16 a.m.)
BY MS. SAUER:
Q. All right. I don't know why I'm having a

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mind block with this. Tell me -- Can you tell me how to pronounce your name again?
A. "Ta-LEE-ya". It's like --
Q. Taleah.
A. -- "Leah" with a "Ta" at the beginning.
Q. Maybe that'll help me. Maybe that'll help me. I'm so sorry.
A. It's okay.
Q. It's not -- It's just me.
Taleah, can you tell me about your annual Mother's Day bike ride on Going-to-the-Sun Road?
A. Yes. My mom and I, whenever we have the opportunity over Mother's Day or sometime close, we like to go bike riding in Glacier. Usually somewhere up the Going-to-the-Sun Road. Not all the way, but.
Q. Okay. Do you go always, like, right around -- do you go -- try to go on Mother's Day or around that time period?
A. Yeah. We try and go whatever day or weekend that falls upon.
Q. Okay. And is it, like, an official thing? Do a lot of folks do it or is it you and your mom's special thing?
A. It's my mom -- me and my mom's

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little -- little thing.
Q. Cool. What kind of bike do you guys -- do you ride?
A. Just one we bought from a secondhand store.
Q. Is it a road bike or a mountain bike?
A. Probably more like mountain bike.
Q. Okay. And do you know when Mother's Day is at?
A. I don't. I couldn't tell you the exact date.
Q. I believe that it is May 14th.
A. That sounds right.
Q. But that's going off my memory. But it's in the -- Do you think -- Do you -- Would you agree with me that it is in the middle of May?
A. Yeah. I think in the spring.
Q. Okay. And do you usually bike up to -- bike up the road -- Going-to-the-Sun Road until you reach where it's closed?
A. It depends on the weather. One year it started raining, so we turned around.
Q. Do you remember biking up the road until you hit the closure, wherever that may be at?
A. I don't think we've gone that far, but

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I'm not sure.
Q. Okay. Do you, by chance, know when that road fully opened up this year?
A. This year I don't know.
Q. Do you know, like, just from your experience of going up there, when the Going-to-the-Sun Road usually fully opens up?
A. I think it's as late as the summer. June. But I'm not sure.
Q. Okay. So how did your bike ride go this year?
A. We didn't go this year.
Q. Why not?
A. Probably we were just busy. Lots of preparations for college.
Q. Yeah. Did you go last year?
A. I'm not sure.
Q. When do you remember last going?
A. I don't really remember the years. I don't keep track of that. I'm sure I could find a photo of our last trip up there.
Q. Could -- Would it be accurate to say you've -- you've gone in the past three years?
A. Yes, I think so.
Q. Okay. Do you remember -- maybe not

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of TALEAH HERNANDEZ in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 17, 2023.

EXHIBIT G

Rikki Held, et al. v
State of Montana, et al.

Lander B.
December 29, 2022

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Q. And are you comfortable reading out loud?
A. Yeah, absolutely.
Q. Okay. Can you please read the first two paragraphs of -- or, sorry, first two sentences of paragraph 21?
A. 21? Yes. So just the sentences?
Q. Yeah.
A. All right. [As Read]: "Plaintiffs Lander B. and Badge B. are 15 and 12 years old, respectively, and live in Kalispell, Montana. Hunting and fishing are an integral part of Lander and Badge's cultural heritage and community, as well as an important food source -- Lander, Badge, and their family depend on the food they hunt and fish for as -- for as their source of meat and protein."
Q. Okay. Great.
A. Mm-hmm.
Q. And do you agree with those statements?
A. I do, mm-hmm.
Q. All right. Can you please explain what -- what "cultural heritage and community" mean to you?
A. Yeah. In -- In reference to this in particular?

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Q. Yes.
A. So my -- my father first moved to Montana around 30 years ago and moved off of a ranch in Kansas where he had been taught at a very young age to bird hunt and work with dogs and -- as well as deer hunting. I mean, not as much big game hunting in Kansas, but things he was taught at a very young age by his father and his grandfather to his -- to his father before that.
And so when he moved up to Montana and decided to have a family with my mother, these were things that he wanted to impart upon to us, and I'm very happy that he has, and they're a part of our family values for sure and are something that I'll impart on my kids as well, mm-hmm.
Q. Okay.
A. Mm-hmm.
Q. And kind of with regard to community, what do you think that -- what your --
A. Mm-hmm.
Q. -- what community are --
A. Yeah.
Q. -- you a part of?
A. Hunters and fishermen. I mean, Kalispell is -- is -- everybody I know hunts and fishes.

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That -- That's -- That's what we do, and we have so many opportunities for incredible outdoor recreation. We want to put them to good use, and along -- I mean, obviously, like I said, it's a part of our -- a part of our family values, and a lot of people hold those values very dear. Especially when we depend on our hunting trips and fishing trips to get food on the table for things like winter and whatnot, so...
Q. Yeah.
A. Mm-hmm.
Q. Do you -- You said you have incredible --
A. Mm-hmm.
Q. I -- I can't paraphrase exactly what you said --
A. Mm-hmm.
Q. -- but is it correct that you have incredible opportunities for hunting and fishing?
A. Yeah. Absolutely. Mm-hmm.
Q. To this day?
A. Yeah. I -- I mean, to the access of -- of places that we have. I mean, Montana's a huge state, but we have -- there's a lot that we can cover. I mean, obviously in the last few years

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we've had much more restricted access to these sorts of things because of the conditions that we've endured, but -- as -- as a result of climate change, but there's still many opportunities for us to be able to -- to pursue hunting and fishing and whatnot.
Q. Sure.
A. Mm-hmm.
Q. And when you say just in the last couple years --
A. Mm-hmm.
Q. -- it's been -- you feel like it's been more restricted?
A. Yeah. I -- I'd say five years or so. I mean, obviously I -- I -- I've grown up a lot since then -- the pandemic has -- has gone on, so there's a lot of other outside contributing factors, but we -- my brother -- my -- my family, in general, has seen a great decline of our opportunity to pursue, like, outdoor activities and recreation.
Q. In the past five years?
A. Yeah. Mm-hmm.
Q. Okay. Do you --
A. About, yeah.

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devastation from the forest fire. So it's, yeah, more of the place as opposed to the population. But the population is affected by these things as well.

Q. Mm-hmm.

A. Mm-hmm.

Q. Yeah. I -- I've seen population numbers for some of the forests around here.

A. Mm-hmm.

Q. The population seem to better -- there are more -- seem to be more reported elk and deer --

A. Mm-hmm.

Q. -- in the forests, so I'm just wondering how that squares with access to important food sources like deer and elk if there's so many of them in the forest.

A. Yeah. I mean, we don't want to just hunt right near our house as well. We have many places that we go outside. And in terms of state conditions, not just locally, we -- we have many places that are not just, like, say, in our backyard where we want to be able to hunt and that are affected by things like forest fires and, yeah.

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Q. Do you have any other thoughts on that?

A. No.

Q. Okay. Let's look at paragraph 22.

A. Mm-hmm.

Q. Can you go ahead and read the -- maybe the first two sentences, please?

A. First two?

Q. Yeah.

A. "Lander and Badge are also avid fishermen and catch cutthroat trout, rainbow trout, bull trout, and other fish in Montana. Their ability to fish is adversely impacted as the climate crisis causes abnormally low instream water levels and high water temperatures, which harm fish and decrease their population."

Q. Okay. And do you know much about -- is that an accurate --

A. Yeah, mm-hmm.

Q. -- statement?

A. Yeah.

Q. Okay. Caught any bull trout lately?

A. No. I mean, that's quite the trophy -- trophy fish. My brother has. I've had a couple close calls, but I've never caught a bull trout. He's caughten one really big bull trout

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before.

Q. And a cutthroat?

A. Cutthroat, yeah. They're all -- they're all over, mm-hmm.

Q. Have you ever caught a cutbow?

A. I have, yeah. I mean, they're kind of hard to identify sometimes, but, yeah, I've caught cut bows before.

Q. Do you understand what the -- what's going on there with the cut bow?

A. Yeah. I -- I don't really know -- I mean, I just catch the fish, and so --

Q. Right?

A. -- I -- Yeah. I mean, the -- the fish is a fish, but, yeah, we -- I -- I'm sure I've caught one at some point. I don't know how it exactly works. I'm assuming a cutthroat accidentally fertilizes some rainbow eggs or something like that --

Q. Okay.

A. -- and that's what happens, so...

Q. And I think you mentioned a couple times that you've had fishing trips canceled.

A. Mm-hmm.

Q. Can you please go ahead and read the

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third sentence? No, I'm sorry -- I should have had you read it from the get-go.

A.. [As Read]: "Climate disruption is at the" -- it's the third? Yeah. [As Read]: "Climate disruption is also -- has also caused the closure of certain fisheries; Lander and Badge recall closures on the Flathead River and Blackfoot River, among others, which have prohibited them from fishing."

Q. Okay. So when it says "closure of certain fisheries," can you please describe that a little bit more?

A. Yeah. So fisheries, in this case, is referencing just places where the fish are.

Q. Okay.

A. Rivers in particular. That -- And then, yeah, we go on to talk about how the Flathead and Blackfoot in particular are rivers that -- that have been impacted which are fisheries because they contain fish, mm-hmm.

Q. Okay. And when you say "closure," is that a closure by the -- like, an official closure by the state of Montana?

A. On occasion, yes. I can't recall which apply -- like, what closure can apply to which,

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but sometimes we aren't allowed to, like, go on because of the air quality -- Like, get on the river. We usually will raft or sometimes walk up and down river, and that -- that's strongly prohibited just by the air quality, in particular, late in August when we want to get out and fish.

Q. Mm-hmm. And is August the -- late August the time of year when the rivers are running the lowest?

A. I don't know exactly. You'd have to ask one of the experts about that.

Q. From your experience, what time of year are the rivers at their lowest?

A. Usually in -- I mean, actually now that seems about the time, like, September, around that, yeah.

Q. Okay.

A. Beginning of fall.

Q. And y'all fish from boats?

A. Mm-hmm.

Q. Okay. What type of boats do you --

A. Yeah. We -- I mean, we -- we also fish, like, just by walking the river and whatnot.

Q. Mm-hmm.

A. But we have a drift boat and a raft that

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we use. Mm-hmm.

Q. Okay.

A. Mm-hmm.

Q. And so let's start with the Flathead.

A. Yeah. Sure.

Q. I'm guessing you've fished there --

A. Oh, yeah --

Q. -- a little bit?

A. -- yeah.

Q. Okay.

A. The upper Flathead, right.

Q. Okay.

A. Mm-hmm.

Q. Yeah. And do you take your raft or your drift boat when you fish up there?

A. That's a pretty -- That's a pretty manageable one for both. I mean, the Flathead is -- is special because of just how big of a river it is. The -- The drift boat can't be used if it -- if it's really low because we can crack the boat. The raft is -- we can use on much more, like, adverse terrain, but, yeah, we've used the raft and drift boat on the Flathead before, mm-hmm.

Q. And do you understand the -- I kind of

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was alluding to this a minute ago when I was asking when the rivers were at the lowest.

A. Mm-hmm.

Q. Do you understand or can you speak to the yearly cycle of the amount of water that flows through the Flathead?

A. Yeah. I mean, I have a pretty general understanding. You'd have to ask the experts for more like --

Q. Sure.

A. -- information on that. But, I mean, I know, like, in the spring as we start to warm up a little more and it seems even in December when we warm up we get a lot of -- get a lot of -- of runoff here. But -- But, yeah, and that's what contributes to the heightened water levels later in the spring which keeps the rivers high usually through the summer, and then we'll go back down again and then, yeah, just repeats itself, mm-hmm.

Q. Okay. So as to the slow in-stream water levels, do you know anybody in the raft business up in the --

A. Yeah, I do.

Q. -- up in the canyon there?

A. I -- I -- I do know a couple guides,

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yeah. One of them his name is Ben Eisinger, he actually runs True Water Fly Shop which is just about -- a little bit down the street over there.

Q. All right.

A. Yeah. And he's talked to me about how the water levels, in particular, have made it hard for him to book -- or to book clients and whatnot when he can't take people on the river up in areas like that, so, mm-hmm.

Q. Do you know what time of year that is?

A. He works all year long. I don't know exactly his schedule for when he books what -- what gig or whatever, but, yeah, you'd have to ask him.

Q. Okay. And you don't by chance know what type of water temperatures cutthroat trout like?

A. I'm -- I don't know an exact number. You'd have to ask our experts on that --

Q. Mm-hmm.

A. -- but it's cold. It's -- It's cold. They -- Yeah, I don't have an exact number.

Q. Sure.

A. Mm-hmm.

Q. Do you -- So on the trips -- on the fishing trips you've canceled --

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A. Mm-hmm.
Q. – you mentioned air quality.
A. Mm-hmm.
Q. But also have you canceled any fishing trips because the –
A. Water levels?
Q. – because of water -- water levels?
A. Yeah, yeah, we have, but usually, I mean, we fish however -- we fish according to, like, the conditions of the river. So we usually have annual trips that we'll take that have been interrupted because of those conditions just because of that year. I can think of a couple instances where we -- we want to go, like, in the spring and we haven't gotten enough runoff to be able to -- yeah, to be able to even get on the river. Were usually not able to raft until about July or June, but even just to fish the river we've had, yeah, unaccessible conditions before.
Q. Sure.
A. Mm-hmm.
Q. And on what rivers were those -- was that on?
A. I can't -- I don't know, off the top of my head. I know the lower Flathead, in

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particular. That's as opposed to the Flathead, but the Milk River, Blackfeet. Yeah. We -- I don't remember them all --
Q. Okay.
A. -- off the top of my head.
Q. Yeah.
A. Mm-hmm.
Q. And do you go to the Blackfeet – Blackfoot a lot?
A. Yeah. It's been a pretty -- that's an annual trip we do every year to camp on the Blackfoot, fish up and down the river. We don't usually take a boat there, it's not -- it's not wide enough, but, yeah, we do fish the Blackfoot, mm-hmm.
Q. Okay. And so with regard to the text -- Let's see. I don't know -- I can't remember, did I have you read all of paragraph 22 yet?
A. You had me at "Climate disruption." The rest of 22? Yep.
Q. Yeah.
A. So I'm on line 14. "Their ability to raft on rivers, including the Flathead, Blackfoot, and Smith Rivers, has also been restricted, and in

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some cases made impossible, due to low instream water levels."
Q. Okay.
A. Mm-hmm.
Q. So what does that mean, "restricted"?
A. We -- There's certain stretches of river in most cases that will just flow naturally deeper than other parts of the river, and if there are mostly on these rivers, in particular, except the Blackfoot, where you're able to get a raft in, and that's that access point. And so in the past we've had points where we've canceled because where we want to put in a raft or something like that we can't because of the low water levels.
Q. Sure.
A. Mm-hmm.
Q. How about on the Smith River? Do you remember any time in particular you were restricted from floating that river?
A. The Smith River is difficult because you have to put in for a permit. It's one of the few rivers you have to put in for -- you have you to apply for, and then it's, like, a raffle drawing and then you can get in, but we've -- I've only been on it one time. There's not a whole lot of

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opportunity. It's considered a pretty big opportunity if you get to go on the Smith, so, yeah, I can't think of any one time myself, but, yeah, it's a pretty exclusive opportunity to be able to float on the Smith anyway.
Q. Okay. And you have had that opportunity?
A. Yes, I have. Not even when I drew it, but when you draw, I think you're able to take, like, a couple -- like, two parties, like, two families with you, and one of our family friends invited us.
Q. Okay. Sorry. Just give me a minute.
A. You're all right.
Q. I'm sorry.
So how was the fishing this last year in 2022?
A. It was good. I didn't do as much this last summer just because I'm getting in the mix of college applications, everything, touring, whatnot, but, yeah, with the -- on the times I got to go, it was good fishing.
Q. Do you remember, when was the last season that you kind of think in your mind was not good?
A. Like, the last year?
Q. Yeah.

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Q. And is there -- Lander, is there any hunting season -- I'm just reading this. It says "as well as the dry and smoke-filled air in the summer and fall" --
A. Mm-hmm.
Q. -- "have diminished the opportunity."
So how has the smoke-filled air in the summer diminished the opportunities to hunt? Is there a hunting season in the summer I'm missing, or how does that --
A. Well, that -- that -- that correlates to fishing as well, but the fires -- I mean, fire season, in -- in general you can -- that -- as -- as we see it, just like as locals, is about the beginning of that fall season, the -- the end of summer as things start to dry out. So it's more of the -- the effects after that we see. We do have fires later on, like, in the fall, and although the hunting season might not be there then, say we want to go to, like, a place in Eastern Montana that we're planning on going in September that is then hit by a forest fire in August and we can't go explore that later on, so it -- it -- it's kind of -- plays off of each other.

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Q. Okay. And then if you turn the page to 9?
A. Mm-hmm.
Q. We look at line 1, can you --
A. Yeah.
Q. Go ahead and read that last sentence.
A. Would you like me to start on --
Q. On the "However" --
A. Oh, yes.
Q. -- starting on page 9, yeah.
A. "However, as climate disruption increases the frequency of extreme weather events and drought conditions, the birds are experiencing increased mortality rates, which limits Badge's ability to hunt and cuts off a natural food source."
Q. This is kind of about Badge.
A. Yeah.
Q. So I don't -- But I have -- if you have any thoughts on -- 'cause you had mentioned --
A. Mm-hmm.
Q. -- that it's hard to hunt birds when there's snow.
A. Yeah.
Q. So -- But also now, you know, this says

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that drought conditions cause issues.
A. Mm-hmm.
Q. So, I mean, what is a -- the perfect condition to hunt birds if it's not snow and it's not dry?
A. I mean, we want a -- most of the time a perfect condition is, like, a more humid fall day, cloudy fall day where it's -- yeah, it's not -- the sun isn't blaring down on you, you can -- you can be able to walk for a long time without getting too hot. The -- And the -- Also it's for our dogs too. The dryer -- really dry conditions make it hard for them to pick up on smells and whatnot. I mean, they're -- they're how we find the birds, so, yeah.
Q. Okay.
A. Mm-hmm.
Q. But snow is a problem.
A. Yeah. And I -- I kind of mention that because of the birds' access to food. Sometimes it's a problem for our access to be able to get to the spots, but most of it is that much more of the -- the hunting locations are displaced because the birds need to find open, grassy areas which tend to be more urban and, like, farm areas, yeah,

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mm-hmm.
Q. Okay. Hey, thanks so much.
A. Yeah.
Q. Let's take a -- take a break.
A. Let's do it.
Q. I appreciate it.
(Recess taken from 2:06 p.m. to 2:17 p.m.)
BY MS. SAUER:
Q. Okay. So Lander, we were discussing paragraph 23 of the complaint that's Exhibit 1, and on page -- we kind of ended with talking about how climate disruption increases the frequency of extreme weather events and drought conditions and the birds are experiencing increased mortality rates.
A. Mm-hmm.
Q. As far as increased mortality rates, what do you know about that?
A. I don't have the exact numbers, off the top of my head, about the -- you know, about the mortality rates the last few years, but we certainly have seen firsthand just a -- a -- a lesser population of birds in some of our most popular hunting spots.

carbon emissions our -- our energy companies produce and lead to a more healthy environment.

Q. And how would a positive result affect the number of fish in the streams or the time of year that you will be able to catch them or the amount of accessibility to game?

A. Again, there's no way to put an exact number on how many fish would be -- All fish in Montana would be affected by this positively. I don't know an exact number, but we -- yeah, it's kind of, like, how I said in reference to forest fires. Our -- Our water levels would have a much more focus by the state in order to improve them and keep them stable for the fish living in them. So although we don't -- we're not guaranteeing the life of X amount of fish and to improve an X amount, that's not our job, it's the state's job to create those regulations afterwards, so I don't have an exact number for you.

Q. Okay. Thank you. I don't think I have any further questions.

MR. SULLIVAN: I don't have any questions. Thank you.

(Deposition concluded at 3:34 p.m. Deponent excused; signature reserved.)

DEPONENT'S CERTIFICATE

I, LANDER B., the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true, and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

LANDER B., Deponent

Subscribed and sworn to before me this

day of , 2023.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Rikki Held, et al. vs. State of Montana, et al.

CERTIFICATE

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of LANDER B. in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 10, 2023.

EXHIBIT H

Rikki Held, et al. v
State of Montana, et al.

Badge B.
December 29, 2022

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Q. Do other people in your family, like, do you have any uncles or aunts or who else hunts -- I know your brother hunts.
A. My mom's side, only my grandpa hunts, if I'm correct, for, like -- like, similar hunting as us at least. And then I think just my grandpa hunts on my other side as well. At -- Well -- Well, that is at least of right now. I don't really know way back when if my uncles hunted, but most likely. I know my -- my cousins on my mom's side hunt. I see pictures of them with, like, their waterfowl game all the time or whatever, yeah.
Q. Okay. And can you please explain how you depend on the food that you hunt and fish?
A. We try never to buy, like, store bought food unless we, like, super need it. So we really depend on, like, the -- if -- if the hunting year is going to be good. Like, getting big game is really important, and, like, getting birds, like, upland -- upland game hunting is really important to us 'cause we eat, like -- like, Hungarian partridge, like, most nights that my dad gets it, or blue grouse, so we just really try not to buy, like, store-bought chicken every day or stuff --

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stuff like that. Like, it's very -- it's, like, a very rare occasion that we -- that we do do that, and it's generally when we're -- when we're running low on actual, like, meat that we provided for -- for ourselves.
Q. Okay. So what type of game do you hunt and eat? Like, big game?
A. Just me or the family?
Q. The fam.
A. My mom generally doesn't hunt, but, like, antelope, elk, deer, turkey.
Q. Okay. And as far as fishing, do you -- do you guys catch and eat fish?
A. We catch and eat fish, yeah. When we're -- When we're on -- sometimes when we do raft trips on certain rivers, we will stay the night on that river, and we'll just bring our teepee and we'll catch fish, we'll put them on a stringer, and then we'll make, like, fish tacos that night, and then we'll eat them, and then we'll leave the next morning and go home.
Q. Yeah. Do you put -- Oh, do you ever, like, go, like, salmon hooking and put a bunch in your freezer or anything like that?
A. Salmon hooking?

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Q. Mm-hmm. Like catch a bunch -- catch a bunch of a certain type of fish and store it in your freezer?
A. No.
Q. Okay.
A. At least I don't -- I don't -- I don't really know what that is, I'm going to be honest. I don't know what salmon hooking is.
Q. That's okay.
A. We fish with a fly rod.
Q. So do you eat -- do you guys eat pork?
A. We have eaten pork. It's not, like, a daily consumption, but it's -- like I said, it's a pretty rare occasion. Like, we try to eat as much food as we can that we've provided for ourselves.
Q. Do you eat -- Do you guys eat bacon?
A. Yes, but it's -- again, it's a rare occasion. I think that's going to be the answer to all these questions if you --
Q. Yeah. What about -- And I think you mentioned that you try not to buy chicken from the store.
A. Mm-hmm.
Q. Do you ever butcher your own chickens?
A. We have before, only because we had

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roosters. We usually get them when they're really young, so you can't really tell, but when they grow older you can, like, tell if there's roosters. And it's -- you don't want them in the coop when you're trying to produce eggs, so we have -- we have killed our own chickens, but very -- like, very rarely. Maybe, like, three in the whole time that we've had chickens.
Q. Sure. And I know we talked a little bit about your garden. Where do you all get your produce from?
A. We have a local place that we generally get it from, and it's called -- it's this huge garden, and they're friends of ours too, and I don't know what it's -- I'm blanking on the name, but they -- we get, like, a little box from them almost every month, and it's, like -- just, like, all these, like, beautiful, like, with the dirt still on them carrots, and just homegrown local. I want to say -- Like, it's, like, something Foods. I don't know. It's -- I don't know what it's called.
Q. That's all right.
Do you guys do canning?
A. Canning? Like, canning foods?

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Q. Yeah. Can your vegetables for the winter?
A. I don't think so. We usually eat -- We -- We're -- We're, like, some big people. My -- My family's pretty -- like, we eat a lot, so I don't think that's, like, really a need, like, to preserve them.
Q. How do you get -- Do you get fresh produce also in the winter? Does it come to you?
A. No, 'cause, like -- No, 'cause, like, it's a local business.
Q. Mm-hmm.
A. So, then, that's when we have to resort to store bought, if I -- if I'm correct. I -- I mean, I'm not really the right person to ask, I'm not the one buying the produce, but...
Q. I understand. So in your -- in your own words, can you explain how your access to the food -- to your food source as stated, you know, wild game and all of that, is inhibited due to the climate crisis?
A. Are we talking about, like, big game or fishing, or just both?
Q. Let's start with big game.
A. Big game, like, the plants that the big

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game eats is getting dryer due to greenhouse gasses which makes it harder for them to eat --like, to eat.
Fishing. The fish -- Like, the water's warming, obviously, and it's getting lower, the water -- the water level's getting lower, harder for fish to live. Not a controlled ecosystem.
Q. When you say "the water is warming, obviously," how -- how do you know that's obvious?
A. Due to scientific evidence.
Q. Are these studies you've read?
A. No, but this is, like, me fishing and getting less fish and catching less fish, but I probably have read a study about it sometime. I don't know -- I don't really know. I'm not -- I don't really recall every study that I've ever read. Or not really studied but, like, magazine, at least.
Q. So due to your personal experience, you feel like the water is warming.
A. And due to -- And -- And due to scientific evidence, yes.
Q. And the scientific evidence you got from where?
A. From my dad who is very smart, and has,

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like -- definitely has -- it's not just his word, it's definitely him doing his own research as well.
Q. Mm-hmm. Okay. I think we covered both -- Do you have any other thoughts on this? I can repeat the question.
Can you explain how your access to these food sources that -- that you guys catch or hunt for is inhibited due to the climate crisis? Do you have any other thoughts on that?
A. Not -- Not really right now, no.
Q. In your own opinion, how do you think the climate crisis causes abnormally low in-stream water levels? Like, how does that work in your own understanding?
A. I -- I -- I really couldn't tell you. That's really a question for the experts, I feel like. I -- I don't really know the exact answer to that question.
Q. But you know it does?
A. Yes.
Q. Because?
A. It's -- I -- I know it's lowering the water levels because of my -- my dad giving me that information and others that I -- that I trust

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and that have done their own research, and I have probably done my research in that field as well, but I just -- I don't know. I -- Then again, I'm, like -- I -- I can't recall every time I've looked at a magazine.
Q. What kind of magazines do you look at?
A. I -- Then, again, I can't recall. No, I'm kidding.
Q. Do you have any subscriptions?
A. Not really. We don't really get a lot in the mail. If anything, it's, like, pretty online. Just looking at, like, random websites that are trusted. Like, there's some good ones I can't name off the top of my head. But my -- my school, I -- I usually go off the school method which is how to figure out if a website is legit, and you can, like, trust their information. We just like to see if their work is cited and see who it's written by, and blah blah blah. I generally go off that when I look for information.
Q. Okay.
MS. SAUER: Let's take a break.
(Recess taken from 9:58 a.m. to 10:06 a.m.)
///

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BY MS. SAUER:
Q. Let's see. Let's turn to -- you're on the right page. Let's look at paragraph --
A. Eight?
Q. -- 22. Yes, sir. Let's look at paragraph 22. And do you see the numbers down the side?
A. Mm-hmm.
Q. If you go to the number 12, which I think is also the third sentence --
A. It is, yeah.
Q. -- would you please read from the part that says "Climate disruption"?
A. Mm-hmm.
Q. Yeah.
A. Oh, yeah, I can, yep. And down to the end the paragraph?
Q. Sure, sure.
A. "Climate disruption has also closed the closure of certain fisheries; Lander and Badge recall closures on the Flathead River and Blackfoot River, among others, which have prohibited them from fishing. Their ability to raft on rivers, including Flathead, Blackfoot, and Smith Rivers, has also been restricted, and in

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some cases made impossible, due to low instream water levels."
Q. Thank you. Let's -- I'm curious if you could tell me about what you recall about the closure on the Flathead River.
A. I mean, I think it matters what time you're -- you're there, but sometimes we just can't go on certain parts of the river, and sometimes it's just a matter of, like, if we really want to, like, risk a dented-up drift boat or, like, risk having to push the raft for 90 percent of the ride.
Q. So correct me if this -- if what I am saying --
A. And I don't know how accurate this is, actually, 'cause I don't recall every single closure on these, but I do -- I do remember just, like, parts of it not being able to fish or -- but I don't really know where.
Q. Okay. I'm kind of narrowing down on the -- the closure of certain fisheries.
Do you -- Does -- Do you think this means an official closure or just where your dad or, you know, you guys might just decide you're not going to fish there? What does that closure part mean?

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A. I don't know. Doing -- You could probably figure that out just, like -- Then I -- I just said I don't -- I don't really know what --
Q. Yeah.
A. Like if -- I -- I don't -- I don't know. Like, it could just be us saying that we're not going to dent up our raft or our --
Q. Mm-hmm.
A. -- drift boat going there, but I don't -- I don't remember, like, what part of the river is closed or, like, if it was just my dad saying, like, "We're not gonna fish this 'cause it's, like, super low water levels and we're not going to catch any fish."
Q. Okay. To be clear, you don't recall, like, the state of Montana, the Fish Wildlife and Parks closing the river, or do you -- would you like to --
A. I know the Smith River has been closed before.
Q. Mm-hmm.
A. But that's -- I mean, that's the only one I can really remember vividly. If I was, like, I don't know, if I had, like, a memory chip I could probably --

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Q. Right.
A. -- remember the other two, but I -- I do remember the Smith River being closed.
Q. Yeah, I could use a memory chip as well.
A. Mm-hmm.
Q. Let's see. Then the second part of that sentence, "Their ability to raft on rivers, including the Flathead, Blackfoot, and Smith Rivers, has also been restricted."
Now, that word "restricted," in your mind, does that mean or is -- do you --
A. I don't think it means restricted by the government. Is that -- Is that what you're trying to ask?
Q. Mm-hmm.
A. I think it means, like, restricted, like, how well we can -- I mean, this is how I'm picturing it right now. I think it means how well we can, like, raft on that river, and it's restricting us to be able to catch fish and have a good time and actually, like, get through half of the trip without having to push the raft off of land with -- with everyone outside of the raft, like, off --
Q. Which is --

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A. -- of the lake.
Q. -- always fun.
A. Mm-hmm.
Q. So what I'd like you to do, and I know you don't have a memory chip, but try to recall, like, how many times last summer, this last summer, summer 2022, you felt like you had been restricted from going on the Flathead River.
A. Okay. 2022 felt like I had been restricted on the Flathead River. No idea. Like, probably -- I know I definitely -- there have definitely been times where my dad has -- has fished it just himself on the raft --
Q. Mm-hmm.
A. -- and he's told us, he's, like, "Yeah, it was just a bad fishing day." Like, "I had -- I had to -- I had to, like, pull the raft a few times," and then we just wouldn't go the next day. Like, sometimes my dad is just, like, the scout, and he'll just go out and, like, check, and then that really just gives us the information that we need to not go the next day.
Q. Okay.
A. Or to go the next day.
Q. Do you recall what time of year that was?

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A. No idea. It's generally, like, adverse throughout summer or, like, the end of summer or --
Q. Okay. And how about the Blackfoot? I know that's a little bit of a trip -- trip you might remember the Blackfoot better.
A. I -- Yeah. Me -- Me and my -- Me and my dad went there, like, not that recently -- I mean recently, but we didn't raft, we -- we just waded, so I -- I don't --
Q. Mm-hmm.
A. -- I don't really recall.
Q. Okay.
A. But my brother -- my brother has been on the Blackfoot rafting with my dad, I think, recently if I'm correct.
Q. Okay. I can talk about that with him --
A. Yeah.
Q. -- this afternoon.
And how about the Smith River?
A. The Smith River, if I'm -- I think this is the right river where you have to, like, put in a draw to -- to do it, right? It -- I -- I remember -- I do remember my -- my family saying that it was closed 'cause we were actually going

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to do -- we did, like, a huge, like, two-week long trip where we put in the draw, and, like, us and some friends went rafting down it. And then it was due to some, like, extreme weather condition, I think, that people couldn't go on it or it could have just been due to, like, either, like, very low -- low water levels. But, yeah, I do remember it -- it being -- being, like, completely closed, I think.
Q. Okay. But were you planning on going on it when it was closed?
A. I think our family was planning -- Like, had -- had, like, somewhat of a plan that we -- that we maybe wanted -- wanted to go again on the Smith River. We had already been on it once.
Q. Okay.
A. I think we had somewhat of a plan to go.
Q. Mm-hmm.
A. But that's really -- I mean, I'm not the one making those plans, too. I'm just kind of involved in them.
Q. Yeah. And do you want to explain, does any fishing trip where you and your -- that you and your family canceled stick out in your mind?

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A. Yeah. We do, like, lower Flathead trips sometimes, and, like, me and my friend Bennett, we -- we were on one with my family and we were on my pontoon and, like, sometimes we do, like -- sometimes we just hop out of the pontoon and we, like, tie ourselves to it, and, like, just float down the river for, like, a second so we can, just, like, swim for -- for a little bit. And, like, you can touch the water with your feet. And we were going to go, like, again, and we didn't, and I think it was because, like, it was just, like, such low water, we were catching, like, nothing, too. My dad -- My dad and his, like, best friend Nick were catching, like, extremely little amounts of fish, which is unlike usual, which is where he usually catches like a ton.
Q. And when you say usually you catch a ton, is that in the last, like, five years?
A. Yeah, in the last five or, like, ten years-ish.
Q. Mm-hmm.
A. I mean, my dad has been, like, fishing those streams for, like, ever. Ever since he moved here, really.
Q. When was that? When was that fishing

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trip or that -- that trip you were just talking about?
A. Dad? This -- This summer.
Q. Okay.
A. That was this summer.
Q. Okay.
A. 2022. Sorry.
Q. Do you -- Do you at all blame the state of Montana for bad fishing conditions or restrictions on these rivers?
A. I mean, I would say, yeah, because, I mean, no one's really doing anything about it, I feel like, and, I mean, like, there's -- there's -- there's pieces that say, like -- and I think it's in this part over here -- page -- they're literally contradicting our constitution saying that promoting the use of fossil fuels in -- in Montana when -- in the Montana constitution it gives us a right to a clean and healthful environment, and obviously that's not being provided. Right here.
Q. Mm-hmm.
MS. SAUER: For the record, he's looking at --
///

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A. Page 35.
BY MS. SAUER:
Q. Good job. Section -- Paragraph 1 --
A. Hold on. Page 35, section 109. [As Read]: "The State of Montana has started a policy to 'promote energy efficiency, conservation, production, and consumption of a reliable and efficient mix of energy sources that represent the least social, environmental, and economic costs and the greatest long-term benefits to Montana's citizens.'
Contrary to this policy, Montana's State Energy Policy explicitly promotes the use of dangerous fossil fuels that cause numerous social, environmental and economic costs and harms to human's short-term and long-term detriment of Montana citizens. Fossil fuel is the least efficient form of energy available to -- to the State of Montana. The provisions of this State Energy Policy that promote fossil fuels and that Youth Plaintiffs challenge the constitutionality of in this -- of in this action state that it -- that it is the policy of Montana to:" and then it gives -- do you want me to read these too?
Q. No, you don't --

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A. Okay.
Q. You don't have to read them right now, Badge. We'll get you to read those later. Don't worry.
So, yeah, so you're saying -- I think you -- I don't know exactly what you said.
A. Montana is directly going against our constitution and promoting the use of fossil fuels.
Q. Did --
A. So, yes, I do blame Montana as a part of it.
Q. Okay.
A. But not, like, Montana as a state. Like the people who are, I mean, in charge. Not in charge, but, like, who can make, like, a big stance and do something big about it.
Q. Are you done with your question?
A. Yeah, yeah, I'm done.
Q. Okay. With your answer? Sorry. I just didn't want to interrupt you.
A. No, you're fine.
Q. Let me ask you this: I'm not -- I might be not using the exact correct terminology that is in the constitution, but is your understanding

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that the Montana Constitution guarantees you a clean environment?
A. The Montana constitution, yes --
Q. Okay.
A. -- a clean and --
Q. Okay.
A. -- healthful environment.
Q. Okay. What does --
A. For my generation and for future generations.
Q. What does "clean" mean to you?
A. Like a -- a good ecosystem that we can thrive in where animals aren't -- aren't being hurt by -- by the fossil fuel and the greenhouse effect, and where, I don't know, we're cutting down on the use of, like, just fossil fuels, in general.
Q. And what does -- Did you -- I'm sorry, did you use the word "healthful"?
A. I didn't. Do you want me to?
Q. No, no. Can you restate, in your own words, what the constitution guarantees you?
A. The right to a clean and healthful environment for my generation and future generations.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of BADGE B. in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 10, 2023.

EXHIBIT I

Rikki Held, et al. v
State of Montana, et al.

Kian T.
December 28, 2022

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increased stress for the fish, for the trout.
Q. Have you ever fished on the Yellowstone?
A. Possibly.
Q. But not --
A. Not recently.
Q. Not vividly that you can remember.
A. Not that I can remember vividly.
Q. So you -- you like to fish for cutthroat trout. Do you know what temperatures they prefer?
A. I do not know that.
Q. Do you know what temperature the Flathead usually runs at, let's say, in --
A. I don't --
Q. -- August?
A. I don't know that.
Q. Okay. Have you ever been closed out of fishing on the Flathead due to --
A. Due to warmer temperatures?
Q. Yes.
A. I don't think that I've ever been told that I wasn't allowed to fish the Flathead due to warmer temperatures, but I've had fishing trips to the Flathead canceled because my dad decided that it was -- that the fish were too stressed.
Q. Okay. And then do you know the difference

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between -- as far as what temperatures the cold water trout like, the difference between cutthroat trout and rainbow trout?
A. I do not know the difference between that, no.
Q. Have you ever caught a cutbow?
A. I have, yes.
Q. Can you explain what that is?
A. It is a mix between a cutthroat and a rainbow, I believe. Or not a rainbow. Is it a rainbow? Yeah, it is a rainbow --
Q. Mm-hmm.
A. -- from my understanding. I don't think I caught that in Montana, though, I believe I caught it on the Henry's Fork in Idaho.
Q. So you -- So you just don't really -- You have never, like, researched or --
A. I --
Q. -- really looked into water temperatures too much.
A. Not necessarily -- Or, yeah, I haven't really done too much research into -- I'm not an expert on water temperatures in the Flathead.
Q. Have you ever had -- So -- And let's back up. Correct me if I'm wrong, you said that the

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only time that a fishing trip on the Flathead was canceled was when your dad had decided that it was -- it --
A. Yeah.
Q. -- the water -- Okay.
A. Normally because if the water's too warm for the fish, that increases the -- their stress levels. And not only is it bad for the fish if we're -- if we catch one, that'll increase the stress levels, obviously, but also that they're -- we're -- we're less likely to catch anything if they're stressed because they're less likely -- I personally enjoy fishing dry fly, and so that's on top of the river.
Q. Yeah.
A. And it -- they're less likely to be going to the top of the surface -- or the surface of the river if they're stressed.
Q. Okay. Have you ever had a fishing trip to the Missouri canceled due -- directly due to, like, a -- like the Fish and Wildlife -- Fish Wildlife and Parks saying "Water temperatures are too high. You cannot fish here."
A. I don't recall that.
Q. Okay.

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A. Again, I'm not the one mainly deciding when I'm going fishing.
Q. Not when you were a kid.
A. Yeah.
Q. Yeah. Do you agree?
A. Yeah, not when I was a kid.
Q. Okay. Let's see. So that's kind of water temperature. How about less dissolved oxygen? How much do you know about that? The water holding less dissolved oxygen?
A. I know a little bit about it.
Q. Okay.
A. But frankly I don't remember much because that was -- what I learned about that would have been October of last year when I learned the majority of that, and I don't recall too much of that.
Q. Okay. Do you recall what happens to the water when there's less dissolved oxygen in it?
A. There -- I believe --
Q. Or --
A. -- that there are dead zones caused by a lack of oxygen in the water.
Q. And do you know anything about what agricultural runoff into a river or stream will do

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to the --
A. Yeah. And I'm not an expert on this, but I believe that when you have agricultural runoff, that adds nutrients to the stream which can promote algae bloom or something similar to that which causes the bacteria to eat the -- or to -- not -- it's not disintegrate, that's not the word -- decompose. Decompose the algae. And the bacteria uses the oxygen to -- use oxygen to decompose the algae, and they use up all the oxygen in the water creating a dead zone.
Q. Okay. That was pretty impressive for your memory.
So is it -- would you agree with the statement that there are other things besides the increase in temperature in a river that could cause harm to the fish?
A. Oh, absolutely. Temperature isn't the only contribution to stress levels for fish.
Q. Okay.
A. But it still contributes to their stress levels.
Q. And have you ever been affected by -- Do you remember being affected directly by a fishing closure by the Montana Fish Wildlife and --

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A. I do not --
Q. -- Parks?
A. -- remember.
Q. Okay. Do you know about a closure where they will close a river if the daily water temperatures reach 73 degrees for three consecutive days? Have you ever heard that?
A. I've not.
Q. Okay. Have you ever read any studies that found that cutthroat -- that rainbow trout are actually considered an invasive species on the westslope cutthroat --
A. I have heard that --
Q. -- environment?
A. -- yes. Rainbows are not native to our neck of the woods.
Q. How was your last couple fishing trips this past summer?
A. In Montana?
Q. Mm-hmm.
A. Hot, but somewhat successful.
Q. Okay. Do you remember -- Do you remember catching some stuff? What did you catch?
A. I'm pretty sure that -- Let's see. I had one trip where it wasn't really a trip, we just

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went out to the river for a day.
Q. Sure.
A. And I hooked so many fish and I couldn't land a single one. Then my dad hooked -- like, he just -- he was, like, not doing anything, he was just watching me fish or whatever, and then he casted his line, like, three times in a row and hooked -- and hooked and landed a fish every time. I was, like --
Q. What type of fish did he -- Do you remember what type they were?
A. No, but it was probably a cutthroat would be my guess.
Q. How big? Do you remember, like, did he pull anything out --
A. They weren't --
Q. -- that you remember?
A. They weren't crazy, no. They were -- They were pretty small.
Q. Okay. And just out of curiosity, do you at all blame the state of Montana for the fishing conditions when the -- when the fishing is not great?
A. Could you rephrase the question?
Q. Mm-hmm. Do you think it's the state of

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Montana's fault that your fishing trips are getting canceled -- that your fishing trips get canceled?
A. I think that the state of Montana could do more to prevent our rivers and streams from being as affected by global warming, which, in turn, would reduce the amount of trips that get canceled due to global warming or, I would say, smoke, which was one of the major ones which I believe I addressed in my -- my part of the complaint.
Q. All right.
A. Yeah.
Q. How about we take a ten-minute break? Can we do that?
A. Sure.
MR. SULLIVAN: Mm-hmm. Yeah.
MS. SAUER: Fantastic. Thank you.
(Recess taken from 2:13 p.m. to 2:23 p.m.)
BY MS. SAUER:
Q. Let's just keep marching through these paragraphs, and go ahead and turn the page to page 13 and paragraph 35.
How about -- Why don't you just read that paragraph --

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A. I don't have the experience to answer that.
Q. So what about -- So we just talked about natural forest fires. How about climate change? Do you think that there -- climate change -- that natural climate change exists?
A. Yes. If you look at graphs demonstrating both carbon dioxide in the atmosphere and global temperatures going back thousands upon thousands of years, there are natural shifts in climate and global temperatures, and the trend is carbon dioxide and global temperatures seem to rise and fall together. And that, in general, there has been higher temperature periods and lower temperature periods.
The difference between a higher temperature period and now is that we have never seen this increase in global temperatures so rapidly compared to -- if you look at a graph of it, an increase in global temperatures when it hits its peak between when it crosses the midway point -- or not midway -- like, the average, the world average over thousands of years when it -- from there to its peak is a lot higher -- or -- or is, like, a lot longer. It's tens of

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thousands of years, whereas we're seeing this in a century.
Q. And when you say "this," can you --
A. This increase in global temperatures.
Q. Okay. And so do you know, have you -- do you remember from science class or whatever what types of events can cool the earth down?
A. Yes and no. There -- I can tell you which type of events warm the earth up pretty well, but you cannot -- I'm gonna to go with not at the moment.
Q. Okay.
A. Let's go with that.
Q. Fair enough. But you've heard of ice ages.
A. Yes, I've heard of ice ages.
Q. Okay. Okay. Let's --
A. If that was what you were looking for I could --
Q. Yeah.
A. -- say ice ages, but...
Q. Oh, no, I wasn't -- I wasn't looking for that. I just wanted to --
A. Yeah. No, I know -- I know what ice ages are.

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Q. -- say the word.
Let's see. Let's look at paragraph 36. And can you go ahead and read that paragraph?
A. Yeah. Absolutely.
Q. All right. Thank you.
A. "Increased smoke in the summer has impacted Kian's ability to play soccer, fish, hike, camp, and otherwise recreate outside, activities which are central to his health and foundational to his family. The smoke makes Kian feel sick, and he is forced to refuge inside. During the summer of 2017, his family had to cancel a camping trip because the smoke conditions were so oppressive and dangerous."
Q. Okay. Can you please tell me about that -- what you remember about the summer of 2017 camping trip?
A. Yeah. So we go -- we try to do it yearly. It hasn't happened the past few years, but we go up to this campground in -- in Fernie, British Columbia every year in the summer, and actually my mom's phone's wallpaper is a picture of the sun, and there's smoke everywhere on -- it's, like, this beautiful scenic shot, but there's smoke everywhere. And so we go up there

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every single year, or we try to.
And in 2017 the smoke was so bad in Fernie and in the Flathead Valley that we decided that it was unsafe and there would be no -- there was no benefit of going up to Fernie and going camping because the smoke would be so bad that not only would we not be able to see anything, but we wouldn't be able to -- we'd just be stuck in the tent the entire time.
Q. Okay.
A. I believe that was the -- that would be my guess as to what the camping trip was.
Q. Is it your understanding that climate change contributes to the wildfire smoke that --
A. Yes.
Q. -- we just read about?
And how does climate change contribute to the wildfires?
A. I'm not an expert, but from my understanding, climate change increases global temperatures which thus increases or it changes weather patterns which creates drought on the specific areas, and that drought leads to hotter -- hotter and dryer locations specifically in the Pacific Northwest and in the Northern

DEPONENT'S CERTIFICATE

I, KIAN T., the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true, and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

KIAN T., Deponent

Subscribed and sworn to before me this day of , 2023.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Rikki Held, et al. vs. State of Montana, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of KIAN T. in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 9, 2023.

EXHIBIT J

Rikki Held, et al. v
State of Montana, et al.

Kathryn Grace Gibson-Snyder
January 6, 2023

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Q. Okay. Have you ever -- What do you think about, like, poverty in the United States?
A. I think it's quite important.
Q. Have you ever focused on that at all with your -- any of your activism?
A. I -- I have. I ran a supply drive for the Poverello Center, which is our homeless shelter, during COVID in collaboration with some local grocery stores, and I've done a few other things supporting the Poverello Center throughout the years.
Q. Okay, Grace, going back to paragraph 45, could you please read the beginning of it through line -- the sentence that ends on line 4?
A. Mm-hmm. Yes.
"Witnessing climate change" --
Q. Thank you.
A. Oh, sorry. "Witnessing climate change impacts occur around her is devastating emotionally is Grace and she is anxious about her future and fearful that her generation may not survive the climate crisis. Grace has doubts about whether she would want to have her own children given anxieties about the future."
Q. Is that an accurate statement?

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A. The last statement? Or all of it?
Q. All of it.
A. All of it? Yes.
Q. Okay. I understand that this may be emotionally charged, so please let me know if you'd like to take a break at any point, but I'd like to ask you a couple questions about -- about these statements. And in particular I'm curious, especially with your level of knowledge about climate change and public policy, whether -- how you -- what your reasoning is that, quote, you are fearful that -- that -- I'm sorry, I'll put this in quotations, but I'm referencing you. "Fearful that her generation may not survive the climate crisis."
A. So I certainly hope that my generation will survive the climate crisis, but given the current inaction in Montana, for example, and many other states, and even the limited action federally, I think it is quite possible that people of my generation have and will continue to be impacted in devastating ways, and it will see, you know, increased poverty and even increased deaths due to climate disasters. And while I am fortunate to be in a place that has not been

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impacted in any sort of life-threatening way, places around the world are, and my generation is continually impacted by that.
Q. So I guess -- maybe we could put this into perspective a little bit, because when I read this when you say "the entire generation," no one will survive because of climate change. Am I -- Am I reading that incorrectly?
A. I think the -- the key component here is that I have fear that my generation will not survive, and that I live with the emotional weight of knowing that people of my generation's lives are threatened or ended by climate change.
Q. Okay. Grace, I apologize, this might be a tough question for you, but physically in a tangible way how -- what do you see -- what kind of impacts from climate change in your generation's lifetime, let's say a hundred years because we're living longer and longer now, would cause your entire generation not to survive? Like, physically what -- what does that look like on the planet?
A. Sure. So I -- it would be a variety of things, and as I'm sure you're getting at, I will admit that it's quite unlikely that every person

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of my generation dies. However, I think drought and famine can cause -- quickly cause many people to die, and -- and already certainly is beginning to cause strife.
I think, you know, flood -- floods kill people regularly, tropical storms kill people. We've seen all of this this year. And I think in some -- it's important to acknowledge that with these kind of increased tensions from the changing climate, that will cause political tensions as well.
So I mentioned before the -- the water collaboration between Jordan and Israel, which has already caused tension between the two countries because of the -- the way Israel was -- was transporting water into Jordan. And so with things like that and with drought and famine, I think what -- we're likely to see conflict over water and food, which as we have seen for all of human history, war can kill people pretty quickly.
Q. Okay. Thank you.
Do you -- Do you believe that -- I mean, you, let's be honest, lead a pretty -- you're pretty privileged.
A. Mm-hmm.

excuse me, greenhouse gasses not released is significant, and so doing that either on a local or global scale can contribute significantly to preventing the climate crisis.

Q. Okay. As far as your understanding from sources like the -- oh, gosh. Did you say the IFCC? I'm sorry.

A. I said the IP -- the Intergovernmental Panel on Climate Change. IPCC. Did I add an extra C?

Q. IPCC. Right.

A. Yes.

Q. Information -- Okay, so let me reask my question.

A. Yes.

Q. As far as your understanding from the IPCC reports and just from your understanding of the global nature of climate change and policy from what you've learned so far, do you think that, like, the state of Montana can impact the global problem of climate change? Like, the state government of Montana, do you think -- Scratch that. I restart.

Do you think that the state government of Montana can impact the global problem of climate

change in a -- like a significant way?

A. I -- I think your use of the word "significant" there is tricky because I think any change, whether that is maintaining dependence on fossil fuels and promoting development of fossil fuels, is a significant decision in the course of the -- of climate change and the crisis it might cause and also transition away from fossil fuels, and promoting a more sustainable energy system can also be significant.

Q. I think I'm done with questioning.

MS. SAUER: Thank you, guys.

MR. BELLINGER: Thank you. I don't have any questions.

(Deposition concluded at 11:59 a.m. Deponent excused; signature reserved.)

DEPONENT'S CERTIFICATE

I, KATHRYN GRACE GIBSON-SNYDER, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true, and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

KATHRYN GRACE GIBSON-SNYDER,
Deponent

Subscribed and sworn to before me this
day of , 2023.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Rikki Held, et al. vs. State of Montana, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of KATHRYN GRACE GIBSON-SNYDER in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on January 18, 2023.

EXHIBIT K

Rikki Held, et al. v
State of Montana, et al.

Dr. Cathy Whitlock
November 29, 2022

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Right?
MS. OLSON: Objection. Ambiguous or calls for speculation.
BY MR. STERMITZ:
Q. Do you understand what I was asking, Dr. Whitlock? I'll rephrase it if not.
A. Could you rephrase it. I'm sorry.
Q. Sure. Did you understand from talking to Dr. Running that we focused in his deposition quite a bit on the – Montana's contribution to global climate change?
A. No. He didn't tell me that was the focus.
Q. Okay. Well, and I guess that might be somewhat subjective, so we'll just talk about it.
If you look at the executive summary of your report, which is on -- I think on page 4 -- starts on page 4. And on page 5 I will describe that as kind of a description of the circumstances in Montana with regard to climate change and as it says on the top of page 5, the ways that climate change is affecting Montana. Do you see where we are there?
A. Yes, I do.
Q. Okay. And so I'm just going to tell you right now the main focus of my questions is going to be on what will happen to climate change globally if

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we do what you and Dr. Running are suggesting in this report. And to be more specific, I will ask you, have you or Dr. Running calculated what the impact would be on global climate change or global warming if, for example, the court were to declare Montana's energy policies unconstitutional?
A. No. We haven't calculated that.
Q. You do understand that that's one of the goals of this lawsuit -- right -- to declare Montana's energy policy unconstitutional?
A. Yes.
Q. Another major contention, I believe, is that the Montana Environmental Policy Act limitations on evaluating climate change you describe in your report as being problematic for global warming. Correct?
A. Yes.
Q. And I guess I would ask you the same question then about that. If the court were to invalidate the provisions of MEPA that are referenced in your report, you haven't figured out or -- you haven't figured out what the impact would be to global warming if that occurred?
A. We --
Q. Is that correct?

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A. We know what the impacts would be. We haven't calculated a precise number.
Q. Okay. And would you use that same kind of description in regard to the result if the court declared Montana's energy policy unconstitutional?
A. Yes.
Q. What then would be the impact of either of those or both of those things occurring, declaring the energy policy or the MEPA provision unconstitutional?
A. Well, we know the causes of global warming and the role of the burning of fossil fuels, and we know that every molecule of CO2 that is put into the atmosphere contributes to global warming. And so every time that Montana produces in terms of greenhouse gas emissions is contributing to global warming, and that's what we're trying to have stopped.
Q. Okay. Do you know more specifically what the impact would be on any of the individual plaintiffs in this lawsuit if the court made such a ruling?
A. We can see the impacts of climate change in Montana, and we can see the impacts that it's having on the youth plaintiffs. And so we -- we can

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see what the impacts would be if fossil fuel emissions were to stop.
Q. So for example -- well, let me ask you. What would be an example of an impact of global warming on any of the individual plaintiffs? Probably you can pick one if you would like.
MS. OLSON: Objection. Vague.
BY MR. STERMITZ:
Q. Okay. Let me rephrase that. As it now stands without any action by the court, are you familiar with an impact of global warming on any one of the individual plaintiffs?
A. May I answer that question in a more general way, speaking about the plaintiffs in general?
Q. That's fine. We can start there, yes.
A. Okay. Well, they're already experiencing warmer temperatures in their lifetimes. It's gotten two to three degrees Fahrenheit warmer, and that warming is going to continue. They have seen increased wildfires across the west and large fires in Montana. The smoke that we receive in Montana is threatening their health.
We have seen the stream temperatures rise which impacts their abilities to recreate on

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Montana's waterways. We have seen their use of water being compromised for purposes -- for ceremonial purposes. We have also seen the loss of snow pack in Montana. It's been very dramatic, and that's impacted the availability of water for the plaintiffs who are ranchers -- are living on ranches, and also for their ability to recreate and pursue their athletic training with respect to snow, skiing, and that sort of thing. So we have seen impacts from climate change affecting them.

Q. And is it your testimony that if the court invalidated Montana's energy policy or the MEPA provision on climate change, that these things you have listed would no longer occur?

A. As I said, every ton of CO2 that is emitted to the atmosphere is the problem and is causing these conditions in Montana. So if Montana were to cease emission of fossil fuels, we would -- we would change that. It would not happen overnight. It would happen slowly, but it would happen.

Q. So I mean, let's take, for example, just the first thing I think you started with, which is warming temperature -- two to three degrees temperature warming in Montana. If -- I can maybe make it even simpler.

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If somehow the court were to rule that Montana no longer could emit one iota of greenhouse gas, what would the impact be on these warming temperatures in Montana?

A. As I -- as I said before, every ton of CO2 contributes to global warming, and if Montana and the country and we're hoping the entire world stops the emission of greenhouse gases, it will stop the warming that we're seeing.

Q. Well, I -- I can't ask questions -- well, I mean, this lawsuit doesn't ask any other court but a Montana judge in Helena for a ruling. So I'm intentionally limiting my questions to what the judge could do and even hypothetically a little bit beyond that when I say let's assume -- and as an expert you're entitled to make assumptions. Let's assume the result of this case is no greenhouse gas emissions from Montana whatsoever.

Can you tell me to a reasonable degree of scientific certainty how that would change any of these factors that you listed that are experienced by the plaintiffs?

A. I -- we in the report and now I can't give you a precise number.

Q. Do you -- do you believe -- let's look at

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loss of snow pack for example. Do you believe that if Montana emitted no further greenhouse gas emissions, that the snow pack depths would be -- in Montana would be affected in a way that would be measurable?

A. I don't know.

Q. Okay. Do you know, Dr. Whitlock, how the impacts of global warming on the plaintiffs differ from other residents of Montana or other citizens of the world?

A. Could you -- could you rephrase that.

Q. Sure. Sure. Do you -- let me try it this way. Do you believe that -- let me ask it this way. Do you understand that somehow the plaintiffs in this lawsuit are experiencing effects of global warming that are unique as compared to the rest of the citizens of the world?

A. Let me answer that this way. Young people are particularly vulnerable to the effects of climate change.

Q. And why do you say that?

A. There's -- as -- as -- there's health impacts from smoke that young people are particularly vulnerable to, for example.

Q. Do you address that point in your report

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anywhere that you recall; that is, that young people are more prone to be impacted by climate change?

A. I believe we state that fact, but I would have to look at the report more closely.

Q. Okay. Has -- have you done research -- any research on that point; that is, the experience of young people as opposed to other people in regard to climate change?

A. No. I was a -- one of the authors of the climate change and human health in Montana, and that's where my information has come from.

Q. Which -- now, which report specifically was that, Dr. Whitlock? Was it -- when did it come out? First of all, let me ask you that.

A. It came out in 2021. The first author is Adams. It's Adams, et al. It's a special report of the Montana Climate Assessment.

Q. Okay. All right. If you would go to attachment 3 -- it's page 3-6 in the report.

A. Yes.

Q. And it lists -- this is a list of references or reports that you cited. Was your statement just now about a report that included information on the impact especially on young people, this first one under 2021, Adams, Byron, Maxwell,

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of CATHY WHITLOCK, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 11th day of December, 2022.

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

RIKKI HELD, ET AL.,)

Plaintiffs,)

vs.) Cause CDV-2020-307

STATE OF MONTANA, ET AL.,)

Defendants.)

ZOOM VIDEO CONFERENCE DEPOSITION UPON ORAL EXAMINATION

OF

DR. JACK A. STANFORD

ATTENDANCE OF ALL PARTICIPANTS VIA

ZOOM VIDEO CONFERENCE

8:00 a.m.

November 8, 2022

REPORTED BY: Lauren G. Harty, RPR, CCR #2674

of global greenhouse gas emissions, right?

A. Yes, but that doesn't escape the need to recognize that Montana's participatory in that.

Q. And do you have information on Montana's contribution, percentage contribution or otherwise, of measuring it to the global emission of greenhouse gases?

A. No. I -- I have to leave that to the IPCC and Running and other experts because my expertise deals with the ecology of the rivers and streams and lakes of the state and region.

Q. So is it fair to say that there's nothing in the opinions or your report that we could identify that attributes any impacts to Montana from Montana's -- solely from Montana's emissions?

A. No. My -- my report wasn't parsed in that way, but it doesn't discount the importance of Montana's contribution to greenhouse gases. And it's just that I wasn't asked to investigate that and I didn't do it.

Q. Right.

And -- and have you seen any report in this case that has done that?

A. No.

Q. If hypothetically one of the agencies of the

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned Washington Certified Court Reporter, hereby certify that the foregoing deposition upon oral examination of DR. JACK A. STANFORD was taken before me on November 8, 2022, and transcribed under my direction;

That the witness was duly sworn by me pursuant to RCW 5.28.010 to testify truthfully; that the transcript of the deposition is a full, true, and correct transcript to the best of my ability; that I am neither attorney for nor a relative or employee of any of the parties to the action or any attorney or counsel employed by the parties hereto, nor am I financially interested in its outcome;

I further certify that in accordance with CR 30(e), the witness was given the opportunity to examine, read, and sign the deposition within 30 days upon its completion and submission, unless waiver of signature was indicated in the record.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of November, 2022.

Lauren G. Harty

LAUREN G. HARTY, CCR #2674

EXHIBIT M

Rikki Held, et al. v
State of Montana, et al.

Dr. Daniel Fagre
October 27, 2022

Charles Fisher Court Reporting
442 East Mendenhall
Bozeman, MT 59715
(406) 587-9016
maindesk@fishercourtreporting.com

Min-U-Script® with Word Index

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it entails, again, the effects of climate change on the Glacier Park region, right?
A. Yes.
Q. And is there any element of that that relates to what the court is being asked to do in this case, as far as you know?
A. No. I -- all my research was done and I retired before this lawsuit came into, at least, my life. I don't know when it was filed.
So none of my research or opinions were developed with this lawsuit in mind.
Q. Okay. Have you met any of the plaintiffs in the lawsuit?
A. No, I've not.
Q. I said "met," so I obviously meant in person, but have you talked to them otherwise on the phone or anything?
A. No, I've not.
Q. Other than reading the Complaint, are you aware of their circumstances at all?
A. No, I'm not.
Q. Your conclusions are listed in your report. You have a couple of places on page 3, you summarize, and then on page 15, I think you've got a short statement -- sorry. I thought I

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turned that off.
(Whereupon, an off-the-record discussion then took place.)
BY MR. STERMITZ:
Q. Can you -- although I know you weren't asked, as you've just said, to render any opinions about the lawsuit, per se, can you give me your understanding of what the lawsuit is about?
A. Yeah. Based on reading the Complaint, the children, or the plaintiffs, are suing the State over energy policy, essentially.
Q. Did you do any review of what the State's energy policy or policies are?
A. No, I did not.
Q. So it would be a fair statement, tell me if you're wrong, to say that, whatever happens in the litigation, you're not involved in assessing the impact of that to either the plaintiffs or to Glacier Park; is that right?
MR. SULLIVAN: I would object to the form of the question as confusing.
BY MR. STERMITZ:
Q. You're not being asked to render any opinions about how the court can affect climate change -- and I'll just break it down --

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specifically for Glacier Park, right?
A. No.
Q. Okay. And is it fair to say that, as far as you know now, you've finished your opinion and you don't have any pending assignments, other assignments?
A. No pending assignments.
Q. So as far as you know now, if you were called to testify, it would be to the effect that's described in your report?
A. Yes.
Q. And nothing more?
A. Yes.
Q. Or less?
A. Yes.
Q. Okay. And the opinions that you've expressed in here, those are -- to a reasonable degree of scientific certainty --
A. Yes.
Q. -- is the standard that you followed, right?
A. Yes, it is.
Q. I'll just -- you know, we took Dr. Running's deposition and talked a lot about climate change, and I'm not going to duplicate

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that effort because it wouldn't serve anyone's best interest.
So I'm just going to kind of cut to the chase here and ask you a couple of questions to see if we're on the same page.
Climate change, global warming, is a global problem; is that right?
A. Yes.
Q. So what we do in Montana is as -- whatever it is, it has the same -- to the extent it impacts global warming, it has the same affect as something done on the other side of the globe, it's the same thing done on the other side of the globe; is that right?
MR. SULLIVAN: I'm going to object to the form of the question on the -- on the basis of ambiguity in terms of what's referred to as, do what we do.
MR. STERMITZ: Okay.
MR. SULLIVAN: I don't understand that.
MR. STERMITZ: I gotcha.
BY MR. STERMITZ:
Q. So a ton of greenhouse gas emitted in Montana is the same, as far as your assessment of global warming, as a ton of greenhouse gases

emitted in China; is that correct?
A. The -- can I say yes with a caveat?
Q. Sure.
A. Yes, with a caveat. The physics of that are correct; however, there are things like atmospheric mixing and ocean absorption and other things, so it is not precisely true.
But, fundamentally, greenhouse gases emitted eventually wind up being globally mixed.
Q. And let me ask it this way.
If we have, for example, a power plant in Montana that emits greenhouse gases, would it have any greater effect on the ecology at Glacier Park than one that's emitting the same thing in Europe?
MR. SULLIVAN: And before Dr. Fagre answers, I'm going to object on the basis that this line of questioning is beyond the scope of Dr. Fagre's expert report and his stated opinions.
BY MR. STERMITZ:
Q. Do you have an understanding -- do you understand my question, first of all?
A. Yes.
Q. Are you -- do you feel you can answer it?
A. No. I can think of reasons why I can't.
Q. I mean, is it based on your expertise?

A. It is -- it is outside my area of expertise, yes.
Q. Okay. So your opinions, whatever they are in your report, are -- they are not designed to inform the court about any specific actions in Montana in terms of how they might relate to the ecology at Glacier Park?
MR. SULLIVAN: And I'm going to object because it calls for a legal conclusion.
With that objection noted, you can answer to the extent you can.
THE WITNESS: So no, with a caveat. No. Our research is designed to look at the impacts of climate change, period.
We have no policy, energy outcomes or anything in mind. We are simply recording and documenting what is happening.
BY MR. STERMITZ:
Q. I think my outline is too long. Are -- let me try this, Dr. Fagre.
Page 16, your conclusion, the last paragraph -- this is the last paragraph of the report actually.
You say, "Montana's ongoing actions to increase the utilization and development of fossil

fuels will only result in more warming of the climate system and" -- "more rapid melting of Montana's glaciers."
What did you intend to include when you say, "Montana's ongoing actions to increase utilization and development of fossil fuels"?
A. I took that from the Complaint, what its focus was. And that statement was there to show that my testimony was relevant to what was required or asked by the plaintiffs to have in the expert report. It was an attempt to be relevant.
Q. Okay. Do you have any independent knowledge about whether Montana is increasing the utilization and development of fossil fuels?
A. Not explicitly, no.
Q. And, I guess, fair to say then that not -- not -- that would have been included in -- as part of your opinions here?
MR. SULLIVAN: Yeah.
THE WITNESS: Could you repeat --
MR. SULLIVAN: Yeah, I would object to the form.
BY MR. STERMITZ:
Q. So the question is whether you -- and maybe this is a little different than what I asked

before.
But you have an appreciation for what actions there are in Montana that "increase the utilization and development of fossil fuels," quote, and you said "not explicitly."
A. Yes.
Q. Am I correctly stating your testimony?
A. Yes. I have no numbers or figures for percent increases in energy uses.
Q. Okay.
A. That's outside my expertise.
Q. Okay. And then that sentence goes on to say that that increased utilization and development will only result in "more rapid melting of Montana's glaciers."
Based on our discussion here this morning, I take it that you mean that Montana's activities as going into the mix of global activities that affect the glaciers, right?
A. That's correct. I should have said "yes." Yes, that's correct.
Q. Yeah, that's fine.
And so, as I think we're -- we know from talking here, you -- you weren't asked and don't -- have not reported on -- specifically on

A. Yes, it's a well-developed area of science.

Q. Okay. And I can skip all those.

MR. STERMITZ: That's all I have. That's the shortest deposition I think I've ever had.

MR. SULLIVAN: Can we take a short break?

(Whereupon, a break was then taken.)

MR. SULLIVAN: I have no questions.

MR. STERMITZ: No further questions.

(Whereupon, the deposition concluded at 9:53 a.m.)

Signature Reserved

* * * * * * * *

DEPONENT'S CERTIFICATE

I, DR. DANIEL FAGRE, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 29 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

_____

DR. DANIEL FAGRE

Subscribed and sworn to before me this ____ day of _____, 2022.

_____

PRINT NAME:_____

Notary Public, State of Montana

Residing at:_____

My commission expires:_____

KF - Rikki Held, et al. vs. The State of Montana, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: Ss
COUNTY OF GALLATIN)

I, Kasey L. Fisher, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of DR. DANIEL FAGRE in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this the 1st day of November 2022.

EXHIBIT N

Report of Judith Curry, PhD

I submit this report to the Montana First Judicial District Court of Lewis and Clark County, with regards to Rikki Held et al. versus the State of Montana et al. as an expert witness for the State of Montana on the topics of climate change and the energy transition. The facts and data that I considered in forming my opinions are available from public sources and cited in this report.

Executive Summary

This report responds to the Plaintiffs' claims that:

- the release of greenhouse gases from fossil fuel emissions into the atmosphere is already triggering a host of adverse consequences in Montana;
- the threats posed by fossil fuels and the climate crisis are existential;
- Montana's energy system should transition to a portfolio of 100% renewable energy by 2050.

My report provides evidence that supports the following conclusions:

- The climate-related concerns observed by the Plaintiffs are well within the range of historical natural weather and climate variability, with worse occurrences of weather and climate extremes observed during the early 20th century.
- Plaintiffs' concerns about climate change in the 21st century are greatly exaggerated, and not consistent with the most recent assessment reports and research publications.
- In 2021, Montana ranked 10th among U.S states in terms of the share of electricity generated from renewables, about 52%. There are significant problems with a portfolio of 100% renewable energy for Montana by 2050.
- Emissions from fossil fuels generated in Montana provide a miniscule contribution to global greenhouse gas emissions and do not influence directly Montana's weather and climate.

Qualifications

I am Professor Emerita and former Chair of the School of Earth and Atmospheric Sciences at the Georgia Institute of Technology. I am currently President and co-founder of Climate Forecast Applications Network (CFAN).

I received a Ph.D. in Geophysical Sciences from the University of Chicago in 1982. Prior to joining the faculty at Georgia Tech, I held faculty positions at the University of Colorado, Penn State University and Purdue University. My published research spans a variety of topics including climate dynamics of the Arctic, climate dynamics of extreme weather events, cloud microphysics and climate feedbacks, climate sensitivity and scenarios of future climate variability, and reasoning about climate uncertainty. I have been elected to the rank of Fellow of the American Meteorological Society, the American Association for the Advancement of Science, and the American Geophysical Union. I have previously served on the NASA Advisory Council Earth Science Subcommittee, the Department of Energy's Biological and Environmental Research

With regards to Montana's CO_2 emissions, based on 2019 estimates Montana produces 0.63% of U.S. emissions and 0.09% of global emissions.[139] [140] CO_2 is a well-mixed gas in the atmosphere, and local CO_2 emissions do not influence the local climate. The premise behind the UN treaties and agreements on climate change is that reducing global emissions is required to stabilize the global climate, with the implicit assumption that reducing CO_2 emissions will rapidly decrease atmospheric CO_2 and improve regional climates. Reducing 0.09% of global emissions will not make a meaningful difference in atmospheric CO_2 or improve Montana's climate.

The Plaintiffs seem to assume that the two laws they challenge are responsible for a significant percentage of Montana's GHG emissions. Even if this were the case, it would not make any noticeable difference in the global amount of atmospheric CO_2 or in Montana's climate. Simply put, Montana is powerless on its own to influence the global or its local climate.

It is a substantial scientific challenge to understand how atmospheric CO_2 will evolve in response to emissions reductions, and how the fast and slow elements of the climate system will respond. The vagaries of the carbon cycle, in combination with natural climate variability, makes it difficult to identify a measurable change in the evolution of global warming in response to emissions reduction. Inertia in the ocean and ice sheets along with natural internal variability of the climate system will delay the emergence of a discernible response of the climate in the 21st century even to strong CO_2 emissions reductions.[141]

Even with large reductions in carbon emissions, a corresponding significant shift in surface temperature evolution is not anticipated until decades later.[142] It is unclear how the climate will evolve after net-zero emissions is achieved. To address this issue, the Zero Emissions Commitment Model Intercomparison Project (ZECMIP) used multiple Earth System Models to investigate how the climate system including the carbon cycle will respond 50 years after an immediate cessation of CO_2 emissions.[143] The models exhibit a wide variety of behaviors, with some models continuing to warm for decades to millennia while others cool. Carbon uptake by both the ocean and the terrestrial biosphere is shown to be important in counteracting the warming effect created by reduction in ocean heat uptake anticipated decades after emissions cease. This response is difficult to constrain primarily given the high uncertainty in the effectiveness of ocean carbon uptake.[144]

The bottom line is that there is substantial inertia in the global carbon cycle and the climate system. Even if emissions are successfully reduced/eliminated, it takes time for the CO_2 concentration in the atmosphere to respond to the emissions reduction and it takes time for the climate to respond to the change in atmospheric CO_2 concentration. There is substantial uncertainty regarding how much time this will take – we may not see much of a beneficial change to the climate before the 22nd century even if emissions are successfully eliminated, particularly against the background of large natural climate variability.

Climate change is an ongoing predicament.[145] Even if CO_2 and other GHG emissions are eliminated, natural climate variability and inevitable surprises will provide ongoing challenges that require continuing adaptation by communities and states. The 21st century energy transition will be driven by politics, economics and technological developments, with each state and community responding in a different way that best balances their values and perceived risks and opportunities.

EXHIBIT O

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, vs. STATE OF MONTANA, et. al., Defendants.	Case No. CDV-2020-307 Hon. Kathy Seeley

VIDEOTAPED DEPOSITION OF DR. JUDITH CURRY

Taken on Friday, December 16, 2022

At 9:00 a.m.

At Sunshine Litigation Services

151 Country Estates Circle

Reno, Nevada

REPORTED BY: NICOLE J. HANSEN, NV. CCR NO. 446
CAL CSR 13,909, RPR, CRR, RMR
REPORTED BY: JULIE ANN KERNAN, CCR #427, RPR

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scenarios. There are other sources of scenarios.

Q What are the other scenarios that, the IEA scenarios that you --

A Not a scenario. A scenario is a possible future. This can arise from many things not just from emissions. Like I said, for the emissions scenario CI said this previous -- my favorite scenario to use is 4.5 and 3.4, I think those are the two most realistic going forward, but I have used the range from 2.6 to 7.0. But, invariably, even with the more extreme scenarios, I found that when you're looking at regional future scenarios you really natural variability that dominates over that next 30 years.

Q Okay. And how do you derive weather predictions from climate models?

A Weather predictions are not derived from climate models, they're derived from weather prediction models. They count atmosphere models, which, are -- okay. Okay.

MS. OLSON: Melissa, I think we need your line muted.

THE WITNESS: Yeah, there's two --

MS. HORNBEIN: Yeah, I'm sorry about that. I'm having sound issues. Give me ten seconds and I'll figure it out.

THE WITNESS: Okay. While there are some

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similarities, and a few climate models are derived from weather forecast models, they're actually a lot of differences, the weather -- the global weather forecast models I use mostly are the European Center for Medium Range Weather Forecast, it was generally regarded to be the best weather forecast system in the world, and also the NOAA global forecast models. For NISHA application like hurricanes I use a broader range of models which include other global models including the UK met office and the Canadian model, and also regional models run by NOAA.

Q Okay. Thank you. All right. We're going to go back to your expert report. Do you have that in front of you?

A Uh-hum.

Q And on Page 1 you have your 4th bullet. This is the final opinion that you summarize in your expert report. And can you read that for me, please, that 4th bullet?

A "Emissions from fossil fuels generated in Montana provide a minuscule contribution to global greenhouse gas emissions and do not influence directly Montana's weather and climate."

Q How do you define minuscule?

A Okay. A simple calculation but without any paper and pencil. Okay. Let's say we're talking about two

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degrees by 2100. We've already accomplished 1. more by 1.1 degrees so there's nine-tenths of a degree centigrade left. The amount of emissions, direct emissions that are burned in Montana is .09 percent of global emissions. If you multiply .09 percent, which is .0009 times .9 degrees, you other get .0008 degrees centigrade, which would be the amount of warming that's prevented by eliminating Montana's fossil fuels. When you're talking about, like, one one-thousandths of a degree that would be avoided by not burning fossil fuels in Montana, I would call that minuscule. It's not something that's measurable.

Q So you -- is it your opinion that Montana's contribution of emissions to the atmosphere is not measurable?

A You can measure the amount of emissions, okay, but in terms of the impact on the climate, it's immeasurable. You can say how many gigatons or whatever, you can measure that. And that's, like, .09 percent of total global emissions.

Q Okay.

A And it's in the noise, it's in the noise of our ability to accurately calculate global emissions.

Q And Dr. Curry, are you aware that the CDC uses blood-led reference values of 3.5 micrograms per deciliter as a blood-level level -- as a blood-led level in children

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13 years or younger that is too high?

A I'm no fan of that --

MR. RUSSELL: Go ahead.

THE WITNESS: Okay. I'm no fan of léd, but it has nothing to do with CO2.

BY MS. OLSON:

Q I understand. I'm just wondering if you're familiar that their levels that are deemed safe for children of led in their blood?

A Uh-hum.

Q Is that a yes?

A Yes.

Q And would you agree that one microgram per deciliter is a minuscule amount of led in a child's blood?

A It's a different context, completely different context.

Q Is it minuscule?

A In terms of --

MR. RUSSELL: (Unintelligible.)

REPORTER: I'm not understanding what he's saying. What did you say?

MR. RUSSELL: Object, relevance.

THE WITNESS: I'm not going to answer that one because I agree it's not relevant, I don't know.

BY MS. OLSON:

DECLARATION UNDER PENALTY OF PERJURY

I, DR. JUDITH CURRY, do hereby certify under penalty of perjury that I have read the foregoing transcript of my deposition taken on December 16, 2022; that I have made such corrections as appear noted herein in ink, initialed by me; that my testimony as contained herein, as corrected, is true and correct.

Dated this day of , 20 ,

at , Nevada.

DR. JUDITH CURRY

DEPOSITION ERRATA SHEET

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DR. JUDITH CURRY DATED

STATE OF NEVADA)
COUNTY OF WASHOE)

I, Nicole J. Hansen, Certified Court Reporter, State of Nevada, do hereby certify:

That prior to being examined, the witness in the foregoing proceedings was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said proceedings were taken before me at the time and places therein set forth and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said proceedings, not in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name.

Dated: January 13th, 2023

Nicole J. Hansen

Nicole J. Hansen
NV. CCR NO. 446, RPR, CRR, RMR
CA. CSR 13,909

STATE OF NEVADA)
COUNTY OF WASHOE)

I, JULIE ANN KERNAN, a notary public in and for the County of Washoe, State of Nevada, do hereby certify:

That on Friday, the 16th day of December, 2022, at the hour of 1:52 p.m. of said day, at the Offices of Sunshine Litigation Services, 151 Country Estates Circle, Reno, Nevada, personally appeared DR. JUDITH CURRY, who was duly sworn to testify the truth, the whole truth, and nothing but the truth, and thereupon was deposed in the matter entitled herein;

That said deposition was taken in verbatim stenotype notes by me, a Certified Court Reporter, and thereafter transcribed into typewriting as herein appears;

That the foregoing transcript, consisting of pages numbered 136 through 285, is a full, true and correct transcript of my said stenotype notes of said deposition to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 13th day of January, 2023.

Julie Ann Kernan

JULIE ANN KERNAN, CCR #427

EXHIBIT P

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Attorneys for Defendants

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause CDV 20–307 Hon. Kathy Seeley **AFFIDAVIT OF CHRISTOPHER DORRINGTON IN SUPPORT OF DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

State of Montana)
) ss.
County of Lewis and Clark)

I, Christopher Dorrington, being duly sworn, state the following:

1. I am the Director of the State of Montana, Department of Environmental Quality (DEQ). I have personal knowledge of the facts stated in this Affidavit.

2. In my employment with DEQ, I am familiar with how DEQ has implemented the Montana Environmental Policy Act (MEPA), § 75-1-101 *et seq.*

Valid Applications of § 75-1-201(2)(a), MCA:

3. For hundreds of DEQ decisions and corresponding MEPA environmental reviews, the environmental impacts do not extend beyond Montana's borders. There are no actual or potential impacts that are regional, national, or global in nature. § 75-1-201(2)(a).

4. In my employment with DEQ, I am familiar with the files for DEQ Opencut Permitting and DEQ Solid Waste Licensing.

5. DEQ Opencut has performed hundreds of MEPA environmental reviews for Opencut permitting decisions involving Opencut permits for bentonite, clay, scoria, soil materials, peat, sand, gravel, or mixtures of those substances. § 82-4-403(6), MCA. Barring unusual, site-specific exceptions, the impacts for Opencut operations are local. The impacts do not extend beyond Montana's borders. See, especially, § 82-4-432(14), MCA, Opencut permitting for sites that do not affect groundwater or surface water.

6. Because DEQ Opencut's permitting decisions do not have actual or potential impacts that are regional, national, or global in nature, DEQ Opencut MEPA reviews do not analyze actual or potential impacts beyond Montana's borders.

7. DEQ Opencut performed approximately 309 EAs in the last four years: 68 in 2019, 66 in 2020, 99 in 2021, and 76 in 2022 – most, if not all, had no impacts which extended beyond Montana's borders or which could be considered regional, national, or global in nature.

8. DEQ Solid Waste Licensing regularly performs environmental reviews for its licensing decisions. See, The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; Septage Licensure and Disposal Laws, Title 75, chapter 10, part 12, MCA. The Solid Waste Section performs a MEPA analysis for decisions on solid waste management system license applications under § 75-10-221, MCA, and when a licensed septic pumper seeks to add a new land application disposal site to its license under § 75-10-1211(2), MCA.

9. DEQ Solid Waste Section performs a MEPA environmental review for septage land application sites, certain composting facilities, and other solid waste management systems. Except in unusual, site-specific exceptions, the Solid Waste Section's decisions in this regard would not have environmental impacts outside Montana's borders. The MEPA review for these decisions did not analyze impacts outside of Montana's borders.

10. DEQ Solid Waste Section performed approximately 24 EAs in the last four years: 18 EAs for DEQ licensing decisions related to septage land application sites and six EAs for DEQ licensing decisions related to solid waste management systems -- most, if not all, of which did not have impacts which extended beyond Montana's borders or which could be considered regional, national, or global in nature.

Valid Applications of § 90-4-1001(c) through (g):

11. Title 90 of the MCA is captioned: Planning, Research, and Development. Chapter 4 is captioned: Energy Development and Conservation. Part 10 is captioned State Energy Policy -- Goal and Development Process.

12. Section 90-4-1001(c) through (g) contains goals statements which do not regulate the State's permitting requirements. The State's permitting requirements are separately enacted by the Legislature for each activity that the Legislature regulates such as coal permitting.

DEQ regulates permitting and enforces its permitting decisions as specifically authorized by the Legislature in Titles 75 and 82, MCA.

13. In my employment with DEQ, I am familiar with permitting under the Montana Strip and Underground Mine Reclamation Act, § 82-4-201 *et seq.*, MCA, (MSUMRA).

14. In keeping with the Legislature's stated obligations in § 82-4-202, MCA, DEQ follows the specific permitting statutes set forth in MSUMRA which directly regulate DEQ, § 82-4-221 through 223, MCA, not the general, aspirational goal statements of § 90-4-1001, MCA which does not directly regulate DEQ and does not specifically direct DEQ permitting. For coal permitting regulation, DEQ only has the specific authority prescribed in MSUMRA.

Valid application of other sections of the State Energy Program.

15. The State Energy Policy contains a diverse list which is much more extensive than (c) through (g).

16. DEQ's Energy Program, which does not have specific regulatory authority, does specifically promote, expand, or enhance alternative energy. The DEQ Energy Section has implemented the following initiatives:

17. Federal Programs

a. State Energy Program (SEP)

The intended outcomes of SEP, as described by DOE, include helping states to "enhance energy security, advance state-led energy initiatives, and increase energy affordability." Additionally, the program's financial and technical assistance help states achieve one of DOE's goals to "enhance strategic investments in energy efficiency and renewable energy technologies through the use of innovative practices and partnerships." DEQ's use of SEP funding and technical assistance has resulted in millions of dollars of investments in energy conservation, efficiency, and clean energy

throughout its history. Three recent annual reports for this program are included as "Exhibits 1 (A-C)" and highlight some of the clean energy and efficiency work DEQ has completed under SEP.

b. Diesel Emission Reduction Act (DERA)

Congress established the DERA program to reduce harmful emissions from diesel engines in 2005. DEQ has implemented a program since FY 2009 replacing over 100 older diesel engines with cleaner replacements including over 40 school buses and deploying over $7 million in Federal funding to achieve improved air quality outcomes. The associated exhibits detail outcomes from FY 17 and FY18 and include a staff-generated Excel spreadsheet highlighting outcomes for each program year Montana has implemented the program.

c. Energy Efficiency and Conservation Block Grant (EECBG)

The EECBG program was originally authorized by Congress in 2007 and initially funded under the American Recovery and Reinvestment Act of 2009. The Energy Bureau received nearly $10 million in federal funds, the majority of which was sub-granted to local governments for the purpose of achieving resource savings (energy, water, and waste) in local facilities.

18. State Statutes and Programs

a. Alternative Energy Revolving Loan Program (AERLP)

The AERLP, established in 2001 and enshrined under 75-25-101, *et seq.*, MCA, has provided low-interest loans to hundreds of Montanans to invest in "alternative energy systems" and energy efficiency measures. While the program tracks estimated resultant energy production and does not account for GHG emission reductions, it is undeniable that this program has reduced GHG emissions and achieved several of the state's energy goals, established under 90-4-100, MCA. This program has directly financed over $16 million in renewable energy and energy efficiency measures for Montanans in the past two decades.

b. State Buildings Energy Conservation Program (SBECP)

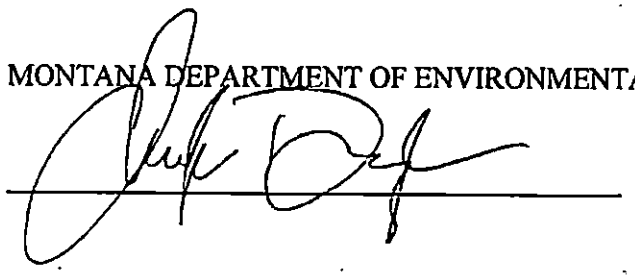
The Montana legislature established the SBECP (90-4-6, MCA) in 1989 with $4.4 million in oil overcharge funds. DEQ applied additional funding sources to the program in subsequent years including an allocation under the Stripper Well Fund, general obligation bonds, and other federal sources including the American Recovery and Reinvestment Act of 2009. Investments made under the SBECP since 2009, have provided an estimated $2.53 million in annual energy cost savings from electricity, natural gas, and water utilities in state-owned buildings. While there are obvious greenhouse gas reductions associated with these energy and fiscal savings, those figures are not directly tracked by the program.

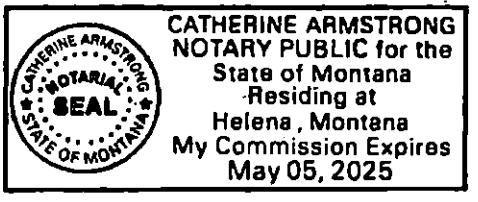
19. The Goal Statements in § 90-4-1001, as set forth in the Planning, Research, and Development Title of the Montana Code Annotated do not apply to the state agencies whose activities are directly regulated by specific statutes. Only the Legislature enacts statutes governing fossil fuels in Montana, not DEQ.

20. If the Court invalidates the State Energy Policy, it will not have any effect on DEQ because DEQ must follow the specific directives in Titles 75 and 82, MCA.

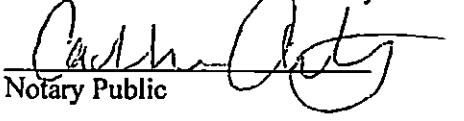
DATED this 1st day of February, 2023.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY





Sworn to before me this 1st day of February 2023.



Notary Public

EXHIBIT Q

Chernaik v. Brown

Supreme Court of Oregon

November 13, 2019, Argued and Submitted; October 22, 2020, Decided

SC S066564

Reporter
367 Ore. 143 *; 475 P.3d 68 **; 2020 Ore. LEXIS 732 ***

Olivia CHERNAIK, a minor and resident of Lane County, Oregon; Lisa Chernaik, guardian of Olivia Chernaik; Kelsey Cascadia Rose Juliana, a minor and resident of Lane County, Oregon; and Catia Juliana, guardian of Kelsey Juliana, Petitioners on Review, v. Kate BROWN, in her official capacity as Governor of the State of Oregon; and State of Oregon, Respondents on Review.

Subsequent History: Reconsideration denied by *Chernaik v. Brown, 2020 Ore. LEXIS 849 (Or., Dec. 10, 2020)*

Prior History: CC 161109273. CA A159826. On review from the Court of Appeals. [***1] *

Chernaik v. Brown, 295 Ore. App. 584, 436 P.3d 26, 2019 Ore. App. LEXIS 81 (Jan. 9, 2019)

Disposition: The decision of the Court of Appeals is affirmed. The judgment of the circuit court is vacated, and the case is remanded to the circuit court.

Core Terms

public trust doctrine, resources, declaration, public trust, plaintiffs', waters, natural resources, navigable waters, circuit court, climate, navigable, atmosphere, substantial impairment, fiduciary obligation, emissions, submerged, submersible, separation of powers, carbon dioxide, wildlife, fish, fiduciary duty, public right, principles, obligations, common-law, greenhouse, questions, courts, effects

Case Summary

Overview
HOLDINGS: [1]-The court declined to impose broad fiduciary duties on the state, akin to the duties of private trustees, that would require the state to protect public trust resources from effects of greenhouse gas emissions and consequent climate change, as plaintiffs did not develop a legal theory that led the court to alter current law concerning the state's duty under the public trust doctrine.

Outcome
Judgment of court of appeals affirmed, judgment of circuit court vacated, and case remanded to circuit court.

LexisNexis® Headnotes

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Transportation Law > Water Transportation > Waterways

Governments > Public Lands > Public Trust Doctrine

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

HN1[] **Coverage & Definitions, Navigable Waters**

The public trust doctrine applies to navigable waterways and the lands underlying those waterways. Under the doctrine, Oregon acquired title at statehood to the lands underlying all bodies of water within the state that meet the federal test for navigability. Although title passed to the state by virtue of its sovereignty, its rights were

*On appeal from Lane County Circuit Court, Karsten Rasmussen, Judge. *295 Ore. App. 584, 436 P.3d 26 (2019)*.

merely those of a trustee for the public. In addition to the land underlying bodies of water that meet the federal test for navigability, the navigable waters themselves are a public trust resource.

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

Real Property Law > Water Rights > Boundaries

Governments > Public Lands > Public Trust Doctrine

Transportation Law > Water Transportation > Waterways

HN2[] Natural Resources & Public Lands, Public Trust Doctrine

The public trust doctrine is partially codified by statutes that declare that the waters of all navigable lakes are of public character and that title to what the statute refers to as "submersible and submerged lands" beneath navigable lakes is vested in the State of Oregon. The statutes apply likewise to waters of navigable streams.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Real Property Law > Water Rights > Nonconsumptive Uses > Fishing

Governments > Agriculture & Food > Animal Protection

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

Governments > Public Lands > Public Trust Doctrine

HN3[] Coverage & Definitions, Navigable Waters

In contrast to the public trust doctrine, which provides that the general public has a right to use navigable waters for certain purposes, subject to objectively reasonable restrictions on that right, the wildlife trust doctrine describes the state's broad authority over wild fish and animals in Oregon. The wildlife trust doctrine provides that the state has the authority to manage and preserve wildlife resources, and that the legislature may restrict, prohibit, or condition the taking of game or fish in Oregon as the law-making power may see fit.

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

Governments > Public Lands > Public Trust Doctrine

HN4[] Natural Resources & Public Lands, Public Trust Doctrine

As a common-law doctrine, the public trust doctrine is not necessarily fixed at its current scope. It is within the purview of the Oregon Supreme Court to examine the appropriate scope of the doctrine and to expand or to mold it to meet society's current needs.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Governments > Public Lands > Public Trust Doctrine

Transportation Law > Water Transportation > Waterways

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

HN5[] Coverage & Definitions, Navigable Waters

The core purpose of the public trust doctrine is to obligate the state to protect the public's ability to use navigable waters for identifiable uses. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. The public trust doctrine limits the state's authority to interfere with the public's right to use the public waters of the state. Any restrictions by the state on the public's right of use must be objectively reasonable in light of the purpose of the trust and the circumstances of the case. The state may not sell or dispose of or grant the right to make any use of the beds of navigable streams which would impair or impede navigation.

Evidence > Types of Evidence > Judicial

Admissions > Effects

Evidence > Types of Evidence > Judicial Admissions > Legal Conclusions

HN6 **Judicial Admissions, Effects**

The pleadings in a cause are, for the purposes of use in that suit, judicial admissions and therefore a limitation of the issues.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN7 **Estoppel, Judicial Estoppel**

Judicial estoppel requires a benefit in an earlier proceeding, different judicial proceedings, and inconsistent positions.

Counsel: Courtney Johnson, Crag Law Center, Portland, argued the cause and filed the briefs for petitioners on review. Also on the briefs was William Sherlock.

Carson L. Whitehead, Assistant Attorney General, Salem, argued the cause and filed the brief for respondents on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Charles M. Tebbutt, Law Offices of Charles M. Tebbutt P.C., Eugene, filed the brief for amici curiae Michael Dembrow, Shemia Fagan, Lew Frederick, Jeff Golden, Ken Helm, Alissa Keny-Guyer, Karin Power, Floyd Prozanski, Andrea Salinas, Kathleen Taylor, and Marty Wilde. Also on the brief was Daniel C. Snyder.

Kenneth E. Kaufmann, Law Office of Kenneth Kaufmann, West Linn, filed the brief for amici curiae Randall S. Abate, Nadia B. Ahmad, Robert T. Anderson, Craig Anthony Arnold, Hope Babcock, Michael C. Blumm, Sara A. Colangelo, Kim Diana Connoly, Karl Coplan, John Davidson, Myanna Delinger, Rachele Deming, John C. Dernbach, **[***2]** Debra L. Donahue, Tim Duane, Richard Fink, Alyson C. Flourney, Denise D. Fort, Dale D. Goble, Carmen Gonzalez, Jaqueline Hand, Richard Hildreth, Hillary Hoffman, Oliver Houck, Blake Hudson, Sam Kalen, Helen H. Kang, Christine A. Klein, Kenneth T. Kristi, Katrina Kuh, Howard Latin, Ryke Longest, Kevin Lynch, Peter Manus, Patrick C. McGinley, David K. Mears, Errol Meidinger, Joel A. Mintz, Catherine A. O'Neill, Jessica Owley, Patrick A. Parenteau, Cymie R. Payne, Jacqueline Peel, Zymunt Jan Broel Plater, Ann Powers, Melissa Powers, Karl R. Rabago, Rick Reibstein, Kaylani Robbins, Jason Anthony Robison, Daniel John Rohlf, Jonathan Rosenbloom, Collette Routel, John Ruple, Erin Ryan, Shelley Ross Saxer, Amy Sinden, William Snape, Gus Speth, David Takacs, Gerald Torres, Clifford J. Villa, Elizabeth Kronk Warner, Charles F. Wilkinson, Robert A. Williams, Jr., Chris Wold, Mary Christina Wood, and Sandra Zellmer.

Elisabeth A. Holmes, Blue River Law, P.C., Eugene, filed the briefs for amici curiae 350 Corvallis, 350 Deschutes, 350 Eugene, 350 PDX, Ashland Food Co-Op, Beyond Toxics, Cascadia Action Network, Cascadia Wildlands, Churchill Climate Action Club, Citizens for Renewables of Coos County, **[***3]** City of Milwaukie, Clackamas Climate Action Coalition, Climate Action Coalition, Climate Justice League, Climate Reality Project: Portland, Coconut Bliss, Earth Guardians 350 Club, Ecumenical Ministries of Oregon, Eugene Springfield NAACP, First Unitarian Church of Portland, Friends of the Columbia Gorge, Hair on Fire Oregon, Paul Holvey, Hummingbird Wholesale, Indivisible North Coast Oregon, Indow Windows, Interfaith Earthkeepers, League of Women Voters of Oregon, John Lively, Mount Pisgah Arboretum, Multnomah Youth Commission, OPAL Environmental Justice Oregon, ORD2 Indivisible, Oregon Environmental Council, Oregon League of Conservation Voters, Oregon Physicians for Social Responsibility, Oregon Unitarian Universalist Voices for Justice, Oregon Youth Legislative Initiative, Organically Grown Company, Partners for Sustainable Schools, Portland Youth Climate Council, Reverend Cecil Prescod, Riverside Community Church, Royal Blue Organics, Reverend Dr. Marilyn Sewell, Reverend John Shuck, Stop Fracked Gas PDX, Eric Strid, Temple Beth Israel, The Center for Sustainable Economy, The Green Energy Institute, The Raven Corps, The Sierra Club and its Oregon Chapter, The Village School, **[***4]** Thrive Hood River, Unitarian Universalist Church of Eugene, Mayor Lucy Vinis, and Willamette Riverkeeper.

Courtney Lords, Multnomah County Attorney's Office, Portland, filed the brief for amici curiae Multnomah and Lane Counties. Also on the brief was Jenny M. Madkour, County Attorney for Multnomah County.

Travis Eiva, Zemper Eiva Law LLC, Eugene, filed the brief for amicus curiae Oregon Trial Lawyers Association.

Brian T. Hodges, Pacific Legal Foundation, Bellevue, Washington, filed the brief for amicus curiae Pacific Legal Foundation.

Judges: Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices, and Kistler, Senior Judge, Justice pro tempore.**. Walters, C. J., dissented and filed an opinion.

Opinion by: NAKAMOTO

Opinion

[71] [*147] NAKAMOTO, J.**

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is vacated, and the case is remanded to the circuit court.

Walters, C. J., dissented and filed an opinion.

Relying on an expanded view of the public trust doctrine, plaintiffs—two young Oregonians, concerned about the effects of climate change, and their guardians—brought this action against the Governor and the State of Oregon (collectively, the state). Broadly speaking, plaintiffs contended that the state was required to act as a trustee under the public trust doctrine to protect various natural resources in Oregon from substantial impairment due to greenhouse **[***5]** gas emissions and resultant climate change and ocean acidification. Among other things, plaintiffs asked the circuit court to specify the natural resources protected by the public trust doctrine and to declare that the state has a fiduciary duty, which it breached, to prevent substantial impairment of those resources **[**72]** caused by emissions of greenhouse gases. Plaintiffs also asked for an injunction ordering the state to (1) prepare an annual accounting of Oregon's carbon dioxide emissions and (2) implement a carbon reduction plan protecting the natural resources, which the court would supervise to ensure enforcement.

The circuit court granted the state's motion for summary judgment and denied plaintiffs' motion for partial summary judgment. The court concluded that no trial was needed, because the public trust doctrine did not encompass most of the natural resources that plaintiffs had identified and did not require the state to take the protective measures that plaintiffs sought. In 2015, the circuit court entered a general judgment dismissing the action, and the Court of Appeals vacated the judgment and remanded for the circuit court to enter a judgment, consistent the Court of Appeals **[***6]** opinion, declaring the parties' rights. *Chernaik v. Brown, 295 Ore. App. 584, 601, 436 P3d 26 (2019)*.

On review, plaintiffs assert first that, as a matter of common law, the public trust doctrine is not fixed and, indeed, that it must evolve to address the undisputed circumstances presented, namely, that climate change is damaging Oregon's natural resources. They argue that the doctrine is not limited to the natural resources that the circuit court identified and, indeed, that the doctrine should cover other natural resources beyond those that have been **[*148]** traditionally protected. Second, plaintiffs contend that at least some of the relief that they sought is permissible under the public trust doctrine, and the circuit court erred when it granted summary judgment to the state.

We hold that the public trust doctrine currently encompasses navigable waters and the submerged and submersible lands underlying those waters. Although the public trust is capable of expanding to include more natural resources, we do not extend the doctrine to encompass other natural resources at this time. We also decline, in this case, to adopt plaintiffs' position that, under the public trust doctrine, the state has the same fiduciary duties that a trustee of a common-law **[***7]** private trust would have, such as a duty to prevent substantial impairment of trust resources. Accordingly, we affirm the decision of the Court of Appeals, which vacated the judgment of the circuit court, and remand the case to the circuit court to enter a judgment consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Our review concerns the second phase of this long-running case, so we only briefly describe the first phase, an initial appeal and remand to the circuit court, as part of the procedural background. Plaintiffs sued the Governor and the State of Oregon in 2011. The state moved to dismiss the complaint on jurisdictional grounds. By agreement of the parties, the motion did not address the merits of plaintiffs' claims. The circuit court concluded that (1) plaintiffs' requested declaratory relief exceeded the court's authority under *Oregon's Declaratory Judgment Act*, (2) plaintiffs' claims were barred by sovereign immunity, (3) the requested relief violated the separation of powers doctrine, and (4) the suit presented political questions. Based on those conclusions, the circuit court granted the state's motion to dismiss.

** Garrett, J., did not participate in the consideration or decision of this case.

Plaintiffs appealed, and the Court of Appeals reversed. [***8] The Court of Appeals concluded that plaintiffs were entitled to declarations on whether the atmosphere and other natural resources are public trust resources and whether the state, as trustee, has a fiduciary obligation to protect those resources from the impacts of climate change. [*149] *Chernaik v. Kitzhaber, 263 Ore. App. 463, 481, 328 P3d 799 (2014)*.

The second phase of this case began on remand to the circuit court. In the prayer for relief in their amended complaint, plaintiffs sought four declarations:

> "A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere as a commonly shared public trust resource from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians."
>
> "A declaration that water resources, navigable waters, submerged and submersible [**73] lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared public trust resources from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians."
>
> "A declaration that Defendants have failed to uphold their [***9] fiduciary obligations to protect these trust assets for the benefits of Plaintiffs as well as current and future generations of Oregonians by failing adequately to regulate and reduce carbon dioxide emissions in the State of Oregon."
>
> "A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six per cent each year until at least 2050."

Plaintiffs also sought injunctive relief. They first requested an order requiring the state "to prepare, or cause to be prepared, a full and accurate accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter." Second, plaintiffs asked for an order requiring the state "to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science." In connection with their requested injunctive relief, plaintiffs requested "[t]hat [the circuit court] retain continuing jurisdiction over this matter for purposes of enforcing the relief awarded."

In its answer, the state admitted several of the scientific facts and future effects of climate change that [*150] plaintiffs had alleged.[1] Overall, the state agreed that "global climate [***10] change is a very serious problem that is causing, and will continue to cause, harm to our planet and the State of Oregon, if global greenhouse gas emissions are not curtailed." The state then asserted four affirmative defenses: (1) plaintiffs failed to state a claim, (2) the matter was not justiciable, (3) the requested relief was barred by the political question doctrine, and (4) the requested relief was barred by principles of separation of powers. The parties then filed cross-motions for summary judgment.

In their motion for partial summary judgment, plaintiffs sought a ruling only on their entitlement to declaratory relief. Plaintiffs contended that they were entitled as a matter of law to four declarations, all of which had morphed from what was contained in the amended complaint.

First, plaintiffs sought a declaration concerning the scope of the public trust doctrine:

> "[The] State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions [***11] of

---

[1] Among the scientific facts that plaintiffs alleged and that the state admitted were the following: Earth's average temperature has increased approximately 0.8 degrees Celsius in the last 100 to 150 years; human-caused fossil fuel burning and resulting climate change are already contributing to numerous adverse impacts to public health; climate changes are occurring faster than even the most pessimistic scenarios presented in 2007; and, if the atmosphere passes certain thresholds or tipping points, the existing climatic conditions that exist today cannot be restored.

The state also admitted that "global climate change" is likely to result in "some" (1) heating of the oceans and impacts on fisheries; (2) rising temperatures and weather changes that may lead to increased allergy and related health problems; (3) change to ecosystems from drought and rising temperatures and changes to Oregon's weather patterns; (4) loss of beaches and shorelines from erosion, rising sea levels, and the heating of the ocean and consequent impacts on fisheries and other sea life; and (5) reduced water availability, drought, increases in pests, rising temperatures, and weather changes.

> greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification[.]"

That requested declaration was not exactly stated in their amended complaint and instead was a combination and **[*151]** reformulation of the first two declarations that plaintiffs had pleaded. Next, plaintiffs requested, with slight modifications, the third declaration included in their prayer for relief concerning defendants' breach of "fiduciary obligations":

> **[**74]** "A declaration that [d]efendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon."

Finally, plaintiffs requested that the circuit court enter two additional declarations based on the premise that a specific carbon dioxide level in the atmosphere will lead to substantial damage to Oregon's natural resources:

> "A declaration that atmospheric concentrations of carbon dioxide (CO2) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and **[***12]** thereby the other public trust assets[.]"
>
> "A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO2 necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100[.]"

Those declarations appear to be a refined version of a declaration included in their prayer for relief that the "best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six per cent each year until at least 2050." The specific carbon dioxide level seems to be based on an allegation in the amended complaint that "[t]o limit average surface heating to no more than 1° C (1.8° F) above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million or 'ppm.'"

Plaintiffs further noted that they would petition for supplemental relief in the form of an injunction if the court granted the requested declaratory relief. That injunction would require the state to (1) prepare an annual accounting of Oregon's greenhouse gas emissions and **[***13]** (2) develop and implement a greenhouse gas reduction plan that would **[*152]** return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100. Plaintiffs also indicated their intent to request continuing supervision from the court.

The state moved for summary judgment on all of plaintiffs' claims for relief. The state's primary contentions were that the public trust doctrine does not extend to the atmosphere, or all waters of the state and fish and wildlife, and that the public trust doctrine does not impose fiduciary duties upon the state like those associated with traditional private trusts. In tandem, the state argued that, "[b]ecause there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied." In addition, the state opposed injunctive relief, even were the court to recognize "new fiduciary duties," because, in its view, the court was being asked to violate the principle of separation of powers and to decide a political question entrusted to the legislative and executive branches of government.

In responding to plaintiffs' motion for partial summary judgment, **[***14]** the state highlighted the changes between what plaintiffs had included in the amended complaint and later sought in their motion for partial summary judgment. The state argued that the changes in requested relief demonstrated that plaintiffs themselves were unable to settle on what they thought the public trust doctrine required the state to do and that the declaratory relief they sought was too uncertain to be granted. Plaintiffs responded that the requested relief permitted the legislative and executive branches to fashion the specifics.

The circuit court denied plaintiffs' motion and granted the state's motion. The court concluded that the public trust doctrine encompasses only submerged and submersible lands—not navigable waters, beaches, other waters of the state, shorelands, islands, fish and wildlife, and the atmosphere. Next, the court examined the state's duties under the public trust doctrine. After observing that the public trust doctrine has historically only prevented the state from "entirely alienating submerged and submersible lands under navigable waters," the court determined that **[*153]** the state does not have a fiduciary obligation under the public trust doctrine to **[**75]** protect **[***15]** public trust resources from the effects of climate change. The circuit court further concluded that granting plaintiffs' requested relief would violate the separation of powers doctrine. Based on those conclusions, the circuit court entered a

general judgment of dismissal.

Plaintiffs appealed, and the parties presented arguments to the Court of Appeals that largely mirrored their arguments to the circuit court. Plaintiffs advanced two additional arguments, which the state disputed: The circuit court erred by treating all facts relating to climate change as "legislative facts" and applied an incorrect standard of review under ORCP 47, and the circuit court improperly had issued an advisory opinion on injunctive relief. For its part, the state added that the court should not consider plaintiffs' proposed declaration that "atmospheric concentrations of carbon dioxide (CO^2) exceeding 350 parts per million (ppm) constitutes substantial impairment," because it was not pleaded. But the state conceded that the circuit court had erred by stating the public trust doctrine too narrowly, because the doctrine also applies to the state's navigable waters.

The Court of Appeals did not decide the pleading **[***16]** dispute and rejected without discussion plaintiffs' assertion that the circuit court had applied an incorrect legal standard under ORCP 47 when it considered the parties' summary judgment motions. Chernaik, 295 Ore. App. at 592 n 6. The court also did not decide what types of resources are protected by the public trust doctrine. Id. at 592, 596 n 10. The court only addressed "whether the state has fiduciary obligations under the public-trust doctrine to affirmatively protect public-trust resources from the effects of climate change," because its conclusion on that issue was dispositive. Id. at 592.

To address the state's duties under Oregon's public trust doctrine, the Court of Appeals first examined the historical underpinnings of the doctrine in Oregon. The court concluded from this court's case law that the doctrine has "served to place restraints on state action with respect to the lands it holds underlying navigable waterways to protect **[*154]** the recognized public uses in those waterways," those uses being the public's right to navigation, commerce, fishing, or recreation. Id. at 594.

The Court of Appeals rejected plaintiffs' and *amici* law professors' reliance on out-of-state case law and on other sources of Oregon law, such as statutes, to support their understanding **[***17]** of Oregon's public trust doctrine. Instead, the court concluded, only Oregon's common law determines the contours of the doctrine. Id. at 596-97. As for Oregon case law, plaintiffs relied on State v. Dickerson, 356 Ore. 822, 835, 345 P3d 447 (2015), in which this court stated that, "[a]lthough the trust metaphor is an imperfect one * * *, the state's powers and duties with respect to wildlife have many of the traditional attributes of a trustee's duties." The court found plaintiffs' reliance on *Dickerson* to be misplaced, explaining that that statement affirmed the state's authority to enact laws protecting wildlife, but that this court had not determined that the state had a *duty* to enact such laws. Chernaik, 295 Ore. App. at 599-600.

Ultimately, the court determined that nothing in Oregon's public trust doctrine suggested that the doctrine imposed fiduciary obligations on the state to prevent damage to trust resources from the effects of greenhouse gases and climate change. Id. at 600. Instead, the court concluded that Oregon's public trust doctrine "is rooted in the idea that the state is *restrained* from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources." *Id.* (emphasis in original). Consistently with that conclusion, the **[***18]** Court of Appeals held that the circuit court had correctly granted the state's motion for summary judgment and denied plaintiffs' motion for partial summary judgment. However, because the case involved declaratory relief, the court determined that dismissal of the case was not the correct disposition. Therefore, it vacated the judgment and remanded for the circuit court to enter a judgment that declared the parties' **[**76]** rights.[2]

[*155] II. ANALYSIS

On review, the parties continue to dispute the scope of natural resources subject to the public trust doctrine and the state's obligations with respect to natural resources subject to the doctrine. Urging an expansion of the public trust doctrine, plaintiffs contend that the state has, and breached, fiduciary obligations to prevent impairments due to climate change with respect to a range of natural resources in Oregon. Although the state agrees that the natural resources in Oregon that plaintiffs describe have suffered some adverse effects of climate change brought on, in part, by carbon dioxide emissions, the state contends that the Court of Appeals correctly determined that the state does not have the

[2] The circuit court issued a lengthy, detailed opinion and order that contained declarations at various points, but the judgment, which incorporated the opinion and order by reference, did not set out any declarations. Id. at 601. We allowed plaintiffs' petition for review.

obligations **[***19]** that plaintiffs claim and that plaintiffs overstate the range of natural resources subject to the public trust doctrine. Thus, we are presented with two questions on review: whether the public trust doctrine applies to other natural resources, beyond the submerged and submersible lands that the circuit court identified, and whether the public trust doctrine imposes a fiduciary duty upon the state to protect trust resources from the negative impacts of climate change.

A. *Resources Protected by the Public Trust Doctrine*

We begin with plaintiffs' argument that the circuit court erred in concluding that the public trust doctrine[3] applies only to submerged and submersible state lands. In their view, the public trust doctrine is a common law doctrine that can and should be applied flexibly and expansively to protect a range of Oregon's natural resources, specifically, all the state's waters, wild fish and other wildlife, and the atmosphere.

As the state has correctly conceded, the public trust doctrine currently extends both to the state's navigable **[*156]** waters and to the state's submerged and submersible lands. **[***20]** And, we agree with plaintiffs that the public trust doctrine, as a common-law doctrine, can be modified to reflect changes in society's needs. But whether the public trust doctrine is capable of expanding beyond its current scope and whether plaintiffs have established the legal grounds justifying an expansion of the doctrine in this case are two distinct questions. For reasons explained below, we reject plaintiffs' contention that this court should adopt an expansive test for determining protected trust resources and, applying that test, should hold that the public trust doctrine extends to all the waters of the state, wild fish and other wildlife, and the atmosphere in Oregon.

1. *Currently protected resources*

HN1[↑] As it stands today, the public trust doctrine applies to "navigable" waterways and the lands underlying those waterways. Under the doctrine, Oregon acquired title at statehood to "the lands underlying all bodies of water within the state that meet the federal test for navigability."[4] *Kramer v. City of Lake Oswego, 365 Ore. 422, 438, 446 P3d 1,adh'd to as modified on recons, 365 Ore. 691, 455 P3d 922 (2019)*. Although title passed to the state "by virtue of its sovereignty, its rights were merely those of a trustee for the public." *Corvallis Sand & Gravel v. Land Board, 250 Ore. 319, 334, 439 P2d 575 (1968)* (quoting *Winston Bros. Co. v. State Tax [**77] Com., 156 Ore. 505, 511, 62 P2d 7 (1936), cert den, 301 US 689, 57 S. Ct. 793, 81 L. Ed. 1346 (1937))*.

In addition to **[***21]** the land underlying bodies of water that meet the federal test for navigability, the navigable waters themselves are a public trust resource. *See PPL Montana, LLC v. Montana, 565 US 576, 590, 132 S Ct 1215, 182 L Ed 2d 77 (2012)* (the people, "based on principles of sovereignty, 'hold the absolute right to all their navigable waters and the soils under them' " (citations omitted)); *Kramer, 365 Ore. at 437 n 12* ("Water is not the only resources that the state holds in trust."); *Winston Bros. Co., 156 Ore. at [*157] 511* (ownership of land underlying waters "is that of the people in their united sovereignty, while the waters themselves remain public"). In *Kramer*, a case concerning the public's right to use Oswego Lake, we explained that ***HN2***[↑] the public trust doctrine is also partially codified by statutes that "declare that the waters of all navigable lakes are 'of public character' and that title to what the statute refers to as 'submersible and submerged lands' beneath navigable lakes is vested in the State of Oregon." *365 Ore. at 438-39*. The statutes apply likewise to waters of navigable "streams."[5]

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[3] The term "public trust doctrine" gained widespread use following Joseph Sax's landmark article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970). Although early Oregon cases do not use the term "public trust doctrine," we use that term throughout this opinion to remain consistent. The first Oregon case to use that term was *Morse v. Division of State Lands, 34 Ore. App. 853, 581 P2d 520 (1978), aff'd 285 Ore. 197, 590 P2d 709 (1979)*.

[4] Federal law governs any questions concerning navigability of waters—the criterion that determines whether Oregon acquired title to the underlying land at statehood—but state law determines what the public trust doctrine means for the resources it protects. *Kramer, 365 Ore. at 437*.

[5] *ORS Chapter 274* governs the submersible and submerged lands in the state. In relevant part, *ORS 274.025* provides that

> "The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and which has not become vested in any person, is vested in the State of Oregon."

Relatedly, *ORS 274.430* states that "[a]ll meandered lakes are declared to be navigable and public waters. * * * The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or

Accordingly, the circuit court erroneously concluded that the scope of the natural resources subject to the public trust doctrine in its current form was limited to submerged and submersible state lands; the state's navigable waters are also subject to the public **[***22]** trust doctrine.

We reject plaintiffs' contention that this court previously has "recognized that the trust extends to waters and wild fish" as well as wild animals. In part, they rely on *Alsos v. Kendall et al., 111 Ore. 359, 227 P 286 (1924)*. In *Alsos*, this court explained that the state has "absolute ownership in and dominion over the bed and soil which underlies the tidal waters of the state" and "the waters themselves," and the state holds "in trust for its own citizens, title to and ownership of the fish in such waters, so far as they are capable of ownership while in a state of freedom * * *." *Id. at 371*. *Alsos* reiterates that navigable waters (at that time, based on the "ebb and flow of the tide" test) and underlying lands are subject to the public trust doctrine. The decision does not pertain to waters of the state generally, and it fails to support plaintiffs' position that the public trust doctrine extends to all waters of the state. **[***23]**

[*158] As for wildlife, plaintiffs assert that, in *Dickerson*, this court affirmed several of its early decisions concluding that the state controls fish and wildlife "in its sovereign capacity for the benefit of, and in trust for, its people in common." According to plaintiffs, to the extent that this court's cases have differentiated between the public trust doctrine and what the parties and this court have referred to as a "wildlife trust" doctrine, *see Dickerson, 356 Ore. at 834*, "the legal concept is analogous" and no distinction between the two kinds of trusts is warranted.

We disagree. Although we have "long used the metaphor of a trust to describe the state's sovereign interest in wildlife," *id.*, and some similarities exist between the "wildlife trust" and the public trust doctrine, plaintiffs erroneously conflate the use of the trust metaphor with a conclusion that fish and wildlife are natural resources that are protected by the public trust doctrine. The two doctrines are currently separate and distinct doctrines. ***HN3***[↑] In contrast to the public trust doctrine, which provides that the general public has a right to use navigable waters for certain purposes—subject to objectively reasonable restrictions on that right—and **[***24]** which we later **[**78]** describe in more detail, the wildlife trust doctrine describes the state's broad authority over wild fish and animals in Oregon. The wildlife trust doctrine provides that the state has "the authority to manage and preserve wildlife resources," *id. at 835*, and that the legislature may restrict, prohibit, or condition the taking of game or fish in Oregon "as the law-making power may see fit," *State v. Pulos, 64 Ore. 92, 95, 129 P 128 (1913)*.

2. *The public trust doctrine as a common-law doctrine*

HN4[↑] As a common-law doctrine, the public trust doctrine is not necessarily fixed at its current scope. It is within the purview of this court to examine the appropriate scope of the doctrine and to expand or to mold it to meet society's current needs, as we have done in the past. *See, e.g., Horton v. Or. Health & Sci. Univ., 359 Ore. 168, 218, 376 P.3d 998 (2016)* ("[T]he common law is not inflexible but changes to meet the changing needs of the state."); *Re Water Rights of Hood River, 114 Ore. 112, 180, 227 P 1065 (1924), dismissed 273 US 647, 47 S Ct 245, 71 L Ed 821 (1926)* ("The very essence of the common **[*159]** law is flexibility and adaptability."). Indeed, from the earliest days of the doctrine in this country, the public trust doctrine has evolved in response to different circumstances and society's changing needs.

The public trust doctrine in the United States traces its roots to English common law. At English common law, **[***25]** the crown held title to the beds of "waters subject to the ebb and flow of the tide," but the public "retained the right of passage and the right to fish in the stream." *PPL Montana, LLC, 565 US at 589*. The crown asserted the same title to such resources in North America, and that title transferred to the original 13 states following the American Revolution. *Pacific Elevator Co. v. Portland, 65 Ore. 349, 379, 133 P 72 (1913)*. Under the equal-footing doctrine, each new state after the 13 original states also acquired the same title to the beds of navigable waters within its borders. *PPL Montana, LLC, 565 US at 591*. Thus, upon statehood, each state—including Oregon—"gain[ed] title within its borders to the beds of waters then navigable," while the United States retained "any title vested in it before statehood to any land beneath waters not then navigable." *Id.*

Because of the vast geographic differences between North America and England, the English "ebb and flow of the tide" test excluded large bodies of waters in the United States from being considered navigable, meaning that the states did not gain title to those waters and land underlying them upon statehood. Those

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conveyance from the State of Oregon, is vested in the State of Oregon."

differences led some states to conclude that a state held "presumptive title to navigable waters whether or not the waters [were] subject **[***26]** to the ebb and flow of the tide." *Id. at 590*. But at first, Oregon adhered to the original "ebb and flow of the tide" test for purposes of determining whether it held title to the land under a body of water within its boundaries. Thus, in the late 1800s, this court's case law identified three classes of waters: (1) waters in which the tide ebbed and flowed, which were deemed navigable, with "all right[s] in [them] belong[ing] exclusively to the public," with the state owning the subjacent soil; (2) streams that were navigable in fact, which were considered public highways in which the public had an easement for navigation and commerce, with the title of the subjacent soil to the middle of the stream remaining with the riparian **[*160]** owner;[6] and (3) streams that were so "small or shallow as not to be navigable for any purpose," in which the public had no right of use, which were considered "altogether private property." *Shaw v. Oswego Iron Co., 10 Ore. 371, 375-76 (1882)*. Although aware of the trend toward expanding the doctrine to "large fresh water rivers" that are "navigable in fact," the court in *Shaw* declined to answer whether Oregon should also follow that trend, *id. at 377, 383*, and concluded that the Tualatin River was "not a stream in which the tide ebbs **[***27]** and flows" and so, "in the common law sense," was "not navigable," *id. at 376*.

[79]** Over 35 years after *Shaw*, in *Guilliams v. Beaver Lake Club, 90 Ore. 13, 175 P 437 (1918)*, this court addressed whether to expand the public trust doctrine to include waters that were not subject to the ebb and flow of the tide. In *Guilliams*, a case concerning the defendant's erection of a dam in a creek navigable by boat, this court reiterated the three classes of waters that it had previously described in *Shaw*. *Id. at 19*. It then stated: "To this list may be added our larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public." *Id.* Thus, the first major advancement in Oregon's public trust doctrine was to adopt the nationwide trend abandoning the narrow ebb-and-flow test as the sole test of navigability and thereby expand the resources that were included in the public trust doctrine. *Cf. PPL Montana, LLC, 565 US at 590* ("By the late 19th century, the Court had recognized the now prevailing doctrine of state sovereign title in the soil of rivers really navigable.") (internal quotation marks omitted).

The court in *Guilliams* also expanded the public trust doctrine in another way, by extending the concept of navigability—under what later would become **[***28]** known as the public use doctrine—to include "the use of boats and vessels for the purposes of pleasure." *90 Ore. at 27*. To support that expansion, the court quoted with approval the reasoning from a Minnesota case that it viewed as having matching facts: "To hand over all these [lakes that will probably never **[*161]** be used for commerce] to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated." *Id. at 29* (quoting *Lamprey v. State, 52 Minn. 181, 200, 53 N.W. 1139 (1893)*).

This court has also expanded the levels of governmental bodies to which the public trust doctrine applies. We recently examined the public trust doctrine and the limitations it places on local governments. In *Kramer*, we held that "any limitations on the state's ability to interfere with the public's right to use the public trust waters are, similarly, limits on the city's authority." *365 Ore. at 447 n 22*.

As the foregoing cases illustrate, at various points in Oregon's history, this court has adapted the public trust doctrine to address new situations as they arose. For over a century, this court has recognized that the public trust doctrine is a forward-looking doctrine that is flexible enough to **[***29]** accommodate future uses and to protect against unforeseen harms to the public's ability to use public trust resources.

But the earlier adaptations of the public trust doctrine all effectuate ***HN5***[↑] the core purpose of the doctrine: to obligate the state to protect the public's ability to use navigable waters for identifiable uses. That purpose appears in the early cases describing the doctrine. The United States Supreme Court explained that the doctrine is "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Illinois Central Railroad v. Illinois, 146 US 387, 436, 13 S Ct 110, 36 L Ed 1018 (1892)*. As we recently recognized in *Kramer*, the public trust doctrine "limits the state's authority to interfere with the public's right to use the public waters of the state." *365 Ore. at 449*. Any restrictions by the state on the public's right of use "must

[6] The public's easement for navigation and commerce on such waters is now referred to as the "public use doctrine." *Kramer, 365 Ore. at 432-33*.

be objectively reasonable in light of the purpose of the trust and the circumstances of the case." *Id. at 449-50*. And, this court has long emphasized that the state may not "sell or dispose of or grant the right to make any use of [the beds of navigable streams] which would impair or impede navigation." *Gatt v. Hurlburt, 131 Ore. 554, 561, 284 P. 172, reh'g [***30] den 132 Ore. 415, [*162] 286 P 151 (1930)*; *see also Corvallis Sand & Gravel, 250 Ore. at 334* ("[T]he state can make no sale or disposal of the soil underlying its navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing.").

Thus, the first adaptation of the doctrine to include waters not subject to the ebb and flow of the tide protected the public's use of [**80] the large bodies of water in the United States that were vital for commerce. The expansion of protected uses to include recreation was based on the recognition that "[a] boat used for the transportation of pleasure-seeking passengers is * * * as much engaged in commerce as is a vessel transporting a shipment of lumber." *Luscher v. Reynolds, 153 Ore. 625, 635, 56 P2d 1158 (1936)*. And finally, the expansion to include acts by local governments, *Kramer, 365 Ore. at 447*, similarly protects the public's paramount rights to use navigable waters in Oregon.

To summarize, the public trust doctrine is not fixed but is capable of change and expansion. The public trust doctrine has evolved from its original narrow conception, when it applied only to lands underlying waters subject to the ebb and flow of the tide. And although the expansions relate to different aspects of the public trust doctrine (protected resources, protected uses, and government [***31] actors), they all resulted from disputes involving a specific body of water and furthered the primary purpose of the doctrine—protecting the public's right to use navigable waters for fishing and navigation.

3. *Plaintiffs' argument for expansion of the public trust doctrine*

We now turn to whether this case presents an opportunity to expand the scope of the doctrine based on plaintiffs' argument that the public trust doctrine should apply to other natural resources besides submerged and submersible lands underlying navigable waters and the navigable waters themselves. As noted at the outset, this case is not about a dispute concerning use or protection of any particular bodies of water; rather, plaintiffs allege a right to a judicial declaration that broadly expands the natural resources [*163] subject to the public trust doctrine to include all waters of the state, wild fish and wildlife, and the atmosphere. The state maintains that the doctrine has historically been limited in scope and that plaintiffs have not established a basis for the court to expand the resources protected by the doctrine as plaintiffs request.

We first address plaintiffs' argument that the state has "reversed its positions [***32] regarding the scope of the natural resources protected under the public trust [doctrine] and its fiduciary duty to protect those resources," because if plaintiffs are correct, it may not be necessary to address plaintiffs' proposed test for expanding the public trust doctrine. In support of their argument, plaintiffs point to the complaint that the state filed in 2018 in the Multnomah County Circuit Court in *State of Oregon v. Monsanto Company*, No. 18CV00540. In that case, the state sought relief from Monsanto and others "in its sovereign capacity as trustee for all natural resources within its borders" and as a land owner, alleging environmental contamination and remediation costs due to PCBs (polychlorinated biphenyls) that Monsanto manufactured. Complaint at 4, *State of Oregon v. Monsanto Co., et al.*, Case No 18CV00540 (Multnomah Cty Cir Ct Jan 4, 2018). The state described its relationship to the natural resources within its borders in one paragraph of the complaint as follows:

> "The State holds in trust for the public the bed and banks, and waters between the bed and banks, of all waterways within the State. By virtue of its public trust responsibilities, all such lands are to be [***33] preserved for public use in navigation, fishing, and recreation. The State is also the trustee of all natural resources—including land, water, wildlife, and habitat areas—within its borders. As trustee, the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available to all Oregonians to use and enjoy for recreational, commercial, cultural, and aesthetic purposes."

Id. at 5. Plaintiffs argue that that statement should be deemed a judicial admission, or, alternatively, that the state should be estopped from asserting a different position in the case at hand. Both arguments are without merit.

[*164] We reject the argument that the state's complaint against an unrelated party in another case can be considered a judicial admission in the present case. ***HN6***[↑] In *Borgert v. Spurling et al., 191 Ore. 344, 352, 230 P2d 183 (1951)*, this court quoted

Wigmore's treatise **[**81]** on evidence to explain that " '[t]he pleadings in a cause are, for *the purposes of use in that suit*, * * * judicial admissions * * * and therefore a limitation of the issues.' " (Emphasis added; quoting IV Wigmore, Evidence, § 1064, 45 (3d ed).) Thus, this court concluded in *Borgert* that, as alleged in the complaint, it was "conclusively established for the purposes of this **[***34]** case" that a codefendant had parked his car in a certain location. *Id.*; *see also* Vokoun v. City of Lake Oswego, 335 Ore. 19, 21 n 1, 56 P3d 396 (2002) (although the defendant disputed a fact on appeal, this court treated a fact as established by judicial admission because the defendant had admitted that fact in its answer in that case).

Plaintiffs similarly fail to demonstrate the elements of judicial estoppel. ***HN7***[↑] Judicial estoppel requires a "benefit in the earlier proceeding, different judicial proceedings, and inconsistent positions." Hampton Tree Farms, Inc. v. Jewett, 320 Ore. 599, 611, 892 P2d 683 (1995). At least one of the three elements is not present in this case. Even assuming that the state's allegation in the *Monsanto* case is in an "earlier proceeding," the state's position in the present case is not "diametrically opposite" to the position that it has taken in the *Monsanto* case, as plaintiffs assert. In the *Monsanto* complaint, the state differentiates between resources that are public trust resources and other natural resources that it holds in trust, which is consistent with how this court has described the state's trust relationships in the past. And the complaint in *Monsanto* is in line with the state's position in this case about its obligations under the public trust doctrine—it has the *authority* to act in **[***35]** the manner plaintiffs request, but it cannot be compelled to take the requested actions. Because the state's position in the *Monsanto* case does not affect this proceeding, we turn to plaintiffs' other argument that the public trust doctrine should be expanded to include additional natural resources.

Plaintiffs have posited a test for expanding the types of natural resources that are subject to the public **[*165]** trust doctrine. They identify two unifying features of public trust resources: "(1) they are not easily held or improved" and "(2) they are of great value to the public for uses such as commerce, navigation, hunting, and fisheries." Restating those two features, plaintiffs' proposed test for adding resources to the public trust doctrine would pose two questions: (1) Is the resource not easily held or improved? (2) Is the resource of great value to the public for uses such as commerce, navigation, hunting, and fishing? According to plaintiffs, a "yes" answer to each question would mean that the resource should be included under the doctrine as a public trust resource. Applying that test, plaintiffs conclude that the atmosphere qualifies as a public trust resource.

To back up their conclusion, **[***36]** plaintiffs assert that the atmosphere is "intricately linked with other trust assets, such as water" as a factual matter. But the interconnectedness of natural resources within Oregon (or of resources within and outside Oregon) does not mean that all natural resources, including the atmosphere, must be considered public trust resources under Oregon's public trust doctrine.[7] Plaintiffs do not provide a corresponding legal theory for including the atmosphere within the public trust doctrine, beyond the test that they propose.

Returning to plaintiffs' proposed test, we agree that plaintiffs' two factors are relevant **[**82]** considerations. But as the only two factors, they are insufficient because they fail to provide practical limitations. Indeed, the test that plaintiffs propose is so broad that it is difficult to conceive **[*166]** of a natural resource that would not satisfy it. We do not foreclose the idea that the public trust doctrine may evolve to include more resources in the future. However, we decline to adopt the test that plaintiffs have urged us to use and, based on that test, to expand the resources included in the public trust doctrine well beyond its current scope.

B. ***[***37] Plaintiffs' Requested Remedies***

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[7] We do not imply that a factual connection between a condition or activity affecting a natural resource and adverse effects on a recognized public trust resource is irrelevant. In California, for example, litigants have sought to establish that the factual connection between governmental action involving one natural resource and resultant adverse effects on a particular recognized public trust resource can form the basis for relief under the public trust doctrine. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 33 Cal 3d 419, 437, 189 Cal. Rptr. 346, 658 P2d 709, *cert den*, **464 US 977, 104 S. Ct. 413, 78 L. Ed. 2d 351 (1983)** (in action to enjoin city water department from diverting water that would ultimately flow into Mono Lake, explaining that the public trust doctrine in California "protects navigable waters from harm caused by diversion of nonnavigable tributaries"); Environmental Law Foundation v. State Water Resources Control Bd., 26 Cal App 5th 844, 859, 237 Cal Rptr 3d 393 (Cal Ct App 2018) (involving whether state agency had a duty under the public trust doctrine to regulate extractions of groundwater that affected use of the Scott River, a navigable waterway).

Although we do not expand the scope of resources protected by the public trust doctrine using plaintiffs' proposed test, we address plaintiffs' requested relief. Based on the current scope of the protected resources and the state's duties under the doctrine, which we explain below, we conclude that, in this case, none of plaintiffs' requested relief is available beyond a declaration correctly stating that the doctrine applies to navigable waters and submerged and submersible lands.

Plaintiffs sought four declarations in their motion for partial summary judgment. One requested declaration related to the atmosphere as a public trust resource:

> "A declaration that atmospheric concentrations of carbon dioxide (CO2) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and thereby the other public trust assets[.]"

That requested declaration rests on the assumption that the atmosphere is a public trust resource. Because we have already concluded that it is not, no further discussion of that declaration is necessary.

Plaintiffs also requested a declaration concerning both the scope of the resources covered by the doctrine and the **[***38]** state's duties:

> "[The] State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification[.]"

[*167] Because that declaration in part concerns the scope of the resources covered by the public trust doctrine, and both plaintiffs and the state correctly point out that the circuit court erroneously omitted navigable waters as trust resources, plaintiffs are entitled to a declaration that the public trust doctrine applies to navigable waters and submerged and submersible lands. For the resources besides navigable waters and the submerged and submersible lands, plaintiffs' requested declaration fails to seek a form of relief that may be granted in this case.

That same declaration also would impose a "fiduciary obligation" on the state to protect trust resources, including navigable waters and submerged and submersible **[***39]** lands under those waters, from substantial impairment caused by climate change. That component of the requested relief presents two discrete issues: whether the state has a fiduciary obligation under the public trust doctrine and, if so, whether "substantial impairment" is the appropriate standard to evaluate the state's execution of its fiduciary obligation. We need only address the first issue.

Plaintiffs argue that courts "have consistently defined the state's relationship to the public and our shared natural resources as a 'trust.' " As a result, plaintiffs argue, this court should acknowledge the legal meaning that attaches to that word. As plaintiffs view it, common-law trust principles like those applicable to trustees of private trusts—including that trustees owe beneficiaries fiduciary duties—should guide an understanding of the state's duties to protect public trust resources under the public trust doctrine.

This court has described the state as filling the role of a "trustee" within the doctrine. *Winston Bros. Co., 156 Ore. at 511* ("[A]lthough the title [to the land underlying navigable waters] passed to the state by virtue of its sovereignty, its rights were merely those of a trustee for the public."). **[**83]** And **[***40]** we have previously relied on common-law private trust cases in explaining the state's role as trustee, declaring that "even when a trustee has discretion with respect to how trust property is managed, the trustee's actions must satisfy the 'general standard of reasonableness' in exercising **[*168]** that discretion." *Kramer, 365 Ore. at 446* (quoting *Rowe v. Rowe et al., 219 Ore. 599, 604, 347 P2d 968 (1959)*).

But this court's case law cannot be read to conclude that all common-law principles of private trust law govern the public trust doctrine. Although some common-law principles of private trust law may be consistent with the public trust doctrine, *see, e.g., Kramer, 365 Ore. at 446* (recognizing the "basic principle of trust law" requiring a trustee to protect trust property and to manage trust property in a way that will benefit all trust beneficiaries), we observed in *Kramer* that "[n]either the legislature nor this court has mandated specific requirements or prohibitions to govern the state's management of the waters that it holds in trust for the public as a whole," *id.*[8]

[8] The dissent misreads the idea in this paragraph of the opinion that "some common-law principles of private trust law may be consistent with the public trust doctrine" as tantamount to an acknowledgment that the state, as the trustee of public

Given the abstract nature of this litigation and this court's doctrines of judicial restraint and *stare decisis*, we reject plaintiffs' argument in this case that the public trust doctrine imposes obligations **[***41]** on the state like those that trustees of private trusts owe to trust beneficiaries. Plaintiffs' suggestion of a wholesale importation of generalized private trust principles to govern the state's obligations under the public trust doctrine could result in a fundamental restructuring of the public trust doctrine and impose broad new obligations on the state, beyond the recognized duty that the state has to protect public trust resources for the benefit of the public's use of navigable waterways for navigation, recreation, commerce, and fisheries. Accordingly, under the legal theory that they articulate in this case, plaintiffs are not entitled to their requested declaration that the state has fiduciary obligations under the public trust doctrine that require that this court declare that the state must protect **[*169]** public trust resources from the effects of climate change. That conclusion makes it unnecessary to address the state's secondary argument that imposing such duties would violate the principle of separation of powers.

Finally, plaintiffs request two additional declarations that are specifically related to carbon dioxide emissions, applying a "substantial impairment" standard to natural **[***42]** resources that are public trust resources as well as natural resources that are not:

> "A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO2 necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100[.]"
>
> "A declaration that [d]efendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouses gases in, or within the control, the State of Oregon."

Because we conclude that plaintiffs are not entitled to their requested declaration concerning the state's duties, we need not decide whether a "substantial impairment" standard and specific greenhouse gas emission limits should be used with respect to the duties that plaintiffs have contended the state has to protect public trust resources from the effects of climate change.

III. CONCLUSION

The public trust doctrine in Oregon currently encompasses submerged and submersible **[**84]** lands underlying navigable waters and the navigable waters themselves. We do not foreclose **[***43]** the possibility that the doctrine could expand to include other resources in the future, but the test that plaintiffs urge us to adopt sweeps too broadly. We also do not foreclose the possibility that the doctrine might be expanded in the future to include additional duties imposed on the state. However, even though the state acknowledges in briefing to the court that it recognizes the threats posed by climate change and that the state needs to do more to address those threats, plaintiffs have not developed a legal theory **[*170]** that leads us to alter current law concerning the state's duty under the public trust doctrine. In this case, therefore, we do not impose broad fiduciary duties on the state, akin to the duties of private trustees, that would require the state to protect public trust resources from effects of greenhouse gas emissions and consequent climate change. Thus, we affirm the decision of the Court of Appeals and remand the case to the circuit court for entry of a judgment declaring the parties' respective rights, with instructions to include navigable waters as a public trust resource.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is vacated, **[***44]** and the case is remanded to the circuit court.

Dissent by: WALTERS

Dissent

WALTERS, C. J., dissenting.

All parties to this case, including the state, agree that climate change "is causing, and will continue to cause, harm to our planet and the State of Oregon." All parties to this case, including plaintiffs, agree that the legislative and executive branches of our state government have taken steps to address and prevent that harm. I conclude that the judicial branch also has a role to play:

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trust resources, has to comply with a generalized duty to protect trust resources for the benefit of trust beneficiaries, which the dissent then concludes encompasses a fiduciary duty to protect resources against the effects of climate change. *Chernaik, 367 Ore. at 171* (Walters, C. J., dissenting); *see also id. at 174* (citing *Kramer* for the same argument). That is the dissent's sole tie to the existing public trust doctrine, but this court has never extended the state's duties under the public trust doctrine that broadly—not in this case, not in *Kramer*, and not in any of the cases concerning the public trust doctrine since statehood.

This court can and should determine the law that governs the other two branches as they undertake their essential work. This court can and should issue a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources. Because the majority declines to issue that declaration in this case, I dissent.[1]

In doing so, however, I want to emphasize that the majority does not foreclose such a declaration in another case. *Chernaik v. Brown, 367 Ore. 143, 166, 475 P.3d 68 (2020)*. The majority begins by considering the natural resources to which the public trust doctrine applies and issues a declaration that it certainly applies to navigable waters and the submerged and submersible lands underlying those waters. **[***45]** The majority expressly does "not foreclose the idea that the **[*171]** public trust doctrine may evolve to include more resources in the future." *Id.* The majority then goes on to consider two additional questions: "whether the state has a fiduciary obligation under the public trust doctrine and, if so, whether 'substantial impairment' is the appropriate standard to evaluate the state's execution of its fiduciary obligation." *Id. at 167*. Although the majority does not answer those two questions affirmatively, it expressly states that it does "not foreclose the possibility that the doctrine might be expanded in the future to include additional duties imposed on the state." *Id. at 169*.

As I see it, however, the time is now. This court already has recognized the state's duty to protect and preserve the natural resources to which the public trust doctrine applies and should declare that that duty exists; the reasons the majority gives for refusing to do so are not convincing. As to the first question—whether the state has a fiduciary obligation under the public trust doctrine—the majority sidles up to, if it does not affirmatively embrace, an affirmative conclusion. The majority confirms that the state has a "recognized **[***46]** duty" to "protect public trust resources for the benefit of the public's use." *Id. at 168*. And the majority acknowledges that that duty is consistent with the " 'basic principle of trust law' requiring a trustee to protect trust property and to manage **[**85]** trust property in a way that will benefit all trust beneficiaries." *Id.* (quoting *Kramer v. City of Lake Oswego, 365 Ore. 422, 446, 446 P3d 1, adh'd to as modified on recons, 365 Ore. 691, 455 P3d 922 (2019)*). Rather than declaring that the state has that "recognized duty," however, the majority reframes the question. The majority characterizes plaintiffs' claim as one that seeks a broader declaration of the state's duty—requiring the "wholesale importation of generalized private trust principles to govern the state's obligations under the public trust doctrine"—and declines that invitation to *expand* the law. *Chernaik, 367 Ore. at 168*. The majority cites "the abstract nature of this litigation" and "this court's doctrines of judicial restraint and *stare decisis*" and concludes that "*under the legal theory that they articulate in this case*," plaintiffs are not entitled to the declaratory relief that they request. *Id.* (emphasis added). Then, having refused to declare the existence of a duty, the **[*172]** majority correctly decides that it need not reach the second question presented—whether **[***47]** "substantial impairment" is the appropriate standard to evaluate the state's execution of that duty. *Id. at 169*. As I explain below, I would answer both of the pressing questions that this case presents, and I would answer them both affirmatively.

THE PUBLIC TRUST DOCTRINE IMPOSES AN AFFIRMATIVE FIDUCIARY DUTY

I begin with my understanding of plaintiffs' argument on the first question presented—whether the state has a fiduciary obligation under the public trust doctrine. As I understand plaintiffs' position, they do not seek a declaration that the public trust doctrine incorporates all of the principles that apply to private trusts. Rather, they argue that, in deciding the nature of the obligation that the state has under the public trust doctrine, this court should consider, as it has in the past, the metaphor of a common-law trust. *See, e.g., State v. Dickerson, 356 Ore. 822, 834-35, 345 P3d 447 (2015)* (explaining that the trust metaphor is used to describe the wildlife trust doctrine); *Kramer, 365 Ore. at 437 n 12* (discussing *Dickerson* and noting that "water is not the only resources that the state holds in trust").[2] In fact,

[1] I do not address the majority's conclusion that the public trust doctrine does not encompass natural resources beyond navigable waters and the submerged and submersible lands underlying those waters.

[2] Similarly, the phrase "fiduciary duty," when used by the plaintiffs, is a way of describing what plaintiffs assert are the obligations the state owes the public when managing public trust resources. Plaintiffs assert that when they use the word "fiduciary," to describe the state's duty, they mean that the duty is "protective" in nature. Describing the state's obligation as a "fiduciary" one does not mean that the state is under the exact same obligations of that of a trustee of a common-law trust. *See* Tamar Frankel, *Fiduciary Law, 71 Cal L Rev 795,*

plaintiffs expressly state that "[w]hether or not [the public trust] obligation exactly mirrors the fiduciary roles under private trust law (including duties **[***48]** of loyalty and confidence) is not essential to the resolution of plaintiffs' claims." Instead, they "ask this court to declare that the public trust doctrine imposes an obligation on the state to protect and preserve trust resources."

[*173] Given that understanding of the declaration that plaintiffs seek, I turn to the merits of the dispute and the state's arguments in opposition. With respect to the first question presented, the state argues that, to date, this court has applied the public trust doctrine only as a limit on state action alienating or restricting the use of public trust resources. The state contends that we should not expand the state's obligation to incorporate an affirmative duty to act.

I agree with the state's description of the factual context in which this court's public trust cases have been decided. We have decided that the public trust doctrine prohibits the state from taking action that restricts the public's use of public trust resources, but we have not been called upon to decide whether the public trust doctrine requires the state to take affirmative steps to protect those resources. Nevertheless, what we have said about that doctrine and its purpose **[***49]** leads me **[**86]** to conclude that the state's obligation is indeed one that requires affirmative action when the applicable standard is met.

The state holds resources to which the public trust doctrine applies in "trust" for the public.[3] *See, e.g.*, *Kramer, 365 Ore. at 438* (noting that "this court's cases describe the public's right in terms of the beneficial interest of one for whom land is held in 'trust' "); *Corvallis Sand & Gravel v. Land Board, 250 Ore. 319, 335-36, 439 P2d 575 (1968)* (explaining that state holds title to public trust resources but title is held "not in a proprietary capacity, but in its sovereign capacity, that is to say, as trustee for the public"). The "core purpose" of the public trust doctrine is "to obligate the state to protect the public's ability" to use and enjoy those resources.[4] *Chernaik, 367 Ore. at 161* (declining **[*174]** to adapt public trust doctrine to extend to more resources because it would not further core purpose of the doctrine); *see also Kramer, 365 Ore. at 449* (explaining that the limits on the state's authority under the doctrine further the goal of ensuring the "public's right to use the public waters of the state"); *Winston Bros. Co. v. State Tax Com., 156 Ore. 505, 511, 62 P2d 7 (1936), cert den, 301 US 689, 57 S Ct 793, 81 L Ed 1346 (1937)* (explaining that, "although title passed to the state by virtue of its sovereignty, its rights were merely those of a trustee for the public" and that the purpose of the trust **[***50]** doctrine was to ensure that the resources "remain public so that all persons may use them"); *accord Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 285, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)* (describing state's duty under public trust doctrine as an "obligation to regulate, improve, and secure submerged lands for the benefit of every individual"). That obligation is "consistent with a * * * basic principle of trust law: that a trustee has a duty to protect trust property and to ensure, consistently with any requirements and prohibitions specific to the trust, that trust property is managed in a way that will benefit trust beneficiaries." *Kramer, 365 Ore. at 446* (internal quotations omitted). In *Morse v. Oregon Division of State Lands, 285 Ore. 197, 201, 590 P2d 709 (1979)*, this court relied on *Illinois C. R. Co. v. Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)*, and described that case as the "bellwether" of public trust cases. And in *Illinois Central*, the Court explained that

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795-97 (1983) (noting that "[f]iduciaries appear in a variety of forms," and that "[c]ourts, legislatures, and administrative agencies increasingly draw on fiduciary law to answer problems caused by * * * social changes"). In this case, the analogy to a "fiduciary" is helpful for illustrating the idea that the state holds title to public trust resources for the benefit of the public and that the state's obligations under the doctrine should reflect the benefits that the doctrine is aimed at achieving.

[3] Under Oregon law, a "trust" is simply an "obligation" that rests upon "a person by reason of a confidence reposed in him to apply or deal with property for the benefit of some other person." *Templeton v. Bockler, 73 Ore. 494, 506, 144 P 405 (1914)*.

[4] This court clarified the nature of the public's rights in *Kramer*; however, the principle announced in that case was not a new one. *See Luscher v. Reynolds, 153 Ore. 625, 635, 56 P2d 1158 (1936)* (rejecting "navigability" test to determine what resources are protected by the public trust doctrine because "[t]here are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptation of such terms"); *Guilliams v. Beaver Lake Club, 90 Ore. 13, 29, 175 P 437 (1918)* (many lakes are not suitable for navigation but used for recreational purposes and "other public purposes which cannot now be enumerated or even anticipated" so to "hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent to which cannot perhaps, be new even anticipated").

the public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *146 US at 436*. Because the purpose of the public trust doctrine is to ensure the public's rights to use and enjoy public trust resources now and into the future, the doctrine must impose an obligation to protect and preserve them. To ensure the future use and enjoyment of public trust resources, the state **[***51]** must do more than refrain from selling public trust resources and restricting their use. **[*175]** The state must act reasonably to prevent their substantial impairment.[5]

[87]** Let me give some examples to illustrate circumstances in which the state may have a duty to act and this court may have a role in declaring and enforcing that duty. The state acknowledges that "[a] court has the power to prohibit state action that would unreasonably restrict the public's rights." Thus, if the state were emitting pollutants that were substantially interfering with the public's rights to use and enjoy a particular trust resource, then it would seem beyond contest that, on a plaintiff's allegations of harm, this court could and should declare that the state would have an obligation to act reasonably to prevent substantial impairment of that resource and to enter an injunction prohibiting the state from unreasonably emitting those pollutants.

Here, the alleged circumstances are different: Plain-tiffs allege that actors other than the state are causing climate change, and plaintiffs do not allege that the state is wrongfully acting; they allege that the state is failing to act. The state contends **[***52]** that, in this circumstance, no declaration of its affirmative obligations is permitted. The state argues that the duty that the state owes under the public trust doctrine is a negative restriction only and that this court does not have authority to "compel state action."

But if the state knew that a particular third party was emitting a particular pollutant that was causing substantial impairment to a particular lake and thereby was interfering with the public's rights to the use and enjoy that lake, I cannot imagine that this court would refuse to declare that the state had a fiduciary obligation to act reasonably to protect and preserve the lake from substantial **[*176]** impairment. Whether the state or a third party emitted the pollutant should not matter in the analysis. In either circumstance, the pollutant would harm the lake and interfere with the public's right to use and enjoy it.

When an entity has a duty to protect person or property from harm, the entity breaches that duty when it causes such harm. And an entity can cause harm either by acting or failing to act. *Fazzolari v. Portland School Dist., 303 Ore. 1, 734 P.2d 1326 (1987)* (school could be held liable for negligence for injuries caused when student **[***53]** was attacked on school grounds where school knew of previous attacks and allegedly failed to provide proper supervision and security personnel, failed to warn, and failed to trim and remove vegetation where assailant hid); *see also Little v. Wimmer, 303 Ore. 580, 739 P2d 564 (1987)* (noting that the state has a duty to maintain public roadways it owns); *Stuhr v. Berkheimer Co., 220 Ore. 406, 349 P2d 665 (1960)* (explaining that "an act or omission may be regarded as negligent [so long as] the person charged therewith [had] knowledge or notice that such act or omission involved [a risk of harm]" (internal quotation omitted)). In *Little*, for example, the state argued that it had no duty to remedy a dangerous condition on a roadway and could not be held liable for a failure to act. *303 Ore. at 584*. We disagreed and explained that there was no dispute that the state was responsible for maintaining the intersection. *Id. at 585*. Therefore, we said, the question should be centered not on whether the state had a duty to maintain the intersection, but on whether the harm caused by the failure to do so was foreseeable. *Id.* Here, because the state has a duty to protect public trust resources and to preserve the public's rights to those resources, the state breaches that duty when it causes foreseeable harm, whether by acting **[***54]** or failing to act.

Here, again, the circumstances are different from the hypothetical posed: Plaintiffs allege that many actors are causing climate change and that many, if not all, public trust resources are being harmed. Those circumstance add complexity, but they do not change

[5] Cases from other jurisdictions articulate the doctrine similarly. *See Pa. Envtl. Def. Found. v. Commonwealth, 640 Pa 55, 100, 161 A3d 911 (2017), 161 A.3d 911* (the public trust doctrine "impose[s] [a] fiduciary duty to manage the corpus of the * * * public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, *inter alia*, preventing and remedying the degradation, diminution and depletion of our public natural resources"); ***In re Water Use Permit Applications, 94 Hawai'i 97, 172-73, 9 P3d 409 (2000)*** (state's water permitting scheme was required to take into account the state's "affirmative duty under the public trust and statutory instream use protection scheme to investigate, consider, and protect the public interest in the flow of the Kahana stream").

the nature of the state's fiduciary duty to protect public trusts resources for the public's use and enjoyment. Rather, those circumstances **[*177]** may bear, as the state contends in its separation of powers arguments, on the degree to which a court is permitted to determine or is reasonably able **[**88]** to determine whether the state has fulfilled that duty.

Having taken the position that the state has an affirmative duty to protect public trust resources, it is incumbent on me to address the merits of the state's separation of powers arguments.[6] I am convinced that, despite the complexity of the problem posed by climate change, the judicial branch has an important constitutional role to play and should declare the governing law.

DECLARING AN AFFIRMATIVE FIDUCIARY DUTY DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES

The state advances two arguments based on separation of powers principles. First, the state argues that, with **[***55]** respect to climate change, a declaration of an affirmative, fiduciary duty to act would be fundamentally inconsistent with the allocation of responsibility outlined in *Article III, section 1, of the Oregon Constitution*, and would shift the balance of power between the branches or authorize the court to perform the functions of the other branches. Second, the state argues that the public trust doctrine does not supply judicially manageable standards for evaluating the state's compliance with that affirmative duty. I recognize that the responsibility for addressing climate change rests with the legislative and executive branches of our state government, and I recognize the complexity of the challenge they face. That does not mean, however, that our courts do not have a constitutional role to play.

One of the core functions of the judicial branch is to determine the legal authority and obligations of the other two branches of government. As this court said in *Pendleton School Dist. v. State of Oregon, 345 Ore. 596, 609, 200 P3d 133 [*178] (2009)*, it is this court's "obligation to determine what the law is." *See also Marbury v. Madison, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803)* ("It is emphatically the province and duty of the judicial department to say what the law is."). Exercise of that authority does not violate separation of powers principles.

Article III, section 1, of the Oregon Constitution provides for separation of powers **[***56]** between the state's three branches of government. It provides:

> "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Or Const, Art III, § 1. That provision "requires the three branches of state government to exercise their functions separately and exclusively." *Cascadia Wildlands v. Oregon Dept. of State Lands, 365 Ore. 750, 764, 452 P3d 938 (2019)*. However, "[t]he separation of powers principle cannot in practice work absolutely; there is a necessary overlap between the governmental functions." *Sadler v. Oregon State Bar, 275 Ore. 279, 285, 550 P2d 1218 (1976)*; *see also Putnam v. Norblad, 134 Ore. 433, 438, 293 P 940 (1930)* ("Practically, [the three branches] are not required to be kept entirely distinct, as their duties sometimes are blended or overlap."). In evaluating a separation of powers argument, "the appropriate inquiry is whether the action of another branch of government has interfered with [another] in a manner that prevents or obstructs the performance of [that branch's] irreducible constitutional task." *See State ex rel Metropolitan Public Defender v. Courtney, 335 Ore. 236, 241, 64 P3d 1138 (2003)* (applying the standard to question of legislative interference with judiciary's power); *Cascadia Wildlands, 365 Ore. at 765* (noting that *Courtney* states the **[***57]** standard for finding a separation of powers violation). The separation of powers principle is therefore "not offended by choices that the other branches make, unless **[**89]** those choices unduly burden the capacity of [another branch] to perform its core function." *Courtney, 335 Ore. at 241*.

[*179] The state correctly does not contest the authority of the judicial branch to determine the authority and obligations of the other two branches, nor does it argue that a declaration of an affirmative fiduciary

[6] As noted, having concluded that plaintiffs are not entitled to their requested declaration that the state has fiduciary obligations under the public trust doctrine, the majority—correctly—declines to address the second issue presented—"whether a 'substantial impairment' standard" is the appropriate standard to evaluate the state's execution of its fiduciary obligation to address the effects climate change on Oregon's trust resources. *Chernaik, 367 Ore. at 169*.

obligation to protect public trust resources would unduly burden their ability to perform their core functions. Rather, the state argues as follows:

> "How Oregon should respond to the global climate-change crisis is a policy question of immense importance and complexity. The political branches of government must answer that question in the first instance: the legislature passes laws, after a deliberative process to determine the appropriate course of action, and the executive enforces those laws and takes additional action through agencies. The Governor also has the power to exercise executive authority, as necessary and as authorized by law. The courts can then review laws for compliance with the constitution and can review **[***58]** executive actions for compliance with the law."

I agree, but I also contend that the courts can review the acts of the legislature and the Governor not only for compliance with the constitution and statutory law, but also for compliance with common-law dictates, including the common-law public trust doctrine. It is, after all, a core function of *this* branch to determine what the public trust doctrine requires, and, in exercising that authority, this court may determine that a legislative action which violates the principles of the public trust doctrine is invalid. *See, e.g.*, *Kramer, 365 Ore. at 450* (holding that the city may not unreasonably interfere with the public's ability to enter the public water from abutting upland, and whether city's restrictions should be invalidated depended on a reasonableness test); *Winston Bros. Co., 156 Ore. at 511* ("[T]he state can make no sale of the soil underlying its navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing, but must hold them in trust for the public."); *Corvallis & Eastern R. Co. v. Benson, 61 Ore. 359, 369-70, 121 P 418 (1912)* (explaining that the state holds submerged and submersible lands underlying public-owned waters in trust for the people and that the state may not dispose of the lands abutting those **[***59]** resources if it would **[*180]** materially interfere with the public's right to use those resources themselves).

Again, the state does not seem to take issue with that application of judicial authority; instead, the state argues against a consequence that it asserts necessarily will follow from a declaration of an affirmative fiduciary duty to protect against harm caused by climate change. The state argues that plaintiffs ask this court to compel the legislative and executive branches to make particular policy decisions, including, for example, adopting particular emissions targets. The state contends that if this court could compel the other two branches to take those actions, the judicial branch would wrongfully usurp the roles of the other two branches and the people of this state.

The state misunderstands or mischaracterizes the court's role in two important respects. First, the state confuses initial decisions about how to combat climate change—decisions only the legislative and executive branches can make—with a review of such decisions for their legality—a review that the judicial branch is charged to conduct. Second, the state fails to recognize that, in undertaking that review function, **[***60]** a court does not make its own policy decisions; instead, in the context of a challenge under the public trust doctrine, the court reviews the decisions of the state under an objective reasonableness standard. *See Kramer, 365 Ore. at 450* (explaining that "the validity of the waterfront resolution depends upon whether the restriction on the public's right to enter the water * * * is objectively reasonable under the circumstances").

It is true that, when a court determines that an initial decision made in another branch of government violates the constitution or other statutory or common law, that determination may have the effect of precluding the initial legislative or executive decision and may counsel another. *See State v. Ausmus, 336 Ore. 493, 508, 85 P3d 864 (2003)* (invalidating statute prohibiting disorderly **[**90]** conduct, *former* *ORS 166.025(1)(e)* (2003), after determining that phrase "congregates with other persons in a public place" was constitutionally overbroad); *see also* *ORS 166.025(1)* (current version of disorderly conduct statute does not include phrase **[*181]** "congregates with other persons in a public place"). But a court's invalidation of a legislative or executive action or its determination that such an action does not meet a legal standard, including a common-law legal standard, does **[***61]** not violate separation of powers principles; it requires that the other two branches comport with the law.

Here, the applicable legal standard is objective reasonableness.[7] Under *Kramer*, this court evaluates

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[7] In *Kramer*, this court explained that the fiduciary duty to preserve and protect public trust resources is measured by an "objective test of reasonableness." *365 Ore. at 446-47, 450* (explaining that "whether a trustee's action is reasonable is an 'objective test of reasonableness in the circumstances' " and

whether government has violated the public trust doctrine not by substituting its own views of how best to protect and manage public trust resources, but by evaluating whether the government's acts or omissions are objectively reasonable. *365 Ore. at 446*. Thus, this court may declare that the government has an affirmative fiduciary duty to protect public trust resources against the ravages of climate change without declaring that the state must meet specific emissions targets. And a trial court may determine whether the state breached its duty without explaining what the state would have had to do to comport with that duty. The question for a trial court would be whether the state took reasonable steps to fulfill its fiduciary obligation to protect Oregon's trust resources; the fact that the court may have taken different steps if it had been the policy maker would be immaterial.

The common-law doctrine of nuisance provides an example of the exercise of the court's review function. That **[***62]** doctrine requires that all property owners, including the government, maintain and manage property that they own such that they do not unreasonably interfere with the use and enjoyment of neighboring properties. *See Jacobson v. Crown Zellerbach Corp., 273 Ore. 15, 18-19, 539 P.2d 641 (1975)* (to establish nuisance, plaintiffs were required to **[*182]** show that invasion of their right "was unreasonable in the sense that the harm to plaintiffs is greater than they should be required to bear in the circumstances"). A court may declare that that duty exists, may evaluate whether governmental owners complied with that duty, and may even enjoin governmental action without violating separation of powers principles.

An example of the exercise of that judicial authority is found in *Mark v. ODFW, 191 Ore. App. 563, 84 P3d 155 (2004)*. There, the plaintiffs brought a nuisance claim against the state, the owner of a public beach adjacent to the plaintiffs' land. *Id. at 573*. The gravamen of the plaintiffs' claim was that the state "[had] failed to adequately control the conduct of [the state's] invitees" at the public beach. *Id.* (internal quotation omitted). On *de novo* review, the Court of Appeals found that on sunny days, hundreds, and occasionally, maybe even thousands, of naked adults visited the public beach and that sometimes those **[***63]** adults engaged in explicit sexual conduct in plain view of plaintiffs, and sometimes even did so on plaintiffs' own property. *Id. at 574*. The court concluded that the visitors' conduct "substantially and unreasonably interfered with plaintiffs' ability to use or enjoy their property," and rejected the state's argument that it could not be liable for nuisance because the plaintiffs had failed to show that it "did not undertake reasonable efforts to control intrusive displays of nudity and associate offensive conduct by beach users." *Id. at 578*. The court reviewed the state's "beach use plan" and found that far from mitigating the interference with plaintiffs' **[**91]** use and enjoyment of their property, may have exacerbated the problems. *Id. at 579*. The court affirmed the trial court's determination that defendants failed to take reasonable steps to control the offensive uses on their property and its issuance of a permanent injunction requiring the state to eliminate the nuisance. *Id. at 565*.

As a final matter, the court took up the state's arguments about the scope and content of that injunction—specifically, its requirements that the state "adequately staff the area in and around plaintiffs' property," "establish a buffer of sufficient **[***64]** length to avoid viewing of nude sunbathers on [the beach] from plaintiffs' property," and "sufficiently **[*183]** sign the North boundary [of the state's property]." *Id. at 572*. The state argued that those terms violated principles of separation of powers because they impermissibly impinged on the prerogatives of the Oregon Department of Fish and Wildlife—an executive agency—"to select the means to perform its prescribed functions." *Id. at 579*. The Court of Appeals disagreed. It noted that the terms of the injunction afforded the Oregon Department of Fish and Wildlife "considerable flexibility in choosing the means by which the mandated ends are to be accomplished," and that the cases that the state had cited did not preclude the issuance of the injunction. *Id. at 580*.

Similarly, here, the state does not cite any cases limiting the authority of the judicial branch to declare the common-law obligations of the other two branches or to review their acts or omissions for compliance with the applicable legal standard. Here, the declaration of an affirmative fiduciary obligation to protect and manage public trust property would allow a court to review the actions or omissions of those in the legislative and

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therefore that "the validity of the waterfront resolution depends upon whether the restriction on the public's right to enter the water * * * is objectively reasonable under the circumstances" (quoting *White v. Public Emples. Ret. Bd., 351 Ore. 426, 443, 268 P.3d 600 (2011)*). There are other fiduciary duties that may be measured by different standards, but those are not at issue here. *See Strickland v. Arnold Thomas Seed Service, Inc., 277 Ore. 165, 172-73, 560 P2d 597 (1977)* (noting that there is a "rigid standard of behavior required" of a trustee under the "duty of loyalty and good faith").

executive branches for [***65] objective reasonableness, but the exercise of that review function would not necessarily usurp or interfere with the policymaking functions of the other two branches.

That brings me, finally, to the obstacle that all branches face when confronted with the magnitude of the problem presented by climate change—its scientific complexity. The state characterizes that complexity as raising questions of separation of powers without citing a case that makes that link. Instead, the state refers to a concern for a lack of "judicially manageable standards," using a phrase from *Baker v. Carr, 369 US 186, 82 S Ct 691, 7 L Ed 2d 663 (1962)*. There, the Supreme Court characterized questions under the Guaranty Clause as "political questions" due, in part, to its view that that clause does not include "judicially manageable standards." *Id. at 223* (explaining that the Guaranty Clause is not a "repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government"). Here, the state does not contend that questions about whether the state has met its obligations under the public trust doctrine are "political questions" under *Baker*; rather, the state [*184] seems to argue that a court's review of the state's compliance [***66] with its public trust obligations will require the court to evaluate the state's "policy" decisions. The state seems to assume that the proper standard of review would be review for abuse of discretion and seems to argue that review under that standard would require the court to make substantive "policy" decisions:

> "Attempting to apply such a standard to the complex policy decisions that are required in addressing climate change—decisions that invariably touch on a wide range of complex issues, including transportation, energy generation, energy efficiency, and a host of economic considerations—would require the court to make substantive policy decisions under the guise of a common law doctrine."

That argument is not persuasive. First, as discussed above, judicial review for compliance with the law may have the effect of invalidating a policy decision of another branch, but in exercising that function, a court does not itself make a policy decision. Second, this court reviews the state's compliance with its trust obligation to preserve and protect trust resources for objective reasonableness, [**92] not abuse of discretion.[8] Third, the fact that review for objective [*185] reasonableness requires consideration [***67] of "a wide range of complex issues," does not mean that such a review would offend separation of powers principles.

Judicial review of the legality of government action often requires consideration of a range of factors. *See, e.g., State v. Rodriguez/Buck, 347 Ore. 46, 58, 217 P3d 659 (2009)* (when determining whether a sentence is so disproportionately severe that it "shocks the moral sense" of a reasonable person, this court considers "at least" three factors); *State v. Iseli, 366 Ore. 151, 173, 458 P3d 653 (2020)* (determination of whether state established unavailability of witness by showing pursuit of "reasonable means" to procure witness should be

[8] It is interesting that the state cites the *Restatement (Third) of Trusts* in support of its argument for an abuse of discretion standard, given its argument that this court should not consider general trust principles in deciding public trust cases. More importantly, the provisions that the state cites for that deferential standard are consistent with our decision in *Kramer* adopting an objective reasonableness standard. The state asserts that under general trust principles, "[w]hen a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." *Restatement (Third) of Trusts § 87* (2007). Therefore, the state asserts, plaintiffs would have to show that the legislature or Governor acted outside "the range of legally correct discretionary choices" and that those actions did not result in a "permissible, legally correct outcome." *See State v. Rogers, 330 Ore. 282, 312, 4 P3d 1261 (2000)* (describing abuse of discretion standard of review). The *Restatement* provisions the state relies upon explain, however, that a "court will not interfere with a trustee's exercise of a discretionary power (or discretion not to exercise the power) when that conduct is reasonable." *Restatement § 87 (comment b)*. The state appears to be conflating the use of the word "discretion" in the *Restatement (Third) of Trusts*, which is used to describe the idea that the trustee has considerable discretion in the ability to make the initial choices as to how a trust should be managed, with this court's standard of review for "abuse of discretion." As the *Restatement* explains, the question courts ask is whether the trustee's choices were reasonable, but that does not mean our standard of review when evaluating a trustee's decisions is for abuse of discretion. *See Restatement § 87* (comment c) (noting that in "most of the litigation in which it is concluded that a trustee has committed an abuse of discretion involves a finding that the trustee, in exercising a power, has acted unreasonably"). As we explained in *Kramer*, under Oregon law, "whether a trustee's action is reasonable is an 'objective test of reasonableness in the circumstances.' " *365 Ore. at 446-47* (quoting *White, 351 Ore. at 443*).

judged on the "totality of the circumstances" and "[t]hose circumstances encompass a wide range of factors"). Judicial review may even involve the balancing of competing interests. *See* Busch v. McInnis Waste Systems, Inc., 366 Ore. 628, 650, 468 P3d 419 (2020) (invalidating statutory damages cap that violated Article I, section 10, and explaining that the legislature may modify common-law remedies but may only do so "for a reason sufficient to counterbalance the substantive right that Article I, section 10, grants"). That those exercises are difficult does not, however, preclude their undertaking.

And the same is true even when a court reviews **[***68]** governmental action for an abuse of discretion. A court also conducts review for abuse of discretion without substituting its own substantive policy decisions. School Dist. No. 17 v. Powell, 203 Ore. 168, 191, 279 P2d 492 (1955) (discussing abuse of discretion standard of review of school board decisions and noting that "[c]ourts can interfere only when the board refuses to exercise its authority or pursues some unauthorized course," and that a "[d]ifference in opinion or judgment is never a sufficient ground for interference" (internal quotation omitted)).

I turn now to the state's final argument, which is that if plaintiffs prevail, "then the courts would be hopelessly **[*186]** entangled in the discrete policy decisions that are entrusted to the legislative and executive branches by the constitution." That is problematic, according to the state, because courts are "ill equipped to balance such policy concerns." I disagree. The complexity of an issue may make a judicial decision more difficult, but it does not permit this court to abdicate its role.

Consider, for example, the *Eighth Amendment* prohibition on "cruel and unusual punishment." As the United States Supreme Court has explained, " '[t]he basic concept underlying the *Eighth Amendment* is nothing less than the dignity of man.' " Brown v. Plata, 563 US 493, 510, 131 S Ct 1910, 179 L Ed 2d 969 **[**93]** (2011) (quoting **[***69]** Atkins v. Virginia, 536 US 304, 311, 122 S Ct 2242, 153 L Ed 2d 335 (2002)). Determining whether a state has violated a prisoner's *Eighth Amendment* rights and how to remedy a violation requires a weighing of imponderables and a review of expert decision-making:

> "To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death. Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.
>
> "If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting *Eighth Amendment* violation. Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals."

Id. at 510-11 (internal quotations and citations omitted).

In the two consolidated cases **[***70]** that the United States Supreme Court discussed in *Plata*, a Special Master and a Receiver had struggled for over 10 years to oversee efforts to remediate the unconstitutional conditions in the California **[*187]** prisons that had resulted in "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates" and an "unconscionable degree of suffering and death." *Id. at 506-07* (internal quotation omitted). But, as the Court explained, the need for deference to experienced and expert prison administrators faced with that difficult task did not give courts an out:

> "Courts nevertheless must not shrink from their obligation to enforce the constitutional rights of all 'persons,' including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."

Id. at 511 (internal quotation and citation omitted).

Courts also must not shrink from their obligation to enforce the rights of all persons to use and enjoy our invaluable public trust resources. How best to address climate change is a daunting question with which the legislative and executive branches of our state government must grapple. But that does **[***71]** not relieve our branch of its obligation to determine what the law requires. *See* Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis L Rev 785, 788 (2015) ("As a coequal branch of government, the [judicial] branch

must enforce the legislature's obligation to preserve the public trust."). We should not hesitate to declare that our state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of our public trust resources. I respectfully dissent.

End of Document

EXHIBIT R

Funk v. Wolf

Commonwealth Court of Pennsylvania

June 6, 2016, Argued; July 26, 2016, Decided; July 26, 2016, Filed

No. 467 M.D. 2015

Reporter
144 A.3d 228 *; 2016 Pa. Commw. LEXIS 338 **

Ashley Funk; Otis Harrison, a minor, by his guardian Amy Lee; Lilian McIntyre, a minor, by her guardian Jennifer McIntyre; Rekha Dhillon-Richardson, a minor, by her guardian Jaskiran Dhillon; Austin Fortino, a minor, by his guardian Ruth Fortino; Darius Abrams, a minor, by his guardian Elaine Abrams; Kaia Luna Elinich, a minor, by her guardian Arianne Elinich, Petitioners v. Tom Wolf, in his official capacity as Governor of Pennsylvania; Pennsylvania Department of Environmental Protection; John Quigley, in his official capacity as Secretary of the Pennsylvania Department of Environmental Protection; Pennsylvania Environmental Quality Board; John Quigley, in his official capacity as Chairperson of the Environmental Quality Board; Pennsylvania Public Utility Commission; Gladys M. Brown, in her official capacity as Chairperson of the Public Utility Commission; Pennsylvania Department of Conservation and Natural Resources; Cindy Adams Dunn, in her official capacity as Secretary of the Pennsylvania Department of Conservation and Natural Resources; Pennsylvania Department of Transportation; Leslie S. Richards, in her official capacity as Secretary of the Pennsylvania Department of Transportation; Pennsylvania Department of Agriculture; Russell C. Redding, in his official capacity as Secretary of the Department of Agriculture, Respondents

Prior History: [**1] Appealed from No. ORIGINAL JURISDICTION.

Core Terms

climate, regulations, executive branch, environmental, allegations, atmosphere, rights, natural resources, conserve, mandamus, declaratory relief, executive order, emissions, impacts, concentrations, obligations, appellate jurisdiction, original jurisdiction, mandatory duty, promulgate, rulemaking, esthetic, levels, public trust, clean air, asserting, agencies, mandamus relief, preservation, Declaratory

Case Summary

Overview

HOLDINGS: [1]-Because deciding whether to conduct particular studies, promulgate regulations, or issue executive orders detailing the process by which environmental decisions were made, and whether to prepare and implement comprehensive regulations addressing climate change, were either discretionary acts of government officials or tasks for the General Assembly, mandamus would not lie; [2]-Petitioners were not entitled to relief under the Declaratory Judgment Act, as granting relief would require the court to issue an advisory opinion in that stating that a safe atmosphere was protected by *Pa. Const. art. I, § 27*, that respondents had a duty to protect the atmosphere, and that respondents had failed to uphold their obligations would provide a legal predicate to the success of their mandamus claims, but would otherwise have no independent significance.

Outcome

Petition for review dismissed with prejudice.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

Governments > Public Lands > Public Trust Doctrine

HN1 **Bill of Rights, Fundamental Rights**

See Pa. Const. art. I, § 27.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

Governments > Public Lands > Public Trust Doctrine

HN2[] Bill of Rights, Fundamental Rights

The first sentence of the Environmental Rights Amendment (ERA) (first provision) endows the people of Pennsylvania with the right to the described resources. The rights to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment, like all rights established in Article I of the Pennsylvania Constitution, prevent the state from acting in ways that would infringe upon such rights. The second and third sentences (second provision) establish that the Commonwealth is the "trustee" of Pennsylvania's public natural resources. With regard to the second provision, the intent of the ERA is to place Pennsylvania's public natural resources in trust and to impose a duty on the Commonwealth, as trustee, to conserve and maintain them for the benefit of all the people. A legal challenge asserting the rights established in the ERA may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

HN3[] Bill of Rights, Fundamental Rights

While expansive in its language, the Environmental Rights Amendment (ERA) was not intended to be read in absolutist terms so as to prohibit development that enhances the economic opportunities and welfare of the people currently living in Pennsylvania. Instead, the ERA places policymakers in the constant and difficult position of weighing conflicting environmental and social concerns and in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources. To this end, the ERA has been described as a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process when environmental concerns of development are juxtaposed with economic benefits of development.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN4[] Bill of Rights, Fundamental Rights

Judicial review of governmental decisions implicating the Environmental Rights Amendment (ERA) must be realistic and not merely legalistic. In Payne, the court established a three-fold test to determine whether a government decision complies with the ERA. (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands > Public Trust Doctrine

HN5[] Bill of Rights, Fundamental Rights

There can be no question that the Environmental Rights Amendment (ERA) itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. But merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief. The ERA speaks in no such

absolute terms. The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands > Public Trust Doctrine

HN6[] **Bill of Rights, Fundamental Rights**

Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the Environmental Rights Amendment (ERA), and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action. While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General Assembly makes basic policy choices and imposes upon the agencies or departments the duty to carry out the declared legislative policy in accordance with the general provisions of the statute.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands > Public Trust Doctrine

HN7[] **Bill of Rights, Fundamental Rights**

The second provision of the Environmental Rights Amendment (ERA), which establishes that the Commonwealth is the "trustee" of Pennsylvania's public natural resources, impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to expand the powers of a statutory agency. Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act.

Civil Procedure > Pleading & Practice > Responses > Defenses, Demurrers & Objections

HN8[] **Responses, Defenses, Demurrers & Objections**

The court must accept as true all well-pleaded allegations of material facts in the petition, as well as all of the inferences reasonably deducible from those facts. A preliminary objection will only be sustained where it appears with certainty that the law will permit no recovery and any doubt must be resolved in favor of the non-moving party.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN9[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Whether the court has subject matter jurisdiction over a petition for review is a threshold matter that must be addressed prior to considering any of the issues asserted therein.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN10[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Pursuant to § 761(a)(1) of the Judicial Code, the commonwealth court has original jurisdiction of all civil actions or proceedings against the Commonwealth government, including any officer thereof. 42 Pa.C.S. § 761(a). Further, § 761(c) provides the court with original jurisdiction in cases of mandamus and prohibition to other government units where such relief is ancillary to matters within its appellate jurisdiction. § 761(c).

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN11[] Reviewability, Jurisdiction & Venue

See 42 Pa.C.S. § 763(a).

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN12[] Reviewability, Jurisdiction & Venue

Those matters the legislature has placed within the commonwealth court's appellate jurisdiction under 42 Pa.C.S. § 763 are excluded from its original jurisdiction under 42 Pa.C.S. § 761(a)(1). In short, the commonwealth court's original jurisdiction of actions against the Commonwealth is limited to those not within its § 763 appellate jurisdiction over appeals from Commonwealth agencies, whether directly under § 763(a)(1) or (2), indirectly under 42 Pa.C.S. § 762(a)(3) or (4) or otherwise within its appellate jurisdiction.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

HN13[] Administrative Proceedings & Litigation, Jurisdiction

The court has appellate jurisdiction over a final order of the Environmental Quality Board (EQB) denying a rulemaking petition pursuant to Section 1920-A(h) of the Administrative Code of 1929, and a final order of the Environmental Hearing Board denying an appeal of a Department of Environmental Protection decision to not submit a rulemaking petition to the EQB pursuant to § 4 of the Environmental Hearing Board Act.

Administrative Law > Agency Rulemaking > State Proceedings

Environmental Law > Administrative Proceedings & Litigation

HN14[] Agency Rulemaking, State Proceedings

According to the Department of Environmental Protection's regulations, a successful rulemaking petition must include either suggested regulatory language if the petition requests that the Environmental Quality Board (EQB) adopt or amend regulations, or a specific citation to the regulations to be repealed if the petition requests that the EQB repeal existing regulations. 25 Pa. Code § 23.1(a)(2).

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN15[] Justiciability, Standing

When determining whether a party has standing to challenge the legality of an action, it must be assumed that the action is in fact contrary to some rule of law. The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge. A person is sufficiently aggrieved under Pennsylvania's prudential standing requirement if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Environmental Law > Administrative Proceedings & Litigation

HN16[] Justiciability, Standing

For purposes of standing, a party has a substantial interest in the outcome of litigation if his interest surpasses that of all citizens in procuring obedience to the law. While the harm alleged must be substantial, it need not be pecuniary in nature. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. An interest is direct if there is a causal connection between the matter complained of and the harm alleged. An interest is immediate when the causal connection is not remote or speculative.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Environmental Law > Administrative Proceedings & Litigation

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN17 **Standing, Injury in Fact**

While Pennsylvania's prudential standing requirement differs from standing under Article III of the United States Constitution as applied in federal courts, Pennsylvania courts often look to federal standing decisions for guidance. The United States Supreme Court has long held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. Moreover, federal precedent is clear that the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Environmental Law > Administrative Proceedings & Litigation

HN18 **Standing, Injury in Fact**

Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands > Public Trust Doctrine

HN19 **Bill of Rights, Fundamental Rights**

The second provision of the Environmental Rights Amendment, which establishes that the Commonwealth is the "trustee" of Pennsylvania's public natural resources, places an affirmative duty on the Commonwealth to prevent and remedy the degradation, diminution, or depletion of our public natural resources.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Governments > Public Lands

Constitutional Law > Bill of Rights > Fundamental Rights

HN20 **Justiciability, Standing**

For purposes of standing, an immediate interest is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question. The zone of interest protected by the Environmental Rights Amendment (ERA) is the rights of all the people of the Commonwealth, including future generations. The right to enjoy public natural resources and to not be harmed by the effects of environmental degradation now and in the future is among the interests protected by the ERA.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN21 **Common Law Writs, Mandamus**

Mandamus is an extraordinary remedy designed to compel the performance of a ministerial act or

mandatory duty, as opposed to a discretionary act. Mandamus cannot be used to direct the exercise of judgment or discretion in any particular way. Nor will it issue to establish legal rights. The court may issue a writ of mandamus only where the petitioner has a clear legal right to enforce the performance of a ministerial act or mandatory duty, the defendant has a corresponding duty to perform the act, and the petitioner has no other adequate or appropriate remedy.

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

HN22[] Bill of Rights, Fundamental Rights

The Environmental Rights Amendment charges the Commonwealth with the duty of conserving and maintaining public natural resources for the benefit of the people.

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

Constitutional Law > Bill of Rights > Fundamental Rights

Governments > Public Lands

HN23[] Legislative Controls, Scope of Delegated Authority

While the Environmental Rights Amendment (ERA) may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, it cannot legally operate to expand the powers of a statutory agency. The ERA can operate only to limit such powers as had been expressly delegated by proper enabling legislation.

Business & Corporate Compliance > ... > Climate Change > Environmental Law > Climate Change

Governments > State & Territorial Governments > Employees & Officials

Governments > State & Territorial Governments > Legislatures

HN24[] Environmental & Natural Resources, Climate Change

Deciding whether to conduct particular studies, promulgate regulations or issue executive orders detailing the process by which environmental decisions are made, and to prepare and implement comprehensive regulations addressing climate change, are either discretionary acts of government officials or are tasks for the General Assembly.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN25[] State Declaratory Judgments, Grounds for Relief

The purpose of the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531 - 7541, is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered, the availability of declaratory relief is limited by certain justiciability concerns. In order to sustain an action under the Declaratory Judgments Act, a plaintiff must allege an interest which is direct, substantial and immediate, and must demonstrate the existence of a real or actual controversy, as the courts of the Commonwealth are generally proscribed from rendering decisions in the abstract or issuing purely advisory opinions.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Judgments > Declaratory Judgments > State Declaratory Judgments

HN26[] Judges, Discretionary Powers

Granting or denying an action for a declaratory judgment is committed to the sound discretion of a court of original jurisdiction.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN27 **State Declaratory Judgments, Scope of Declaratory Judgments**

Declaratory judgment must not be employed as a medium for the rendition of an advisory opinion which may prove to be purely academic. Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request.

Counsel: Kenneth T. Kristl, Wilmington, DE, for petitioners.

Kenneth L. Joel, Chief Deputy Attorney General, Harrisburg, for respondents Pennsylvania Public Utility Commission and Gladys Brown.

Robert A. Reiley, Office of Chief Counsel, Harrisburg, for respondents PA Department of Environmental Protection, et al.

Judges: BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE JAMES R. COLINS, Senior Judge. OPINION BY JUDGE COHN JUBELIRER.

Opinion by: RENÉE COHN JUBELIRER

Opinion

[*232] OPINION BY JUDGE COHN JUBELIRER

Before this Court in our original jurisdiction are the Preliminary Objections (POs) of the Pennsylvania Public Utility Commission (PUC) and Gladys M. Brown, in her official capacity as Chairperson of the PUC, (PUC Respondents) and the separately filed POs of Tom Wolf, in his official capacity as Governor of Pennsylvania, and various Executive Branch Departments and Secretaries acting in their official capacities (Executive Branch Respondents) to the "Second Amended Petition for Review Seeking Declaratory and Mandamus Relief" (Petition) of Ashley Funk, et al. (Petitioners).[1] Petitioners seek various forms of declaratory and mandamus relief with **[**2]** the goal of requiring PUC and Executive Branch Respondents (together, Respondents) "to develop a comprehensive plan" and to regulate "Pennsylvania's emissions of carbon dioxide ('CO_2') and other greenhouse gases ('GHGs')" in a comprehensive manner that is "consistent with[,] and in furtherance of[,] the Commonwealth's duties and obligations under *Article I, Section 27*" of the Pennsylvania Constitution. *Pa. Const. art. I, § 27*. (Petition ¶ 1.) Petitioners allege that by not developing and implementing a comprehensive plan to regulate CO_2 and GHGs in **[*233]** light of the present and projected deleterious effects of global climate change, Respondents have not fulfilled their constitutional obligations to not infringe upon the rights granted to the people by the Constitution and have not adequately acted as trustees of the Commonwealth's public natural resources, including the atmosphere. (Id.) The Executive Branch Respondents object to the Petition through 12 POs and the PUC Respondents filed an additional 7 POs. For the reasons that follow, we sustain the Respondents' POs in part and dismiss the Petition.

I. THE ENVIRONMENTAL RIGHTS AMENDMENT

The claims asserted in this action relate to the rights granted to citizens of Pennsylvania by *Article I, Section 27 of the Pennsylvania Constitution*, commonly referred to as the "Environmental Rights Amendment" (ERA) and the respective obligations imposed upon the Commonwealth by the same. The ERA provides:

> ***HN1*** The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. ***HN2*** The first sentence of the ERA (first provision) endows the people of Pennsylvania with the **right** to the described resources. *Cmty. Coll. of*

[1] The Petitioners include: Ashley Funk; Otis Harrison, a minor, by his guardian Amy Lee; Lilian McIntyre, a minor, by her guardian **[**3]** Jennifer McIntyre; Rekha Dhillon-Richardson, a minor, by her guardian Jaskiran Dhillon; Austin Fortino, a minor, by his guardian Ruth Fortino; Darius Abrams, a minor, by his guardian Elaine Abrams; and Kaia Luna Elinich, a minor, by her guardian Arianne Elinich.

Delaware Cnty. v. Fox, 20 Pa. Commw. 335, 342 A.2d 468, 473 (Pa. Cmwlth. 1975). The rights to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," like all rights established in **[**4]** Article I of the Pennsylvania Constitution, prevent the state from acting in ways that would infringe upon such rights. *Com. by Shapp v. Nat'l Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588, 592 (Pa. 1973)*. The second and third sentences (second provision) establish "that the Commonwealth is the 'trustee' of Pennsylvania's 'public natural resources.'" Id. We have said, with regard to the second provision, that the intent of the ERA is "to place Pennsylvania's 'public natural resources' in trust and to impose a **duty** on the Commonwealth, as trustee, to '*conserve and maintain* them for the benefit of all the people.'" *Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 167 (Pa. Cmwlth. 2015)* (quoting the ERA) (emphasis added). A legal challenge asserting the rights established in the ERA "may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories." *Id. at 156*. (quoting *Robinson Twp., Washington Cnty. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 950-51 (Pa. 2013)* (plurality).

HN3[↑] While expansive in its language, the ERA was not intended to be read in absolutist terms so as to prohibit development that enhances the economic opportunities and welfare of the people currently living in Pennsylvania. *Payne v. Kassab, 468 Pa. 226, 361 A.2d 263, 273 (Pa. 1976)* (hereinafter, "Payne II"); see also *Robinson Twp., 83 A.3d at 958* ("the duties to conserve and maintain [public natural resources] are tempered by legitimate development tending to improve upon the lot of Pennsylvania's **[**5]** citizenry"). Instead, the ERA places policymakers in the "constant and difficult" position of "weighing conflicting environmental and social concerns" and "in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources." **[*234]** *Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86, 94 (Pa. Cmwlth. 1973)* (hereinafter, "Payne"). To this end, we recently described the ERA as "a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process" when "environmental concerns of development are juxtaposed with economic benefits of development." *Pa. Envtl. Def. Found., 108 A.3d at 170*.

HN4[↑] Judicial review of governmental decisions implicating the ERA "must be realistic and not merely legalistic." *Payne, 312 A.2d at 94*. In Payne, we established a three-fold test to determine whether a government decision complies with the ERA.

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision **[**6]** or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Id.[2]

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[2] In Robinson Township, a plurality of the Pennsylvania Supreme Court stated that, in contrast to conducting a **realistic analysis** discussed in Payne, "the courts must conduct a **principled analysis** of whether the [ERA] has been violated." *Robinson Twp., 83 A.3d at 951* (emphasis added). The plurality also criticized the three-fold test established by this Court in Payne when it stated:

> [T]he Payne test appears to have become, for the Commonwealth Court, the benchmark for *Section 27* decisions in lieu of the constitutional text. In its subsequent applications, the Commonwealth Court has indicated that the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly's policy choices, rather than by the plain language of the amendment. But, while the Payne test may have answered a call for guidance on substantive standards in this area of law and may be relatively easy to apply, the test poses difficulties both obvious and critical. First, the Payne test describes the Commonwealth's obligations—both as trustee and under the first clause **[**7]** of *Section 27*—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon *Section 27* is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court's Payne decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control. The branches of government have independent constitutional duties pursuant to the [ERA], as these duties are interpreted by the judicial branch and this Court in particular. **Because of these critical difficulties, we conclude that the non-textual *Article I, Section 27* test established in Payne**

The Payne test is particularly applicable in situations where a person challenges a government decision or action. This test is somewhat less satisfying when, as here, a person alleges that the government failed to affirmatively engage in an action required by its trusteeship **[*235]** duties under the ERA's second provision. When confronted with such allegations, the Supreme Court's discussion in Payne II is helpful, where the Court explained:

> ***HN5***[↑] There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. . . . But merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be **[**9]** invaded, creates no automatic right to relief. The [ERA] speaks in no such absolute terms. The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people.

Payne II, 361 A.2d at 272-73. ***HN6***[↑] Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action. *See Nat'l Solid Wastes Mgmt. Ass'n v. Casey, 143 Pa. Commw. 577, 600 A.2d 260, 265 (Pa. Cmwlth. 1991)*, aff'd, *533 Pa. 97, 619 A.2d 1063 (Pa. 1993)* (holding that the Governor can only execute laws and the balance required by the ERA was achieved through legislative enactments). While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General **[**10]** Assembly makes "basic policy choices" and imposes upon the agencies or departments "the duty to carry out the declared legislative policy in accordance with the general provisions of the statute." *MCT Transp. Inc. v. Phila. Parking Auth., 60 A.3d 899, 904 (Pa. Cmwlth.)*, aff'd sub nom. *MCT Transp., Inc. v. Phila. Parking Auth., 622 Pa. 741, 81 A.3d 813 (Pa.)*, and aff'd sub nom. *MCT Transp., Inc. v. Phila. Parking Auth., 623 Pa. 417, 83 A.3d 85 (Pa. 2013)* (quotation omitted). ***HN7***[↑] The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to "expand the powers of a statutory agency . . . ." *Cmty. Coll. of Delaware Cnty., 342 A.2d at 482*. Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act. *Id. at 473*.

> **and its progeny is inappropriate to determine matters outside the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance *Section 27* interests.**

Id. at 966-67 (emphasis added) (citations and parentheticals omitted).

Because the above portion of the lead opinion in Robinson Township did not garner a majority of the Supreme Court, **[**8]** the plurality's rejection of the analytical framework discussed in Payne and its progeny is not binding precedent. *Pa. Envtl. Def. Found., 108 A.3d at 159*. "For our purposes, we find the plurality's construction of [the ERA] persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject." *Id. at 156 n.37*.

II. PETITIONERS' ALLEGATIONS

Petitioners allege a series of facts related to the "overwhelming scientific consensus that human-caused climate change is occurring" and that humans can mitigate the effects of climate change by restricting activities that discharge GHGs and encouraging activities that remove CO_2 from the atmosphere. (Petition ¶¶ 35-41.) Petitioners also allege that "climate change is already damaging human and natural **[**11]** systems" across the globe and in Pennsylvania. (Id. at ¶¶ 42, 54.) According to the allegations:

> 54. The effects of climate change are already occurring in Pennsylvania and are projected to significantly impact the **[*236]** Commonwealth in the future. In the past 110 years, the overall temperature in Pennsylvania has increased by

1.3°C (2.4°F) due to anthropogenic [GHG] emissions.
55. Climate change is already disrupting the hydrological cycle in Pennsylvania and continued climate change wi[ll] lead to greater disruptions. Pennsylvania is already experiencing an increase in heavy precipitation events, a decrease in snow cover, a decrease in summer runoff, a decrease in summer and fall soil moisture, and an increase in short- and medium-term soil moisture droughts. Rising stream temperatures could also degrade water quality. Additionally, rising sea levels causes degradation of fresh groundwater supplies due to saltwater intrusion.

56. If the atmospheric concentration of CO_2 rises to 450 ppm[,] sea levels are expected to rise at least 6-8 meters. This would be a major disruption to the Delaware River and Estuary, wetlands and parks along the river, and would inundate significant portions of Philadelphia, **[**12]** including the Philadelphia International Airport, Citizens Bank Park, the Philadelphia Navy Yard, the Philadelphia CSX rail yard, and numerous neighborhoods and other businesses.
57. Rising temperatures are degrading, diminishing, and depleting the water quality and quantity of streams, rivers, and wetlands leading to a decrease in biodiversity. Some wetlands may also disappear due to increased evaporation and transpiration and longer dry periods. Increased water temperatures will degrade, diminish, and deplete cold-water aquatic species like brook trout while leading to an increase in invasive species.
58. Climate change is degrading, diminishing, and depleting Pennsylvania's forests and leading to species composition shifts, greater tree stress, shifts in regeneration rates, more tree mortality, and increases in insect, disease, and invasive species activities.

59. Higher temperatures contribute to heat-related deaths and also lead[] to increased formation of ground-level ozone. Ozone is linked to adverse health impacts including asthma, respiratory infections, increased mortality, and wheezing. Other health impacts associated with climate change may include an increase in people su[ff]ering from **[**13]** allergies as pollen increases.
60. Without immediate science-based reductions in CO_2 and other GHGs, there is an immediate and substantial danger that within Youth [Petitioners] lives, higher temperatures, water and food shortages, droughts, floods, extreme weather events, sea level rise, and other climate impacts will make significant portions of Pennsylvania unfit to live in and will threaten the very survival of Pennsylvania citizens. This is not a distant threat but one that will be realized in the coming decades unless the Commonwealth acts with urgency to do its part to reduce CO_2 and GHG emissions and restore the atmosphere.

(Id. at ¶¶ 54-60.) Petitioners allege that the consumption of fossil fuels within Pennsylvania substantially contributes to climate change and ocean acidification and cite to data from the United States Energy Information Agency stating that if Pennsylvania was a country, it would be the 26th largest emitter of GHGs in the world. (Id. at ¶¶ 61, 64.)

In order to combat climate change and stabilize GHGs in the atmosphere, Petitioners allege that the current science confirms that humans must reduce CO_2 concentrations to 350 parts per million (ppm) or less by the **[**14]** end of the current century. **[*237]** (Id. at ¶¶ 66-67.) According to Petitioners' allegations, further delay in reducing CO_2 concentrations in the atmosphere will make it "harder for [Petitioners] and future generations to protect a livable world" and that current climate change legislation and policy are not in line with achieving the goal of reducing CO_2 levels to 350 ppm by the end of the century. (Id. at ¶¶ 71, 74.) Petitioners allege, based on current scientific projections, that "[i]t is imperative that Respondents calibrate state emission limits to put Pennsylvania on a trajectory aimed for 350 ppm and then establish a plan that will put Pennsylvania on track towards ensur[ing] that Pennsylvania does its part to meet these limits." (Id. at ¶ 71.)

With these factual allegations as predicate, Petitioners allege that the ERA bestows upon them rights that must be protected by Respondents and that the Commonwealth owes to them a fiduciary duty as public trustee to conserve and maintain "clean air and safe levels of CO_2 and GHGs in accordance with current climate science." (Id. at ¶ 88.) Specifically, Petitioners allege that Respondents have not carried out their mandatory duty under the ERA to conduct various **[**15]** "stud[ies], investigation[s], or [any] other analysis" related to how the rights secured by the ERA are to be protected, and how the Commonwealth's obligations as a trustee of the public trust are to be fulfilled "in light of climate change and/or increasing concentration of CO_2 and GHGs in the atmosphere." (Id. at ¶¶ 90 (a)-(c), (e)-(g).) Petitioners further allege that

Respondents have not carried out their mandatory duty to propose, promulgate, or issue executive orders or regulations governing how the rights secured by the ERA are to be protected and have not issued any similar regulations or executive orders limiting emissions of CO_2 and GHGs in a **comprehensive manner** to protect the rights secured by the first provision of the ERA or to satisfy their duties as trustees of the public trust pursuant to the second provision of the same. (Id. at ¶¶ 90 (d), (h)-(j).) As a result of Respondents' failure take necessary action, Petitioners assert that they have been, and will continue to be, injured and that their constitutional rights have been violated.

Petitioners request that we remedy the above harms and constitutional violations by issuing a writ of mandamus requiring Respondents to:

> a. conduct — either individually **[**16]** or in combination with one or more other Respondents — a study, investigation, or other analysis to determine how the rights to clean air, pure water, and to the preservation **[*238]** of the natural, scenic, historic and esthetic values of the environment secured by the first [provision of the ERA] have been, are being, or in the future may be impacted by climate change and/or increasing concentrations of CO_2 and GHGs in the atmosphere;
>
> b. conduct — either individually or in combination with one or more other Respondents — a study, investigation, or other analysis to determine what actions that the Respondents can take to protect the rights to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment secured by the first [provision of the ERA] in light of climate change and/or increasing concentrations of CO_2 and GHGs in the atmosphere;
>
> c. conduct — either individually or in combination with one or more other Respondents — a study, investigation, or other analysis to determine whether any actions that the Respondents have taken or will take are contrary to the rights to clean air, pure water, and to the preservation of the natural, **[**17]** scenic, historic and esthetic values of the environment secured by the first [provision of the ERA] in light of climate change and/or increasing concentrations of CO_2 and GHGs in the atmosphere;
>
> d. promulgate by regulation, executive order, or other official action setting forth a process for the rights to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment secured by the first [provision of the ERA] are to be considered, accounted for, or applied in decisions being made by the Respondent;
>
> e. conduct — either individually or in combination with one or more other Respondents — a study, investigation, or other analysis to determine what actions are necessary to conserve and maintain public natural resources, including the atmosphere, in light of climate change and/or increasing concentrations of CO_2 and GHGs in the atmosphere in order to satisfy their obligations as trustees of the public trust created in the second [provision of the ERA];
>
> f. conduct — either individually or in combination with one or more other Respondents — a study, investigation, or other analysis to determine what actions that the Respondents can take **[**18]** to conserve and maintain public natural resources, including the atmosphere, in light of climate change and/or increasing concentrations of CO_2 and GHGs in the atmosphere in order to satisfy their obligations as trustees of the public trust created in the second [provision of the ERA];
>
> g. promulgate by regulation, executive order, or other official action setting forth a process for the obligations to conserve and maintain public natural resources, the duties of loyalty, impartiality, and/or to exercise ordinary skill, prudence, and caution in managing the public trust assets as trustee of the public trust created in the second [provision of the ERA] are to be considered, accounted for, or applied in decisions being made by the Respondent;
>
> h. prepare comprehensive regulations, in accordance with the current science, designed to account for embedded emissions and reduce carbon dioxide and other greenhouse gas emissions to safe levels and thereby reach the concentrations that must be achieved to satisfy their constitutional obligations as public trustees of the air and atmosphere;
>
> i. implement regulations that will in fact reduce carbon dioxide and other greenhouse gas emissions to safe **[**19]** levels and thereby reach the concentrations that must be achieved to satisfy their constitutional obligations as public trustees of the air and atmosphere;

(Petition, Request for Relief ¶¶ 7 (a)-(i) (Mandamus

Request).) Petitioners further seek the following forms of declaratory relief:

> 1. Declare that an atmosphere with safe levels of CO_2 and GHGs is part of the right to clean air recognized in the first [provision of the ERA];
> 2. Declare that the atmosphere is a public natural resource falling within the public trust established by [the second provision of the ERA];
> 3. Declare each Respondent, as an agency or agent of the Commonwealth, has a duty to not act contrary to the fundamental right to clean air, pure water, and to the preservation of natural, historic, and esthetic values of the environment recognized in the first [provision of the ERA];
>
> 4. Declare that each named Respondent, as an agency or agent of the Commonwealth, have [sic] public trustee **[*239]** duties to protect the atmosphere and other public natural resources pursuant to the public trust established by [the second provision of the ERA];
>
> 5. Declare each Respondent, as an agency or agent of the Commonwealth, has failed to meet **[**20]** Respondent's duty to not act contrary to the fundamental right to clean air, pure water, and to the preservation of natural, historic, and esthetic values of the environment recognized in the first [provision of the ERA] with respect to [CO_2] and other [GHG] emissions;
> 6. Declare that each named Defendant, as an agency or agent of the Commonwealth, has failed to meet the public trustee duties established by the second [provision of the ERA] with respect to [CO_2] and other [GHG] emissions.

(Id. at ¶¶ 1-6.)[3]

While Petitioners allege that CO_2 concentrations in the atmosphere above 350 ppm are unsafe and will make it harder for Petitioners to protect a livable world, (Petition ¶¶ 70-71), Petitioners stress that their Petition

> **does not seek to have this Court require Respondents to implement any particular set of regulations**; rather, it asks this Court — via declaratory and mandamus relief — to require Respondents to determine what steps are necessary to conserve and maintain the public natural resources, including the atmosphere, in the face of **[**21]** climate change via regulation of CO_2 and GHGs, develop a comprehensive plan to achieve those necessary steps, and to implement the comprehensive plan via regulations of CO_2 and GHG emissions in order to satisfy the constitutional mandate in [the ERA] and thereby protect Petitioners as [ERA] beneficiaries.

(Petition ¶ 1 (emphasis in original).)

III. RESPONDENTS' POs

Executive Branch Respondents object to the Petition through 12 POs and the PUC Respondents assert an additional 7 POs. For the purpose of this opinion, we will merge duplicative POs and construe the POs as asserting 10 distinct objections that we have organized in the following manner for ease of discussion.

Executive Branch Respondents first challenge this Court's jurisdiction on the basis that Petitioner Funk previously filed a rulemaking petition with the Environmental Quality Board (EQB) on September 5, 2013, that is nearly identical to the instant matter, which was denied and not subsequently appealed. (Executive Branch Respondents' POs (Exec. Branch POs) ¶ 49.) Executive Branch Respondents contend that the current action is a collateral attack on the EQB ruling and that absent a timely appeal to this Court in its appellate **[**22]** jurisdiction, this Court lacks jurisdiction to entertain the Petition in its original jurisdiction. (Id. at ¶¶ 52-54, 115-18.)

Respondents next allege that Petitioners lack standing to assert their claims because the harm they allegedly suffer is remote, speculative, and generalized, and the interest they assert does not surpass the common interest of all citizens who have a general interest in the government obeying the law. (PUC POs ¶¶ 39-43; Exec. Branch POs ¶¶ 131-33.)

Third, Respondents assert that Petitioners cannot obtain mandamus relief as the Petition does not allege facts necessary to satisfy the required elements of mandamus relief. **[*240]** (PUC POs ¶ 51.) Central to Respondents' argument is an allegation that mandamus cannot be used to require the exercise of discretion in any particular way, and Respondents understand the Petition as demanding Respondents promulgate and implement regulations Petitioners think are necessary. (Id. at ¶¶ 53-58.) Respondents further argue that mandamus will not lie because alternative relief is available through a rulemaking petition to the

[3] Petitioners also seek costs, reasonable attorney's fees, and other relief the court may deem just and proper. (Petition, Request for Relief ¶¶ 8-9.)

Department of Environmental Protection (DEP) or appeal of the previously rejected decision of the EQB. (Id. at **[**23]** ¶ 59; Exec. Branch POs ¶¶ 104-106.) Executive Branch Respondents also allege that mandamus relief is not appropriate when the writ will be futile, and here, requiring Respondents to act a particular way in isolation from global and national regulators would not remedy the harms alleged or lessen the threat of climate change. (Exec. Branch POs ¶ 110.)

Fourth, the Executive Branch Respondents allege that the current action is barred by the doctrine of exhaustion of administrative remedies and that Petitioners do not fall under a recognized exception to the doctrine. (Id. at ¶¶ 87, 98-99.) Executive Branch Respondents allege that, with the exception of Petitioner Funk, no other Petitioner has filed a rulemaking petition, and that the EQB has the discretion to grant a subsequent petition from Petitioner Funk. (Id. at ¶¶ 89-91.)

Fifth, both Respondents demur to the allegations in the Petition. Executive Branch Respondents, relying on the Payne test, contend that Petitioners have not alleged sufficient facts showing that Respondents did not comply with existing laws or regulations, did not make a reasonable effort to reduce CO_2 and GHG emissions, or that the harm of any decision outweighs **[**24]** the benefits derived from such decisions. (Id. at ¶¶ 59-62.) Respondents further allege that the relief sought by Petitioners is already being carried out by Respondents through a variety of programs and strategies, including, but not limited to, the 2009 Climate Impacts Assessment Report and Climate Change Action Plan. (Id. at ¶¶ 64-66; PUC POs ¶¶ 90-100.)

Respondents next allege that the Petition lacks specificity. PUC Respondents contend that the Petition does not allege any facts particular to the PUC Respondents, nor state within any specificity how the PUC Respondents actions or inactions were unlawful. (PUC POs ¶¶ 82-85.) Similarly, Executive Branch Respondents allege that the Petition "do[es] not articulate the specific actions each of the Respondents are engaged in or how they injured [Petitioners]." (Exec. Branch POs ¶ 142.)

Seventh, Respondents contend that some of the Respondents are improper parties to the action. Executive Branch Respondents allege that Governor Tom Wolf, the Department of Conservation and Natural Resources (DCNR), the Department of Transportation, Department of Agriculture, the PUC, and Secretaries Dunn, Richards, and Redding, as well as Chairperson Brown, are **[**25]** not proper parties because their interests are fully represented by DEP and its Secretary, John Quigley,[4] who also serves as Chair of the EQB. (Id. at ¶¶ 159-60.) Executive Branch Respondents argue that none of the above parties "have statutory or regulatory authority to regulate CO_2 or GHGs as part of their official duties," and "[t]o include them ... is unnecessary and duplicative." **[*241]** (Id. at ¶ 162.) The PUC Respondents echo the Executive Branch Respondents' allegations and contend that the PUC has no authority to regulate CO_2 or GHGs and that DEP, the EQB, and Secretary Quigley are the proper parties. (PUC POs ¶¶ 30-34.)

Eighth, Respondents assert the affirmative defense of sovereign immunity. Citing to *Fawber v. Cohen, 516 Pa. 352, 532 A.2d 429, 433-34 (Pa. 1987)*, Respondents allege that the doctrine of sovereign immunity bars suits that "seek to *compel affirmative action on the part of state officials*." (Exec. Branch POs ¶ 121; PUC POs ¶ 63 (emphasis in original).) According to the PUC's POs, because Petitioners seek an order requiring "Respondents to promulgate regulations, adopt specific policies, and generally perform their **[**26]** duties in the way that Petitioners want," the Petition cannot clear the bar of sovereign immunity. (PUC POs ¶ 65.)

Ninth, Respondents allege that declaratory relief is improper because it would amount to "advisory opinions which can have 'no practical effect on the parties.'" (Exec. Branch POs ¶ 124 (quoting *Swift v. Dep't. of Transp., 937 A.2d 1162, 1169 (Pa. Cmwlth. 2007)*).) Respondents allege that the declaratory relief sought would not tell Respondents what needs to be done to satisfy their trustee obligation because the Commonwealth is bound to both conserve public natural resources and do other things also for the benefit of the people. (Id. at ¶ 127.) According to the PUC, because Petitioners' claims for declaratory relief have no practical effect, they should "fall along with the [mandamus] claim [these claims] serve[] to support." (PUC POs ¶ 67-68 (quoting *Stackhouse v. Pa. State Police, 892 A.2d 54, 62 (Pa. Cmwlth. 2006)*).)

Finally, Respondents allege that the Petition asks this Court to decide a non-justiciable political question. (Exec. Branch POs ¶ 145; PUC POs ¶ 70.) The PUC asserts that "[t]he continuing development and

[4] John Quigley resigned as Secretary of DEP on May 20, 2016. Patrick McDonnell currently serves as Acting Secretary of DEP.

implementation of [GHG] emission reduction strategies should remain with the executive agencies charged with those responsibilities under the law, as they possess the technical program expertise **[**27]** and scientific background necessary for such regulations." (PUC POs ¶ 76.) According to the Executive Branch Respondents, "[c]ourts do not possess the scientific and technological expertise to evaluate the current science and to make conclusions, which would amount to policy determinations, based on their evaluations and therefore cannot resolve the dispute in the way intended by [Petitioners]." (Exec. Branch POs ¶ 150.)

IV. DISCUSSION

In assessing the POs, we are mindful that ***HN8***[↑] "this Court must accept as true all well-pleaded allegations of material facts in the [Petition], as well as all of the inferences reasonably deducible from those facts." *Funk v. Dep't of Envtl. Prot., 71 A.3d 1097, 1101 n.4 (Pa. Cmwlth. 2013)*. A PO will only be sustained where it "appear[s] with certainty that the law will permit no recovery" and "[a]ny doubt must be resolved in favor of the non-moving party." *Guarrasi v. Scott, 25 A.3d 394, 400 n.5 (Pa. Cmwlth. 2011)*.

A. Jurisdiction

HN9[↑] Whether this Court has subject matter jurisdiction over a petition for review is a threshold matter that must be addressed prior to considering any of the issues asserted therein. *Borough of Olyphant v. Pa. Pub. Util. Comm'n, 861 A.2d 377, 382 n.10 (Pa. Cmwlth. 2004)*. Executive Branch Respondents argue that this Court lacks subject matter jurisdiction over the Petition because it is not vested **[*242]** with authority to engage in rulemaking or to compel specific rulemaking. **[**28]** Executive Branch Respondents contend that "this Court's original jurisdiction is limited to items that are *not* in its appellate jurisdiction." (Executive Branch Respondents' Brief (Exec. Branch Br.) at 21 (citing *Pa. Dept. of Aging v. Lindberg, 503 Pa. 423, 469 A.2d 1012, 1017-18 (Pa. 1983)*).) Thus, it is the Executive Branch Respondents' contention that because a petitioner may file a rulemaking petition with the EQB pursuant to Section 1920-A(h) of the Administrative Code of 1929[5] and this Court has appellate jurisdiction over final orders of the EQB, this Court cannot exercise original jurisdiction over suits requesting rulemaking.

Petitioners argue in response that their action asserts "classic mandamus relief" based on Respondents' failure to perform their duties mandated by the ERA, which is within this Court's jurisdiction. Petitioners assert that the Executive Branch Respondents' objection rests on an improper understanding of the relief sought. Petitioners contend that **[**29]** they do not request that this Court impose any specific regulatory regime; rather, they ask this Court to require Respondents to develop approaches in a manner determined by Respondents that will ensure that Petitioners' constitutional rights under the ERA are protected.

HN10[↑] Pursuant to *Section 761(a)(1)* of the Judicial Code, this Court has "original jurisdiction of all civil actions or proceedings . . . [a]gainst the Commonwealth government, including any officer thereof." *42 Pa. C.S. § 761(a)*.[6] Further *Section 761(c)* provides this Court with original jurisdiction "in cases of mandamus and prohibition to . . . other government units where such relief is ancillary to matters within its appellate jurisdiction." *42 Pa. C.S. § 761(c)*. This Court's appellate jurisdiction is set forth in *Section 763(a)* of the Judicial Code, which provides:

> ***HN11***[↑] Except as [not relevant here], the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:
>
> > (1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Board of Claims, the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment **[**30]** Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.
> >
> > (2) All appeals jurisdiction of which is vested in

[5] Act of April 9, 1929, P.L. 177, as amended, *71 P.S. § 510-20(h)*. Section 1920-A was added by the Act of December 3, 1970, P.L. 834, *71 P.S. § 510-20(h)*. Section 1920-A(h) provides: "Any person may petition the Environmental Quality Board to initiate a rule making proceeding for the issuance, amendment or repeal of a regulation administered and enforced by the department." Id.

[6] *Section 761(a)(1)(i)-(v)* provides for certain exceptions to this Court's original jurisdiction, none of which are relevant here.

> the Commonwealth Court by any statute hereafter enacted.

42 Pa. C.S. § 763(a). In construing these provisions, the Pennsylvania Supreme Court has said:

> ***HN12***[↑] those matters our legislature has placed within Commonwealth Court's appellate jurisdiction under *Section 763* are excluded from its original jurisdiction under *Section 761(a)(1)*. In short, the Commonwealth Court's original jurisdiction of actions against the Commonwealth is limited to those not within its **[*243]** *Section 763* appellate jurisdiction over appeals from Commonwealth agencies, whether directly under *Section 763(a)(1)* or *(2)*, indirectly under *Section 762(a)(3)* or *(4)* or otherwise within its appellate jurisdiction.

Lindberg, 469 A.2d at 1015-16.

Whether we have jurisdiction over the instant action, therefore, turns on whether we would have appellate jurisdiction over the matter. While we agree that ***HN13***[↑] we would have appellate jurisdiction over a final order of the EQB denying a rulemaking petition pursuant to Section 1920-A(h) of the Administrative Code of 1929, and a final order of the Environmental Hearing Board (EHB) denying an appeal **[**31]** of a DEP decision to not submit a rulemaking petition to the EQB pursuant to *Section 4* of the Environmental Hearing Board Act,[7] we would not have appellate jurisdiction over the instant matter. ***HN14***[↑] According to DEP's regulations, a successful rulemaking petition must include either "[s]uggested regulatory language if the petition requests that the EQB adopt or amend regulations," or "[a] specific citation to the regulations to be repealed if the petition requests that the EQB repeal existing regulations." *25 Pa. Code § 23.1(a)(2)*. Petitioners would not be able to file a successful rulemaking petition based on the allegations before us because they do not seek the enactment of a specific regulation or repeal of an existing regulation.[8] Rather, Petitioners ask that we order the EQB to enact whatever regulation EQB deems to be required to satisfy the ERA after conducting appropriate studies discovering what would be required to protect Petitioners' rights in light of the threat of climate change. The only court in which Petitioners could try to seek such a remedy, if one is available at all, is in this Court's original jurisdiction. *42 Pa. C.S. § 761(b)* (providing that the original jurisdiction of this Court "shall be exclusive except as provided in [sections **[**32]** not relevant here]"). We therefore overrule Executive Branch Respondents' preliminary objection alleging that this Court lacks subject matter jurisdiction over the Petition.

B. Standing

We next address Respondents' challenge to Petitioners' standing, where Respondents contend that the Petition merely asserts generalized injuries and claims based upon remote and speculative allegations of harm. ***HN15***[↑] "When determining whether [a party has] standing to challenge the legality of an action, it must be assumed that the action is in fact contrary to some rule of law." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 287 n.32 (Pa. 1975)*. The "core concept [of standing] is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' **[**33]** thereby and has no standing to obtain a judicial resolution of his challenge." *Id. at 280*. A person is sufficiently aggrieved under Pennsylvania's prudential standing requirement "if he can establish that he has a **substantial, direct[,] and immediate** interest in the outcome of the litigation." *Fumo v. City of **[*244]** Philadelphia, 601 Pa. 322, 972 A.2d 487, 496 (Pa. 2009)* (emphasis added).

HN16[↑] "A party has a **substantial** interest in the outcome of litigation if his interest surpasses that of all citizens in procuring obedience to the law." Id. (quotation omitted) (emphasis added). While the harm alleged must be substantial, it need not be pecuniary in nature. *See Wm. Penn Parking, 346 A.2d at 281 n.20* (quoting *Sierra Club v. Morton, 405 U.S. 727, 734, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)* ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the

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[7] Act of July 13, 1988, P.L. 530 *§ 4*, as amended, *35 P.S. § 7514*.

[8] This is in contrast to a previous Rulemaking Petition filed by Petitioner Funk. Ms. Funk submitted a rulemaking petition on September 5, 2013, requesting the EQB promulgate a regulation reducing the amount of CO2 emitted from fossil fuel burning by at least six percent per year through 2050. (Petition ¶ 6; Exec. Branch POs at App. 1, p. 3) Ms. Funk also filed an almost identical rulemaking petition in 2012, which was addressed by this Court in *Funk v. Department of Environmental Protection, 71 A.3d 1097 (Pa. Cmwlth. 2013)*.

judicial process."). An interest is **direct** if there is a causal connection between the matter complained of and the harm alleged. *Fumo, 972 A.2d at 496* (quotation omitted). An interest is **immediate** when the "causal connection is not remote or speculative." Id.

HN17[↑] While Pennsylvania's prudential standing requirement differs from standing under **[**34]** Article III of the United States Constitution as applied in federal courts, Pennsylvania courts often look to federal standing decisions for guidance. *Id. at 500 n.5.* The United States Supreme Court has long "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (internal quotation marks omitted); see also *Lujan v. Defs. of Wildlife, 504 U.S. 555, 562-63, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ("the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"); *Sierra Club, 405 U.S. at 734* ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society"). Moreover, federal precedent is clear that "the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Id.; see also *Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 522, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)* ("That . . . climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)* ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that **[**35]** the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.").

In Friends of the Earth, the United States Supreme Court addressed a citizen suit authorized by *Section 505(a)* of the federal Clean Water Act.[9] The petitioner **[*245]** alleged that by discharging pollutants into a waterway, the defendant violated the Clean Water Act and the conditions of its discharge permit issued by the state department of health. *Friends of the Earth, 528 U.S. at 176.* The petitioner averred that it had standing as an association because some of its members have standing. *Id. at 181-82.* One of its members alleged that he lived close to the waterway and that it smelled polluted as he drove by. Id. The member also alleged that he liked to fish, camp, swim, and picnic by the river, and that he would not do so now due to the discharges. *Id. at 182.* Other members alleged that they liked to walk, birdwatch, and hike near the waterway, but would no longer do so. Id. The Court held that the association had standing based on the averments of its individual members. *Id. at 183.* According to the Court,

> We have held that *HN18*[↑] environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area **and are persons for whom the [**36] aesthetic and recreational values of the area will be lessened by the challenged activity** . . . . [T]he affidavits and testimony presented by [plaintiff] in this case assert that [defendant's] discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere general averments and conclusory allegations . . .

Id. at 183-84 (quotations omitted) (emphasis added).

The Pennsylvania Supreme Court applied the above principles in **[**37]** *Robinson Township*.[10] There, the Court addressed an appeal of this Court's decision

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[9] *33 U.S.C. § 1365(a)*. Pursuant to *Section 505(a)*:

> any citizen may commence a civil action on his own behalf--
>
> **(1)** against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the *eleventh amendment* to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> **(2)** against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Id.

[10] While much of Robinson Township is non-binding, Section A of the lead opinion addressing standing was supported by a majority of the Supreme Court.

sustaining, in part, the Commonwealth's preliminary objections to a challenge to Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act,[11] by several municipalities, two residents and elected officials, a non-profit environmental group and its executive director, and a physician who treats patients allegedly impacted by the challenged activity (together, "citizens"). Relevant to the instant matter, the Commonwealth argued that the harm alleged by the citizens is speculative and remote and that there were "other parties better positioned to raise [the] claims." *Robinson Twp., 83 A.3d at 921*. In response, the citizens generally argued that they had standing because Marcellus Shale drilling directly impacted them and that Act 13's regulatory scheme violated, *inter alia*, the ERA. *Id. at 915-16*. The Court agreed with the citizens and concluded:

> In response to preliminary objections, the citizens relied on of-record affidavits to show that individual members of the [non-profit organization] are Pennsylvania residents and/or owners of property and business interests in municipalities and zoning districts that either already host or **are likely [**38] to host** active natural gas operations related to the Marcellus Shale Formation. Like [two other individual landowners] (as to whom the Commonwealth conceded the standing issue), these members asserted that **[*246]** they **are likely to suffer considerable harm** with respect to the values of their existing homes and the enjoyment of their properties given the intrusion of industrial uses and the change in the character of their zoning districts effected by Act 13. **These individual members have a substantial and direct interest in the outcome of the litigation premised upon the serious risk of alteration in the physical nature of their respective political subdivisions and the components of their surrounding environment. This interest is not remote.**

Id. at 922 (emphasis added) (record citations omitted).

Here, Petitioner McIntyre alleges that she is 10 years old, lives in Philadelphia, and attends fourth grade at Germantown Friends School. (Petition ¶ 9.) She suffers from asthma and a pollen allergy and is concerned about how climate **[**39]** change will impact her conditions. (Id.) Ms. McIntyre also alleges that rising sea levels associated with climate change threaten to inundate her home town of Philadelphia with floodwaters, and that rising temperatures are associated with a reduction in snow that will limit her ability to go skiing in the Pocono Mountains and other locations. (Id.) In addition to concern over the future impacts of climate change, Ms. McIntyre alleges that climate change is impacting her life and environment now in the following ways: "[t]he increasingly hot summer temperatures have ma[d]e it hard for [her] to enjoy outdoor activities, such as riding bikes, hiking, and playing soccer"; she likes to hike but her enjoyment of the forests is reduced by the prevalence of dangerous ticks and the disruption of wildlife caused by climate change; and the increasing frequency and destructiveness of storms poses an immediate threat to her safety, well-being, and ability to use and enjoy her property. (Id. at ¶¶ 9-10) Ms. McIntyre cites to examples where she has allegedly been threatened by extreme weather events caused by climate change: first, she has "experienced tornadoes where she lives, which are not normal and have **[**40]** been linked to climate change," and second, she was involved in an incident during Hurricane Sandy in October of 2012 where she and her mother "got stuck in floodwaters when a stream by her house overflowed its banks." (Id. at ¶ 10.)

Further, Ms. McIntyre alleges that she, and the other minor Petitioners,

> represent the youngest living generation of Pennsylvania's public trust beneficiaries, and have a substantial, direct, and immediate interest in protecting the environment, their quality of life, and in ensuring that the climate remains stable enough to secure their constitutional rights to a livable future. A livable future includes the opportunity to drink clean water, to grow food that will abate hunger, to be free from direct and imminent property damage caused by extreme weather events, to be able to enjoy and benefit from the use of property, and to enjoy the abundant and rich biodiversity in Pennsylvania. []Petitioners are suffering both immediate and threatened injuries as a result of actions and inactions by Respondents and will continue to suffer more injuries to their health, personal safety, bodily integrity, cultural and spiritual practices, economic stability, food security, **[**41]** property, and recreational interests without the relief sought here. The relief requested will redress the [] Petitioners' injuries by reducing the conditions from climate change that adversely

[11] Act of February 14, 2012, P.L. 87, *58 Pa. C.S. §§ 2301 - 3504*.

affect the [] Petitioners.

(Id. at ¶ 23.)

Based on these allegations, which we must accept as true, Ms. McIntyre has **[*247]** sufficiently alleged facts conferring her standing to assert the claims in the Petition. First, as to whether her interest is substantial, Ms. McIntyre avers that climate change and Respondents' failure to act appropriately to combat the climate crisis has diminished her ability to engage in activities she enjoys, threatens her safety, and raised concern over whether her health and enjoyment of the environment will be negatively diminished in the future. (Id. at ¶¶ 9-10.) These allegations sound much like those asserted in *Friends of the Earth* and *Robinson Township*, which were found to be beyond the abstract interest of the general public in ensuring obedience with the law. While many people like to hike and are impacted by severe weather, Ms. McIntyre's allegations that her ability to enjoy outdoor activity is diminished and that she has been harmed by floods linked to climate **[**42]** change have sufficiently distinguished her "from those asserting only the common right of the entire public that the law be obeyed." *Wm. Penn Parking, 346 A.2d at 287*.

Respondents distinguish Robinson Township and similar cases upon which Petitioners rely by arguing that those cases involve appeals of actions — permit decisions or legislation enactments — that resulted in harm to those persons, and not, as here, the harm based on Respondents' alleged failure to act that is generic and no different from the interests of the general public. Respondents are correct that, heretofore, we have not addressed a case where the alleged harm and violation of law is the government's failure to act. However, we see no reason to conclude that Ms. McIntyre's interest is less substantial than the interests of those in Robinson Township or Friends of the Earth solely because she is alleging harm caused by Respondents' failure to fulfill an allegedly mandatory duty instead of harm caused by an affirmative act. Instead of asserting a right to relief under the first provision of the ERA, Ms. McIntyre asserts a right to relief under ***HN19***[↑] the second provision of the ERA, which "places an affirmative duty on the Commonwealth to 'prevent and remedy **[**43]** the degradation, diminution, or depletion of our public natural resources.'" *Pa. Envtl. Def. Found. 108 A.3d at 168* (quoting the ERA).

Next, as to whether Ms. McIntyre's interests are "direct," Respondents argue that Ms. McIntyre asserts generalized injuries that may or may not be directly related to climate change and that some of the injuries are associated with activities conducted outside of Pennsylvania. Respondents further argue that Ms. McIntyre has not connected these speculative impacts to any action by Respondents. However, Ms. McIntyre specifically alleges a causal connection by asserting that she is harmed by climate change and that Respondents have violated their duty to conserve and maintain the natural resources as required by the ERA. (Petition ¶¶ 90, 92.) Specifically, Ms. McIntyre alleges that "[b]ecause of Respondents' failures to carry out their mandatory duties under [the ERA], dangerous levels of CO2 and GHGs are occurring which have unreasonably contributed to the actual degradation of the air, water, and natural, historic, and esthetic values of the environment." (Id. at ¶ 92.) Ms. McIntyre has thus alleged a causal connection between the harm alleged and the alleged inaction of Respondents.

Finally, as to **[**44]** whether Ms. McIntyre's interests are "immediate," Respondents contend that the remote and speculative nature of Ms. McIntyre's claims are illustrated by Petitioners' factual allegations. PUC Respondents point to the numerous portions of the Petition discussing the "expected" impacts of climate change, and allegations that due to these impacts, **[*248]** Petitioners "could" be harmed. Ms. McIntyre alleges that she and the other Petitioners are suffering harm based on the threat of climate change now, and the fact that many of the deleterious effects of climate change will allegedly occur in the coming decades does not render their interests remote. Like the petitioners in Robinson Township, whom the Supreme Court concluded had immediate interests in the litigation based on allegations of **likely harms**, Ms. McIntyre alleges both present and likely future harms. We have said that ***HN20***[↑] "[a]n immediate interest is shown 'where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question.'" *Unified Sportsmen of Pa. ex rel. Their Members v. Pa. Game Comm'n, 903 A.2d 117, 123 (Pa. Cmwlth. 2006)* (quoting *George v. Pa. Pub. Util. Comm'n, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999)*). The zone of interest protected by the ERA is the rights of all the people of the Commonwealth, **including future generations [**45]** . *Pa. Envtl. Def. Found. 108 A.3d at 157*. The interests asserted here — the right to enjoy public natural resources and to not be harmed by the effects of environmental degradation now and in the future — are among the interests protected by the ERA.

For these reasons, Ms. McIntyre has standing, and we therefore overrule Respondents' POs alleging that Petitioners lack standing. (Exec. Branch POs ¶¶ 129-38; PUC POs ¶¶ 35-46.)[12]

C. Mandamus

HN21[↑] Mandamus is an extraordinary remedy "designed to compel the performance of a ministerial act or mandatory duty, as opposed to a discretionary act." *Unified Sportsmen, 903 A.2d at 125*. Mandamus cannot be used to direct the exercise of judgment or discretion in any particular way. *Clark v. Beard, 918 A.2d 155, 159 (Pa. Cmwlth. 2007)*. Nor will it issue to establish legal rights. Id. "We may issue a writ of mandamus only where the petitioner **[**46]** has a clear legal right to enforce the performance of a ministerial act or mandatory duty, the defendant has a corresponding duty to perform the act[,] and the petitioner has no other adequate or appropriate remedy." *Unified Sportsmen, 903 A.2d at 125*.

Petitioners argue that the ERA imposes certain mandatory duties, including the duty "to prevent and remedy the degradation, diminution, or depletion of our public natural resources." (Petitioners' Br. at 18 (quoting *Robinson Twp, 83 A.3d at 957*).) It is long established that ***HN22***[↑] the ERA charges the Commonwealth "with the duty of conserving and maintaining [public natural resources] for the benefit of the people." *Snelling v. Dep't of Transp., 27 Pa. Commw. 276, 366 A.2d 1298, 1305 (Pa. 1976)*. The question posed, however, is not whether the ERA imposes mandatory duties in the general sense, but whether the ERA provides Petitioners with a clear right to the performance of the **specific acts** for which Petitioners requests a writ, and whether the performance of such acts by Respondents is mandatory in nature.

We addressed the mandatory duties imposed upon executive branch **[*249]** agencies and officials in *Community College of Delaware County* and *National Solid Wastes Management Association*. Delaware County involved an appeal of the EHB's decision to reverse the grant of a sewage permit issued **[**47]** by the Department of Environmental Resources (DER).[13] The EHB concluded in that case that DER did not adequately consider the environmental impact of the proposed sewage lines in light of the requirements of the ERA. *Cmty. Coll. of Delaware Cnty., 342 A.2d at 474*. According to the EHB, prior to issuing the permit, DER was required to assess the long-range and indirect impact of the sewer project on the values expressed in the ERA, consider alternative methods of using the resources in question, and consider alternative methods of attaining the objectives sought by the permit. Id. Upon review, we evaluated the mandates of the Clean Streams Law,[14] the law governing DER's permit process. *Id. at 477-78*. Finding no requirement in the Clean Stream Law to conduct the analysis proscribed by the EHB, we held that by requiring DER to examine issues outside those required by the Clean Streams Law, the EHB imposed requirements that extended beyond what was intended by the General Assembly. *Id. at 480*. ***HN23***[↑] While we noted that the ERA "may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, **it cannot legally operate to expand the powers of a statutory agency . . . .**" *Id. at 482* (emphasis added). We held that the ERA "could operate **[**48]** **only to limit such powers as had been expressly delegated by proper enabling legislation.**" Id. (emphasis added).

This Court applied the above holding to an executive action in which the Governor issued Executive Order 1989-8 governing municipal waste disposal throughout the Commonwealth. The executive order effectively ordered DER to stop reviewing applications or issuing permits for new landfills until DER developed and adopted a state-wide Municipal Waste Management Plan. *Nat'l Solid Wastes Mgmt. Ass'n., 600 A.2d at 261*. The executive order further "set[] a standard for determining maximum and average waste volume limits for existing landfills." *Id. at 264*. Relevant to the instant matter, the Commonwealth argued that the Governor

[12] The remaining Petitioners assert identical causes of actions as Ms. McIntyre. Because we conclude that Ms. McIntyre has standing, we need not address whether the other Petitioners also have standing to reach the merits of this case. See *Callowhill Neighborhood Ass'n v. City of Philadelphia Zoning Bd. of Adjustment, 118 A.3d 1214, 1220-21 (Pa. Cmwlth.)*, appeal denied, ***129 A.3d 1244 (Pa. 2015)*** (concluding that because one objector in a zoning appeal raised all the arguments at issue below and has standing, the Court need not address whether the other objectors also have standing).

[13] DER was renamed as the Department of Environmental Protection (DEP) on July 1, 1995 pursuant to the *Section 501* of the Conservation and Natural Resources Act, Act of June 28, 1995, P.L 89, *71 P.S. § 1340.501*.

[14] Act of June 22, 1937, as amended, *35 P.S. §§ 691.1 - 691.1001*.

had the authority to issue Executive Order 1989-8 pursuant to the Governor's obligations under the ERA. *Id. at 265*. An association of waste management providers sought declaratory relief stating that the executive orders contravened statutes and associated regulations governing solid waste management, which, the **[**49]** association argued, formed a comprehensive scheme for the regulation of municipal waste landfills. *Id. at 262*. We agreed with the association. According to the Court:

> Our review of [municipal waste statutes] and the regulations promulgated pursuant thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the [disposal of solid waste]. Executive Order 1989-8 clearly conflicts with those acts and regulations, none of which provide the Governor with the authority to have issued such an executive order. . . . Additionally, we find no authority for Executive Order 1989-8 in [the ERA]. **The balancing of environmental and societal concerns, which the Commonwealth argues [*250] is mandated by [the ERA], was achieved through the legislative process which enacted Acts 97 and 101 and which promulgated the applicable regulations. [The ERA] does not give the Governor the authority to disturb that legislative scheme. Neither does it give him the authority to alter DER's responsibilities pursuant to that scheme.**

Id. at 265 (emphasis added) (quotations and citations omitted).

Because the ERA does not authorize Respondents to disturb the legislative scheme, we must assess whether the actions **[**50]** requested are otherwise made mandatory by the climate change legislative scheme. While the General Assembly has enacted a variety of provisions that directly and indirectly impact global climate change, the current climate change legislative scheme is primarily comprised of the Pennsylvania Climate Change Act (CCA),[15] and the Air Pollution Control Act (APCA).[16] Respondents acknowledge that they have mandatory duties pursuant to *Sections 3(c)* and *7(a)* of the CCA, *71 P.S. §§ 1361.3(c)*, *1361.7(a)*, to examine the potential impacts of climate change and to submit a report and an action plan to the Governor every three years. (Exec. Branch POs ¶¶ 17-18, 148.) Respondents further acknowledge that the General Assembly, through the APCA, bestowed upon them a duty to promulgate and implement rules and regulations to reduce CO2 and GHG emissions.[17] (Id. at ¶ 149.) Respondents argue that the legislative scheme does not require them to combat climate change through the steps outlined in Petitioners' request for a writ of mandamus.

Petitioners point to no legislative enactments or regulatory provisions, and we have found none, that mandate Respondents to do any of the actions sought in the writ. Under the current scheme, ***HN24***[↑] deciding whether to conduct particular studies, promulgate regulations or issue executive orders detailing the process **[**52]** by which environmental decisions are made, and to prepare and implement comprehensive regulations addressing climate change are either discretionary acts of government officials or is a task for the General Assembly.[18] Thus, we conclude

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[15] Act of July 9, 2008, P.L. 935, *71 P.S. §§ 1361.1 - 1361.8*.

[16] Act of January 8, 1960, P.L. 2119, as amended, *35 P.S. §§ 4001 - 4015*.

[17] Respondents' duties to this end derive, in part, from *Section 5(a)(8) of the APCA*, *35 P.S. § 4004(1)*, which requires the EQB to adopt rules and regulations to implement the federal Clean **[**51]** Air Act, *42 U.S.C. §§ 7401-7671q*. The United States Supreme Court, in *Massachusetts v. Environmental Protection Agency, 549 U.S. at 528-29*, had "little trouble" concluding that GHGs are "air pollutants" as defined by the Act and that the Environmental Protection Agency may regulate GHGs. According to the Court:

> The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air ... ." *§ 7602(g)* (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical ... substance [s] which [are] emitted into ... the ambient air." The statute is unambiguous.

Id. (quoting the Clean Air Act, *42 U.S.C. § 7602(g)*) (emphasis in original).

[18] We note that DEP conducted a thorough analysis of the activities it and other agencies are currently conducting pursuant to various statutory and regulatory requirements in response to Petitioner Funk's September 5, 2013 Rulemaking Petition that is attached to the Executive Branch Respondents' POs. (Exec. Branch POs, App. 2.)

that because Petitioners **[*251]** do not have a clear right to have Respondents conduct the requested studies, promulgate or implement the requested regulations, or issue the requested executive orders, mandamus will not lie and we sustain Respondents' POs to that end. (Exec. Branch POs ¶¶ 100-09; PUC POs ¶¶ 47-60.)

D. Declaratory Relief

Petitioners' remaining requests seek declaratory relief pursuant to the Declaratory Judgments Act, *42 Pa. C.S. §§ 7531 - 7541*.

> ***HN25***[↑] [T]he purpose of the Declaratory Judgment[s] Act . . . is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered," **[**53]** the availability of declaratory relief is limited by certain justiciability concerns. In order to sustain an action under the Declaratory Judgment[s] Act, a plaintiff must allege an interest which is direct, substantial and immediate, and must demonstrate the existence of a real or actual controversy, as the courts of this Commonwealth are generally proscribed from rendering decisions in the abstract or issuing purely advisory opinions.

Office of Governor v. Donahue, 626 Pa. 437, 98 A.3d 1223, 1229 (Pa. 2014) (citation omitted). ***HN26***[↑] "Granting or denying an action for a declaratory judgment is committed to the sound discretion of a court of original jurisdiction." *Pa. Envtl. Def. Found., 108 A.3d at 154*.

Petitioners request this Court to declare that: (1) the right to safe levels of CO_2 and other GHGs in the atmosphere is protected by the ERA and that Respondents have a duty to not act contrary to, and protect, that right; and (2) Respondents have failed to meet these obligations. (Declaratory Relief Requests ¶¶ 1-6.) Granting Petitioners' declaratory relief on these questions is not appropriate under the Declaratory Judgments Act because doing so would require us to enter an advisory opinion. ***HN27***[↑] "[D]eclaratory judgment must not be employed . . . as a medium for the rendition of an advisory opinion which may prove to be purely **[**54]** academic." *Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist., 526 Pa. 483, 587 A.2d 699, 701 (Pa. 1991)*. "Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request." *Rendell v. Pa. State Ethics Comm'n., 938 A.2d 554, 559 (Pa. Cmwlth. 2007)*.

Petitioners' request that we declare that an atmosphere with safe levels of CO_2 and other GHGs is protected by the ERA, that Respondents have a duty to protect the atmosphere through both not acting contrary to that right and by affirmatively protecting the atmosphere, and that Respondents have failed to uphold their obligations under the ERA "would provide a legal predicate to the success of [their mandamus] claims[,] but would otherwise have no independent significance." *Stackhouse, 892 A.2d at 63*. We have already determined that mandamus will not lie because Respondents do not have a mandatory duty to conduct the requested studies, promulgate or implement the requested regulation, or issue the requested executive orders. As there is also no indication that future litigation between the parties will turn on the questions raised by Petitioners' requests for declaratory relief, we decline to grant declaratory relief and sustain Respondents' POs alleging that declaratory relief in this context would have no practical effect. (Exec. Branch **[**55]** POs ¶¶ 68, 156-57; PUC POs ¶¶ 124-27.)

V. CONCLUSION

For the foregoing reasons, we sustain, in part, Respondents' POs alleging that the **[*252]** mandamus will not lie because Petitioners lack a clear right to performance of requested activities, and that declaratory relief would serve no practical purpose, and dismiss the Petition for Review with prejudice. We also conclude that granting Petitioners leave to amend their Petition for a third time would be futile given our legal conclusions herein.[19]

RENÉE COHN JUBELIRER, Judge

Senior Judge Colins concurs in the result only.

ORDER

NOW, July 26, 2016, the Preliminary Objections (POs) of Respondents to the Second Amended Petition for

[19] Because all claims have been dismissed, we need not address Respondents' remaining POs. Further, because we did not consider any of the information attached to Respondents' POs, we will not address Petitioners' argument in their brief that the POs constitute speaking demurrers.

Review Seeking Declaratory and Mandamus Relief in the above-captioned matter are **OVERRULED**, in part, and **SUSTAINED**, in part, as follows:

(1) Respondents' PO alleging that this Court lacks subject matter jurisdiction is **OVERRULED**;

(2) Respondents' POs alleging **[**56]** that Ashley Funk, et al. (Petitioners) lack standing to assert the claims in the Petition for Review are **OVERRULED**;

(3) Respondents' POs alleging that mandamus will not lie are **SUSTAINED**;

(4) Respondents' POs alleging that declaratory relief would amount to an advisory opinion are **SUSTAINED**.

The Second Amended Petition for Review Seeking Declaratory and Mandamus Relief filed by Petitioners is dismissed with prejudice.

RENÉE COHN JUBELIRER, Judge

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EXHIBIT S

Neutral
As of: January 31, 2023 1:19 PM Z

Sagoonick v. State

Supreme Court of Alaska

January 28, 2022, Decided

Supreme Court No. S-17297, No. 7583

Reporter
503 P.3d 777 *; 2022 Alas. LEXIS 13 **; 52 ELR 20018; 2022 WL 262268

SUMMER SAGOONICK; LINNEA L., a minor, by and through her guardian, HANK LENTFER; TASHA ELIZARDE; CADE TERADA; KAYTLYN KELLY; BRIAN CONWELL; JODE SPARKS; MARGARET "SEB" KURKLAND; LEXINE D., a minor, by and through her guardian, BERNADETTE DEMIENTIEFF; ELIZABETH BESSENYEY; VANESSA DUHRSEN; ANANDA ROSE AHTAHKEE L., a minor, by and through her guardian, GLEN "DUNE" LANKARD; GRIFFIN PLUSH; CECILY S. and LILA S., minors, by and through their guardians, MIRANDA WEISS and BOB SHAVELSON; and ESAU SINNOK, Appellants, v. STATE OF ALASKA; OFFICE OF GOVERNOR and GOVERNOR MIKE DUNLEAVY, in an official capacity; DEPARTMENT OF ENVIRONMENTAL CONSERVATION and COMMISSIONER JASON BRUNE, in an official capacity; DEPARTMENT OF NATURAL RESOURCES; ALASKA OIL & GAS CONSERVATION COMMISSION; ALASKA ENERGY AUTHORITY; and REGULATORY COMMISSION OF ALASKA, Appellees.

Subsequent History: Rehearing denied by *Sagoonick v. State, 2022 Alas. LEXIS 24 (Alaska, Feb. 25, 2022)*

Prior History: **[**1]** Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Gregory Miller, Judge. Superior Court No. 3 AN-17-09910 CI.

Core Terms

climate, plaintiffs', natural resources, declaratory relief, constitutional right, rights, emissions, resources, political question, injunctive relief, non-justiciable, carbon, declaratory judgment, superior court, courts, energy policy, prudential, public trust doctrine, delegated, implementing, rule-making, public trust, policies, atmosphere, declares, manage, fish, conservation, justiciable, violations

Case Summary

Overview

HOLDINGS: [1]-While plaintiffs alleged that the State's resource development was contributing to climate change and adversely affecting their lives, their declaratory relief claims did not necessarily present non-justiciable political questions, and the superior court properly dismissed them on prudential grounds; "science- and policy-based inquiry" and policy choices necessary to implement resource development were better reserved for the political branches; [2]-The superior court properly dismissed plaintiffs' declaratory relief claims because a declaratory judgment about the legislature's *Alaska Const. art. VIII* duties would do little more than restate the constitutional provisions while leaving the legislature to resolve how the State should fulfill those duties for the maximum benefit of Alaskans collectively.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Executive Controls

Constitutional Law > State Constitutional Operation

Governments > Public Lands > State Parks

HN1 **Separation of Powers, Executive Controls**

Alaska Const. art. VIII, § 2 commands the legislature to

provide for the utilization, development, and conservation of all natural resources belonging to the State of Alaska. To satisfy that obligation, the legislature establishes numerous interrelated statutory policies and delegates implementation authority to the executive branch.

Governments > Local Governments > Property

Governments > Public Lands

HN2[] Local Governments, Property

The Alaska Legislature directs that state lands be managed to balance both public and private purposes and that land use choice be determined through inventory, planning, and classification processes established in AS 38.04.060-.070.

Administrative Law > Separation of Powers > Legislative Controls > Explicit Delegation of Authority

Governments > Public Lands

HN3[] Legislative Controls, Explicit Delegation of Authority

The Alaska Legislature delegates to the Alaska Department of Natural Resources (DNR), an executive branch agency, the duty to implement the Legislature's general public lands policies. DNR classifies, and if necessary reclassifies, state lands for various uses. DNR also has a duty to work with local governments and the public to adopt, maintain, and revise regional land use plans.

Business & Corporate Compliance > ... > Energy & Utilities Law > Federal Oil & Gas Leases > Local & State Regulation

Environmental Law > Natural Resources & Public Lands > Mineral Mining & Resources

Governments > Public Lands > State Parks

Energy & Utilities Law > Discovery, Exploration & Recovery > Exploration Obligations & Rights

Business & Corporate Compliance > ... > Real Property Law > Mining > Regulations

HN4[] Federal Oil & Gas Leases, Local & State Regulation

The Alaska Legislature delegates to the Alaska Department of Natural Resources (DNR) authority to manage exploration, development, and mining of resources on state lands and the authority to lease state lands for oil and gas exploration. But the Legislature delegates to the Alaska Oil and Gas Conservation Commission, a different executive branch agency, the authority to regulate oil and gas development for conservation purposes.

Administrative Law > Separation of Powers > Executive Controls

Governments > Public Lands > State Parks

Constitutional Law > State Constitutional Operation

HN5[] Separation of Powers, Executive Controls

When an executive agency decision about natural resources is challenged under Alaska Const. art. VIII, the Alaska Supreme Court's role is limited to ensuring that the agency has taken a hard look at all factors material and relevant to the public interest.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] Standards of Review, De Novo Review

An appellate court reviews a motion to dismiss de novo, construing the complaint liberally and accepting as true all factual allegations, and it generally does not consider materials outside the complaint and its attachments. Motions to dismiss are disfavored, and it must be beyond doubt that the plaintiff can prove no set of facts that would entitle the plaintiff to relief before dismissal will be granted. Even if the relief demanded is unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts. An appellate court reviews de novo the

question of whether a case should be dismissed on prudential grounds.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN7[] Case or Controversy, Ripeness

Determining whether claims are justiciable requires answering two questions: (1) Whether deciding the claim would require the court to answer questions that are better directed to the legislative or executive branches of government and (2) whether there are other reasons, such as ripeness, mootness, or standing, that persuade the court that, though the case is one it is institutionally capable of deciding, prudence counsels that it not do so.

Constitutional Law > The Judiciary > Case or Controversy > Political Questions

HN8[] Case or Controversy, Political Questions

The separation of powers doctrine prohibits Alaska courts from resolving purely political questions. But merely characterizing a case as political in nature will not render it immune from judicial scrutiny. There are no exact boundaries between the political and the justiciable, but courts identify political questions by applying the test announced by the United States Supreme Court in Baker. Baker lists six factors, at least one of which is prominent on the surface of any case involving a political question: 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of the formulations is inextricable from the case, there should be no dismissal for non-justiciability on the ground of a political question's presence.

Constitutional Law > The Judiciary > Case or Controversy > Political Questions

HN9[] Case or Controversy, Political Questions

The relationship between the judiciary and the coordinate branches of the government gives rise to a political question. The political question doctrine maintains the separation of powers by excluding from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the political branches of government.

Constitutional Law > Congressional Duties & Powers > Delegation of Authority

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

Constitutional Law > State Constitutional Operation

HN10[] Congressional Duties & Powers, Delegation of Authority

Alaska Const. art. VIII enshrines an overarching constitutional policy of making natural public resources available for maximum use consistent with the public interest. It explicitly directs the legislature to manage and develop the State's natural resources for the maximum common use and benefit of all Alaskans. In light of the constitutional delegation of authority, the Alaska Supreme Court's role in reviewing legislative decisions about management and development of natural resources is necessarily limited. The Supreme Court cannot, and should not, substitute its judgment for that of the political branches.

Governments > Courts > Authority to Adjudicate

HN11[] Courts, Authority to Adjudicate

The Alaska Supreme Court has a duty to ensure compliance with constitutional principles, and it has a duty to redress constitutional rights violations.

Constitutional Law > The Judiciary > Case or Controversy > Political Questions

HN12 **Case or Controversy, Political Questions**

Science- and policy-based inquiries and policy choices necessary to implement resource development are better reserved for the political branches.

Constitutional Law > The Judiciary > Case or Controversy > Political Questions

Environmental Law > Natural Resources & Public Lands > Public Trust Doctrine

Governments > Public Lands > Public Trust Doctrine

Constitutional Law > State Constitutional Operation

HN13 **Case or Controversy, Political Questions**

The Baker factors for identifying non-justiciable issues do not apply to judicial interpretations of the constitution. Under Alaska's constitutional structure of government, the judicial branch has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution. Claims seeking primarily an interpretation of the Alaska Constitution and the public trust doctrine do not present non-justiciable political questions.

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

HN14 **Case or Controversy, Advisory Opinions**

A claim must present an actual controversy that is appropriate for judicial determination because it is definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Governments > Courts > Authority to Adjudicate

HN15 **Courts, Authority to Adjudicate**

Although Alaska courts may issue declaratory judgment when there is an actual controversy, courts are not required to grant declaratory relief because it is a non-obligatory remedy. Practicality and wise judicial administration thus guide the discretionary decision to grant or deny declaratory relief. And if a court declines to grant declaratory relief, it need not undertake a wasteful expenditure of judicial resources in the futile exercise of hearing a case on the merits first.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

Governments > Courts > Authority to Adjudicate

HN16 **State Declaratory Judgments, Grounds for Relief**

Prudential concerns often caution against issuing declaratory relief. Declaratory judgments are rendered to clarify and settle legal relations, and to terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. Prudence therefore dictates that courts should not grant declaratory relief unless it will meaningfully accomplish those goals.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN17 **Standards of Review, De Novo Standard of Review**

A court applies the reasonable and not arbitrary standard to agency rule-making decisions about adopting regulations. For questions of law involving agency expertise, a court applies the reasonable basis standard and must confirm that the agency has genuinely engaged in reasoned decision making and must verify that the agency has not failed to consider an important factor in making its decision. But questions of constitutional interpretation are reviewed de novo under the substitution of judgment standard.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of

Protection

HN18[↓] Standards of Review, Arbitrary & Capricious Standard of Review

When exercising the power to look for administrative compliance with the demands of due process, courts consider whether the agency's decision was reasonable and not arbitrary and whether it complied with the applicable statutes. A decision is arbitrary if an agency fails to consider an important factor in making its decision; an agency must take a hard look at the salient problems and genuinely engage in reasoned decision making.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

HN19[↓] Rule Application & Interpretation, Validity

Regulations must be consistent with and reasonably necessary to implement the statutes authorizing their adoption. A regulation is invalid if it conflicts with other statutes.

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Judges: Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney, Justices. WINFREE, Justice. MAASSEN and CARNEY, Justices, dissenting in part.

Opinion by: WINFREE

* We thank amici curiae for their participation in this appeal.

Opinion

[*782] I. INTRODUCTION

Alaska Constitutional Convention keynote speaker E.L. "Bob" Bartlett, territorial Alaska's delegate to Congress and later one of Alaska's original United States Senators, spoke on November 8, 1955 about the importance of Alaska's natural resources for future generations: **[**2]** "[F]ifty years from now, the people of Alaska may very well judge . . . this Convention not by the decisions taken upon issues like local government, apportionment, and the structure and powers of the three branches of government, but rather by the decision taken upon the vital issue of resources policy."[1] Bartlett particularly stressed the need to protect Alaska's natural resources from the "robber baron philosophy" that in the past had damaged the territory.[2] And a convention consultant later noted: "[W]hat we say about natural resources is not limited simply to lands and to fish . . ., but rather being concerned with how we as human beings are going to utilize those so that they become a part of the continuing future development of an area like Alaska."[3]

More than six decades after Alaska's constitution was drafted, we consider its natural resources provisions in a manner likely not contemplated by Bartlett or the convention delegates. Concerns about protecting and developing natural resources for the State's financial support now co-exist with concerns that constitutionally driven resource development creates an existential **[**3]** threat to human life and therefore itself violates individuals' fundamental rights under Alaska's constitution.

[1] 6 Proceedings of the Alaska Constitutional Convention (PACC) App. II at 3 (Nov. 8, 1955) (address of Cong. Del. E.L. Bartlett); *see also* VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 130 (1975).

[2] FISCHER, *supra* note 1, at 130; *see also* *Mallott v. Stand for Salmon, 431 P.3d 159, 164 (Alaska 2018)* ("For more than two centuries, Alaska's economy has been centered around the development and harnessing of its natural resources, from the fur trade of the 18th and 19th Centuries and the gold rushes of the 1890s, to the growth of copper mining and commercial fishing in the early 20th Century and the oil discoveries of the 1950s and 1960s.").

[3] 1 PACC 475 (Dec. 1, 1955) (statement of Vincent Ostrom).

A number of young Alaskans — including several Alaska Natives — sued the State, alleging that its resource development is contributing to climate change and adversely affecting their lives. They sought declaratory and injunctive relief based on allegations that the State has, through existing policies and past actions, violated both the constitutional natural resources provisions and their individual constitutional rights. The superior court dismissed the lawsuit, concluding that the injunctive relief claims presented non-justiciable political questions better left to the other branches of government and that the declaratory relief claims should, as a matter of judicial prudence, be left for actual controversies arising from specific actions by Alaska's legislative and executive branches. The young Alaskans appeal, raising compelling concerns about climate change, resource development, and Alaska's future. But we conclude that the superior court correctly dismissed their lawsuit.

II. SEPARATION OF POWERS IN ALASKA'S NATURAL RESOURCES MANAGEMENT

A. Constitutional Natural Resource [**4] Policy And Framework — Article VIII

It was widely recognized that the Alaska Territory's future success as a state would depend upon natural resource development.[4] Statehood bills pending during the Constitutional Convention contemplated transferring **[*783]** to the proposed state substantial federal land, subsurface mineral rights, and the authority to manage fish and wildlife.[5] The convention delegates "sought to enshrine in the state constitution the principle that the resources of Alaska must be managed for the long-run benefit of the people as a whole."[6] Rather than developing a detailed constitutional code governing resource management,[7] the delegates sought to protect the long-term viability of Alaska's natural resources from "the indifference or avarice of future generations" by fixing "the general concept of the public interest" in both Alaska law and "the consciousness of Alaskans."[8] The delegates incorporated concepts such as "common use"[9] and "sustained yield"[10] to promote "a harmonious

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[4] GORDON HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 129-30 (5th ed. 2021), available at: http://akleg.gov/docs/pdf/citizens_guide.pdf; *seealso* PUBLIC ADMINISTRATION SERVICE, THE ALASKAN CONSTITUTION AND THE STATE PATRIMONY: THE CONSTITUTION AND NATURAL RESOURCES 14 (1955) (stating, in report to convention delegates, that "[f]ew will quarrel with the statement that Alaska's greatest single source of potential wealth lies below the surface of the land").

[5] FISCHER, *supra* note 1, at 129-30 ("According to the terms of pending Alaska statehood bills, more than 100 million acres would be transferred from federal to state ownership."); HARRISON, *supra* note 4, at 129; *cf.* *Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339, 340-41 (1958)* (allowing Alaska to select over 100 million acres of federal public lands and contemplating eventual transfer to Alaska of authority to manage fish and wild life); ***Alaska Land Transfer Acceleration Act, Pub. L. No. 108-452, 118 Stat. 3575 (2004)*** (facilitating transfer to Alaska of some federal lands selected pursuant to Alaska Statehood Act).

[6] HARRISON, *supra* note 4, at 129. *But see* William L. Iggiagruk Hensley & John Sky Starkey, *Alaska Native Perspectives on the Alaska Constitution*, 35:2 ALASKA L. REV. 129-37 (2018) (asserting connection between insufficient representation of Alaska Natives at Constitutional Convention and insufficient protections for Alaska Native rights under *article VIII*).

[7] *See* *Native Vill. of Elim v. State, 990 P.2d 1, 7 (Alaska 1999)* ("The plain language of [*article VIII, section 4*] requires resource managers to apply . . . principles; it does not mandate the use of a predetermined formula, quantitative or qualitative.").

[8] HARRISON, *supra* note 4, at 129; *see* *West v. State, Bd. of Game, 248 P.3d 689, 696 (Alaska 2010)* ("The [natural resources] article's primary purpose is to balance maximum use of natural resources with their continued availability to future generations." (alteration in original) (quoting THE ALASKA CONSTITUTIONAL CONVENTION, PROPOSED CONSTITUTION FOR THE STATE OF ALASKA: A REPORT TO THE PEOPLE OF ALASKA (1956))).

[9] *Alaska Const. art. VIII, § 3* ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); *see* *Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 493 (Alaska 1988)* ("[The common use clause] was a unique provision, not modeled on any other state constitution. Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife[,] and waters.").

[10] *Alaska Const. art. VIII, § 4* ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."). The glossary definition of "sustained yield" provided by the Constitutional Convention's Resources

balance between consumption, preservation, and expansion of natural resources."[11] They further protected the public interest by requiring public notice and development of statutory guidelines for state property **[**5]** disposals.[12]

Article VIII, sections 1 and *2 of the Alaska Constitution* express Alaska's resource development **[*784]** policy and direct the legislature to implement it:

> Section 1. Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.[13]
>
> Section 2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.[14]

Beyond those sections, *article VIII* explicitly addresses "commonuse"[15] and "sustained yield";[16] the "public domain" available for settlement and certain property uses;[17] disposition of property interests;[18] mineral rights;[19] water rights;[20] fishing rights;[21] private property

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Committee is: "[T]he term 'sustained yield principle' . . . . denotes conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed." RESOURCES COMMITTEE OF THE ALASKA CONSTITUTIONAL CONVENTION, Terms (1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20210.pdf; *see West, 248 P.3d at 695-96* (discussing broad meaning of "sustained yield" in wildlife context); *see also AS 38.04.910(12)* (defining "sustained yield" in public lands context as "the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the state land consistent with multiple use").

[11] FISCHER, *supra* note 1, at 130; *see also* GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION 157-59 (2011); HARRISON, *supra* note 4, at 130.

[12] *Alaska Const. art. VIII, § 10* ("No disposals or leases of state lands . . . shall be made without prior public notice and other safeguards of the public interest . . . ."); *id.* at *§§ 9-10* (authorizing legislature to regulate state land disposals); *see* HARRISON, *supra* note 4, at 130 ("With certain exceptions, [*article VIII*] allows the government to sell, lease or give away public land and resources, but it may do so only in accordance with constitutional and statutory guidelines, and all transactions must be in full public view.").

[13] *See* HARRISON, *supra* note 4, at 131 ("This is an emphatic statement that the policy of the state is to encourage the development of its land and resources, but in a manner that recognizes the collective interests of the people as the owners of these lands and resources."); *see also* MCBEATH, *supra* note 11, at 159 ("Delegates to the constitutional convention were uniform in their belief that Alaska's natural resources had been 'locked up' and devalued by the negligent actions of the federal government and absentee owners . . . . Thus, the delegates were committed to the maximum development of Alaska's resources. However, they hedged their need to exploit resources with the requirement that resource use was a public trust.").

[14] *See* HARRISON, *supra* note 4, at 131 ("This section is a broad grant of legislative authority to implement the policy enunciated in Section 1 . . . . In addition to utilization and development, conservation appears as an objective of resource management. The delegates understood the term in its traditional sense of 'wise use.' "); MCBEATH **[**6]**, *supra* note 11, at 159 (stating that delegates "were influenced by the modern principles of resource conservation and use, such as sustained yield and multiple use, which they made the constitutional objectives for all resource policy decisions, as expressed in the phrase, 'maximum use consistent with the public interest' " (quoting *AlaskaConst. art. VIII, §1*)); *see also Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 903 (Alaska 1981)* ("The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to make it available for use.").

[15] *See Alaska Const. art. VIII, § 3*.

[16] *See id. § 4*.

[17] *See id. §§ 5-7*; *State, Dep't of Nat. Res. v. Alaska Riverways, Inc., 232 P.3d 1203, 1212-14 (Alaska 2010)* (discussing *article VIII, section 6* and "public domain").

[18] *Alaska Const. art. VIII, § 8* (regarding leasing), *§ 9* (regarding sales and grants), *§ 10* (regarding public notice).

[19] *Id. § 11* (regarding mineral rights), *§ 12* (regarding mineral leases).

[20] *Id. § 13* (regarding water rights), *§ 14* (regarding access to navigable waters); *see Tulkisarmute Native Cmty. Council v. Heinze, 898 P.2d 935, 940-41 (Alaska 1995)* (acknowledging *article VIII, section 13* constitutionalizes water appropriation doctrine).

[21] *Alaska Const. art. VIII, § 15* ("No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of

rights;[22] equal treatment with respect to the use of natural resources;[23] and **[*785]** the right of eminent domain for the access, extraction, and use of natural resources.[24]

Article VIII was, when approved, the most comprehensive state constitution provision addressing natural resource management policies and principles,[25] and it reflects careful consideration of each government branch's role in managing Alaska's resources and textually establishes the legislature's importance in this policy-making area. We consider the legislature's ensuing statutory policies and the young Alaskans' claims in light of this constitutional framework.

B. The Political Branches' Roles Under Article VIII

HN1[↑] *Article VIII, section 2*, commands the legislature "to provide for the utilization, development, and conservation of all natural resources belonging to the State." To satisfy **[**7]** this obligation the legislature has established numerous interrelated statutory policies and delegated implementation authority to the executive branch. We briefly describe the legislature's policies, starting with land use policies, continuing with specific relevant policies, and concluding with an environmental protection policy.

1. General land use and management policies

Title 38 of the Alaska Statutes contains the legislature's general public land enactments. The legislature's overall land management policy mirrors *article VIII, section 1*: "It is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for the maximum use consistent with the public interest."[26] On a more detailed level *HN2*[↑] the legislature has directed that state lands be managed to balance both public and private purposes and that land use choice be determined through inventory, planning, and classification processes established in *AS*

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the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fisherman and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State."); *see McDowell v. State, 785 P.2d 1, 5-10 (Alaska 1989)* ("*[S]ection 15* . . . was meant to ensure an equal right to participate in fisheries, regardless of where one resides."); *Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 903-04 (Alaska 1981)* (interpreting *article VIII, section 15*).

[22] *Alaska Const. art. VIII, § 16* ("No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."); *see Alaska Riverways, Inc., 232 P.3d at 1213-14* (interpreting *article VIII, section 16* as applied to shore land improvements made after statehood).

[23] *Alaska Const. art. VIII, § 17* ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."); *see McDowell, 785 P.2d at 9-11* ("[A]ny system which closes participation to some, but not all, [fish and game permit] applicants will necessarily create a tension with *article VIII, section 17*."); *Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 498 n.17 (Alaska 1988)* ("[W]e [have] noted that [*article VIII, section 17*] may require 'more stringent review' of a statute than does the *equal protection clause* in cases involving natural resources." (quoting *Gilman v. Martin, 662 P.2d 120, 126 (Alaska 1983)*)).

[24] *Alaska Const. art. VIII, § 18* (regarding eminent domain for private ways of necessity to obtain access to natural resources).

[25] *See* HARRISON, *supra* note 4, at 129 ("In drafting [article VIII], delegates were unable to refer to other state constitutions or the Model State Constitution for ideas and guidance, as none of them dealt with natural resource policy as broadly as the Alaskans thought necessary. At the time of Alaska's constitutional convention, only the Hawaii Constitution addressed natural resource policy in a separate article, and that article was brief." (emphasis omitted)). *But cf.* William L. Iggiagruk Hensley & John Sky Starkey, *Alaska Native Perspectives on the Alaska Constitution*, 35:2 ALASKA L. REV. 129-37 (2018) (asserting connection between insufficient representation of Alaska Natives at Constitutional Convention and insufficient protections for Alaska Native rights under *article VIII*).

[26] *AS 38.05.910*; *see Alaska Survival v. State, Dep't of Nat. Res., 723 P.2d 1281, 1285 (Alaska 1986)* ("Alaska's Constitution and the *Alaska Land Act, AS 38.05*, express a policy of encouraging settlement of the state's lands 'by making them available for maximum use consistent with the public interest.' " (quoting *Alaska Const. art. VIII, § 1*; *AS 38.05.910*)), *superseded on other grounds by statute*, ch. 75, § 10, SLA 1987, *as recognized in Sullivan v. Resisting Env't Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 630 (Alaska 2013)*.

38.04.060-.070.[27]

HN3[↑] The legislature has delegated to the Department of Natural Resources (DNR), an executive branch agency, the duty to implement the legislature's general public lands policies.[28] DNR classifies, **[**8]** and if necessary reclassifies, state lands for various uses.[29] **[*786]** DNR also has a duty to work with local governments and the public to adopt, maintain, and revise regional land use plans.[30]

HN4[↑] The legislature has further delegated to DNR authority to manage "exploration, development, and mining" of resources on state lands[31] and the authority to lease state lands for oil and gas exploration.[32] But the legislature has delegated to the Alaska Oil and Gas Conservation Commission, a different executive branch agency, the authority to regulate oil and gas development for conservation purposes.[33]

2. Specific development policies

The legislature has enacted other statutory policies addressing fundamental aspects of Alaska's natural resources management. The legislature's long-standing economic development policy is found in AS 44.99.100(a):[34]

> To further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state's abundant natural resources and productive capacity. It is the legislature's intent that this development
>
> (1) offer long-term benefits **[**9]** and increased employment to Alaskans by strengthening and diversifying the state's economic base and encouraging new activities;
> (2) provide opportunities for increased personal income or reduced living costs by creating activity in economic sectors;
> (3) have a positive effect on the revenue needs and fiscal conditions of the state and local communities; [and]
> (4) be undertaken after consideration of the social and economic views of citizens impacted by the development, and only after adequate protection is assured for Alaska's environment.

The legislature has made a related finding that Alaskans have an interest in oil and gas development to "maximize the economic . . . recovery of those resources" and that it is in the State's best interests to encourage oil and gas resource assessments allowing flexibility in leasing and minimizing the adverse impact of exploration, development, production, and transportation activity.[35]

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[27] AS 38.04.005-.015 (stating general land classification and use policy, public interest in making land available for private use, and public interest in retaining state land in public ownership).

[28] AS 38.04.060(a)-(b) (outlining commissioner's duties); AS 38.04.910(1) (identifying "commissioner" as commissioner of natural resources).

[29] AS 38.04.065(e); AS 38.05.300; *see also* State v. Weidner, 684 P.2d 103, 107 (Alaska 1984) (stating that AS 38.04.065 generally requires land use plans prior to land classifications); *cf.* AS 38.05.300(a), (c) (establishing DNR's discretion for classification but restricting discretion to close large parcels of land to multiple-purpose use and to preclude mineral exploration and mining unless necessary for land disposal or certain projects). We previously have discussed Alaska's land use management procedures in more detail. *See generally* State, Dep't of Nat. Res. v. Nondalton Tribal Council, 268 P.3d 293, 294-96 (Alaska 2012); Alaska Survival, 723 P.2d at 1289-91.

[30] AS 38.04.065(a), (d), (e); *see also* Denali Citizens Council v. State, Dep't of Nat. Res., 318 P.3d 380, 389 (Alaska 2014) (noting statutory duty to engage in regional land use planning does not indicate plan provisions are legally enforceable against DNR); Nondalton Tribal Council, 268 P.3d at 304 n.93 (stating that although regional land use plan informs future DNR policy, it likely is not enforceable by public against DNR).

[31] AS 27.05.010; AS 38.05.005-.020, .035, .135-.177.

[32] AS 38.05.010, .131-.134, .180.

[33] AS 31.05.005-.170; Alaskan Crude Corp. v. State, Dep't of Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 414 n.3 (Alaska 2011) (describing commission as independent quasi-judicial agency with authority over all state-regulated land to regulate to prevent waste, ensure greater recovery, protect correlative rights and underground water, and further public health and safety).

[34] Ch. 63, § 1, SLA 1985.

[35] AS 38.05.180(a) (concerning leasing state lands for oil and

The legislature's more recent Arctic policy focuses on economic and natural resource development above the Arctic Circle, along with related environmental concerns, and is found in AS 44.99.105(a):[36]

> It is the policy of the state, as it relates to the Arctic, to . . . uphold the state's **[**10]** commitment to economically vibrant communities sustained by development activities consistent with the state's responsibility for a healthy environment, including efforts to . . . ensure that Arctic residents and communities benefit from economic and resource development activities in the region; . . . sustain current, and develop new, approaches for responding to a changing climate, and adapt to the challenges of coastal erosion, permafrost melt, and ocean acidification; . . . collaborate with all levels of government, tribes, industry, and nongovernmental organizations to achieve transparent and inclusive Arctic decision-making, including efforts to . . . value and strengthen the resilience of communities and respect and integrate the culture, **[*787]** language, and knowledge of Arctic peoples[;] . . . recognize Arctic indigenous peoples' cultures and unique relationship to the environment, including traditional reliance on a subsistence way of life for food security, which provides a spiritual connection to the land and the sea; . . . [and] safeguard the fish, wildlife, and environment of the Arctic for the benefit of residents of the state; . . . .

The legislature's stated (but uncodified) **[**11]** intent underlying the Arctic policy included recognition that although climate change presents risks, continuing resource development in an environmentally and socially responsible manner is essential to Alaska's economy and residents.[37]

The legislature's long-standing mineral policy is found in AS 44.99.110:[38]

> The legislature, acting under art. VIII, sec. 1 of the Constitution of the State of Alaska, in an effort to further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources . . ., including metals, industrial minerals, and coal, declares as the mineral policy of the state that
>
> > (1) mineral exploration and development be given fair and equitable consideration with other resource uses in the multiple use management of state land; . . . .

The legislature's relatively recent energy policy is found in AS 44.99.115:[39]

> The State of Alaska recognizes that the state's economic prosperity is dependent on . . . energy to supply the state's . . . needs. The state also recognizes that worldwide supply and demand for fossil fuels and concerns about global **[**12]** climate change will affect the price of fossil fuels . . . . [I]t is the policy of the state to . . . . encourage economic development by . . . promoting the development of renewable [energy sources] . . . . [and] promoting the development, transport, and efficient use of nonrenewable and alternative energy resources, including natural gas, coal, oil, gas hydrates, heavy oil, and nuclear energy for use by Alaskans and for export . . . .

The legislature's stated (but uncodified) intent underlying the energy policy focused on energy efficiency, calling for a 15% increase in energy efficiency between 2010 and 2020 and for 50% of electricity generation through renewable resources by 2025, while emphasizing "remain[ing] a leader in petroleum and natural gas production and becom[ing] a leader in renewable and alternative energy development."[40]

3. Environmental protection and public trust policy

The legislature's long-standing environmental protection and public trust policy is found in AS 46.03.010:[41]

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gas development).

[36] Ch. 10, § 2, SLA 2015.

[37] *Id.* § 1 ("[C]ontinuing development of the state's natural resources in an environmentally and socially responsible manner is essential to the development of the state's economy and to the well-being of the residents of the state . . . .").

[38] Ch. 138, § 1, SLA 1988.

[39] Ch. 82, § 2, SLA 2010.

[40] *Id.* § 1.

[41] Ch. 120, § 3, SLA 1971. This policy is part of legislation creating the Alaska Department of Environmental Conservation and granting authority to regulate pollution. *Id.* §

> (a) It is the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the [**13] people of the state and their overall economic and social well-being.
> (b) It is the policy of the state to . . . develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.[42]

[*788] C. The Judiciary's Role Under Article VIII

Article VIII effectively limits the judiciary's role in implementing Alaska's natural resources policies. In *Sullivan v. REDOIL* we quoted *article VIII, sections 1* and *2*, and then stated that it is the legislature's "duty to determine the procedures necessary for ensuring . . . the State's resources are used 'for the maximum benefit of its people.' "[43] We clarified that we do not "provide instruction on *how* the State should determine what action would be for the maximum benefit of the Alaskan people."[44] We said our role instead is ensuring that constitutional principles are followed, particularly the mandate that "natural resources are to be made 'available for maximum use consistent with the public interest.' "[45] ***HN5***[↑] When an executive agency decision about natural resources is challenged under *article VIII*, our role thus is limited to ensuring that the agency has "taken a 'hard look' [**14] at all factors material and relevant to the public interest."[46]

As we explained in *Sullivan*:

> The "hard look" doctrine for reviewing DNR's decisions first appeared in *Hammond v. North Slope Borough*, when we referenced a United States Supreme Court statement that the "court cannot substitute its judgment as to environmental consequences, but should only ensure that the agency has taken a 'hard look.' " A year later, in *Southeast Alaska Conservation Council, Inc. v. State*, we stated that our role is to
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> > ensure that the agency "has given reasoned discretion to all the material facts and issues." The court exercises this aspect of its supervisory role with particular vigilance if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a '*hard look*' at the salient problems and has not genuinely engaged in reasoned decision making."
>
> Since then, we have used the "hard look" standard when reviewing agency decisions on resource uses.[47]

This is in stark contrast to how we review claims about individual constitutional rights violations.[48]

1-3.

[42] *Article VIII of the Alaska Constitution* also gives rise to some public trust obligations. *See Brooks v. Wright, 971 P.2d 1025, 1031 (Alaska 1999)* ("Instead of recognizing the creation of a public trust in [individual article VIII] clauses per se, we have noted that 'the common use clause was intended to engraft in our constitution certain trust principles . . . .' " (quoting *Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 496 (Alaska 1988)*)). Alaska's constitutional public trust principles have been discussed and applied in various contexts, including: subsistence hunting regulations, *McDowell v. State, 785 P.2d 1, 16-19 (Alaska 1989)* (Rabinowitz, J., dissenting); hunting licensing, *Owsichek, 763 P.2d at 494-97*; fishing regulations, *Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314, 1317-18 (Alaska 1994)*; riparian land ownership, *State, Dep't of Nat. Res. v. Alaska Riverways, Inc., 232 P.3d 1203, 1211-12 (Alaska 2010)*; and wildlife management, *Brooks, 971 P.2d at 1030-33*. We previously have contemplated the possibility that the State's constitutional public trust obligations may be implicated by harm to the atmosphere insofar as it is "inextricably linked" to "recognized public trust resources such as water, shorelines, wildlife, and fish." *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1103 (Alaska 2014)*.

[43] *311 P.3d. 625, 634-35 (Alaska 2013)* (quoting *Alaska Const. art. VIII, § 2*).

[44] *Id. at 635* (emphasis in original).

[45] *Id.*

[46] *Id.* (quoting *Kachemak Bay Conservation Soc'y v. State, Dep't of Nat. Res., 6 P.3d 270, 294 (Alaska 2000)*).

[47] *Id. at 635 n.46* (emphasis in original) (citations omitted) (first quoting *Hammond v. North Slope Borough, 645 P.2d 750, 759 (Alaska 1982)*; and then quoting *Se. Alaska Conservation Council v. State, 665 P.2d 544, 549 (Alaska 1983)*).

[48] *See, e.g., Larson v. Dep't of Corr., Bd. of Parole, 476 P.3d 293, 301 n.55 (Alaska 2020)* (" 'The right to privacy is not absolute' but is balanced against conflicting rights and interests." (quoting *Jones v. Jennings, 788 P.2d 732, 738*

(Alaska 1990)); Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1153 (Alaska 2016) ("Where a compelling state interest is shown, the right [to privacy] may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare." (quoting Gray v. State, 525 P.2d 524, 528 (Alaska 1974))).

For substantive due process violation claims, we have employed three review levels — strict scrutiny, intermediate scrutiny, and rational basis review:

> Under strict scrutiny, when a law substantially burdens a fundamental right, the State must articulate a *compelling* ***[**15]*** state interest that justifies infringing the right and must demonstrate that no less restrictive means of advancing the state interest exists. Under intermediate scrutiny, when state action interferes with an individual's liberty interest that is not characterized as fundamental, the State must show a legitimate state interest and a "close and substantial relationship" between that interest and the chosen means of achieving it. Under rational basis review, the party claiming a substantive due process violation has the burden of showing that there is no rational basis for the challenged legislation. "This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification."

Doe v. Dep't of Pub. Safety, 444 P.3d 116, 125-26 (Alaska 2019) (emphasis in original) (first quoting Sampson v. State, 31 P.3d 88, 91 (Alaska 2001); and then quoting Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974)).

When evaluating equal protection claims, we apply a "flexible 'sliding scale' test" involving a three-step analysis:

> First, we determine what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of the interest is the most important variable in fixing the appropriate level of review. Second, we examine the purposes served by a challenged statute. Depending on the level of review determined, the state may **[**16]** be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest. Third, an evaluation of the state's interest in the particular means employed to further its goals mut be undertaken.

Jones v. State, Dep't of Revenue, 441 P.3d 966, 978 (Alaska 2019) (quoting Ross v. State, Dep't of Revenue, 292 P.3d 906, 909-10 (Alaska 2012)).

[*789] III. FACTS AND PROCEEDINGS IN THIS CASE

In August 2017 over a dozen young Alaskans (plaintiffs[49]) petitioned the Alaska Department of Environmental Conservation to adopt an agency rule ensuring carbon dioxide[50] and greenhouse gas emissions[51] (collectively carbon emissions) have a "reduction trajectory that is based on best climate science."[52] The proposed rule called for the Department to "regulate stationary and mobile sources of [carbon] emissions and the extraction of fossil fuels" in Alaska to reduce carbon emissions to "at least 85% below 1990 levels by 2050" — an estimated global reduction necessary to slow climate change and lower global atmospheric carbon emission levels to a specified level by 2100. The proposed rule also required the Department to publish an annual accounting of the State's progress in addressing carbon emissions and to "adopt a Climate Action Plan to meet **[**17]** the

[49] Plaintiffs — some of whom are expressly stated to be Alaska Natives — and their ages when suit was filed are: Summer Sagoonick of Unalakleet, 17; Esau Sinnok of Shishmaref, 20; Linnea L. of Gustavus, 14; Tasha Elizarde of Juneau, 19; Cade Terada of Dutch Harbor, 19; Kaytlyn Kelly of Palmer, 18; Brian Conwell of Dutch Harbor, 19; Jode Sparks of Sterling, 18; Margaret "Seb" Kurland of Juneau, 18; Lexine D. of Fort Yukon, 9; Elizabeth Bessenyey of Anchorage, 18; Vanessa Duhrsen of Anchorage, 18; Ananda Rose Ahtahkee L. of Anchorage, 8; Griffin Plush of Seward, 21; and Cecily and Lila S. of Homer, 8 and 6, respectively.

[50] *See* Gökçe Günel, *What Is Carbon Dioxide? When Is Carbon Dioxide?*, 39 POL. & LEGAL ANTHROPOLOGY REV. 33 (2016) ("The *Oxford English Dictionary* defines carbon dioxide as 'a colorless, odorless gas produced by the burning of organic compounds and fossil fuels, by the processes of respiration and decomposition, and by volcanic activity, and absorbed by plants during photosynthesis.' . . . . In smaller type, the *OED* concludes[:] 'The increasing quantity of atmospheric carbon dioxide produced by the burning of fossil fuels is widely believed to augment the greenhouse effect and lead to global warming.' " (quoting *Carbon Dioxide*, OXFORD ENGLISH DICTIONARY (3d ed. 2008))).

[51] Plaintiffs described greenhouse gas emissions in their rule-making petition as "any gas that has contributed to anthropogenic global warming." *See also id.*

[52] *See* AS 44.62.220 ("Unless the right to petition for adoption of a regulation is restricted by statute to a designated group or the procedure for the petition is prescribed by statute, an interested person may petition an agency for the adoption or repeal of a regulation . . . .").

reduction requirements specified."

The Department responded in September, denying the petition but assuring plaintiffs that addressing climate change was a State priority. The Department explained that the proposed rule — by "establish[ing] broad policy goals" rather than directly affecting the public or regulating the agency's interactions with the public — did not meet the statutory definition of "regulation";[53] likely **[*790]** exceeded the Department's rule-making authority granted by statute;[54] and was "inconsistent with practical and fiscal constraints" on the Department and the State. The Department advised plaintiffs that resource development and environmental policy questions are "best addressed in partnership with the Legislature" and encouraged them "to continue to engage" with the executive and legislative branches "in seeking creative solutions to addressing climate change in Alaska."

A month later plaintiffs filed a superior court lawsuit against the State and various agencies and officers. Plaintiffs challenged the Department's denial of the **[**18]** rule-making petition as a violation of their constitutional rights and made additional constitutionally based claims for declaratory and injunctive relief regarding what they described as the State's "Climate and Energy Policy." The State later moved to dismiss the lawsuit.[55] In April 2018 the superior court heard arguments on the dismissal motion.

In August plaintiffs amended their complaint, adding specificity to their allegations about Alaska climate change and expressly referring to the legislature's energy policy in AS 44.99.115.[56] The amended complaint detailed each plaintiff's alleged harms and sought to "enforce *sections 1, 7,* and *21 of Article I*[57] . . . and *Article VIII*[58] *of the Alaska Constitution*."

The first plaintiff named in the amended complaint, for example, alleged that climate change is having a devastating effect on his home, subsistence lifestyle, and cultural traditions. This is manifested, he alleged, in erosion of inhabited seacoast due to loss of sea ice that "has historically been a buffer against storms, storm surges, and flooding"; "accelerating thaw of the permafrost underlying [his home] community," causing both erosion and food-cellar flooding; damage to traditional hunting practices and loss of game due to thinning sea ice; inadequate snow cover for necessary winter travel; harm to prey animals such as walrus, seal, and caribou, both directly and through damage to their food supply; increased wildfires damaging the air quality necessary for outdoor recreation; and feelings of "anxiety, stress and loss." Other plaintiffs alleged specific harm to their recreational opportunities, diet, physical and mental health, and traditional

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[53] *See AS 44.62.640(a)(3)* (defining "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it"). " '[R]egulation' includes . . . 'guides to enforcement,' 'interpretative bulletins,' 'interpretations,' and the like, that have the effect of rules, orders, regulations, or standards of general application," *id.*, but "not every agency action or decision constitutes a regulation," *Chevron, U.S.A., Inc. v. State, Dep't of Revenue, 387 P.3d 25, 35-36 (Alaska 2016)*. An agency action is a regulation if it meets two criteria: First, the action must "implement[], interpret[], or make[] specific the law enforced or administered by the agency"; second, the action must "affect[] the public" or be "used by the agency in dealing with the public." *Id. at 36* (quoting *State, Dep't of Nat. Res. v. Nondalton Tribal Council, 268 P.3d 293, 300-01 (Alaska 2012)*).

[54] *Cf. AS 46.03.020(10)(A)* (authorizing Department to promulgate regulations regarding "control, prevention, and abatement of air . . . pollution").

[55] *See Alaska R. Civ. P. 12(b)(6)* (allowing dismissal for failure to state claim upon which relief can be granted).

[56] *See supra* § II.B.

[57] Providing, in relevant part:

> § 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.
>
> . . . .
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> § 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just **[**19]** treatment in the course of legislative and executive investigations shall not be infringed.
>
> . . . .
>
> § 21. Construction. The enumeration of rights in this constitution shall not impair or deny others retained by the people.

[58] *See supra* § II.A.

cultural [**20] activities.

Plaintiffs also made specific factual allegations about State actors' roles in "causing, contributing to, and exacerbating climate [*791] change," primarily by permitting and promoting fossil fuel extraction and other activities contributing to dangerous levels of atmospheric carbon emissions. Plaintiffs set out factual allegations underlying their assertions that the State has long been aware of climate change's harmful effects and of the role the State's policies play in exacerbating the problem. They also detailed carbon emissions produced in Alaska over several relevant time spans and identified the sources of these emissions.

Plaintiffs described "overwhelming scientific consensus that human-caused climate change is occurring"; sources of human-caused increase in carbon emissions; impact on sea levels, ocean acidification, human disease, and mental health disorders; and extreme weather events such as floods and hurricanes. Plaintiffs focused on climate-change impacts in Alaska, detailing increased temperatures, effects on Arctic sea ice and effects on marine mammals and coastal communities, glacial melt and its "profound impacts on freshwater and marine aquatic resources," [**21] and permafrost thawing. They described wildfires, spruce beetle infestations, ocean acidification, and threats to salmon, other fish species, and a variety of land-based plants and mammals. They detailed these changes' effects on Alaskans, amplifying individual plaintiffs' allegations about damaged communities, subsistence hunting and fishing, traditional and cultural activities, and health. Plaintiffs also alleged "[e]conomic and financial losses from climate change [related to] healthcare, wildlife and fisheries management, disaster relief, infrastructure construction and repair, and energy development, among others."

Plaintiffs sought a declaratory judgment stating that: (1) they have a "fundamental and inalienable constitutional right[] to . . . a stable climate system that sustains human life and liberty"; (2) the State has a duty under the public trust doctrine to protect Alaska's natural resources; (3) the State has exacerbated climate change in violation of plaintiffs' individual constitutional rights; (4) the State has put plaintiffs in danger by failing to reduce Alaska's carbon emissions; (5) the State has discriminated against plaintiffs as members of a protected age-based [**22] class who will suffer from climate change effects for a longer period of time than will older people; (6) the State has violated its duty to protect Alaska's natural resources; and (7) the Department's denial of the rule-making petition violated plaintiffs' individual constitutional rights. Plaintiffs also requested injunctive relief requiring the State to: (1) stop implementing its energy policy in violation of their rights; (2) "prepare a complete and accurate accounting of Alaska's [carbon] emissions," including "in-boundary and extraction-based emissions" and "emissions attributable to fossil fuels extracted in Alaska and transported and combusted out of state"; and (3) develop and submit to the court "an enforceable state climate recovery plan . . . consistent with global emissions reductions rates necessary to stabilize the climate system."

After plaintiffs filed their amended complaint, the parties notified the superior court that they had agreed no further briefing or arguments were necessary for the court to rule on the State's pending dismissal motion. In October the court granted the State's motion, dismissing plaintiffs' injunctive relief claims because they implicated non-justiciable [**23] political questions, dismissing plaintiffs' requests for declaratory relief on prudential grounds, and concluding that the Department's denial of plaintiffs' rule-making petition complied with statutory requirements and was not arbitrary.

Plaintiffs appeal.

IV. DISCUSSION

A. Dismissal Of Plaintiffs' Declaratory Judgment And Injunctive Relief Claims

1. Standard of review

HN6[↑] "We review a motion to dismiss de novo, construing the complaint liberally and accepting as true all factual allegations," and we generally "do not consider materials outside the complaint and its attachments."[59] [*792] "[M]otions to dismiss are

[59] *Pedersen v. Blythe, 292 P.3d 182, 184 (Alaska 2012)*. Plaintiffs' 102-page amended complaint is replete with factual allegations, ranging from the very local to the global and stating very specific harms claimed by individual plaintiffs. For purposes of the discussion that follows, we must presume as true and provable at trial that the State knows its actions have exacerbated and will continue to exacerbate climate change, causing serious harms to the individual plaintiffs and contributing to statewide, nationwide, and global damage that

disfavored,"[60] and it must be "beyond doubt that the plaintiff can prove no set of facts that would entitle [the plaintiff] to relief" before dismissal will be granted.[61] "Even if the relief demanded is unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts."[62] "[W]e review de novo the question of whether a case should be dismissed on prudential grounds."[63]

2. *Kanuk ex rel. Kanuk v. State, Department of Natural Resources*

Plaintiffs' factual allegations and legal claims are similar to those addressed in our 2014 *Kanuk ex rel. Kanuk* ***[**24]*** *v. State, Department of Natural Resources* decision.[64] In that case, like this one, the plaintiffs sought a court mandate for substantive State action in response to potentially catastrophic climate change. Because we affirmed the superior court's denial of any relief in *Kanuk*, many arguments in this appeal focus on factual and procedural comparisons of the two cases.

The *Kanuk* plaintiffs were a diverse group of young Alaskans who claimed the State had violated duties under the Alaska Constitution and the public trust doctrine by failing to take steps to protect the atmosphere and curb carbon emissions.[65] The superior court dismissed their complaint, holding that their requests for declaratory and injunctive relief were non-justiciable political questions; the *Kanuk* plaintiffs appealed.[66] We affirmed the dismissal, but for slightly different reasons.

We first held that the *Kanuk* plaintiffs had standing[67] and that their claims were not barred by sovereign immunity.[68] We held that three claims — asking that the court order the State to use the best available science, lower carbon emissions, and prepare a carbon emission accounting — were properly dismissed as non-justiciable because they involved policy questions **[**25]** within other government branches' particular competence.[69] We disagreed with the superior court's decision that the remaining claims also presented non-justiciable political questions, holding that declaratory judgment claims on the nature of the public trust doctrine were justiciable because whether the State has breached a legal duty is a question we can answer, assuming we first can identify the duty at issue.[70] But despite the claims' justiciability, we held dismissal on prudential grounds was proper because the declaratory relief sought would not "clarify and settle [the] legal relations" between the parties and thus ultimately would "fail to serve the principal prudential goals of declaratory relief."[71]

[*793] 3. Justiciability and prudential considerations in this matter

We apply *Kanuk*'s analytical framework to determine whether plaintiffs' claims are justiciable. ***HN7***[↑] This requires answering two questions:

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is accelerating toward climate catastrophe. Plaintiffs assert that the superior court erred by failing to consider their factual allegations in this light, but because we independently review plaintiffs' complaint in our consideration of its dismissal, we do not address that assertion of error.

[60] *Adkins v. Stansel, 204 P.3d 1031, 1033 (Alaska 2009)*.

[61] *Catholic Bishop of N. Alaska v. Does 1-6, 141 P.3d 719, 722 (Alaska 2006)*.

[62] *Adkins, 204 P.3d at 1033*.

[63] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1092 (Alaska 2014)*.

[64] *Id. at 1090-91*.

[65] *Id.*

[66] *Id. at 1091*.

[67] *Id. at 1092-95* (concluding plaintiffs had interest-injury standing because "the complaint shows direct injury to a range of recognizable interests[, e]specially in light of our broad interpretation of standing and our policy of promoting citizen access to the courts").

[68] *Id. at 1095-96* (rejecting sovereign immunity defense because "[t]he duty the State is alleged to have breached . . . is a fiduciary duty based on *article VIII of the Constitution* and the public trust doctrine, not tort law").

[69] *Id. at 1097-99*.

[70] *Id. at 1100*.

[71] *Id. at 1101-02* (quoting *Lowell v. Hayes, 117 P.3d 745, 755 (Alaska 2005)*).

> (1) [W]hether deciding the claim would require us to answer questions that are better directed to the legislative or executive branches of government (the "political question" doctrine), and (2) whether there are other reasons — such as ripeness, mootness, or standing — that persuade us that, though **[**26]** the case is one we are institutionally capable of deciding, prudence counsels that we not do so.[72]

As we explain below, plaintiffs' injunctive relief claims present non-justiciable political questions. And although plaintiffs' declaratory relief claims do not necessarily present non-justiciable political questions, the superior court properly dismissed them on prudential grounds after correctly determining that it could not grant injunctive relief.

a. Plaintiffs' injunctive relief claims and our non-justiciable political questions analysis

HN8[↑] We previously have explained that the separation of powers doctrine prohibits Alaska courts from resolving purely political questions.[73] But "merely characterizing a case as political in nature will [not] render it immune from judicial scrutiny."[74] There are no "exact boundaries between the political and the justiciable," but we identify political questions "by applying the test announced by the United States Supreme Court in *Baker v. Carr*."[75] *Baker* lists six factors, at least one of which is "[p]rominent on the surface" of any case involving a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; **[**27]** or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[76]

"Unless one of these formulations is inextricable from the case . . . there should be no dismissal for non-justiciability on the ground of a political question's presence."[77]

Plaintiffs sought an injunction requiring the State to: (1) stop implementing its statutory energy policy in violation of their asserted constitutional rights; (2) "prepare a complete and accurate accounting of Alaska's [carbon] emissions"; and (3) work with the Department to develop and submit to the superior court "an enforceable [S]tate climate recovery plan . . . consistent with global emissions reductions rates necessary to stabilize the climate **[**28]** system."

These closely resemble the requests in *Kanuk*. The *Kanuk* plaintiffs sought declaratory and injunctive relief, requesting that the court: (1) "declare that the State[]" has a public trust "obligation to protect the atmosphere" by implementing the "best available science"; (2) "order the State 'to prepare a full and accurate accounting of Alaska's current carbon dioxide emissions'"; and (3) "order the State to reduce emissions 'by at least **[*794]** 6% [annually]'" until 2050.[78] We held that the injunctive relief claims presented non-justiciable political questions "under several of the *Baker* factors."[79] We said the claims most obviously implicated the third factor by requiring the court to make an "initial policy determination."[80] We explained that "[t]he limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry [at issue in *Kanuk* was] better reserved for executive-branch

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[72] *Id. at 1096* (footnote omitted).

[73] *Id.*; *see also Abood v. Gorsuch, 703 P.2d 1158, 1160(Alaska 1985)* ("There are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate."); *Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982)* (citing *Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*).

[74] *Malone, 650 P.2d at 356*.

[75] *Kanuk, 335 P.3d at 1096* (citing *369 U.S. at 217*).

[76] *369 U.S. at 217*.

[77] *Id.*

[78] *Kanuk, 335 P.3d at 1097*.

[79] *Id. at 1097-99*.

[80] *Id. at 1097*.

agencies or the legislature."[81]

The superior court in this case concluded that plaintiffs' injunctive relief claims were "materially indistinguishable" from those in *Kanuk* and denied relief. Plaintiffs contend the court made two errors. They first argue that the court (and our *Kanuk* decision) should not have **[**29]** focused on the requested relief to determine whether the "*claims* [themselves] present a political question." (Emphasis in original.) And they argue that, unlike the *Kanuk* plaintiffs, they point to an initial State legislative policy determination and affirmative State actions allegedly violating their constitutional rights. Plaintiffs contend that these differences render their claims justiciable. We consider and reject these arguments in turn.

i. The superior court did not err by considering the injunctive relief requested by the plaintiffs.

Plaintiffs argue that the superior court "obfuscate[d] the proper [political question] inquiry" by focusing on the requested relief instead of the claims presented. But we took the very same approach in *Kanuk*,[82] and a review of our case law reveals that the remedy is a relevant consideration in the political question analysis.[83] Although plaintiffs call this approach "an anomaly," several federal circuit courts of appeal decisions demonstrate that relief is routinely considered during the political question analysis.[84] Categorizing past State actions as a single energy policy "implemented through [its] historical and ongoing affirmative aggregate and systemic actions" **[**30]** rather than contemporaneously **[*795]** challenging proposed agency action is an unusual argument. To the extent our focus on the requested relief could be considered unusual, it is in keeping with the nature of plaintiffs' argument.

Contrary to plaintiffs' argument, *Baker* does not foreclose our approach. After explaining that the claims in *Baker* were justiciable, the United States Supreme Court cursorily wrote: "[I]t is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."[85] But the Court was not excluding from the political question analysis all consideration of remedies; it was acknowledging that an appellate court generally should not speculate about hypothetical remedies *after* determining that a trial court improperly dismissed claims as non-justiciable. That is not the posture of this case. The superior court thus did not err by considering plaintiffs' requested relief as part of its

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[81] *Id. at 1099*.

[82] *See id. at 1097-98*.

[83] *Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913-14 (Alaska 2001)* (rejecting argument that political question doctrine barred judicial consideration because striking regulation, which would require legislature to alter appropriations, is precisely type of remedy judiciary is competent to give); *Abood v. League of Women Voters, 743 P.2d 333, 336 (Alaska 1987)* (holding claim alleging violation of rules of legislative procedure was non-justiciable because Constitution permits legislature to make its own procedural rules and noting "to hold that these claims are justiciable places the judiciary in direct conflict with the legislature's constitutionally authorized rule-making prerogative"); *Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982)* (concluding that declaring legislative house speaker election invalid would be "improper" even if previous speaker's removal was unconstitutional and illegal as argued on appeal).

[84] *Schroder v. Bush, 263 F.3d 1169, 1174-76 (10th Cir. 2001)* ("[I]t is clear to us that Appellants' request that courts maintain market conditions, oversee trade agreements, and control currency . . . would require courts to make 'initial policy determinations' in an area devoid of 'judicially discoverable and manageable standards' . . . ."); *Brown v. Hansen, 973 F.2d 1118, 1121, 27 V.I. 440 (3d Cir. 1992)* ("[The political question doctrine] precludes courts from granting relief that would violate the separation of powers mandated by the United States Constitution."); *Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir. 1992)* (noting injunctive relief claims "may require the courts to engage in the type of operational decision-making beyond their competence . . . [and] are far more likely to implicate political questions"); *Gordon v. Texas, 153 F.3d 190, 193-95 (5th Cir. 1998)* (analyzing claims' justiciability based on relief sought); *see also Republic of Marshall Islands v. United States, 79 F. Supp. 3d 1068, 1074 (N.D. Cal. 2015), aff'd sub nom. Republic of Marsh. Islands v. United States, 865 F.3d 1187 (9th Cir. 2017)* (dismissing case as political question because court "lack[ed] the standards necessary to fashion the type of injunctive relief" sought); *Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 685 (E.D. La. 2006)* ("[T]he nature of the relief sought by the plaintiffs in this action supports a determination that this suit does not fall under the second prong of the political question test."); *Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005)* ("An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve [a political question] . . . .").

[85] *369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*.

political question analysis.

ii. Plaintiffs' injunctive relief claims present non-justiciable political questions.

HN9[↑] "[T]he relationship between the judiciary and the coordinate branches of the . . . Government . . . gives rise to the 'political question.'" **[**31]** [86] The political question doctrine maintains the separation of powers by "exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to" the political branches of government.[87]

We conclude that plaintiffs' injunctive relief claims present non-justiciable political questions, as did the claims in *Kanuk*.[88] We do not reach this conclusion lightly; Alaska courts have a duty to decide cases properly before them.[89] But respect for, not dereliction of, our constitutional duty warrants this conclusion. The Constitution's text, the separation of powers doctrine, and *Kanuk*'s sound precedent prevent us making the legislative policy judgments necessary to grant the requested injunctive relief.

HN10[↑] As explained earlier, *article VIII* enshrines an overarching constitutional policy of making natural public resources available for maximum use consistent with the public interest.[90] It explicitly directs the legislature (and not the judiciary) to manage and develop the State's natural resources for the maximum common use and benefit of all Alaskans.[91] We have long recognized that, in light of this constitutional delegation of authority, **[**32]** our role in reviewing legislative decisions about management and development of natural resources is necessarily limited. Our "hard look" approach to cases involving the proper balance between development and environmental concerns derived from a recognition that we cannot, and should not, substitute our judgment for that of the political branches.[92]

[*796] *HN11*[↑] We recognize that *article VIII* is not a complete delegation of power to the legislature;[93] we have a duty to ensure compliance with constitutional principles,[94] and we have a duty to redress constitutional rights violations.[95] But the nature of

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[86] *Malone, 650 P.2d at 356* (quoting *Baker, 369 U.S. at 210*).

[87] *Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986)*.

[88] *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1097-99 (Alaska 2014)*.

[89] *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913 (Alaska 2001)* ("Under Alaska's constitutional structure of government, 'the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.'" (alteration in original) (quoting *Malone, 650 P.2d at 356*)).

[90] *Alaska Const. art VIII, § 1*; *see supra* § II.A.

[91] *Alaska Const. art VIII, § 2*; *see supra* § II.A; *see also Sullivan v. Resisting Envtl., 311 P.3d 625, 635 (Alaska 2013)* ("The legislature is tasked with the duty to determine the procedures necessary for ensuring the State's resources are used 'for the maximum benefit of its people.'" (quoting *Alaska Const. art VIII, § 2*)).

[92] *See Sullivan, 311 P.3d at 635* ("We have said that to ensure these [constitutional] principles are followed, it is necessary for the State to take a 'hard look' at all factors material and relevant to the public interest . . . ."); *see also Se. Alaska Conservation Council, Inc. v. State, 665 P.2d 544, 549 (Alaska 1983)*; *Hammond v. North Slope Borough, 645 P.2d 750, 759 (Alaska 1982)*.

[93] *See Brooks v. Wright, 971 P.2d 1025, 1033 (Alaska 1999)* ("[T]he legislature does *not* have exclusive law-making powers over natural resource issues merely because of the state's management role over wildlife set forth in *Article VIII of the Alaska Constitution* . . . ." (emphasis in original)); *cf. Malone, 650 P.2d at 356, 359* (holding that legislature's internal rules of procedure were textually committed by Alaska Constitution and that "except in extraordinary circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules").

[94] *See, e.g., McDowell v. State, 785 P.2d 1, 8-9 (Alaska 1989)* (striking down statutory provision establishing rural residency requirements for subsistence hunting and fishing as violating *article VIII* equal use provisions); *Owsichek v. Guide Licensing & Control Bd., 763 P.2d 488, 496 (Alaska 1988)* (holding "minimum requirement of [the public trust] duty [constitutionalized in the common use clause] is a prohibition against any monopolistic grants or special privileges," and noting "we are compelled to strike down any statutes or regulations that violate this principle").

[95] *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 971-72 (Alaska 1997)* ("[W]e cannot defer to the legislature when infringement of a constitutional right results

plaintiffs' as-applied claims upsets our usual approach to reviewing State agency action.[96] Plaintiffs asserted that the State has contributed to climate change and resulting violations of their individual constitutional rights "by and through [the statutory energy policy], implemented through [its] historical and ongoing affirmative aggregate and systemic actions." Plaintiffs' requested remedy thus involves more than striking down a specific statute or regulation or reversing an agency's specific decision. Plaintiffs ask the judicial branch to establish constitutional common law **[**33]** controlling State policy about the appropriate balancing of resource development against environmental protection. And plaintiffs ask us to jettison the constitutional mandate that the legislature manage natural resources in the public interest and for the maximum benefit to Alaskans collectively.

Plaintiffs essentially seek to impose ad hoc judicial natural resources management based on case-by-case adjudications of individual fundamental rights. Judges would be deciding the extent of individual Alaskans' constitutional right to some level of development or conservation under *article VIII* based on those individual Alaskans' arguments about what would provide them "a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry" under article I. But the Constitution expressly delegated to the legislature the duty to balance competing priorities for the collective benefit of all Alaskans. It thus is impossible to grant plaintiffs' requested injunctive relief without also infringing on an area constitutionally committed to the legislature, abandoning our "hard look" standard of review for natural resource decisions, and disrespecting **[**34]** our coordinate branches of government by supplanting their policy judgments with our own normative musings about the proper balance of development, management, conservation, and environmental protection.[97]

[*797] Because we cannot grant the requested relief using factual and legal analyses alone, plaintiffs' claims are not meaningfully distinguishable from the claims brought in *Kanuk*.[98] We rejected the *Kanuk* plaintiffs' attempt to obtain an injunction requiring the State to account for and reduce its emissions based on the "best available science" because it would have involved "underlying policy choices [that were] not ours to make in the first instance."[99] The underlying policy choices were legislative because they: (1) required an "informed assessment of competing interests";[100] (2) largely depended on the application of "scientific, economic, and technological resources";[101] and (3) would be best made with the input of various stakeholders outside of an inflexible trial court record.[102] We stated:

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from legislative action.").

[96] A litigant may challenge the constitutionality of a statute or government policy in two different ways. A facial challenge alleges that a statute or policy is unconstitutional "as enacted"; we will uphold a facially challenged statute or policy "even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'" *State v. Planned Parenthood of the Great Nw., 436 P.3d 984, 1000 (Alaska 2019)* (quoting *Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1133 (Alaska 2016)*). An as-applied challenge alleges that "under the facts of the case[,] application of the statute [or policy] is unconstitutional. Under other facts, however, the same statute [or policy] may be applied without violating the constitution." *State v. ACLU of Alaska, 204 P.3d 364, 372 (Alaska 2009)*.

[97] *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)* (noting political question exists if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department, . . . a lack of judicially discoverable and manageable standards for resolving it; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [or] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"); *see also Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005)* (noting *Baker* factors often "collaps[e] into one another").

[98] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1097 (Alaska 2014)* (noting political question doctrine is implicated "when, to resolve a dispute the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis" (quoting *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005)*)); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986)* (noting "courts are fundamentally underequipped to formulate [large scale] policies or develop standards for matters not legal in nature" (quoting *United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1379, 206 U.S. App. D.C. 405 (D.C. Cir. 1981)*)).

[99] *Kanuk, 335 P.3d at 1098*.

[100] *Id.* (quoting *Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*).

[101] *Id. at 1099* (quoting *Am. Elec. Power Co., 564 U.S. at 428*).

[102] *See id.* (noting that courts may not commission scientific

> [Although] the science of anthropogenic climate change is compelling, government reaction to the problem implicates realms of public policy besides the objectively scientific. The legislature — or an executive **[**35]** agency entrusted with rule-making authority in this area — may decide that employment, resource development, power generation, health, culture, or other economic and social interests militate against implementing what the plaintiffs term the "best available science" in order to combat climate change.[103]

Kanuk **HN12**[↑] s core holding on this issue is that the "science- and policy-based inquiry" and policy choices necessary to implement resource development are "better reserved" for the political branches.[104] That holding applies to this case.

Granting injunctive relief would require making the very same legislative-like policy choices that in *Kanuk* we said courts could not make. Plaintiffs primarily seek an injunction mandating that the State develop a "climate recovery plan" that is "consistent with global emissions reduction rates necessary to stabilize the climate system." Plaintiffs further seek to have the court "[r]etain continuing jurisdiction [to] enforc[e]" that order. Granting an injunction necessarily would impose a court-made policy judgment on the other political branches that no competing interest is more important than implementing the best available science, the plaintiffs' **[**36]** presumptive source of the reduction rate.[105] But this is beyond the "limited institutional role of the judiciary" because it requires a legislative policy judgment.[106]

Plaintiffs pleaded their claims differently than the *Kanuk* plaintiffs, but that does not change our analysis. We said in *Kanuk* that the "underlying policy choices" were not the courts' to make "in the first instance," perhaps unintentionally suggesting that future plaintiffs could resolve the *Kanuk* complaint's shortcomings merely by identifying some relevant initial legislative policy **[*798]** choice.[107] Plaintiffs identify the State's codified energy policy as the initial policy determination, although, as we noted above, plaintiffs really are challenging how the policy is being applied rather than the policy itself. But plaintiffs interpret the political question doctrine too rigidly and formalistically. The barrier in *Kanuk* was not merely absence of an initial policy judgment; the *Kanuk* plaintiffs asked the courts to make and enforce a particular legislative-like policy judgment and impose it on the other political branches. They sought to have courts impose the policy judgment that, when undertaking resource development under Alaska's constitutional **[**37]** directive and various statutory policy pronouncements, the State must prioritize at all costs the best available science or the least climate-damaging activities. This proposed policy judgment would require continuing jurisdiction to ensure that the political branches implement what courts conclude is the appropriate balancing of interests in developing Alaska's "resources . . . for maximum use consistent with the public interest."[108] Asking courts to impose and enforce such a policy judgment presents a non-justiciable political question.

Plaintiffs point to *Plata v. Brown*, a United States Supreme Court decision upholding an injunction requiring California to reduce its prison population to 137.5% of building design capacity to cure *Eighth Amendment* violations,[109] and they suggest that we likewise should "set the constitutional floor necessary for preservation of [p]laintiffs' rights and leave to [the State] the specifics of developing and implementing a compliance plan." But *Plata's* remedy was granted in accordance with the Prison Litigation Reform Act, which authorized federal courts to require the release of prisoners as a remedy to cure federal rights violations under certain conditions.[110] Any separation **[**38]** of powers concerns therefore were less salient because Congress had authorized the requested remedy.[111] By

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studies, convene groups of experts, seek public input under notice-and-comment procedures, or look beyond record).

[103] *Id. at 1098-99* (footnote omitted).

[104] *Id. at 1099*.

[105] *See id. at 1098-99* (explaining judgment would be legislative because it would require informed assessment of competing interests, depend on application of scientific, economic, and technological resources, and best be made with access to information beyond limited trial court record).

[106] *Id.*

[107] *Id. at 1098*.

[108] *Alaska Const. art. VIII, § 1*.

[109] *563 U.S. 493, 509-10, 533, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011)*.

[110] *Id. at 511*; *see also 18 U.S.C. § 3626(a)*.

[111] *See Plata, 563 U.S. at 511*.

contrast, the remedy plaintiffs seek in this case would require courts to make decisions that article VIII has committed to the legislature, and separation of powers considerations therefore are clearly implicated.[112]

The Alaska Constitution and relevant statutes do not leave plaintiffs without recourse. They may challenge discrete actions implementing State resource development and environmental policies.[113] They may attempt to legislate by initiative.[114] They also may continue advocating their position to the public and working to generate enough legislative political will to enact their preferred policies and implementations into law. But having a [*799] majority of elected legislators disagree with or lack the political will to enact or implement plaintiffs' preferred policies does not justify an unconstitutional judicial remedy.[115]

b. Plaintiffs' declaratory relief claims and prudential non-justiciability analysis

Plaintiffs also sought a declaratory judgment stating that: (1) plaintiffs have "fundamental and inalienable constitutional [**39] rights to life, liberty, and property . . . and other unenumerated rights, including the right[] to a stable climate system that sustains human life and liberty"; (2) the State has a public trust duty to protect Alaska's natural resources; (3) the State has violated plaintiffs' various constitutional rights by exacerbating climate change through its statutory energy policy; (4) the State has put plaintiffs in danger by not reducing Alaska's carbon emissions; (5) the State has discriminated against plaintiffs as members of a protected age-based class through its statutory energy policy; and (6) the State has violated its public trust duty to protect Alaska's natural resources.

HN13[↑] As we stated in Kanuk:

> The Baker factors for identifying non-justiciable issues do not apply to judicial interpretations of the constitution. Indeed, "[u]nder Alaska's constitutional structure of government, 'the judicial branch . . . has

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[112] Plaintiffs also cite several United States Supreme Court opinions concerning unconstitutional racial discrimination in public schools and housing: Hills v. Gautreaux, 425 U.S. 284, 96 S. Ct. 1538, 47 L. Ed. 2d 792 (1976); Brown v. Bd. of Educ., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (1955); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). Plaintiffs do not explain how these cases are legally significant to the issue before us. We note that the issues are dissimilar and that, although the remedies granted in the cited cases may have been complex or broad-based, granting the necessary remedies did not require the Court to make policy decisions explicitly constitutionally committed to Congress.

[113] See, e.g., Nunamta Aulukestai v. State, Dep't of Nat. Res., 351 P.3d 1041, 1064 (Alaska 2015) (determining certain mineral exploration permits constitute interest in land and requiring public notice); Sullivan v. Resisting Envtl., 311 P.3d 625, 637 (Alaska 2013) (interpreting Alaska Constitution to require consideration of cumulative impacts throughout course of oil and gas projects); Cook Inlet Keeper v. State, Off. of Mgmt. & Budget, Div. of Governmental Coordination, 46 P.3d 957, 962-66 (Alaska 2002) (requiring State to review proposed offshore exploratory drilling site waste discharge for compliance with coastal water protection program); Northern State Envtl. Ctr. v. Department of Natural Resources, 2 P.3d 629, 639 (Alaska 2000) (requiring best interests finding to grant utility-related right-of-way); Trs. for Alaska v. State, Dep't of Nat. Res., 795 P.2d 805, 812 (Alaska 1990) (finding oil and gas lease sale deficient for failing to review associated environmental problems).

[114] Alaska Const. art. XI, § 1; Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1085 (Alaska 2009) (upholding ballot initiative intended to regulate large-scale mining).

[115] See Clinton v. City of New York, 524 U.S. 417, 449, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). Appellate courts in other states also have concluded that claims requiring the judiciary to evaluate state energy-related policies may present political questions. Aji P. ex rel. Piper v. Washington, 16 Wn. App. 2d 177, 480 P.3d 438, 447 (Wash. App. 2021) (concluding claims asking court to "address whether [Washington's] current [carbon emission] statutes and regulations sufficiently address climate change" presented "political questions" because they "inevitably involve resolution of questions reserved for the" political branches), *petition for review filed*, Petition for Discretionary Review, *Aji P. v. Washington*, No. 80007-8-I (Wash. Mar. 10, 2021); Sanders-Reed ex rel. Sanders-Reed v. Martinez, 2015-NMCA 063, 350 P.3d 1221, 1227 (N.M. App. 2015) (concluding New Mexico "courts cannot independently regulate greenhouse gas emissions in the atmosphere . . . based solely upon a common law duty established under the public trust doctrine"); ***Svitak ex rel. Svitak v. Washington, 178 Wash. App. 1020, 1-2 (2013)*** (concluding claim presented "political question" on grounds that plaintiff asked "court to compel [Washington] to create an economy-wide regulatory program to address climate pollution" that "would necessarily involve resolution of complex social, economic, and environmental issues").

> the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution.'" . . . [C]laims seeking primarily an interpretation of [the Alaska Constitution] and the public trust doctrine do not present non-justiciable political questions.[116]

Plaintiffs' declaratory **[**40]** relief claims, like those in *Kanuk*, do not necessarily present non-justiciable political questions. Plaintiffs seek an interpretation of the Alaska Constitution. They correctly note that we have a "constitutionally mandated duty to ensure [executive and legislative branch] compliance with the provisions of the Alaska Constitution." [117] But even if plaintiffs' declaratory relief claims do not present non-justiciable political questions, justiciability is not guaranteed. [118]

HN14[↑] A claim also must present an "actual controversy" that "is appropriate for judicial determination" because it is "definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy **[*800]** admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [119] As in *Kanuk* we must determine whether plaintiffs' declaratory relief claims — absent the prospect of any concrete injunctive relief — present an actual controversy. The superior court concluded they do not. We agree.

We have discussed Alaska's declaratory judgment framework in light of its federal **[**41]** counterpart elsewhere and only briefly review it here. [120] ***HN15***[↑] Although Alaska courts may issue declaratory judgment when there is "an actual controversy," courts are not required to grant declaratory relief because it "is a 'nonobligatory remedy.'" [121] "[P]racticality and wise judicial administration" thus guide the discretionary decision to grant or deny declaratory relief. [122] And if a court declines to grant declaratory relief, it need not undertake a "wasteful expenditure of judicial resources" in "the futile exercise of hearing a case on the merits first." [123]

HN16[↑] Prudential concerns often caution against issuing declaratory relief. [124] "We have explained that declaratory judgments are rendered to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" [125] Prudence therefore dictates that courts should not grant declaratory relief unless it will meaningfully accomplish these goals. [126] Consideration of these goals counsels against granting declaratory relief in this case, as it did in *Kanuk*. [127]

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[116] *335 P.3d 1088, 1099-100 (Alaska 2014)* (first and second alterations in original) (footnotes omitted) (quoting *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913 (Alaska 2001)*).

[117] *Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982)*.

[118] The nature of prudential doctrines allows for case-by-case determination rather than adherence to bright-line rules. *See, e.g., Johnson v. State, 328 P.3d 77, 82 (Alaska 2014)* ("[T]he general preservation rule [for appealable error] is not absolute, and it is subject to prudential exceptions."); *Alaskans for Efficient Gov't, Inc. v. State, 153 P.3d 296, 298 (Alaska 2007)* (noting that "rule against pre-election review [of initiative's constitutionality] is a prudential one" and "has never been absolute"); *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n, 99 P.3d 553, 559 (Alaska 2004)* (observing that "the primary agency jurisdiction doctrine is one of prudence, and not an absolute jurisdictional limitation").

[119] *Kanuk, 335 P.3d at 1100* (alteration in original) (quoting *Jefferson v. Asplund, 458 P.2d 995, 998-99 (Alaska 1969)*); *Declaratory Judgment Act, AS 22.10.020(g)* ("In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought.").

[120] *Kanuk, 335 P.3d at 1100-03* (stating *AS 22.10.020(g)* was "intended to parallel [its] federal counterpart[], and we therefore interpret [it] in light of pertinent federal authority," and discussing framework for reviewing decisions to grant or deny declaratory judgment).

[121] *Lowell v. Hayes, 117 P.3d 745, 755 (Alaska 2005)* (quoting *Wilton v. Seven Falls Co., 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*).

[122] *Id.* (quoting *Wilton, 515 U.S. at 288*).

[123] *Wilton, 515 U.S. at 287-88*.

[124] *See, e.g., Kanuk, 335 P.3d at 1101*.

[125] *Lowell, 117 P.3d at 755* (quoting *Jefferson v. Asplund, 458 P.2d 995, 997-98 (Alaska 1969)*).

[126] *Id.; see also Kanuk, 335 P.3d at 1100-03*.

[127] *See Kanuk, 335 P.3d at 1100-03*.

In *Kanuk* we concluded that declaratory relief "could serve to clarify the legal relations at issue, **[**42]** [but] it would certainly not 'settle' them." [128] We listed five reasons the parties' legal relations would have remained unsettled, because declaratory relief would: (1) have had "no immediate impact on greenhouse gas emissions in Alaska"; (2) not have compelled "the State to take any particular action"; (3) not have protected "the plaintiffs from the injuries they allege[d] in their complaint"; (4) "not tell the State what it need[ed] to do . . . to satisfy its trust duties and thus avoid future litigation"; (5) conversely . . . not provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties as trustee." [129] We concluded that declaratory relief would not have advanced "the goals of 'terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding' and would thus fail to serve the principal prudential goals of declaratory relief." [130] Declaratory relief in this case thus should be granted only if it settled the legal relations between the parties more fully than it would have in *Kanuk*.

Plaintiffs argue that the prudential analysis in *Kanuk* does not apply in this case "given the distinct **[**43]** factual circumstances underlying the present case, including the . . . **[*801]** acceleration of climate change." But our prudential analysis in *Kanuk* did not turn on climate change acceleration; it turned on our inability to "provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties." [131] Plaintiffs do not explain how this case's "distinct factual circumstances "make it more likely that declaratory relief would achieve this goal. In truth a dynamic acceleration of climate change would reinforce the reality that the judiciary is the least competent branch to address climate challenges because we "lack . . . scientific, economic, and technological resources" and "may not commission scientific studies or convene groups of experts" essential to understanding evolving complexities. [132]

We see two relevant differences between this case and *Kanuk*. The *Kanuk* plaintiffs asserted a single right under the public trust doctrine; [133] in this case plaintiffs assert additional constitutional rights beyond the public trust doctrine. And the *Kanuk* plaintiffs alleged that the State had violated their rights through inaction; [134] in this case plaintiffs allege that the State **[**44]** has violated their rights through past actions implementing the State's energy policy. But neither distinction suggests that granting declaratory relief (absent injunctive relief) would settle the parties' legal relations more fully than it would have in *Kanuk*. Declaratory relief alone still would "have no immediate impact on [carbon] emissions," "would not compel the State to take any particular action," and would not "protect the plaintiffs from the injuries they allege." [135] It also would not tell the State how to fulfill its constitutional obligations or help plaintiffs determine when their constitutional rights have been violated. [136] Without judicially enforceable standards, which the political question doctrine prevents us from developing, declaring the existence or even violation of plaintiffs' various purported constitutional rights would not settle the parties' legal relations any more than it would have in *Kanuk*.

The dissent concedes that this is the correct result if *Kanuk* is followed. [137] But the dissent concludes that our *Kanuk* analysis no longer is sound. [138] The dissent agrees with plaintiffs that *article VIII* and its implied public trust doctrine create individual fundamental constitutional **[**45]** "rights in the development, conservation, and use of our natural resources and environment." [139] And the dissent agrees with plaintiffs that *article VIII* grants each Alaskan an individual fundamental constitutional "right to a climate system that is healthy enough to 'sustain human life, liberty, and dignity.'" [140] Finally, the dissent agrees with plaintiffs

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[128] *Id. at 1102*.

[129] *Id.*

[130] *Id.* (alterations in original) (quoting *Lowell, 117 P.3d at 755*).

[131] *Id.*

[132] *See id. at 1099* (quoting *Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*).

[133] *Id.*

[134] *Id. at 1090-91*.

[135] *See id. at 1102* (explaining that declaratory relief would not settle parties' legal relations).

[136] *See id.*

[137] Dissent at 59.

[138] *Id.* at 59-60.

[139] *Id.* at 63, 65.

[140] *Id.* at 61.

that we should effectively enter declaratory judgment in their favor by holding that they have individual fundamental constitutional rights to Alaska's natural resources under *article VIII*, which includes a right to a stable climate system. [141]

The dissent describes this as "an admittedly small step in the daunting project of focusing governmental response to" climate change. [142] But the dissent says nothing about the next step it would take in this case. The plaintiffs' ultimate goal in having us recognize a new fundamental constitutional right — and requiring a State response to global climate change — can be realized only if plaintiffs are allowed to pursue a remedy for the claimed violations of their fundamental constitutional rights. Would the dissent remand for further proceedings to allow plaintiffs to seek their injunctive remedies? Or does the **[**46]** dissent continue to agree with **[*802]** *Kanuk*'s proposition that the political question doctrine prevents plaintiffs from seeking relief in this context? If the latter, what point is there in the dissent's proposed creation of unenforceable fundamental constitutional rights under *article VIII*? [143]

If the dissent envisions allowing plaintiffs to seek to establish violations of their constitutional rights, that would entirely disregard, and indeed effectively would overrule, our precedent about the judiciary's limited role in determining whether, in a challenge to agency action regarding natural resource development and environmental protection, the agency has followed regulatory procedures and taken a "hard look" at all relevant considerations. **[**47]** [144] The judiciary's formerly limited role would change to case-by-case judicial determinations about the State's compelling interests in resource development, an individual's fundamental right to a particular atmospheric carbon level, and whether the State's proposed action is sufficiently tailored or tethered to the State's interests. [145] Judges would decide, as a matter of constitutional law, questions such as: what comprises a stable climate system; is a stable climate system measured by Alaskans uniquely susceptible to environmental harms or is there some arbitrary climate stability level for most, but not all, Alaskans; and should a court ultimately order that the State deny all permit applications for oil and gas drilling?

Declaratory judgment about the legislature's article VIII duties would do little more than restate the constitutional

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[141] *Id.* at 61-62.

[142] *Id.* at 68.

[143] The New Mexico experience is instructive. In 1971, after a special election, New Mexico added an explicit constitutional provision requiring its legislature to protect the environment. *See* Craig T. Othmer & Henry M. Rivera, *On Building Better Laws for New Mexico's Environment*, 4 N.M. L. REV. 65, 105 n.1 (1973).

Article XX, section 21 of the New Mexico Constitution provides:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

In *Sanders-Reed v. Martinez* the plaintiffs sought a judgment declaring that the public trust doctrine imposes a state duty to regulate greenhouse gas emissions in New Mexico. *2015-NMCA-063, 350 P.3d 1221, 1222 (N.M. App. 2015)*. The New Mexico Court of Appeals agreed with the plaintiffs that New Mexico's constitutional provision "recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state." *Id. at 1225*. But the court also noted that the constitutional provision "delegates the implementation of that specific duty to the Legislature." *Id. at 1226*. The court concluded that whatever common law power the judicial branch may have had under the public trust doctrine to "independently establish the best way to implement protections for the atmosphere, apart from its judicial review [of agency] actions" was superseded by the constitutional delegation to the legislature and the legislature's corresponding "statutory scheme." *Id.* The court further explained that issuing a decision that "independently ignores and supplants the [adjudicative] procedures established" by the legislature in its environmental laws would violate separation-of-powers principles. *Id. at 1227*.

[144] *Cf. supra* section II. C. (discussing limited judicial role in natural resource policies due to "hard look" doctrine of ensuring that legislature has considered all relevant factors when making natural resource decisions); *supra* note 143 (discussing New Mexico court's deferral to regulatory framework for constitutionally mandated legislative decision-making on resource development and environmental protection).

[145] *See supra* note 48 (discussing various constitutional frameworks for resolving fundamental constitutional rights violation claims).

provisions while leaving the legislature to resolve how the State should fulfill those duties for the maximum benefit of Alaskans collectively. [146] And a declaratory judgment about putative individual fundamental constitutional rights to a stable climate system would provide no guidance to the legislature about undertaking its article **[**48]** VIII duties. We thus affirm the superior court's dismissal of plaintiffs' declaratory relief claims on prudential grounds. [147]

[*803] c. Plaintiffs' other argument about dismissal

Plaintiffs also argue that the superior court should not have dismissed their case because a "claim should not be dismissed as long as some relief might be available." [148] But plaintiffs identify no viable relief, and we do not require courts to conduct trials based on the suggestion that some unidentified relief possibly could be available. Plaintiffs ultimately face the same barrier the *Kanuk* plaintiffs faced: Their claims for injunctive relief present non-justiciable political questions, and granting declaratory relief alone would not meaningfully settle the legal relations between the parties. [149]

B. Dismissal Of Plaintiffs' Claims About The Denial Of The Rule-making Petition

1. Standard of review

HN17[↑] We apply the "reasonable and not arbitrary" standard to agency rule-making decisions about adopting regulations. [150] For questions of law involving agency expertise, we apply the reasonable basis standard and "must confirm that the agency '. . . has genuinely engaged in reasoned decision making' and must verify that the agency **[**49]** has not failed to consider an important factor in making its decision." [151] But questions of constitutional interpretation are reviewed de novo under the substitution of judgment standard. [152]

2. Analysis

Plaintiffs asserted that the Department's denial of their rule-making petition violated their constitutional rights. The superior court viewed this constitutional challenge as a claim that the denial was arbitrary, thus violating plaintiffs' right to due process in the agency proceedings. The court cited *Johns v. Commercial Fisheries Entry Commission*, in which we affirmed courts' "power . . . to look for administrative compliance with the demands of due process." [153] ***HN18***[↑] When exercising this power, courts consider whether the agency's decision was reasonable and not arbitrary and whether it complied with the applicable statutes. [154] A decision is arbitrary if "an agency fails to consider an important factor in making its decision"; [155] an agency must take "a 'hard look' at the salient problems" and "genuinely engage[] in reasoned decision making." [156]

The superior court found no constitutional violation because **[**50]** the Department "timely issued a four[-]page written decision that addressed each of [p]laintiffs' points" and explained its position "with supporting

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[146] *See supra* note 143 (discussing New Mexico deferral to regulatory framework for constitutionally mandated legislative decision-making on resource development and environmental protection).

[147] Contrary to plaintiffs' contention, we do not believe the superior court "reached consideration of whether Alaska's Constitution protects" the right to a stable climate. The court ultimately "dismissed on prudential grounds" plaintiffs' declaratory relief claims.

[148] *Adkins v. Stansel, 204 P.3d 1031, 1033 (Alaska 2009)*.

[149] *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1100- 03 (Alaska 2014)*.

[150] *Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971)*.

[151] *Alaska Ctr. for the Env't v. State, 80 P.3d 231, 241 (Alaska 2003)* (quoting *Trs. for Alaska v. State, Dep't of Nat. Res., 795 P.2d 805, 809 (Alaska 1990)*).

[152] *Club SinRock, LLC v. Mun. of Anchorage, Off. of Mun. Clerk, 445 P.3d 1031, 1033-34 (Alaska 2019)* (quoting *Studley v. Alaska Pub. Offs. Comm'n, 389 P.3d 18, 22-23 (Alaska 2017)*).

[153] *699 P.2d 334, 339 (Alaska 1985)*.

[154] *See id. at 339-40*.

[155] *Se. Alaska Conservation Council, Inc. v. State, 665 P.2d 544, 548-49 (Alaska 1983)*, *superseded on other grounds by statute, ch. 86, SLA 2003*.

[156] *Id.* (emphasis omitted) (quoting Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974)).

statutes, case law and well-reasoned analysis," and therefore the denial "satisfied the statutory due process requirements described in *Johns*." Notably, the Department's decision shows consideration of the "salient problem" central to plaintiffs' petition: impending climate disaster. The Department informed plaintiffs that responding to climate change was an administration priority; that the governor recently had appointed a "senior advisor for climate and directed her to work with state agencies, tribes and stakeholders on options that best meet Alaska's [climate-related] needs"; and that a petitioner group, Alaska Youth for Environmental Action, had "been invited to send a representative to [an upcoming] meeting . . . to discuss the path **[*804]** forward for Alaska." The Department "encourage[d] [plaintiffs] to continue to engage with the State's executive branch and to also reach out to the legislative branch, in seeking creative solutions to addressing climate change in Alaska." Because the Commissioner seriously considered the factors important **[**51]** to his decision — including its impact on the climate crisis — we agree with the superior court that the decision was not arbitrary and that it therefore satisfied due process.

As the State points out, we never have described our power to review an agency's denial of a proposed regulation as extending beyond the procedural due process review addressed in *Johns*. [157] Plaintiffs argue, however, that the denial of their rule- making petition violated "substantive due process, equal protection, and public trust rights" and that the superior court erred by failing to evaluate the decision under the heightened standards applicable to these substantive constitutional rights. But plaintiffs cite no authority for the proposition that an agency's *denial* of a rule-making proposal — contrasted with issuing a regulation [158] or adjudicating a dispute [159] — can violate an individual's fundamental constitutional rights. And this argument assumes the Department's rule-making authority is much broader than it may be.

The Department discussed several justifications for denying the rule-making petition: that the proposed regulation, by setting "broad policy goals," failed to meet **[**52]** the definition of "regulation" established by Alaska Statutes and case law; that the proposed regulation "require[d] actions that are inconsistent with practical and fiscal constraints on the State and [the Department]"; that the proposed regulation went beyond the Department's statutory authority; that the proposed regulation conflicted with more lenient federal standards and therefore, under Alaska law, would require support from peer-reviewed studies before it could be adopted; and that — given Alaska's modest contribution to global warming worldwide—the proposed regulation would not achieve the petitioners' goals even if implemented.

We find it sufficient to highlight one of these grounds: that the Department cannot use its rule-making authority to "contradict a clear legislative policy." [160] ***HN19***[↑] Regulations must be "consistent with and reasonably necessary to implement the statutes authorizing their adoption." [161] A regulation is invalid if it "conflicts with

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[157] *See* 699 P.2d at 339 (noting that "[t]he absence of any mention of reviewability in AS 44.62.230 [the statute providing for rulemaking petitions] does not necessarily mean a court cannot pass on the validity of an act done pursuant to the provision" and holding that "[c]ourts have the power in situations such as this . . . to look for administrative compliance with the demands of due process").

[158] *See, e.g.*, State, Dep't of Fish &Game v. Manning, 161 P.3d 1215, 1219-25 (Alaska 2007) (analyzing whether subsistence hunting regulations were unconstitutional); Church v. State, Dep't of Revenue, 973 P.2d 1125, 1130-32 (Alaska 1999) (holding PFD eligibility regulations were constitutional); *see also* Hjelle v. Brooks, 377 F. Supp. 430, 440-42 (D. Alaska 1974) (holding crabbing regulations were unconstitutional and enjoining enforcement of regulations).

[159] *See, e.g.*, Club Sinrock, LLC v. Municipality of Anchorage, 445 P.3d 1031, 1033, 1036-39 (Alaska 2019) (analyzing de novo free speech issue arising from agency adjudication); *see also* McGrath v. Univ. of Alaska, 813 P.2d 1370, 1373-74 (Alaska 1991) (explaining difference between rule making and adjudication and noting "agencies employ rule[-]making procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact'" (quoting Indep. Bankers Ass'n of Ga. v. Bd. of Governors of Fed. Rsrv. Sys., 516 F.2d 1206, 1215, 170 U.S. App. D.C. 278 (D.C. Cir. 1975)); Erickson v. Mun. of Anchorage, 662 P.2d 963, 969 (Alaska App. 1983) (defining legislative facts as "those assumptions of fact, involving social, political, economic or scientific considerations, which a legislature . . . makes in the course of reaching the policy decisions which it articulates in the form of statutes and ordinances").

[160] *See* Richardson v. Felix, 856 F.2d 505, 511 (3d Cir. 1988) ("It is axiomatic that an administrative regulation or practice cannot validly contradict a clear legislative policy.").

[161] Manning v. Dep't of Fish & Game, 355 P.3d 530, 534 (Alaska 2015) (quoting Wilber v. State, Com. Fisheries Entry Comm'n, 187 P.3d 460, 464 (Alaska 2008)).

other statutes." [162]

The legislature's stated energy policy recognizes "concerns about global climate **[*805]** change" but at the same time "encourage[s] economic development by . . . promoting the development, transport, and efficient use **[**53]** of nonrenewable and alternative energy resources, including natural gas, coal, oil, gas hydrates, heavy oil, and nuclear energy, for use by Alaskans and for export." [163] The legislature's stated resource development policy refers to "purposeful development of the state's abundant natural resources" being "undertaken after consideration of the social and economic views of citizens impacted by the development, and only after adequate protection is assured for Alaska's environment."[164] And the legislature's stated Arctic policy emphasizes a commitment to economic development "consistent with the state's responsibility for a healthy environment," including existing and new "approaches for responding to a changing climate."[165] The Department reasonably could conclude that the proposed regulation was inconsistent with the legislature's statutory policies and thus outside its delegated authority. Because the decision to deny the rule-making petition therefore has "a reasonable basis in law,"[166] we affirm the superior court's rejection of plaintiffs' challenge to the Department's rule-making denial.

V. CONCLUSION

We AFFIRM the superior court's dismissal of plaintiffs' lawsuit.

Dissent by: MAASSEN (In Part)

Dissent

MAASSEN, Justice, **[**54]** with whom CARNEY, Justice, joins, dissenting in part.

I disagree with the court's rejection of declaratory relief as serving no useful purpose. In my view, a balanced consideration of prudential doctrines requires that we explicitly recognize a constitutional right to a livable climate — arguably the bare minimum when it comes to the inherent human rights to which the Alaska Constitution is dedicated.[1]

A. A Declaratory Judgment Is An Available Remedy.

This case was decided on a motion to dismiss. But "'[m]otions to dismiss are disfavored,' and before dismissal will be granted it must be 'beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief.'"[2] "Even if the relief demanded is unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts."[3] The alleged facts in this case are, essentially, that rapidly accelerating climate change is causing serious damage on a spectrum ranging from the individual to the global, and that the State, while acknowledging the problem, continues to actively compound it. Given these alleged facts, a declaratory judgment about the nature of the rights at stake **[**55]** is a small but not inconsequential bit of relief.

Five of the plaintiffs' claims — paragraphs 3-7 of the amended complaint — seek declarations that their "fundamental and inalienable constitutional rights" have been violated by various actions of the State, both directly and through the State's energy policy. In order

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[162] *Id.* (quoting *Wilber, 187 P.3d at 464-65*).

[163] *AS 44.99.115*.

[164] *AS 44.99.100(a)*.

[165] *AS 44.99.105(a)(1)*.

[166] *Alaska Cmty. Action on Toxics v. Hartig, 321 P.3d 360, 366 (Alaska 2014)* (quoting *Storrs v. State Med. Bd., 664 P.2d 547, 554 (Alaska 1983)*).

[1] *See Alaska Const. art. I, § 1* ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry . . . .").

[2] *Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1092 (Alaska 2014)* (alterations in original) (quoting *Adkins v. Stansel, 204 P.3d 1031, 1033 (Alaska 2009)*).

[3] *Adkins, 204 P.3d at 1033*; *see also Jefferson v. Asplund, 458 P.2d 995, 1000 (Alaska 1969)* ("The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention but whether he is entitled to a declaration of rights at all." (citing *City of Mobile v. Gulf Dev. Co., 277 Ala. 431, 171 So. 2d 247, 257 (Ala. 1965)*)).

to determine whether the State's constitutional duties have been breached we **[*806]** must first determine whether a duty exists.[4] This question is raised by the amended complaint's first two requests for declaratory judgment, which ask the court to do the following:

> 1. Declare that Defendants have constitutional duties and constitutional and statutory authority to protect and refrain from infringing Plaintiffs' fundamental and inalienable constitutional rights to life, liberty, and property; equal rights, opportunities and protection under the law; and other unenumerated rights, including the rights to a stable climate system that sustains human life and liberty [and] dignity, to personal security and safety, autonomy, and other liberty interests, including their capacity to provide for their basic human needs, safely raise families, learn and practice their religious and **[**56]** spiritual beliefs, learn and transmit their native cultural traditions and practices, and lead lives with sufficient access to clean air, water, shelter, and food.
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> 2. Declare that Defendants have constitutional duties and constitutional and statutory authority under the Public Trust Doctrine to maintain control over and protect Alaska's waters, atmosphere, land, fish, wildlife, and other Public Trust Resources from substantial impairment, waste, and alienation, and to manage such resources prudently and with impartiality and loyalty to present generations, including Youth Plaintiffs, and future generations.

The plaintiffs in *Kanuk* made similar requests. We described four of their claims for relief as "of the sort that is within the institutional competence of the judiciary" to decide:

> [A] declaratory judgment that (1) "the atmosphere is a public trust resource under [a]rticle VIII"; (2) the State therefore "has an affirmative fiduciary obligation to protect and preserve" it; (3) the State's duty is "enforceable by citizen beneficiaries of the public trust"; and (4) with regard to the atmosphere, the State "has failed to uphold its fiduciary obligation."[5]

We noted in *Kanuk* that "the plaintiffs do **[**57]** make a good case" for their declaratory judgment claim.[6] We explained that the public trust doctrine had its roots in "the sovereign's authority over management of fish, wildlife and water resources" and that it was now "'constitutionalized' in Alaska's common use clause, *article VIII, section 3*," which reserves these resources "to the people for common use."[7] We observed that our earlier cases had "described the content of the trust, the State's duty as trustee, and the public's status as beneficiary — reflecting three of the plaintiffs' claims for declaratory relief in this case," and that the fourth claim, "[w]hether the State has breached a legal duty," was also "a question we are well equipped to answer — assuming the extent of the State's duty can be judicially determined in the first place."[8]

But notwithstanding our institutional ability to decide these issues, we affirmed dismissal of the requests for declaratory relief in *Kanuk*, reasoning that declaring the plaintiffs' rights in the context of the public trust doctrine "would not significantly advance the goals of 'terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding' and would thus fail **[**58]** to serve the principal prudential goals of declaratory relief."[9] We further explained: "Within the very general framework of a public trust, 'the rights and obligations of [the] litigants' with regard to the atmosphere would depend on further developments — by the legislature, by executive **[*807]** branch agencies, and through litigation focused on more immediate controversies."[10]

The plaintiffs here contend that they have presented us with a "more immediate controvers[y]" based on their challenge to the codified State Energy Policy, *AS*

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[4] *Cf. Dore v. City of Fairbanks, 31 P.3d 788, 791 (Alaska 2001)* ("In order to reach the questions of whether the city has statutory immunity or has breached its duty, we must first determine whether the city owes a duty in tort to the plaintiff."); *Kooly v. State, 958 P.2d 1106, 1108 (Alaska 1998)* ("Determining whether a duty exists in the type of case presented is the first analytical step in deciding whether a negligence action can be maintained.").

[5] *Kanuk, 335 P.3d at 1099*.

[6] *Id. at 1101-02*.

[7] *Id.* (quoting *Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 494 (Alaska 1988)*).

[8] *Id. at 1099-1100*.

[9] *Id. at 1102* (quoting *Lowell v. Hayes, 117 P.3d 745, 755 (Alaska 2005)*).

[10] *Id. at 1103*.

44.99.115(2)(B). The court decides that we should reach the same conclusion we did in Kanuk and again, prudentially, reject all the plaintiffs' claims for declaratory relief as unlikely to resolve anything. I agree with the court that this conclusion is consistent with Kanuk. A grant of declaratory relief here will not forestall future litigation over the same or similar issues. Litigation over the government's role in addressing climate change is still in its infancy, and more challenges to state action based on its potential for worsening the crisis are not just likely but certain, regardless of how we resolve this case.

But I am no longer convinced that nothing can be gained by clarifying **[**59]** Alaskans' constitutional rights and the State's corresponding duties in the context of climate change. When considering the value of declaratory relief, the proliferation of climate-change litigation cuts both ways. On the one hand, as the court cogently explains today, it means that any decision we make here cannot "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding,"[11] the consideration we found most compelling in Kanuk. But because prudential concerns such as "practicality and wise judicial administration" also guide our use of declaratory relief,[12] we may conclude that it is an appropriate remedy even when terminating controversy is not possible.[13]

Undoubtedly, Alaskans who bring future challenges to state actions alleged to pose an unacceptable risk to the climate will continue to assert that a livable climate is a constitutional right. Appellate courts like ours have almost always avoided the issue on standing, justiciability, or prudential grounds; have decided that the constitution gives no such right; or have done both.[14] We decided in Kanuk that the plaintiffs had standing to assert their claims and that their claims for declaratory relief **[**60]** were justiciable.[15] But we have yet to say explicitly whether such claims have a basis in the Alaska Constitution.

This same important question is before us for the second time in six years. It has been thoroughly briefed by committed parties and three groups of amici. Our failure to answer the question now will not eliminate it but will only postpone our answer, in the meantime putting the burden of redundantly litigating it on plaintiffs, the State, and the trial courts, potentially to return to us on appeal again and again until we conclude that prudence finally requires an answer. Given the urgency of the issue, I would conclude that "practicality and wise judicial administration" militate strongly in favor of limited declaratory relief identifying the constitutional source of the right plaintiffs claim.[16]

[*808] B. The Public Trust Doctrine As "Constitutionalized" In Article VIII Provides A Right To A Livable Climate.

The plaintiffs' amended complaint asked for a declaratory judgment that the Alaska Constitution recognizes the right to a climate system that is healthy enough to "sustain human life, liberty, and dignity." I agree that it does. And I am not as stymied as the court is **[**61]** today by the inability to predict the course of future climate litigation. As is true with every constitutional right, case law will continue to define the right further in the context of more specific controversies — including the extent to which it includes individuals' interests in "safely rais[ing] families, learn[ing] and practic[ing] their religious and spiritual beliefs, learn[ing] and transmit[ting] their [N]ative cultural traditions and practices, and lead[ing] lives with sufficient access to clean air, water, shelter, and food," as the plaintiffs explain their claimed right in the amended complaint.

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[11] Op. at 44 (quoting Lowell, 117 P.3d at 755).

[12] Kanuk, 335 P.3d at 1101 (quoting Lowell, 117 P.3d at 756).

[13] As the court observes, prudential doctrines, by their very nature, allow for case-by-case determination rather than adherence to bright-line rules. Op. at 42 n.118.

[14] See Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) ("The central issue before us is whether, even assuming such a broad constitutional right [to a 'climate system capable of sustaining human life'] exists, an Article III court can provide the plaintiffs the redress they seek . . . . "); Clean Air Council v. United States, 362 F. Supp. 3d 237, 244-53 (E.D. Pa. 2019) (dismissing complaint for lack of Article III standing but also finding no constitutional basis for claims to "life-sustaining climate system").

[15] Kanuk, 335 P.3d at 1092-1100.

[16] See Chernaik v. Brown, 367 Ore. 143, 475 P.3d 68, 84 (Or. 2020) (Walters, C.J., dissenting) (asserting that "the time is now" for court to "determine the law that governs the other two branches as they undertake their essential work" of addressing climate change and that "[t]his court can and should issue a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources").

Courts have grappled diligently with such unformed concepts as "fundamental rights,"[17] "substantive due process,"[18] and "right of privacy,"[19] clarifying rights and duties a case at a time. That we cannot answer every subsequent question does not mean we should shy away from answering the first.

The plaintiffs identify a number of possible sources for their claimed constitutional right to a healthy climate system. They contend that the State's energy policy, by causing and contributing to climate change, violates their substantive due process rights under **[**62]** article I, section 7; their equal protection rights under article I, section 1; and their "public trust rights" under article VIII.

The plaintiffs' substantive due process claims, though well reasoned, have minimal support in existing case law. They rely heavily on United States District Judge Aiken's decision in Juliana v. United States[20] that public trust claims brought under federal law were enforceable as substantive due process claims under the Fifth Amendment's Due Process Clause[21] and the Ninth Amendment.[22] The Ninth Circuit reversed the district court's decision on standing grounds while assuming the existence of the constitutional right;[23] District Judge Staton, sitting on the panel by designation and writing in dissent, located the constitutional right at issue not in substantive due process bur rather in the "perpetuity principle" that "is structural and implicit in our constitutional system": that is, a principle "that the Constitution does not condone the Nation's willful destruction."[24]

These recent constitutional interpretations are novel and provocative.[25] But in Alaska there is a more obvious source of the right at issue in article VIII, which is devoted entirely to defining the people's rights in the development, **[*809]** conservation, and use of our natural resources and environment.

We addressed article VIII in Kanuk in the context of the public trust doctrine; the plaintiffs had asked us to declare that the atmosphere was a public trust resource the State had an affirmative duty to protect.[26] We did not find it necessary to answer that question. We observed that "if the plaintiffs are able to allege claims for affirmative relief in the future that are justiciable under the political question doctrine, they appear to have a basis on which to proceed even absent a declaration that the atmosphere is subject to the public trust doctrine."[27] Because the various aspects of our ecosystem are interdependent, "[a]llegations that the State has breached its duties with regard to the management of" individual resources "such as water, shorelines, wildlife, and fish" — which we have already recognized as subject to the public trust doctrine — "do not depend on a declaratory judgment about the atmosphere."[28] Simply put, the public trust doctrine is

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[17] *See, e.g.*, In re Tammy J., 270 P.3d 805, 813 (Alaska 2012) (identifying "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" as among the fundamental rights protected by substantive due process (quoting Lawrence v. Texas, 539 U.S. 558, 573-74, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003))).

[18] *See, e.g., id.*; Doe v. Dep't of Pub. Safety, 444 P.3d 116, 125 (Alaska 2019) ("Substantive due process is a doctrine that is meant to guard against unfair, irrational, or arbitrary state conduct that 'shock[s] the universal sense of justice.'" (alteration in original) (quoting Church v. State, Dep't of Rev., 973 P.2d 1125, 1130 (Alaska 1999))).

[19] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (recognizing "the zone of privacy created by several fundamental constitutional guarantees"). In Alaska, of course, the constitutional right of privacy is explicit. Alaska Const. art. I, § 22.

[20] 217 F. Supp. 3d 1224, 1260-61 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

[21] "No person shall . . . be deprived of life, liberty, or property, without due process of law."

[22] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[23] Juliana, 947 F.3d at 1169-70.

[24] Id. at 1175, 1177-79 (Staton, J., dissenting).

[25] *See, e.g.*, Scott Novak, *The Role of Courts in Remedying* ***[**63]*** *Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 GEO. ENV. L. REV. 743 (2020); Bradford C. Monk, *Does the Evolving Concept of Due Process in* Obergefell *Justify Judicial Regulation of Greenhouse Gases and Climate Change?*: Juliana v. United States, 52 U.C. Davis L. Rev. 855 (2018).

[26] Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1099 (Alaska 2014).

[27] Id. at 1103.

[28] *Id.*

implicated by allegations that a particular State action exacerbates **[**64]** the climate crisis and thereby harms "water, shorelines, wildlife, and fish" — as the plaintiffs have alleged here.

By making those allegations, the plaintiffs plainly seek vindication of a constitutional right. *Article VIII* emphasizes the importance of resource development but also the importance of environmental stewardship. *Article VIII, section 2*, says that "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, *for the maximum benefit of its people*." (Emphasis added.) *Section 3* states the "common use" principle: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." *Section 4* articulates the "sustained yield" principle: "Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." Interpreting these provisions, we have observed that "[a]rticle VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide **[**65]** for future generations, and that income generation is not the sole purpose of the trust relationship."[29] And as *article VIII* was described to the voters at the time of Statehood, its "primary purpose is to balance maximum use of natural resources with *their continued availability to future generations*. In keeping with that purpose, all replenishable resources are to be administered, insofar as practicable, on the sustained yield principle."[30] As we pointed out in *Kanuk*, the legislature has recognized these principles in declaring it "the policy of the state . . . to manage the basic resources of water, land, *and air* to the end that the state may fulfill *its responsibility as trustee of the environment for the present and future generations*."[31] Allegations that climate change destroys natural resources or even limits their continuing availability for present and future generations clearly implicate the State's stewardship responsibilities under *article VIII*.[32]

The court today takes a very narrow view of both the rights granted by *article VIII* **[*810]** and our role in protecting those rights. The court is concerned **[**66]** that recognizing an individual right to a livable climate would impinge on the legislative prerogative to manage the State's natural resources for the benefit of all Alaskans.[33] But the Constitution recognizes individual Alaskans' rights vis-á-vis the State and their fellow citizens in a number of different contexts.[34] The judiciary acts within its delegated role when it concludes that the legislature, despite its broad article VIII powers, has violated individual Alaskans' article VIII rights.[35] And as the court acknowledges,[36] we also act within our delegated role when we determine that an agency,

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[29] *Brooks v. Wright, 971 P.2d 1025, 1032 (Alaska 1999)*; *see also Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988)* (noting that "the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of *all* the people" (emphasis added)).

[30] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game, 357 P.3d 789, 803 (Alaska 2015)* (emphasis in original) (quoting *West v. State, Bd. of Game, 248 P.3d 689, 696 (Alaska 2010)* (quoting THE ALASKA CONSTITUTIONAL CONVENTION, PROPOSED CONSTITUTION FOR THE STATE OF ALASKA: A REPORT TO THE PEOPLE OF ALASKA (1956))).

[31] *335 P.3d at 1102 n.78* (emphasis in original).

[32] *See Sanders-Reed v. Martinez, 2015- NMCA 063, 350 P.3d 1221, 1225 (N.M. 2015)* (holding that state constitutional provision declaring importance of state's environment "recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state").

[33] Op. at 36.

[34] *See Alaska Const. art. VIII, § 11* (stating how mineral claimants discover and appropriate mineral rights); *id.* at *§ 14* (providing that access to navigable waters "shall not be denied to any citizen of the United States or resident of the State"); *id.* at *§ 16* (providing that "[n]o person shall be involuntarily divested of" rights in natural resources without just compensation and operation of law); *id.* at *§ 17* (providing that natural resource laws "apply equally to all persons similarly situated"); *id.* at *§ 18* (authorizing "[p]roceedings in eminent domain . . . for private ways of necessity"); *see also Owsichek, 763 P.2d at 492 n.10* ("Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest *running to each person within the state*." (emphasis added) (quoting with approval *State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983)* (Rabinowitz, J., dissenting))).

[35] *See McDowell v. State, 785 P.2d 1, 4-11 (Alaska 1989)* (striking down statute establishing rural preference for subsistence hunting and fishing as violating *article VIII, §§ 3, 15*, and *17*).

[36] Op. at 16-18.

despite having taken the requisite "hard look at the salient problems,"[37] has reached a decision that infringes a constitutional right. We cannot exercise that oversight effectively without first defining the individual rights that may be implicated.

Recognizing a right to a livable climate does not mean that the right is violated whenever the legislature declares a resource development policy that harms the climate, or whenever an executive agency implements such a policy. Even fundamental rights are not absolute but must be "balanced **[**67]** against conflicting rights and interests,"[38] which will often encompass policy judgments we are not equipped to make. But Alaska's courts do have the experience and expertise required to weigh the effect of specific government action on individual rights.[39] And defining those rights is part of our task. As recently summarized by Chief Justice Walters of the Oregon Supreme Court: "How to address climate change is a daunting question with which the legislative and executive branches of our state government must grapple. But that does not relieve our branch of its obligation to determine what the law requires."[40]

[*811] In my view, the law requires that the State, in pursuing its energy policy, recognize individual Alaskans' constitutional right to a livable climate. A declaratory judgment to that effect would be an admittedly small step in the daunting project of focusing governmental response to this existential crisis. But it is a step we can and should take. For that reason I respectfully dissent.

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[37] *See* Alpine Energy, LLC v. Matanuska Elec. Ass'n, 369 P.3d 245, 251 (Alaska 2016); Op. at 17.

[38] Larson v. State, Dep't of Corr., Bd. of Parole, 476 P.3d 293, 301 n.55 (Alaska 2020) ("'The right to privacy is not absolute' but is balanced against conflicting rights and interests." (quoting Jones v. Jennings, 788 P.2d 732, 738 (Alaska 1990))); Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1163 n.52 (Stowers, J., dissenting) (Alaska 2016) ("Where a compelling state interest is shown, the right [to privacy] may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare." (quoting Gray v. State, 525 P.2d 524, 528 (Alaska 1974))); ***Breese v. Smith, 501 P.2d 159, 168-69 (Alaska 1972)*** (Although student's choice of hairstyle is protected by "a fundamental constitutional right implicit in the concept of liberty as guaranteed by the constitution of Alaska, we do not hold that such right is absolute. . . . [Personal freedoms] 'must yield when they intrude upon the freedom of others.'" (quoting Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971))).

[39] *See, e.g.*, Ellingson v. Lloyd, 342 P.3d 825, 831 (Alaska 2014) (deciding that Board of Game failed to adequately consider facts and inconsistency with other laws when adopting regulation defining when domestic animal becomes "feral" for game purposes); State, Bd. of Fisheries v. Grunert, 139 P.3d 1226, 1240 (Alaska 2006) (striking down emergency regulation allocating harvestable salmon as inconsistent with Limited Entry Act); Cook Inlet Keeper v. State, Off. of Mgmt. & Budget, 46 P.3d 957, 965-66 (Alaska 2002) (holding that State's review of offshore exploratory drilling platform was deficient because it failed to consider discharges already permitted under federal law).

[40] Chernaik v. Brown, 367 Ore. 143, 475 P.3d 68, 93 (Or. 2020) (Walters, C.J., dissenting).

EXHIBIT T

Aji P. v. State

Court of Appeals of Washington, Division One

September 17, 2020, Oral Argument; February 8, 2021, Filed

No. 80007-8-I

Reporter
16 Wn. App. 2d 177 *; 480 P.3d 438 **; 2021 Wash. App. LEXIS 237 ***; 51 ELR 20024; 2021 WL 423133

AJI P. ET AL., *Appellants*, v. THE STATE OF WASHINGTON ET AL., *Respondents*.

Subsequent History: Review pending at *Aji P. v. State, 2021 Wash. LEXIS 441 (Wash., Sept. 1, 2021)*

Review denied by *Aji P. v. State, 2021 Wash. LEXIS 667 (Wash., Oct. 6, 2021)*

Prior History: **[***1]** Judge signing: Honorable Michael Scott. Judgment or order under review. Date filed: 08/14/2018.

Core Terms

Youths, climate, public trust doctrine, fundamental rights, emissions, atmosphere, reduction, resources, stable, rights, political question, trial court, doctrine of separation of powers, constitutional right, asserted right, recovery plan, public trust, state-created-danger, stabilize, includes, pleasant, policy determination, nonjusticiable, declaration, justiciable, persuasive, sustaining, violates, substantive due process right, legislative branch

Case Summary

Overview

HOLDINGS: [1]-The dismissal of the youths' action seeking declaratory and injunctive relief alleging that the State injured them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that the State knew would result in greenhouse gas emissions, dangerous climate change, and resulting widespread harm, was proper because it would have been a violation of the separation of powers doctrine for the court to resolve the youths' claims. Resolution of the claims was constitutionally committed to the legislative and executive branches under *Wash. Const. art. II, § 1*, and there was no judicially manageable standard by which the court would resolve the claims; [2]-The claims were not justiciable under the Uniform Declaratory Judgments Act, Wash. Rev. Code ch. 7.24, because resolution of the case would not be final or conclusive.

Outcome

Judgment affirmed.

Counsel: *Andrea K. Rodgers* (of *Our Children's Trust*) (*Andrew L. Welle*, of counsel), for appellants.

Robert W. Ferguson, *Attorney General*, and *Chris Reitz*, *Matthew Huot*, and *Sandra Adix*, *Assistants*, for respondents.

Jack W. Fiander on behalf of or Sauk-Suiattle Indian Tribe, amicus curiae.

Richard K. Eichstaedt on behalf of University Legal Assistance and Faith Community, amici curiae.

[*2]** *Oliver Stiefel* on behalf of League of Women Voters of Washington, amicus curiae.

Wyatt F. Golding on behalf of Swinomish Indian Tribal Community, amicus curiae.

Daniel J. Von Seggern on behalf of Environmental Groups, amici curiae.

Charles M. Tebbutt on behalf of Public Health Organizations, Medical Doctors, and Public Health

Officials, amici curiae.

Matthew Mattson and *Kristi J. Denney* on behalf of Business Amici, amici curiae.

Judges: Authored by Lori Smith. Concurring: Bill Bowman, David Mann.

Opinion by: Lori Smith

Opinion

[*183] [444]**

¶1 SMITH, J. — The appellants are 13 youths (the Youths) between the ages of 8 and 18 who sued the State of Washington, Governor Jay Inslee, and various state agencies and their secretaries or directors (collectively the State) seeking declaratory and injunctive relief. The Youths alleged that the State "injured and continue[s] to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that [the State] knew would result in greenhouse gas ('GHG') emissions, dangerous climate change, and resulting widespread harm." To this end, the Youths asserted substantive due process, equal protection, and public trust doctrine claims, among others. They asked the trial court to declare that they have "fundamental **[***3]** and inalienable constitutional rights to life, liberty, property, **[**445]** equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." They further requested that the court "[o]rder [the State] to develop and submit to the Court ... an enforceable state climate recovery plan," and that it "[r]etain jurisdiction over this action to approve, monitor and enforce compliance" therewith.

¶2 We firmly believe that the right to a stable environment should be fundamental. In addition, we recognize the extreme harm that greenhouse gas emissions inflict on the environment and its future stability. However, it would be a violation of the separation of powers doctrine for the court to resolve the Youths' claims. Therefore, we affirm the superior court's order dismissing the complaint.

BACKGROUND

¶3 Climate change poses a very serious threat to the future stability of our environment. Washington experienced the hottest year on record in 2020, and "'climate extremes like floods, droughts, fires and landslides are ... affecting Washington's economy and environment.'" The parties to this case and this court readily acknowledge the **[*184]** fact **[***4]** that the federal and state governments must act now to address climate change. The Washington State Department of Ecology said in December 2014, "Climate change is not a far off-risk. It is happening now globally[,] and the impacts are worse than previously predicted, and are forecast to worsen."[1] It concluded that "[i]f we delay action by even a few years, the rate of reduction needed to stabilize the global climate would be beyond anything achieved historically and would be more costly."[2] According to the *Joint Statement on "Human Rights and Climate Change"* (*Joint Statement*) signed by five United Nations human rights bodies, "[t]he adverse impacts identified in the [2018 Intergovernmental Panel on Climate Change (IPCC)] report[ ] threaten, among others, the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights."[3] "The risk of harm is particularly high for those segments of the population already [marginalized] or in vulnerable situations[,] ... such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas."[4] "The IPCC report makes it clear that to avoid **[***5]** the risk of irreversible and large-scale systemic impacts, urgent and decisive climate action is required."[5] Prompted by this knowledge, groups of determined youths around the United States have sought dramatic and necessary climate change action from their executive and legislative branches. When **[*185]** unsatisfied with the results, they have sought redress in

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[1] WASH. DEP'T OF ECOLOGY, WASHINGTON GREENHOUSE GAS EMISSION REDUCTION LIMITS: REPORT PREPARED UNDER *RCW 70.235.040*, at vi (Dec. 2014), *https://apps.ecology.wa.gov/publications/documents/1401006.pdf* [*https://perma.cc/VYA3-GT3E*].

[2] *Id.*

[3] Comm. on Elimination of Discrimination Against Women et al., *Joint Statement on "Human Rights and Climate Change,"* UNITED NATIONS HUM. RTS. OFF. OF HIGH COMMISSIONER (Sept. 16, 2019), *https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998 &LangID=E* [*https://perma.cc/C23Q-TJYZ*].

[4] *Id.*

[5] *Id.*

the courts.

FACTS

¶4 In February 2018, the Youths filed a complaint against the State, Governor Inslee, Ecology, the Washington State Department of Commerce, the Washington State Department of Transportation, and the agencies' directors and secretaries. The Youths detailed the harmful and dire effects of climate change, including serious threats to India B.'s[6] family farm, to salmon populations that Wren W. considers "a source of spiritual and recreational **[***6]** beauty," and to James Charles D. and Kylie JoAnn D.'s home in the Taholah lower village of the Quinault Indian Nation.

¶5 The Youths presented six claims for relief: (1) violation of their substantive due process rights to "[a] stable climate system, ... an essential component to [their] rights **[**446]** to life, liberty, and property," (2) violation of their substantive due process rights under the state-created-danger doctrine, (3) violation of their "[f]undamental [r]ight to a [h]ealthful and [p]leasant [e]nvironment" under *RCW 43.21A.010* and *article I, section 30 of the state constitution*, (4) violation of the public trust doctrine by "substantial impairment to essential Public Trust Resources" through "[h]arm to the atmosphere[, which] negatively affects water, wildlife, and fish resources," (5) violation of their right to equal protection under *article I, section 12 of the state constitution* "as young people under the age of 18," who the Youths contend "are a separate suspect and/or quasi-suspect class," and (6) challenges to the constitutionality of *RCW 70.235.020(1)(a)* and *RCW 70.235.050(1)(a)-(c)*.[7]

¶6 The Youths asked the court to declare that they "have fundamental and inalienable constitutional rights to life, **[*186]** liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains **[***7]** human life and liberty." They alleged that the State placed them "in a position of danger with deliberate indifference to their safety in a manner that ... violates [their] fundamental and inalienable constitutional rights to life, liberty, and property." Additionally, the Youths requested that the court

> [o]rder Defendants to develop and submit to the Court by a date certain an enforceable state climate recovery plan, which includes a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend;
>
> ... [and r]etain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court.

¶7 While acknowledging that the threats of climate change are serious, the State moved for judgment on the pleadings under *CR 12(c)*, contending that the Youths' claims and requested relief violated the separation of powers doctrine, were nonjusticiable under the *Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW*, and should have been **[***8]** brought under the *Administrative Procedure Act (APA), chapter 34.05 RCW.*

¶8 In its detailed order granting the State's motion, the superior court held that the Youths' claims were nonjusticiable, that there is no fundamental constitutional right to "a clean" or "'healthful and pleasant environment,'" that the Youths did not present a cognizable claim under the *equal protection clause*, and that, "[f]or the reasons stated in [the State's] motion and reply memorandum, all of [the Youths'] other claims must be dismissed." The Youths appeal.

[*187] ANALYSIS

Standard of Review

[1] ¶9 We review a *CR 12(c)* motion for judgment on the pleadings de novo and "'identically to a *CR 12(b)(6)* motion'" to dismiss. *Wash. Trucking Ass'ns v. Emp't Sec. Dep't, 188 Wn.2d 198, 207, 393 P.3d 761 (2017)* (quoting *P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012)*). "Dismissal under either subsection is 'appropriate only when it appears beyond doubt' that the plaintiff cannot prove any set of facts that 'would justify recovery.'" *Id.* (quoting *San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)*). To this end, "[a]ll facts alleged in the complaint are taken as true, and we may consider hypothetical

[6] Consistent with the parties' briefing at the trial court and on appeal, we refer to the Youths by their first name and the initial of their last name.

[7] The Youths withdrew the appeal of their sixth claim for relief following recent legislative amendments.

facts supporting the plaintiff's claim." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014)*. In addition, "[c]onstitutional questions are questions of law and are subject to de novo review." *In re Det. of Morgan, 180 Wn.2d 312, 319, 330 P.3d 774 (2014)*.

[447]** *Separation of Powers Doctrine*

¶10 The Youths contend that the trial court erred in concluding that their claims presented nonjusticiable political **[***9]** questions. Because the Youths' claims inevitably involve resolution of questions reserved for the legislative and executive branches of government, we disagree.

[2-4] ¶11 "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*. "Separation of powers create[s] a clear division of functions among each branch of government, and the power to interfere with the exercise of another's functions [is] very limited." *Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009)*. "The judicial branch violates the **[*188]** doctrine when it assumes 'tasks that are more properly accomplished by [other] branches.'" *Id. at 506* (alteration in original) (internal quotation marks omitted) (quoting *Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994)*).

¶12 "Prominent on the surface of any case held to involve a political question is" (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving it," (3) "the impossibility of" resolving a claim "without an initial policy determination of a kind clearly for nonjudicial discretion," or (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" through, **[***10]** for example, failing to attribute "finality to the action of the political departments." *Baker, 369 U.S. at 217, 210*. In our review of these factors, we must complete a "discriminating inquiry into the precise facts and posture of the particular case." *Id. at 217*.

[5-9] ¶13 Here, the Youths' claims ask us to address whether the State's current GHG emissions statutes and regulations sufficiently address climate change.[8] The Youths request that the State be required to achieve a 96 percent reduction of carbon dioxide (CO_2) emissions by 2050, "transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years," and "generate 90% of its electricity from carbon-free sources by 2030." We assume—for this section's analysis only—that the Youths have a fundamental right to a healthy and pleasant environment. *See, e.g., Juliana v. United States, 947 F.3d 1159, 1169-70 (9th Cir. 2020)* (*Juliana* II) (assuming that the plaintiffs' asserted constitutional rights existed for the purpose of analyzing redressability). However, even **[*189]** assuming there is such a right, the *Baker* factors lead to the conclusion that the question posed inevitably requires determination of a nonjusticiable political question.

¶14 First, the resolution of the Youths' claims is constitutionally committed **[***11]** to the legislative and executive branches. "*Article 2, section 1, of the Washington State Constitution* vests all legislative authority in the legislature and in the people' through the power of initiative and referendum." *Nw. Animal Rights Network v. State, 158 Wn. App. 237, 245, 242 P.3d 891 (2010)* (quoting *In re Chi-Dooh Li, 79 Wn.2d 561, 577, 488 P.2d 259 (1971)*). To provide the Youths' requested relief, we would be required to order the executive branch, through the power vested in it by the legislature, and the legislative branch to create and implement legislation, or, as the Youths call it, a "climate recovery plan." For all intents and purposes, we would be writing legislation and requiring the legislature to enact it. But we cannot force the legislature to legislate, and we cannot legislate ourselves. In short, resolving the Youths' claims would require the judiciary to legislate, in contravention of the textually demonstrable constitutional commitment of the legislative power to the legislative branch and to the people.
[448]**

¶15 Second, there is no judicially manageable standard by which we can resolve the Youths' claims. The

[8] The Youths "do not claim that any *individual* agency action exceeds statutory authorization or, *taken alone*, is arbitrary and capricious." *See Juliana v. United States, 947 F.3d 1159, 1167 (9th Cir. 2020)* (emphasis added). Rather, the Youths' claims for relief challenge "the affirmative aggregate acts of" the State and its agencies. Therefore, contrary to the State's contention, the Youths were not required to bring their claims under the APA.

Youths' climate recovery plan includes "a carbon budget[ ] to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system." But as the Youths acknowledge, **[***12]** scientific expertise is required to make a determination regarding appropriate GHG emission reductions, and the determination necessarily involves including all stakeholders and balancing the many implicated and varied interests affected by any GHG emission reduction policies. To this end, the agencies employ and retain climate scientists from the University of Washington to assist with their policy determinations. Were we to make these determinations, we would decide matters beyond the scope of our **[*190]** authority with resources not available to the judiciary. Accordingly, we cannot imagine a judicially manageable standard available to create and enforce the Youths' asserted right, the related claims, or the extension of the public trust doctrine to the atmosphere.

¶16 Third, the legislature and the agency respondents have already made an initial policy determination concerning the Youths' claims, pursuant to their constitutionally and statutorily prescribed authority, and they created a regulatory regime on that basis. The Youths ask us to discern and provide the State with "the maximum safe level of CO_2 concentrations and the timeframe in which that level must be achieved – and leave to Respondents **[***13]** the specifics of developing and implementing a compliant plan." But the political branches have already made this policy determination: Ecology recently enacted its final clear air rule, *chapter 173-442 WAC*, which regulates GHG emissions, following an extensive analysis and utilizing all of the resources available to it, including public comment and the work of renowned climate scientists. And despite the Youths' assertions to the contrary,[9] we cannot create a regulatory regime to replace one already enacted by the legislature and state agencies without an initial policy determination of a kind clearly for nonjudicial discretion.

¶17 Finally, resolution of any of the Youths' claims involves disrespecting the coordinate branches. In particular, **[*191]** the Youths asked the trial court to "[r]etain jurisdiction over this action to approve, monitor and enforce compliance with Defendants' Climate Recovery Plan and all associated orders of this Court." Such action by the court necessarily involves policing the legislative and executive branches' policy-making decisions and, thus, inherently usurps those branches' legislative authority. This is particularly true where, as is the case here, the political branches **[***14]** have already made an initial policy determination. Accordingly, the relief and resolution of the Youths' claims would require the court to "bulldoze[ ] any notion of a separation of powers." *Rousso v. State, 170 Wn.2d 70, 87, 239 P.3d 1084 (2010)*.

¶18 Ultimately, by wading into the waters of what policy approach to take, what economic and technological constraints exist, and how to balance all implicated interests to achieve the most beneficial outcome, the court would not merely "'serve[ ] as a check on the activities of another branch.'" *McCleary v. State, 173 Wn.2d 477, 515, 269 P.3d 227 (2012)* (finding it necessary to check the legislative branch's compliance with the explicit constitutional duty of the State to provide children an adequate education) (internal **[**449]** quotation marks omitted) (quoting *In re Salary of Juvenile Dir., 87 Wn.2d 232, 241, 552 P.2d 163 (1976)* (plurality opinion)). Rather, the judiciary would usurp the authority and responsibility of the other branches. Furthermore, it would be inappropriate for the judiciary to assume it can discern the appropriate GHG emissions reduction standard, "given the scale and complexity of the climate challenge," where "States must ensure an inclusive multi-stakeholder approach, which harnesses the ideas, energy and ingenuity of all stakeholders."[10] Therefore, we conclude that the Youths' claims present a political question to be determined **[***15]** by the people and their elected

[9] The Youths assert both that they did not request that we impose a regulatory regime and that we can impose one. As to the latter assertion, case law says otherwise. *See, e.g., Nw. Animal Rights Network, 158 Wn. App. at 245* (declining to disturb the legislature's determination that certain activities are not abhorrent to our society and therefore legal); *Nw. Greyhound Kennel Ass'n v. State, 8 Wn. App. 314, 319, 321, 506 P.2d 878 (1973)* (declining to rule on whether a statutory scheme forbidding parimutuel dog racing violates the *equal protection clause* because doing so would require resolution of "a political question in an area of almost complete legislative discretion"); *Rousso v. State, 170 Wn.2d 70, 87-88, 239 P.3d 1084 (2010)* (dealing with a dormant commerce clause issue pertaining to online gambling, but finding that Rousso's suggestion that "the court force the legislature to trust in the regulatory systems of other countries" and dismantle the State's current regulatory scheme "bulldozes any notion of a separation of powers between the judiciary and the legislature"). And with regard to the former, the Youths' complaint says otherwise.

[10] *Joint Statement, supra.*

representatives, not the judiciary.

¶19 This conclusion is supported by *Juliana* II. There, 21 youths sought "an order requiring the government to develop **[*192]** a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2.'" *Juliana II, 947 F.3d at 1164-65*. They asserted substantive due process rights, equal protection violations, rights under the *Ninth Amendment to the United States Constitution*, and a violation of the public trust doctrine. *Id.* The Ninth Circuit assumed that the "broad constitutional right" to "a 'climate system capable of sustaining human life'" existed. *Id. at 1164*. Nevertheless, it concluded that the United States Constitution article III requirement for redressability was not satisfied: the plaintiffs' request for an order to promulgate a GHG emissions reduction plan "ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right." *Id. at 1173*. The court doubted "that any such plan can be supervised or enforced by an Article III court," and noted, "[I]n the end, any plan is only as good as the court's power to enforce it." *Id.*

¶20 Similarly, in 2011, a group of youths (collectively Svitak) sued Washington **[***16]** State, then-Governor Christine Gregoire, and state agency directors, alleging that the defendants violated the public trust doctrine. *Svitak v. State*, No. 69710-2-I, *slip op. at 1-2 (Wash. Ct. App. Dec. 16, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/697102.pdf*. Svitak argued that the State "fail[ed] to accelerate the pace and extent of [GHG] reduction." *Id. at 2*. Svitak sought declaratory judgment asking "th[e] court to create a new regulatory program." *Id. at 5*. On appeal, we held that the issue was a political question because Svitak did "not point to any constitutional provision violated by state inaction regarding the atmosphere, [did] not challenge any state statute as unconstitutional, and, absent such unconstitutionality, cannot obtain a remedy under the [UDJA]." *Id. at 2, 4-6*. We concluded, "Because our state constitution does not address state responsibility for climate change, it is up to the legislature, not the judiciary, to decide whether[—and to what extent—]to act as a matter of public policy." *Id. at 5*. **[*193]** And as was the case then, "[t]his is particularly true here, where the legislature has already acted." *Id. at 5-6*.

¶21 Like in *Juliana II* and *Svitak*, we are without power "to order, design, supervise, or implement the plaintiffs' requested **[***17]** remedial plan" because such a plan "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana II, 947 F.3d at 1171*. And we are "not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can we determine which risks are acceptable and which are not. ... [W]e lack the tools." *Rousso, 170 Wn.2d at 88*. For these reasons, we conclude that resolving the Youths' claims would violate the separation of powers doctrine; the issues that the Youths' claims present and the implementation and monitoring of the requested climate action plan require us to resolve political questions reserved for the executive and legislative branches.

¶22 The Youths disagree and rely on *Seattle School District No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978)*, and *McCleary* for the proposition that they are merely asking the court "to engage in its traditional and core duty to interpret and enforce Washington's Constitution." In *Seattle School District*, the district sued the **[**450]** State, alleging that the State failed to discharge its constitutional duty under *article IX, sections 1* and *2* of the state constitution to provide ample funding for education. *90 Wn.2d at 481-82*. On appeal, our Supreme Court determined that **[***18]** *article IX, section 1* imposes a mandatory affirmative duty on the State, which creates a "jural correlative" right in children to receive an adequate education. *Id. at 500-01, 511-12*. In concluding that the court's interpretation and construction of *article IX, sections 1* and *2* do not violate the separation of powers doctrine, the court reasoned "that the judiciary has ample power to protect constitutional provisions that look to protection of personal 'guarantees.'" *Id. at 502, 510*. **[*194]** However, the court declined to specify standards for program requirements, concluding that "the general authority to select the *means* of discharging [the constitutional] duty should be left to the Legislature." *Id. at 520*.

¶23 Applying *Seattle School District*, in *McCleary*, our Supreme Court revisited the issue of whether the State was adequately discharging its affirmative, constitutionally prescribed duty to provide for children's education. *McCleary, 173 Wn.2d at 512*. In concluding that the State was not adequately discharging its duty, the court highlighted two aspects of *article IX, section 1*. First, because *article IX, section 1* imposes a duty on the "*State*," the court concluded that it "contemplates a sharing of powers and responsibilities among all three branches of government." *Id. at 515*. Second, because

article IX, section 1 creates a "'true right'" in children to receive education, the "federal limits [***19] on judicial review such as the political question doctrine or rationality review are inappropriate." Id. at 518 (quoting Seattle Sch. Dist., 90 Wn.2d at 513 n.13), 519. The court reasoned that in the context of a positive right, "we must ask whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'" Id. (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1137 (1999)). Our Supreme Court noted:

> While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.

Id. at 546.

¶24 This case is distinguishable from Seattle School District and McCleary because, in both cases, the court found that the State has an affirmative, *constitutionally prescribed* duty to provide—and that children have a corresponding true right to receive—an adequate education. [*195] Accordingly, there was a judicially appropriate question concerning what satisfied that explicit duty. But "our state constitution does not address state responsibility for climate change," Svitak, No. 69710-2-I, slip op. at 5, and, [***20] in particular, provides no true right to a healthful and pleasant environment. Thus, neither case is persuasive.

¶25 The Youths disagree and cite Brown v. Plata, 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011), contending that "[a]s in *Plata*, the Superior Court can set the constitutional floor necessary for preservation of the Youth['s] rights." The Youths' reliance on *Plata* is misplaced. In *Plata*, the United States Supreme Court relied on the Prison Litigation Reform Act of 1995 in determining that a three-judge panel had authority to order California to reduce its prison population. Id. at 512. Here, we have no similar statute empowering the court's review of the legislative and executive actions at issue. Accordingly, *Plata* does not control.

¶26 The Youths also contend that "it is entirely premature at this early stage to speculate as to the propriety of any relief that may ultimately be awarded." If the Youths' assertion were true, courts would consistently resolve political questions only to find out after considerable expenditure of court resources that the case must be dismissed or the court will violate the political question doctrine. Thus, we are not persuaded by the Youths' assertion. [**451]

[10] ¶27 Similarly, the Youths cite Martinez-Cuevas v. DeRuyter Bros. Dairy, 196 Wn.2d 506, 475 P.3d 164 (2020), to support their assertion that their "constitutional [***21] claims should be decided on a full factual record as opposed to a motion to dismiss." Because *Martinez-Cuevas* does not discuss the standard of review on CR 12(c) motions or the propriety of developing a factual record thereunder, we disagree. Moreover, this is not the standard on a CR 12(c) motion to dismiss,[11] and factual development is not required [*196] to dismiss a political question. Accordingly, the Youths' assertion fails.

¶28 Finally, the Youths rely on a number of dissimilar cases for their position that the court may resolve their claims without violating the separation of powers doctrine. Because those cases concern distinct and distinguishable constitutional issues, we are not persuaded. *See* Milliken v. Bradley, 433 U.S. 267, 279-80, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977) (addressing whether a court can order, as an equitable remedy, education programs in a desegregation decree and holding that "the nature of the *desegregation* remedy is to be determined by the nature and scope of the constitutional violation" (emphasis added)); Rousso, 170 Wn.2d at 92 (addressing whether a statute violated the dormant commerce clause); In re Flint Water Cases, 960 F.3d 303, 324 (6th Cir. 2020) (addressing the substantive due process right to bodily integrity); Martinez-Cuevas, 196 Wn.2d at 511 (addressing a statute's provision "exempting agricultural workers from the overtime pay requirement set out in the [***22] Washington Minimum Wage Act, ch. 49.46 RCW" and concluding it violates article I, section 12 of our state constitution).

The Uniform Declaratory Judgments Act

¶29 The Youths contend that their claims are justiciable under the UDJA. Because the court's resolution of this case would not be final or conclusive, we disagree.

[11, 12] ¶30 The UDJA provides a means by which a

[11] Wash. Trucking, 188 Wn.2d at 207.

party may bring a claim for declaratory relief. It states that "[a] person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. But "'before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy.'" To-Ro Trade Shows v. [*197] Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). A justiciable controversy is one that presents

> "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which **[***23]** will be final and conclusive."

Id. (alteration in original) (quoting Diversified Indus. Dev. Corp., 82 Wn.2d at 815).

[13] ¶31 Here, at the very least, the fourth element is lacking. Specifically, the Youths requested that the trial court retain jurisdiction over the matter to monitor and enforce the State's implementation of a climate recovery plan. This would include ensuring that the defendant agencies enact rules in accordance with legislation the court deems satisfactory. Such a remedy is necessarily provisional and ongoing, not final or conclusive. While the declaratory relief would be final, it is inextricably tied to the retention of jurisdiction and to the order to implement the climate recovery plan. And a trial court order would not result in the atmospheric carbon levels required to either stabilize the future global climate or protect the Youths' asserted right because the world must act collectively in order to stabilize the climate.[12] **[**452]** See Juliana II, 947 F.3d at 1173. Therefore, the Youths' claims are not justiciable under the UDJA.

¶32 The Youths assert that "[n]o new laws are necessary to remedy past and ongoing constitutional violations" and that, therefore, their claims are justiciable under the UDJA. However, in their complaint, and throughout this appeal, **[***24] [*198]** the Youths requested that the court order the State to create a climate plan, i.e., new legislation regarding the reduction of GHG emissions, and that we determine the appropriate GHG emission reductions. Therefore, the Youths' assertion is implausible and unpersuasive.

¶33 In short, the separation of powers doctrine and the lack of justiciability under the UDJA are dispositive with regard to all of the Youths' claims. Therefore, the trial court did not err by dismissing them. We next address the merits of the Youths' various claims to foreclose any assertion that their resolution should alter our conclusion.

Substantive Due Process

[14-21] ¶34 The Youths assert that the trial court erred when it concluded that there is no fundamental right "to a healthful and pleasant environment," which includes "the right to a stable climate system that sustains human life and liberty." Because the Youths fail to provide a basis for the court to find the unenumerated right to a healthful environment and because we must exercise the utmost care in extending the liberties protected by the due process clause, we disagree.

¶35 "An individual seeking the procedural protection of the Fourteenth Amendment's due process clause must establish that [their] interest in life, liberty, or **[***25]** property is at stake." In re Pers. Restraint of McCarthy, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007). But "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). "Modern substantive due process jurisprudence requires a 'careful description of the asserted fundamental liberty interest.'" Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (internal quotation marks omitted) **[*199]** (quoting Glucksberg, 521 U.S. at 721). But "[t]he identification and protection of fundamental rights ... 'has not been reduced to any formula.'" Obergefell v. Hodges, 576 U.S. 644, 663-64, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (HARLAN, J., dissenting)). "[I]t requires courts to exercise reasoned judgment in identifying

[12] We recognize that this is not a reason to resist the opportunity to implement advanced climate change policies. It does, however, provide evidence that judicial resolution would not be final or conclusive and, therefore, would be inappropriate.

interests of the person so fundamental that the State must accord them its respect," and "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id. at 664*.

¶36 As an initial matter, it is important to articulate the Youths' claimed right and legal bases. The Youths assert a fundamental right to "a healthful and peaceful environment, which includes a stable climate system." In support of this alleged right, the Youths cite *Washington Constitution article I, section 3* and *section 30*, and *RCW 43.21A.010*.[13] These provisions do not provide for the asserted right. In particular, unlike the constitutional mandate creating an affirmative duty in *Seattle School District* and *McCleary*, none **[***26]** of these provisions provide a true right, created by a positive constitutional grant, which the State cannot invade or impair.
[453]**

¶37 *Article I, section 3 of the state constitution* states that "[n]o person shall be deprived of life, liberty, or property, without due process of law," mimicking the *Fourteenth Amendment*. "The types of interests that constitute 'liberty' and 'property' for *Fourteenth Amendment* purposes are both broad and limited[:] The interest must rise to more than 'an abstract need or desire'" "and must be based on **[*200]** more than 'a unilateral hope.'" *In re Pers. Restraint of Lain, 179 Wn.2d 1, 14, 315 P.3d 455 (2013)* (quoting *Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*; *Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981)*). The court should expand substantive due process protections in very limited circumstances "'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *Glucksberg, 521 U.S. at 720* (quoting *Collins, 503 U.S. at 125*). And in "extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* Therefore, the court must "'exercise the utmost care whenever we are asked to break new ground in this field,' ... lest the liberty protected by the *Due Process Clause* be subtly transformed into the policy preferences of the [judiciary]." *Id.* (quoting *Collins, 503 U.S. at 125*).

¶38 An examination **[***27]** of "our Nation's history, legal traditions, and practices"[14] presents no evidence of a liberty interest in a healthful and peaceful environment. In particular, only one court has ever held that there exists a fundamental right to a climate system capable of sustaining life. *See Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016)* (*Juliana* I) (holding that there is a fundamental right to a climate system capable of sustaining life), *rev'd and remanded, 947 F.3d 1159*; *cf. Clean Air Council v. United States, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019)* (holding that there is no "fundamental right to a life-sustaining climate system"); *SF Chapter of A. Philip Randolph Inst. v. U.S. Envtl. Prot. Agency, No. C07-04936 CRB, 2008 WL 859985, at *7, 2008 U.S. Dist. LEXIS 27794, at *19 (N.D. Cal. Mar. 28, 2008)* (court order) (holding that the right to be free from climate change pollution is not a fundamental right under the *Fourteenth Amendment*); **[*201]** *Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1238 (3d Cir. 1980)* (holding that "there is no constitutional right to a pollution-free environment"), *vacated on other grounds sub nom. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)*; *Concerned Citizens of Neb. (CCN) v. U.S. Nuclear Regulatory Comm'n (NRC), 970 F.2d 421, 427 (8th Cir. 1992)* (holding that under the *Ninth Amendment* and the *equal protection clause*, CCN does "not have a fundamental right to be free from non-natural radiation").[15] While the lack of a historical and

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[13] The Youths also cite the United Nations (UN) *Joint Statement* as evidence of their substantive due process right to a peaceful environment. However, they failed to provide authority to support the proposition that a UN joint statement may be used as a basis for substantive due process rights. We therefore do not address it as such a basis. *See City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205* ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" (quoting *DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)*)), *review denied, **195 Wn.2d 1031 (2020)***.

[14] *Glucksberg, 521 U.S. at 710*.

[15] The Swinomish Indian Tribal Community, Suquamish Tribe, and Quinault Indian Nation assert that the right to a healthful environment is fundamental because it is the "prerequisite to the free exercise of specific, enumerated rights," specifically, life and liberty. To this end, they liken the Youths' alleged right and the rights to life and liberty to the right to municipality employment and the right to travel. They cite *Eggert v. City of Seattle, 81 Wn.2d 840, 841-44, 505 P.2d 801 (1973)*, for the proposition that a court looks to "whether [the asserted] right is implicit and necessary to the exercise of enumerated rights, and whether the right is deeply embedded in societal values." In *Eggert*, the court held that the city of Seattle's one year

legal tradition protecting the environment for future generations **[**454]** almost certainly led us to the position we are in now, there simply is no historical basis for the determination that a right to a healthful or stable environment exists. Moreover, were we to create such an interest, we would transform substantive due process rights **[***28]** into the policy preferences of the court. Therefore, we conclude that *article I, section 3* does not provide a fundamental right to a healthful and peaceful environment.

¶39 *Article I, section 30* provides that "[t]he enumeration in this Constitution of certain rights shall not be construed **[*202]** to deny others retained by the people." More specifically, *article I, section 30* is a declaration that the statement of "certain fundamental rights belonging to all individuals and made in the *Bill of Rights* shall not be construed to mean the abandonment of others" that the constitution does not express but that "inherently exist in all civilized and free states." *State v. Clark, 30 Wash. 439, 443-44, 71 P. 20 (1902)*.

¶40 As noted above, the Youths point to no legal or social history to support their asserted right, and the State is not required to "disprove the existence of [the asserted] right" under *article I, section 30*. *Halquist v. Dep't of Corr., 113 Wn.2d 818, 820, 783 P.2d 1065 (1989)*. Without a showing of how the asserted right inherently exists and has existed in civilized states, the Youths' contention fails. Accordingly, we conclude that *article I, section 30* does not provide the right to a healthful and peaceful environment or to a stable climate system.

¶41 *RCW 43.21A.010* provides:

> The legislature recognizes and declares it to be the *policy* of this state, that it is a fundamental and inalienable right of the people of the state of **[***29]** Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources. The legislature further recognizes that as the population of our state grows, the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic and other needs will place an increasing responsibility on all segments of our society to plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state.

(Emphasis added.) *RCW 43.21A.010* is merely a policy declaration "explain[ing] goals, or designat[ing] objectives to be accomplished." *Seattle School Dist., 90 Wn.2d at 499* (holding that because *article IX, section 1* explicitly provides a constitutionally mandated duty and a correlative **[*203]** right for children to receive an adequate education, it is not merely a policy declaration). While the statute articulates the policy of the legislature, it does not provide an interest and cannot provide for a fundamental right. Therefore, *RCW 43.21A.010* does not provide a basis for the asserted right.

¶42 The Youths disagree and contend that the trial court failed to "undertake **[***30]** the proper analysis for identifying unenumerated fundamental rights." Specifically, they assert that the trial court failed to recognize that an unenumerated fundamental right may be created by statute. While this is true, the relied on statutory provision cannot be a policy statement. *See, e.g., State v. Hand, 192 Wn.2d 289, 302, 429 P.3d 502 (2018)* (MADSEN, J., concurring) (holding that where the statute established "only aspirational timelines" and procedures, the asserted fundamental right did not exist). As discussed, *RCW 43.21A.010* is a policy statement. Therefore, we are not persuaded.

¶43 As a final matter, to the extent that the amici curiae focus on the right to a stable climate system, that focus is not entirely aligned with the Youths' claim. Specifically, the Youths' claim is much broader, and in their opposition to the State's motion to dismiss, the Youths discuss only the right to a healthful and peaceful environment. Nonetheless, even if the Youths asserted the narrow right to a stable climate system, their reliance on *Juliana I, 217 F. Supp. 3d at 1250*, which concluded that a fundamental right to "a stable climate

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residency requirement for employment violated the constitutionally protected right to travel. *Id. at 848*. The court chose not to address whether the right to employment was fundamental. *Id.* While the right to life and liberty may be connected to the right to a healthful and pleasant environment, as discussed, we must be wary of extending due process liberty interests into new arenas. More importantly, the right to employment or to one's chosen occupation has historically been viewed as a protected interest. *See Fields v. Dep't of Early Learning, 193 Wn.2d 36, 46, 434 P.3d 999 (2019)* (noting that the plaintiff had a "protected interest, but not a fundamental right, to pursue her chosen, lawful occupation"). However, the right to a healthful environment—for better or worse—has not been embedded in our societal values such that it is considered a protected interest. Accordingly, we are not persuaded.

system" exists, is unpersuasive for three reasons. First, *Juliana* I was reversed based on the nonjusticiability **[**455]** of the question presented and therefore is not **[***31]** a final order with persuasive authority. *See Juliana II, 947 F.3d at 1175*. While the Ninth Circuit did not address whether there exists a constitutional right, we are not persuaded by *Juliana* I's conclusion. Second, *Juliana* I is an outlier in finding that the right exists.[16] Finally, *Juliana* I's and the **[*204]** Youths' reliance on *Obergefell* is misplaced because *Obergefell* dealt with a right it described as a "keystone of our social order" and a liberty interest deeply rooted in our nation's and the judiciary's history and traditions. *Obergefell, 576 U.S. at 669*. Because the Youths fail to proffer similar history with regard to a healthful environment *or* a stable climate system, neither *Obergefell* nor *Juliana* I is persuasive. *See, e.g., Lake v. City of Southgate, No. 16-10251, 2017 WL 767879, at *4, 2017 U.S. Dist. LEXIS 27623, at *9-10 (E.D. Mich. Feb. 28, 2017)* (court order) (concluding that the plaintiff did not have a fundamental right "in health or freedom from bodily harm" because she failed to provide a "'careful description'" as required under *Glucksberg* and provided no "evidence that [the] alleged right is rooted in our nation's traditions or implicit in the concept of ordered liberty" (quoting *Glucksberg, 521 U.S. at 720-21*)).

Equal Protection Claim

¶44 The Youths contend that the State violated their right to equal protection of the law under *article I, section 12*.[17] Because the Youths failed to establish that **[***32]** a fundamental right has been implicated or that they received disparate treatment because of their membership in a suspect or quasi-suspect class with immutable characteristics, we disagree.

[22-24] ¶45 "The *Equal Protection clause of the Washington State Constitution, article I, section 12* ... require[s] that 'persons similarly situated ...' receive like treatment."[18] *Kustura v. Dep't of Labor & Indus., 142 Wn. App. 655, 684, [*205] 175 P.3d 1117 (2008)* (quoting *State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)), aff'd on other grounds, 169 Wn.2d 81, 233 P.3d 853 (2010)*. To assert an equal protection claim, the Youths must first establish that a fundamental right has been implicated or that the Youths "received disparate treatment because of membership in a class of similarly situated individuals, and that the disparate treatment was the result of intentional or purposeful discrimination." *Thornock v. Lambo, 14 Wn. App. 2d 25, 33, 468 P.3d 1074 (2020)*. Stated differently, the State must have implicated "a fundamental right" in taking discriminatory action or drawn a "suspect or semisuspect classification." *Kustura, 142 Wn. App. at 684*.

[25, 26] ¶46 The Youths contend that "[t]he affirmative aggregate acts of Defendants reflect a *de facto* policy choice to favor the present generation's interests to the long-term detriment of" the Youths. The Youths' contention is unpersuasive. First, "[a] suspect class 'must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently **[***33]** bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class.'" *Kustura, 142 Wn. App. at 685* (quoting *Andersen v. King County, 158 Wn.2d 1, 19, 138 P.3d 963 (2006)* (plurality opinion), *abrogated by Obergefell, 576 U.S. 644)*. Here, youth is not an immutable characteristic. "[I]mmutable" is defined as "not capable or susceptible of change." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (2002). As the superior court correctly noted, "each [Youth], like every human, will grow older." And while children are "socially, emotionally, physically, and psychologically **[**456]** vulnerable and different from adults in manners beyond their control," this status does not last forever and inevitably changes. Accordingly, the Youths are not a suspect class.
[*206]

¶47 Second, the Youths contend that they will be disparately affected in the future, not that they are suffering a discriminatory deprivation of their right to a healthful or stable environment today. But case law does not support the proposition that an equal protection claim can be premised on a future deprivation, and the Youths provide no persuasive

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[16] *See supra* note 9.

[17] They further assert that the trial court erred because it did not address their equal protection claim pertaining to discrimination with regard to a fundamental right. But because we conclude that no fundamental right to a peaceful and stable environment exists, we do not address this contention.

[18] "The *equal protection clause of the Fourteenth Amendment to the United States Constitution* and *article I, section 12 of the Washington State Constitution* are 'substantially identical and subject to the same analysis.'" *Thornock v. Lambo, 14 Wn. App. 2d 25, 33, 468 P.3d 1074 (2020)* (quoting *State v. Osman, 157 Wn.2d 474, 483 n.11, 139 P.3d 334 (2006)*).

authority to convince us to conclude otherwise.

¶48 Lastly, the aggregate acts of the State do not show any discrimination or discriminatory intent. Accordingly, **[***34]** the Youths fail to establish that the State has treated them disparately. For these reasons, we conclude that, as a matter of law, the Youths failed to present a valid equal protection claim.

¶49 The Youths disagree and assert that they are a suspect class. The Youths assert that they are suspect or semisuspect because they will be the most affected by climate change, they are unable to vote, and they "do not have economic power to influence the state's energy and transportation system." To this end, they cite *Miller v. Alabama*, which states, "'[Y]outh is more than a chronological fact.' It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" *567 U.S. 460, 476, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)* (second alteration in original) (citations omitted) (quoting *Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*; *Johnson v. Texas, 509 U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)*). The *Miller* Court did not address age in the context of equal protection or youths' status as a suspect class. *Id. at 479* (concluding that mandatory life sentences without the possibility of parole for juvenile offenders are unconstitutional pursuant to the *Eighth Amendment*). Accordingly, *Miller* is not persuasive.

¶50 The Youths also rely on *Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)*, to support their contention **[***35]** that they are a suspect class. In *Plyler*, the **[*207]** United States Supreme Court applied heightened scrutiny to Texas laws that withheld funding for public education where the school allowed undocumented children to attend. *Id. at 220*. In applying heightened scrutiny, the Court reasoned that while undocumented status is not "an absolutely immutable characteristic," laws discriminating against undocumented children place a "discriminatory burden on the basis of a legal characteristic over which children can have little control." *Id.* But here, the characteristic at issue is age only, not undocumented status as a child. Furthermore, the children in *Plyler* provided evidence that Texas was discriminating based on this status characteristic. Therefore, *Plyler* does not control.

State-Created-Danger Claim

¶51 The Youths claim that the trial court erred in dismissing their state-created-danger claim. Because the Youths fail to show that the State's actions put them in a worse position, we disagree.

[27] ¶52 To succeed on a state-created-danger claim, the Youths "must show not only that the [State] acted 'affirmatively,' but also that the affirmative conduct placed [them] in a 'worse position than that in which [they] would **[***36]** have been had [the state] not acted at all.'" *Pauluk v. Savage, 836 F.3d 1117, 1124 (9th Cir. 2016)* (some alterations in original) (quoting *Johnson v. City of Seattle, 474 F.3d 634, 641 (9th Cir. 2007)*).

¶53 Here, the Youths cannot show that the State acted affirmatively to create the danger. Rather, despite their contentions to the contrary, the Youths alleged injuries stemming from the State's failure to act more aggressively with regard to regulating GHG emissions.[19] Nonetheless, **[*208]** any affirmative **[**457]** actions by the State did not put the Youths in a worse position than that in which they would have been without the State's action: the State's regulation of GHG emissions, although it fails to provide for the reductions that the Youths claim are necessary to protect the environment, still places the Youths in a position of lesser danger than that which they would be in if the State chose not to regulate GHG emissions at all. Accordingly, the state-created-danger exception does not apply, and the Youths' claim fails.

¶54 The Youths disagree and inappropriately rely on *Pauluk* and *Munger v. City of Glasgow Police Dep't, 227 F.3d 1082 (9th Cir. 2000)*, for the proposition that the State has a duty to protect the Youths from climate change. In *Pauluk*, the court held that Daniel Pauluk's family established a valid state-created-danger claim where Pauluk died from exposure to toxic mold

[19] In their complaint, the Youths contended that the State pursued and implemented policies "that result in dangerous levels of GHG emissions." They went on to explain, however, that the State "placed [them] in a position of danger with deliberate indifference to [the Youths] safety" by its "ongoing act of *omission* in not reducing Washington's GHG emissions consistent with rates that would avoid dangerous climate interference." (Emphasis added.) The Youths further asserted that the State failed to implement its "own laws, plans, policies, and recommendations for climate stabilization or any other comprehensive remedial measures." In short, the Youths' claims, despite their characterization below and on appeal, revolve around omissions or actions, which the Youths perceive are not adequate to remedy climate change.

in **[***37]** a county health office after county officials transferred Pauluk, over his objections, to a building known to contain toxic mold. *836 F.3d at 1119, 1125*. In *Munger*, the Ninth Circuit held that summary judgment was improper for a state-created-danger claim where Lance Munger died after police officers ejected him from a Montana bar at night when the outside temperatures were subfreezing. *227 F.3d at 1087, 1090*. In both cases, state actors affirmatively placed the individuals in known danger, which resulted in the individuals' deaths. Here, the State has not affirmatively placed the Youths in a worse position or injured them.

¶55 In addition, the Youths' reliance on *Braam* is misplaced because, there, the State acted affirmatively as "the custodian and caretaker" of children in the foster care system. *Braam, 150 Wn.2d at 703-04*. Despite the Youths' **[*209]** contentions, the State's role as a custodian and caretaker of foster children is not analogous to "the State's role in energy and transportation system[s]." Therefore, these cases are not persuasive.

Public Trust Doctrine

¶56 The Youths contend that they alleged valid public trust doctrine claims. Because the Youths' complaint alleges a violation of the public trust doctrine in relation to the climate system as a whole, **[***38]** including the atmosphere, and because Washington has not yet expanded the public trust doctrine to encompass the atmosphere, we disagree.

[28] ¶57 The public trust doctrine is based on the common law, but article XVII of our constitution "partially encapsulate[s]" the public trust doctrine. *Rettkowski v. Dep't of Ecology, 122 Wn.2d 219, 232, 858 P.2d 232 (1993)*. Specifically, *article XVII, section 1* asserts state ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

[29, 30] ¶58 The public trust doctrine has never been applied to the atmosphere. To this end, *Rettkowski* is instructive. There, a group of cattle ranchers brought a claim against Ecology based on Ecology's failure to prevent the depletion of a creek that the ranchers used to water their cattle. *Id. at 221-22*. The ranchers contended and, after performing studies, Ecology discovered that groundwater withdrawals from irrigation farmers negatively affected the creek's flow. *Id. at 221*. In dicta, the court discussed the application of the public trust doctrine to groundwater, noting that one problem with applying the doctrine to the ranchers' claim was that Washington has "never **[***39]** previously interpreted the doctrine to extend to non-navigable waters or groundwater." *Id. at 232*. It therefore **[*210]** declined to extend the doctrine thereto. *Id.* Similarly, Washington courts have never extended the public trust doctrine to the atmosphere, and we decline to do so now.

[458]**

¶59 The Youths contend that, in *Rettkowski*, our Supreme Court "intentionally avoided delineating the scope of the" public trust doctrine. The court stated, "We similarly do not need to address the scope of the doctrine today." *Id. at 232 n.5*. The Youths contend that this avoidance amounts to an implicit statement that the public trust doctrine applies to the atmosphere. But it is a legal fallacy to rely on the court declining to address an issue to prove the existence of the principle not addressed, i.e., what resources fall under the public trust doctrine. Therefore, the Youths' reliance on *Rettkowski* is misplaced.

¶60 More generally, the Youths contend that "'the navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical.'" To this end, the Youths cite the Code of Justinian from sixth century Rome as the basis for the public trust doctrine's **[***40]** application to the air. However, "the interconnectedness of natural resources ... does not mean that all natural resources, including the atmosphere, must be considered public trust resources under [the] public trust doctrine." *Chernaik v. Brown, 367 Or. 143, 165, 475 P.3d 68 (2020)*. And we decline "to expand the resources included in the public trust doctrine well beyond its current scope" to include the atmosphere. *Id. at 166*.

¶61 The Youths and amici rely heavily on the superior court's order in *Foster v. Department of Ecology*, affirming the Department of Ecology's "Denial of Petition for Rulemaking." No. 14-2-25295-1 SEA (King County Super. Ct., Wash. Nov. 19, 2015). There, the court declared that the public trust doctrine applies to the atmosphere. *Id.* But we **[*211]** are not bound by a trial court's decision,[20] and our analysis does not lead us to

[20] *See In re Estate of Jones, 170 Wn. App. 594, 605, 287 P.3d*

the conclusion that the public trust doctrine applies to the atmosphere. Accordingly, we are not persuaded.

[31] ¶62 Finally, the Youth assert that they "alleged impairment to traditional Public Trust Resources such as navigable waters and submerged lands." But in their complaint, the Youths asserted that "[t]he overarching public trust resource is the climate system, which encompasses the atmosphere, waters, oceans, and biosphere." **[***41]** They explained, "The dangerous levels of [GHG] emissions that Defendants have allowed into the *atmosphere* have a scientifically demonstrable effect on the public's ability to use, access, enjoy and navigate the state's tidelands, shorelands, and navigable waters and other Public Trust Resources." Therefore, we are not persuaded by the Youths' attempt to recharacterize their allegation.[21]

CONCLUSION

¶63 The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths **[*212]** may establish and enforce their policy goals. Because resolution of the Youths' claims would require this court to violate the separation of powers doctrine, we affirm.

MANN, C.J., and BOWMAN, J., concur.

Review denied at *198 Wn.2d 1025 (2021)*.

References

LexisNexis Practice Guide: Washington Pretrial Civil Procedure

Washington Administrative Law Practice **[***42]** Manual

Annotated Revised Code of Washington by LexisNexis

United States Code Service (USCS) by LexisNexis

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610 (2012) ("Stare decisis is not applicable to a trial court decision because 'the findings of fact and conclusions of law of a superior court are not legal authority and have no precedential value.'" (quoting *Bauman v. Turpen, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007)*)).

[21] The Sauk-Suiattle Indian Tribe contends that the Quinault youth, as members of the Quinault Indian Nation, have constitutionally protected treaty rights under the Quinault Treaty. But the Youths did not raise this argument. Therefore, we do not address it. *City of Seattle v. Evans, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015)* (A court "'will not address arguments raised only by amicus.'" (quoting *Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003)*)).

EXHIBIT U

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

DELANEY REYNOLDS; et. al.
Plaintiffs,
v.

CASE NO. 2018-CA-819
CIRCUIT CIVIL

THE STATE OF FLORIDA;
RON DESANTIS, in his official capacity
As Governor of the State of Florida; et. al.
Defendants.
_____/

ORDER GRANTING MOTIONS TO DISMISS WITH PREJUDICE

THIS MATTER came before the Court for hearing on June 1, 2020 on the Defendants several Motions to Dismiss the First Amended Complaint. This court, having reviewed the file and pleadings to date, the cited authorities, the submissions of the parties, and having heard argument of counsel, and being otherwise fully advised in the premises, finds as follows:

1. Plaintiffs, 8 young Floridians, brought this complaint seeking Declaratory and Injunctive Relief, asserting injury because of "*Defendants' deliberate indifference to their fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system, in violation of Florida common-law and the Florida Constitution*". The complaint further asserts that the "Fossil Fuel Energy System" created and operated by the Defendants does not, and cannot, ensure that the plaintiffs will grow to adulthood safely, and enjoying the same rights, benefits and privileges of earlier-born generations of Floridians. The complaint purports to seek declaratory relief and an injunction compelling Defendants to develop and implement a comprehensive plan to bring its Energy System into constitutional compliance.

2. The various Defendants have filed motions to dismiss the amended complaint asserting numerous grounds including nonproper party, failure to state a cause of action, (including separation of powers doctrine and political question doctrine) and other grounds.

3. Having reviewed the extensive materials submitted and heard argument of counsel, the Court finds that the motions to dismiss should be, and hereby are, GRANTED. Simply put, this Court finds that it lacks the authority to grant the relief requested due to the Separation of Powers Clause of the Florida Constitution. See Art.II, 3, Fla. Const. and *Citizens for Strong Schools v. Fla. State Board of Education*, 262 So.3d 127 (Fla. 2019). This Court finds that the Plaintiff's claims are nonjusticiable. The claims are inherently political questions that must be resolved by the political branches of government. Further, because this Court has found that the relief requested involves non-justiciable political questions and separation of powers, the Complaint's flaws cannot be corrected by amendment and therefore the amended complaint should be, and hereby is, DISMISSED WITH PREJUDICE.

4. Having arrived at its conclusions as set forth in paragraph 3 above, this court does not address the motions to dismiss to the extent that they concern the status of any defendant as a proper party to this litigation, or as to any other grounds. Such determination is unnecessary, in light of the ruling above.

DONE AND ORDERED, in Chambers, in Tallahassee, Leon County, Florida this ninth day of June, 2020.

KEVIN J. CARROLL, Circuit Judge

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EXHIBIT V

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NATALIE R., a Minor, by and through her Guardian, DANIELLE ROUSSEL; et al., **Plaintiffs,** **vs.** **STATE OF UTAH, et al.,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 220901658** **Honorable Robert P. Faust**

The Court has before it Defendants' Motion to Dismiss. Oral argument was held with respect to the Motion on November 4, 2022. Following the hearing, the matter was taken under advisement. After reviewing the record, the Court hereby enters the following ruling:

BACKGROUND

Plaintiffs are children, appearing through their guardians, and one adult, who assert they are uniquely vulnerable to and face disproportionate harms to their physical and psychological health, safety, and development as a result of Utah's development and combustion of fossil fuels. Specifically, Plaintiffs allege the State of Utah is violating their substantive due process rights protected by Utah Constitution, Article I, Sections 1 and 7, by impinging on Plaintiffs' right to life.

LEGAL STANDARD

The State Defendants seek dismissal of Plaintiffs' claims pursuant to Utah R. Civ. P. 12(b)(1) and (6). Rule 12(b)(6) permits dismissal for "failure to state a claim on which relief can be granted." "A district court should grant a rule 12(b)(6) motion only when, 'assuming the truth of the allegations' that a party has made and 'drawing all reasonable inferences therefrom in the light most favorable' to that party, 'it is clear that [the party] is not entitled to relief.'" *Calsert v. Est. of Flores*, 2020 UT App 102, ¶ 9, 470 P.3d 464, 468. (Internal citations omitted).

RULING

After reviewing the record, and while Plaintiffs have a valid concern, the Court finds Plaintiffs' claims are precluded because (1) the political question doctrine prevents the Court from creating climate change and fossil fuels policy; (2) Plaintiffs' requested equitable relief cannot effectively redress their alleged harms; and (3) the Court should not extend the substantive due process doctrine into areas where it has not previously been applied, such as global climate change and fossil fuels policy.

POLITICAL QUESTION DOCTRINE

"The Utah Constitution explicitly establishes separation of powers between the legislative, judicial, and executive branches at the state level." *Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995). Specifically, the Utah Constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. Utah Const. art. V, § 1.

Utah courts rely on federal case law when interpreting and applying the political question doctrine. *Id.* This in mind, in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court set forth a six-prong test for determining when the doctrine applies:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Similar to this matter before this Court, the Washington Court of Appeals considered a similar case:

> The appellants are 13 youths (the Youths) between the ages of 8 and 18 who sued the State of Washington, Governor Jay Inslee, and various state agencies and their secretaries or directors (collectively the State) seeking declaratory and injunctive relief. The Youths alleged that the State "injured and continue[s] to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that [the State] knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm." To this end, the Youths asserted substantive due process, equal protection, and public trust doctrine claims, among others. They asked the trial court to declare that they have "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." *Aji P. by & through Piper v. State*, 16 Wash. App. 2d 177, 183, 480 P.3d 438, 444–45, *review denied sub nom. Aji P. v. State,* 198 Wash. 2d 1025, 497 P.3d 350 (2021).

The Court's holding made clear that the issues raised by Plaintiffs are non-justiciable political questions:

> We firmly believe that the right to a stable environment should be fundamental. In addition, we recognize the extreme harm that greenhouse gas emissions inflict on the environment and its future stability. However, it would be a violation of the separation of powers doctrine for the court to resolve the Youths' claims. Therefore, we affirm the superior court's order dismissing the complaint. *Id.* at 445.

The Court noted that "the resolution of the Youths' claims is constitutionally committed to the legislative and executive branches. 'Article 2, section 1, of the Washington State Constitution vests all legislative authority in the legislature and in the people,' through the power of initiative and referendum." *Id.* at 477.

Utah's Constitution is not materially different. As in Washington, the power to create and repeal environmental legislation is constitutionally committed to the political branches or the people directly in Utah.

Similarly, the Ninth Circuit, when it considered a case where minor children via through their guardians also asked for a court order declaring the federal government's fossil fuels policy unconstitutional and ordering the government to address global climate change, concluded:

> The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government. *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020).

Plaintiffs rely on a Montana District Court case distinguishing *Juliana* based on the claim that declaratory relief might be acceptable but injunctive relief was not. (Op. at 4.) However, that Court observed, "Article II, Section 3 of the Montana Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right." *Held v. Montana*, Order on Mot. to Dism. at 23, Cause No. CDV-2020-307, August 4, 2021. Utah's Constitution has no parallel to this right. And as the *Aji P.* Court wrote, "Because our state constitution does not address state responsibility for climate change, it is up to the legislature, not the judiciary, to decide whether [—and to what

extent—] to act as a matter of public policy." 16 Wash. App. 2d at 192. The argument that declaratory relief can address climate change also failed in the Oregon Supreme Court and Washington Court of Appeals. *Chernaik v. Brown*, 367 Or. 143 (2020); *Aji P.*, 16 Wash. App. 2d 177.

The Alaska Supreme Court also reached the same conclusion as *Juliana*:

> A number of young Alaskans — including several Alaska Natives — sued the State, alleging that its resource development is contributing to climate change and adversely affecting their lives. They sought declaratory and injunctive relief based on allegations that the State has, through existing policies and past actions, violated . . . their individual constitutional rights. The superior court dismissed the lawsuit, concluding that the injunctive relief claims presented non-justiciable political questions better left to the other branches of government and that the declaratory relief claims should, as a matter of judicial prudence, be left for actual controversies arising from specific actions by Alaska's legislative and executive branches. The young Alaskans appeal, raising compelling concerns about climate change, resource development, and Alaska's future. But we conclude that the superior court correctly dismissed their lawsuit. *Sagoonick v. State*, 503 P.3d 777, 782 (Alaska 2022), *reh'g denied* (Feb. 25, 2022).

Moreover, a federal district court in Pennsylvania considering a case where minor children filed an action against federal authorities claiming that the federal government had violated their due process rights to life and "personal bodily integrity" by "allowing and permitting fossil fuel production, consumption and its associated CO2 pollution," held, "[b]ecause I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants' Motion" to Dismiss. *Clean Air Council v. United States*, 362 F.Supp.3d 237 (2019).

Additionally, the Iowa Supreme Court also considered a case where environmentally concerned plaintiffs asked the courts to amend state policies regarding water quality. The court held that these were non-justiciable policy questions:

> In our view, stating that the legislature must "broadly protect[ ] the public's use of navigable waters" provides no meaningful standard at all. Different uses matter in different degrees to different people. How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed

> against additional costs for drinking water? Even if courts were capable of deciding the correct outcomes, they would then have to decide the best ways to get there. Should incentives be used? What about taxes? Command and-control policies? In sum, these matters are not "claims of legal right, resolvable according to legal principles, [but] political questions that must find their resolution elsewhere." *Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780, 796-97 (2021).

Neither Utah's Constitution, nor the United States Constitution, addresses anything about fossil fuels or global climate change which would permit the Court to grant a judicial remedy.

Next, Plaintiffs fail to satisfy the second prong of the *Baker* test, which requires "judicially discoverable and manageable standards for resolving" the issues before the Court. *Baker*, 369 U.S. at 217. In the present case, Plaintiffs ask the Court to declare unconstitutional statutes governing the production of fossil fuels. Such policy decisions would require the Court to "decide matters beyond the scope of our authority with resources not available to the judiciary." *Aji P. by & through Piper*, 16 Wash. App. 2d at 189–90. While Plaintiffs cite the case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for the proposition that a "mathematically precise standard" is not necessary-in the instant, such is clearly distinguishable, as in the present case, NO guiding or limiting principles are provided.

Finally, the fourth *Baker* factor cautions against, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" *Baker*, 369 U.S. at 217. Energy policy, fossil fuels development, and global climate change are paradigm examples of "matters of the greatest societal interest [that] involving a grand, overarching balance of important public policies [and] are beyond the capacity of courts to resolve." *Gregory v. Shurtleff*, 2013 UT 18, 299 P.3d 1098, 1132 n.29.

In this case, Plaintiffs ask the Court to declare legislative acts unconstitutional based on things that are not expressed in the constitution. They seek a different weighing of the interests involved, though the Legislature has already balanced the interests and created policy through

statute. Striking down the legislature's fossil fuel policies would be contrary to our constitutional system and violate the separation of powers.

PLAINTIFFS CLAIMS ARE NOT REDRESSABLE

There are three (3) requirements for traditional standing in Utah. "'First, plaintiffs must assert that they have been or will be 'adversely affected by the [challenged] actions.' Second, they must 'allege a causal relationship between [their] injury [and] the [challenged] actions.' And third, 'the relief requested must be substantially likely to redress the injury claimed.' 'E]ach step must be demonstrated in order to confirm standing.'" *S. Utah Wilderness All. v. Kane Cnty. Comm'n*, 2021 UT 7, ¶ 23, 484 P.3d 1146, 1155 (Internal citations omitted). *See also Carlton v. Brown*, 2014 UT 6,123, 323 P.3d 571 ("Utah's standing requirements are similar to the federal court system in that they contain the same three basic elements—injury, causation, and redressability").

In the present case, Plaintiffs ask the Court to declare policy explanations in the two (2) statutes unconstitutional, without addressing the operative language of the statutes. The Court should not, however, declare a constitutional violation without a "'limited and precise' standard discernible in the Constitution for redressing the asserted violation." *Juliana*, 947 F.3d at 1173 (*quoting Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)* (the court was unable to adopt a standard for gerrymandering cases that was not "relatively easy to administer as a matter of math")). As noted above, Plaintiffs offer no such precise standard for redressability.

Moreover, Plaintiffs have not shown their proposed declaration will have any effect on carbon emissions in Utah. Plaintiffs offer no analysis explaining how any of the challenged statutes might be used to interpret operative requirements in a manner that would reduce fossil fuel consumption. Indeed, in the one case cited by Plaintiffs on this point, the court found that, "it is

likely that if the governmental action is declared unconstitutional, the adverse impact on *Jenkins* will be relieved." *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983). The same is not true here.

Indeed, Plaintiffs admit that "Defendants' authority to require permits for and regulate fossil fuel development would remain intact," if their request is granted, (Op. at 17), and that "They do not ask this Court to determine what Utah's policy should be, or to order the State to adopt or implement any specific policy, or to prepare or effectuate any remedial plan." *Id.* at 4. "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005). Without knowing how legal requirements will change, Plaintiffs cannot promise it will have any effect at all.

Plaintiffs cite *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 346-47 & n.5 (Utah 1991), as an example of a case where the Utah Supreme Court issued a "declaration of public interest." The *Bennion* Court interpreted operative provisions of Utah Code Ann. § 40–6–6(5). *Id.* at 345-47. However, predicting how courts might interpret the operative provisions after the legislative intent elements are removed would be purely speculative, because all operative provisions would survive the requested relief. In fact, the *Bennion* Court refused to apply the "declaration of public interest" to deny "imposition of a statutory non-consent penalty" as plaintiffs requested. *Id.*at 352.

Plaintiffs' claimed harms would require a global solution, and a court attempting to address climate change would be forced to retain jurisdiction and implement a recovery plan. Indeed, even if the Court were to enter a declaration regarding the constitutionality of the challenged provisions in Plaintiffs' favor, without a concrete climate recovery plan, remediation is unlikely, thus failing the redressability requirement.

Even assuming, for the sake of discussion, that Utah's oil and gas statutes were declared unconstitutional in total, it would not result in a cessation of fossil fuel development or in the reduction of emissions. If Plaintiffs prevail in invalidating the Act, the common law rule of capture would become the legal principle dictating oil and gas development in Utah and the unregulated production of hydrocarbons would likely increase. *See P*hillip W. Lear, Thomas A. Mitchell, & William R. Richards, Modern Oil & Gas Conservation Practice: And you Thought the Law of Capture was Dead? 41 Rocky Mtn. Min. Law Inst. 17-1, 17-9 at § 17.02[5](1995) (scholarly article compiling articles and cases discussing the common law rule of capture); Phillip Wm. Lear, Utah Oil and Gas Conservation Law and Practice, 43B RMMLF-INST 5C (1997)(article detailing oil and gas conservation practice in Utah). Prior to 1955, oil and gas development in Utah was governed by the common law rule of capture.

SUBSTANTIVE DUE PROCESS AND FOSSIL FUELS POLICY

There is no precedent for extending the doctrine of substantive due process into policy decisions regarding the development of fossil fuels. Courts have uniformly concluded substantive due process does not apply to fossil fuels policy. *See e.g. Exxon Corp. v. Governor of Maryland.* 437 U.S. 117, 124 (1978)(*quoting Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963)); *Bullseye Glass Co. v. Brown,* 366 F.Supp.3d 1190 (D. Oregon), *see also Wildgrass Oil & Gas Comm. v. Colorado,* 447 F. Supp. 3d 1051, 1068 (D. Colo. 2020), aff'd, 843 F. App'x 120 (10th Cir. 2021). Moreover, the Supreme Court also cited with approval a portion of a First Circuit case holding that the federal Coal Act did not infringe substantive due process rights because it was economic legislation and did not abridge fundamental rights. *E. Enterprises v. Apfel,* 524 U.S. 498, 517 (1998)(*citing and reversing on other grounds Eastern Enterprises v. Chater,* 110 F.3d 150 (C.A.1 1997)).

The Supreme Court has, "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It protects only those freedoms "implicit in the concept of ordered liberty[.]" *Id.* A new policy proposal to cease or significantly curtail fossil fuel development is not implicit in this nation's history and traditions and is not involved with the concept of ordered liberty. Plaintiffs admit that fossil fuel development in Utah is "historic and ongoing." (Complaint ¶ 6.)

Further, the Due Process Clause does not require the State to protect against private actors. The Supreme Court has recognized that "the Due Process Clause does not require the State to provide its citizens with particular protective services[.]" *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196–97 (1989). "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors." *Id.* at 195. "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195. The "purpose [of the Due Process Clause] was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *Id.* at 196.

The United States District Court for the Eastern District of Pennsylvania specifically found that:

> Once again third parties—not the Government—are polluting the air. As I have discussed, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney, 489 U.S. at 197, 109 S.Ct. 998. Accordingly, Plaintiffs have failed to state a claim based on a violation of their right to life or bodily integrity. *Clean Air Council*, 362 F.Supp.3d at 253.

Accordingly, the principle of limiting substantive due process to prevent policy decisions by judges is entirely consistent with the political question doctrine's limitations on the courts' authority.

OPEN COURTS

Finally, Defendants' arguments do not violate Utah's Open Courts protections. Plaintiffs cite *Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998), for the proposition that courts must be accessible to all for the resolution of their disputes. (Op. at 7.) However, the right provided under the Open Courts Clause, "revolves around the judicial system, not the specific results of the judicial action." *Jeffs*, 970 P.2d at 1250. This Court is open to the Plaintiffs in this matter and their claims are being considered in this Motion to Dismiss. This does not, however, mean Plaintiffs have a right to proceed to discovery and trial absent a meritorious case.

BASED UPON THE FORGOING, Defendants' Motion to Dismiss is granted. Plaintiffs' claims are dismissed with prejudice.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 9th day of November 2022

BY THE COURT:

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE

ROBERT P. FAUST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed/emailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 9th day of November 2022:

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STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

EXHIBIT W

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

LAYLA H., et al., *Plaintiffs*	)	
v.	)	
	)	**Case No: CL22-0632**
COMMONWEALTH OF VIRGINIA, *Defendants*	)	

ORDER

On September 16, 2022, this matter came before the Court on the Commonwealth's ("Defendant") Demurrer and Plea of Sovereign Immunity. Defendant and Layla H., et al., ("Plaintiffs") appeared by and through their counsel. Upon due consideration of the parties' written and oral arguments the Court **FINDS** that the Commonwealth of Virginia has sovereign immunity from Plaintiffs' allegations and **FINDS** that Virginia Constitution Article 1, § 11, in this instance, is not self-executing. The Court **GRANTS** the Plea of Sovereign Immunity.

This matter is hereby **DISMISSED** with prejudice.

The Clerk is directed to provide a copy of this Order to all parties. Endorsements are waived pursuant to Rule 1:13.

IT IS SO ORDERED.

ENTER: 9/29/2022

C. N. Jenkins, Jr., Judge

EXHIBIT X

Juliana v. United States

United States Court of Appeals for the Ninth Circuit

June 4, 2019, Argued and Submitted, Portland, Oregon; January 17, 2020, Filed

No. 18-36082

Reporter
947 F.3d 1159 *; 2020 U.S. App. LEXIS 1579 **; 50 ELR 20025; 2020 WL 254149

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamel Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen, Plaintiffs-Appellees, v. UNITED STATES OF AMERICA; MARY B. NEUMAYR, in her capacity as Chairman of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and the Budget; KELVIN K. DROEGEMEIR, in his official capacity as Director of the Office of Science and Technology Policy; DAN BROUILLETTE, in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; DAVID L. BERNHARDT, in his official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; MARK T. ESPER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; ANDREW WHEELER, in his official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States, Defendants-Appellants.

Subsequent History: Later proceeding at *Juliana v. United States, 2020 U.S. App. LEXIS 6849 (9th Cir. Or., Mar. 4, 2020)*

Rehearing denied by, En banc *Juliana v. United States, 2021 U.S. App. LEXIS 3688 (9th Cir., Feb. 10, 2021)*

Prior History: [**1] Appeal from the United States District Court for the District of Oregon. D.C. No. 6:15-cv-01517-AA. Ann L. Aiken, District Judge, Presiding.

Juliana v. United States, 339 F. Supp. 3d 1062, 2018 U.S. Dist. LEXIS 176508, 2018 WL 4997032 (D. Or., Oct. 15, 2018)

Disposition: REVERSED.

Core Terms

plaintiffs', climate, redress, emissions, courts, injuries, political branch, rights, fossil fuel, constitutional right, district court, atmospheric, gerrymandering, perpetuity, questions, factors, global, federal court, concrete, catastrophic, justiciable, partisan, carbon, levels, orders, scientific, decisions, reduction, cases, fuels

Case Summary

Overview

HOLDINGS: [1]-The district court erred in denying the

government's motion to dismiss plaintiffs' claim that the government violated their constitutional rights, including a claimed right under the *Fifth Amendment Due Process Clause* to a climate system capable of sustaining human life, because plaintiffs lacked U.S. Const. art. III standing to bring their claims as they failed to show that the relief they sought was substantially likely to redress their injuries, and regardless, plaintiffs failed to establish that the specific relief they sought was within the power of an Article III court.

Outcome
Judgment reversed. Case remanded.

Summary:

SUMMARY[**]

Climate Change / Standing

The panel reversed the district court's interlocutory orders in an action brought by an environmental organization and individual plaintiffs against the federal government, alleging climate-change related injuries to the plaintiffs caused by the federal government continuing to "permit, authorize, and subsidize" fossil fuel; and remanded to the district court with instructions to dismiss for lack of Article III standing.

Some plaintiffs claimed psychological harms, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. Plaintiffs alleged violations of their constitutional rights, and sought declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."

The panel held that: the record left little basis for denying that climate change was occurring at an increasingly rapid pace; copious expert evidence established that the unprecedented rise in atmospheric **[**2]** carbon dioxide levels stemmed from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked; the record conclusively established that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions; and the record established that the government's contribution to climate change was not simply a result of inaction.

The panel rejected the government's argument that plaintiffs' claims must proceed, if at all, under the *Administrative Procedure Act ("APA")*. The panel held that because the APA only allows challenges to discrete agency decisions, the plaintiffs could not effectively pursue their constitutional claims — whatever their merits — under that statute.

The panel considered the three requirements for whether plaintiffs had Article III standing to pursue their constitutional claims. First, the panel held that the district court correctly found that plaintiffs claimed concrete and particularized injuries. Second, the panel held that the district court properly found the Article III causation requirement satisfied for purposes of summary judgment because there was at least a genuine factual dispute as to whether a **[**3]** host of federal policies were a "substantial factor" in causing the plaintiffs' injuries. Third, the panel held that plaintiffs' claimed injuries were not redressable by an Article III court. Specifically, the panel held that it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.

The panel reluctantly concluded that the plaintiffs' case must be made to the political branches or to the electorate at large.

District Judge Staton dissented, and would affirm the district court. Judge Staton wrote that plaintiffs brought suit to enforce the most basic structural principal embedded in our system of liberty: that the Constitution does not condone the Nation's willful destruction. She would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial.

Counsel: Jeffrey Bossert Clark (argued), Assistant Attorney General; Andrew C. Mergen, **[**4]** Sommer H. Engels, and Robert J. Lundman, Attorneys; Eric Grant, Deputy Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.

Julia A. Olson (argued), Wild Earth Advocates, Eugene,

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Oregon; Philip L. Gregory, Gregory Law Group, Redwood City, California; Andrew K. Rodgers, Law Offices of Andrea K. Rodgers, Seattle, Washington; for Plaintiffs-Appellees.

Theodore Hadzi-Antich and Ryan D. Walters, Texas Public Policy Foundation, Austin, Texas, for Amici Curiae Nuckels Oil Co., Inc. DBA Merit Oil Company; Libety Packing Company, LLC; Western States Trucking Association; and National Federation of Independent Business Small Business Legal Center.

Richard K. Eichstaedt, University Legal Assistance, Spokane, Washington, for Amici Curiae Eco-Justice Ministries; Interfaith Moral Action on Climate; General Synod of the United Church of Christ; Temple Beth Israel of Eugene, Oregon; National Advocacy Center of the Sisters of the Good Shepherd; Leadership Counsel of the Sisters Servants of the Immaculate Heart of Mary of Monroe, Michigan; Sisters of Mercy of the Americas' Institute Leadership Team; GreenFaith; **[**5]** Leadership Team of the Sisters of Providence of Saint-Mary-of-the-Woods Indiana; Leadership Conference of Women Religious; Climate Change Task Force of the Sisters of Providence of Saint-Mary-of-the-Woods; Quaker Earthcare Witness; Colorado Interfaith Power and Light; and the Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces.

Dr. Curtis FJ Doebbler, Law Office of Dr. Curtis FJ Doebbler, San Antonio, Texas; D. Inder Comar, Comar LLP, San Francisco, California; for Amici Curiae International Lawyers for International Law.

Wendy B. Jacobs, Director; Shaun A. Goho, Deputy Director; Emmett Environmental Law & Policy Clinic, Harvard Law School, Cambridge, Massachusetts; for Amici Curiae Public Health Experts, Public Health Organizations, and Doctors.

David Bookbinder, Niskanen Center, Washington, D.C., for Amicus Curiae Niskanen Center.

Courtney B. Johnson, Crag Law Center, Portland, Oregon, for Amici Curiae League of Women Voters of the United States and League of Women Voters of Oregon.

Oday Salim, Environmental Law & Sustainability Clinic; Julian D. Mortensen and David M. Uhlmann, Professors; Alexander Chafetz, law student; University of Michigan Law School, Ann Arbor, **[**6]** Michigan; for Amicus Curiae Sunrise Movement Education Fund.

Zachary B. Corrigan, Food & Water Watch, Inc., Washington, D.C., for Amici Curiae Food & Water Watch, Inc.; Friends of the Earth — US; and Greenpeace, Inc.

Patti Goldman, Earthjustice, Seattle, Washington; Sarah H. Burt, Earthjustice, San Francisco, California; for Amici Curiae EarthRights International, Center for Biological Diversity, Defenders of Wildlife, and Union of Concerned Scientists.

David Hunter and William John Snape III, American University, Washington College of Law, Washington, D.C., for Amici Curiae International Environmental Law and Environmental Law Alliance Worldwide—US.

Timothy M. Bechtold, Bechtold Law Firm PLLC, Missoula, Montana, for Amici Curiae Members of the United States Congress.

Rachael Paschal Osborn, Vashon, Washington, for Amici Curiae Environmental History Professors.

Thomas J. Beers, Beers Law Offices, Seeley Lake, Montana; Irma S. Russell, Professor, and Edward A. Smith, Missouri Chair in Law, the Constitution, and Society, University of Missouri-Kansas City School of Law, Kansas City, Missouri; W. Warren H. Binford Professor or Law & Director, Clinical Law Program, Willamette University, Salem, **[**7]** Oregon; for Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People.

Helen H. Kang, Environmental Law and Justice Clinic, Golden Gate University School of Law, San Francisco, California; James R. May and Erin Daly, Dignity Rights Project, Delaware Law School, Wilmington, Delaware; for Amici Curiae Law Professors.

Toby J. Marshall, Terrell Marshall Law Group PLLC, Seattle, Washington, for Amici Curiae Guayaki Sustainable Rainforest Products, Inc.; Royal Blue Organics; Organically Grown Company; Bliss Unlimited, LLC, dba Coconut Bliss; Hummingbird Wholesale; Aspen Skiing Company, LLC; Protect Our Winters; National Ski Areas Association; Snowsports Industries America; and American Sustainable Business Council.

Alejandra Núñez and Andres Restrepo, Sierra Club, Washington, D.C.; Joanne Spalding, Sierra Club, Oakland, California; for Amicus Curiae Sierra Club.

Judges: Before: Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton,* District Judge. STATON, District Judge, dissenting

*The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

Opinion by: HURWITZ

Opinion

[*1164] HURWITZ, Circuit Judge:

In the mid-1960s, a popular song warned that we were "on the eve of destruction."[1] The plaintiffs in this case have presented compelling evidence **[**8]** that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.

The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the *Due Process Clause of the Fifth Amendment* to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric **[*1165]** CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.

I.

The plaintiffs are twenty-one young citizens, an environmental organization, and a "representative of future generations." Their original complaint named as defendants the President, the United States, and federal agencies **[**9]** (collectively, "the government"). The operative complaint accuses the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The complaint asserts violations of: (1) the plaintiffs' substantive rights under the *Due Process Clause of the Fifth Amendment*; (2) the plaintiffs' rights under the *Fifth Amendment* to equal protection of the law; (3) the plaintiffs' rights under the *Ninth Amendment*; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[2]

The district court denied the government's motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a *Fifth Amendment* due process right to a "climate system capable of sustaining human life." The court defined that right as one to be free from catastrophic climate change that "will cause human **[**10]** deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." The court also concluded that the plaintiffs had stated a viable "danger-creation due process claim" arising from the government's failure to regulate third-party emissions. Finally, the court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the *Ninth Amendments*.

The government unsuccessfully sought a writ of mandamus. *In re United States, 884 F.3d 830, 837-38 (9th Cir. 2018)*. Shortly thereafter, the Supreme Court denied the government's motion for a stay of proceedings. *United States v. U.S. Dist. Court for Dist. of Or., 139 S. Ct. 1, 201 L. Ed. 2d 1112 (2018)*. Although finding the stay request "premature," the Court noted that the "breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.*

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the *Ninth Amendment* claim, dismissed the President as a defendant, and dismissed the equal protection claim in part.[3] But the court

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[1] Barry McGuire, *Eve of Destruction, on* Eve of Destruction (Dunhill Records, 1965).

[2] The plaintiffs also assert that ***section 201 of the Energy Policy Act of 1992, Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866*** (codified at *15 U.S.C. § 717b(c)*), which requires expedited authorization for certain natural gas imports and exports "without modification or delay," is unconstitutional on its face and as applied. The plaintiffs also challenge DOE/FE Order No. 3041, which authorizes exports of liquefied natural gas from the proposed Jordan Cove terminal in Coos Bay, Oregon.

[3] The court found that age is not a suspect class, but allowed

otherwise denied the government's motions, again holding that the plaintiffs had standing to sue and finding that they had presented sufficient evidence **[**11]** to survive summary **[*1166]** judgment. The court also rejected the government's argument that the plaintiffs' exclusive remedy was under the *Administrative Procedure Act ("APA"), 5 U.S.C. § 702 et seq.*

The district court initially declined the government's request to certify those orders for interlocutory appeal. But, while considering a second mandamus petition from the government, we invited the district court to revisit certification, noting the Supreme Court's justiciability concerns. *United States v. U.S. Dist. Court for the Dist. of Or.*, No. 18-73014, Dkt. 3; *see In re United States, 139 S. Ct. 452, 453, 202 L. Ed. 2d 344 (2018)* (reiterating justiciability concerns in denying a subsequent stay application from the government). The district court then reluctantly certified the orders denying the motions for interlocutory appeal under *28 U.S.C. § 1292(b)* and stayed the proceedings, while "stand[ing] by its prior rulings . . . as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States, No. 6:15-cv-01517-AA, 2018 U.S. Dist. LEXIS 207366, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018)*. We granted the government's petition for permission to appeal.

II.

The plaintiffs have compiled an extensive record, which at this stage in the litigation we take in the light most favorable to their claims. *See Plumhoff v. Rickard, 572 U.S. 765, 768, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014)*. The record leaves **[**12]** little basis for denying that climate change is occurring at an increasingly rapid pace. It documents that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years.

Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius above pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century. The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average. This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching "the point of no return." Absent some action, the destabilizing **[**13]** climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.

The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a "wait and see" carbon emissions policy was extremely risky. And, in the 1990s, the EPA implored the government to act before it was too late. Nonetheless, by 2014, U.S. fossil fuel emissions had climbed to 5.4 billion metric tons, up substantially from 1965. This growth shows no signs of abating. From 2008 to 2017, domestic petroleum and natural gas production increased by nearly 60%, and the country is now expanding oil and gas extraction four times faster than any other nation.

[*1167] The record also establishes that the government's contribution to climate change is not simply a result of inaction. The **[**14]** government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.[4]

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the equal protection claim to proceed on a fundamental rights theory.

[4] The programs and policies identified by the plaintiffs include: (1) the Bureau of Land Management's authorization of leases for 107 coal tracts and 95,000 oil and gas wells; (2) the Export-Import Bank's provision of $14.8 billion for overseas petroleum projects; (3) the Department of Energy's approval of over 2 million barrels of crude oil imports; (4) the Department of Agriculture's approval of timber cutting on federal land; (5) the undervaluing of royalty rates for federal leasing; (6) tax subsidies for purchasing fuel-inefficient sport-utility vehicles; (7) the "intangible drilling costs" and "percentage depletion allowance" tax code provisions, *26 U.S.C. §§ 263(c)*, *613*; and (8) the government's use of fossil fuels to power its own

A.

The government by and large has not disputed the factual premises of the plaintiffs' claims. But it first argues that those claims must proceed, if at all, under the APA. We reject that argument. The plaintiffs do not claim that any individual agency action exceeds statutory authorization or, taken alone, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C). Rather, they contend that the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions, *see* *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-91, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990), the plaintiffs cannot effectively pursue their constitutional claims—whatever their merits—under that statute.

The defendants argue that the APA's "comprehensive remedial scheme" for challenging the constitutionality of agency actions implicitly bars the plaintiffs' freestanding constitutional claims. But, even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional **[**15]** claims to follow its strictures would bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation. *See* *Sierra Club v. Trump*, 929 F.3d 670, 694, 696 (9th Cir. 2019) (stating that plaintiffs could "bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the [APA]"); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims"). Because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear. *See* *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)); *see also* *Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) ("After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims."). Nothing in the APA evinces such an intent.[5] Whatever the merits **[*1168]** of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA. *See* *Sierra Club*, 929 F.3d at 698-99 ("Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert **[**16]** an APA claim . . . . [C]laims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA."); *Navajo Nation*, 876 F.3d at 1170 (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

B.

The government also argues that the plaintiffs lack Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. *See* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir. 2011). A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment. *See* *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

1.

The district court correctly found the injury requirement met. At least some plaintiffs claim concrete and particularized injuries. Jaime B., for example, claims that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2416, 201 L. Ed. 2d 775 (2018) (finding separation from relatives to be a concrete injury). Levi D. had to evacuate his coastal home multiple times because of flooding. *See* *Maya v. Centex Corp.*, 658 F.3d 1060,

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buildings and vehicles.

[5] The government relies upon *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328-29, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74-76, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), both of which held that statutory remedial schemes implicitly barred freestanding equitable claims. Neither case, however, involved claims by the plaintiffs that the federal government was violating their constitutional rights. *See* *Armstrong*, 575 U.S. at 323-24 (claiming that state officials had violated a federal statute); *Seminole Tribe*, 517 U.S. at 51-52 (same).

1070-71 (9th Cir. 2011) (finding diminution in home property value to be a concrete injury). These injuries are not **[**17]** simply "'conjectural' or 'hypothetical;'" at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)); *cf.* Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 478, 385 U.S. App. D.C. 257 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future").

The government argues that the plaintiffs' alleged injuries are not particularized because climate change affects everyone. But, "it does not matter how many persons have been injured" if the plaintiffs' injuries are "concrete and personal." Massachusetts v. EPA, 549 U.S. 497, 517, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (quoting Lujan, 504 U.S. at 581 (Kennedy, J., concurring)); *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.") (alteration in original) (quoting Jewel, 673 F.3d at 909). And, the Article III injury requirement is met if only one plaintiff has suffered concrete harm. *See* Hawaii, 138 S. Ct. at 2416; Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017) ("At least one plaintiff **[*1169]** must have standing to seek each form of relief requested in the complaint. . . . For all relief sought, there must be a litigant with standing.").

2.

The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. Causation can be established **[**18]** "even if there are multiple links in the chain," Mendia v. Garcia, 768 F.3d 1009, 1012 (9th Cir. 2014), as long as the chain is not "hypothetical or tenuous," Maya, 658 F.3d at 1070 (quoting Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 849 (9th Cir. 2002), *amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002)). The causal chain here is sufficiently established. The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. *See* Massachusetts, 549 U.S. at 524-25 (finding that emissions amounting to about 6% of the worldwide total showed cause of alleged injury "by any standard"). And, the plaintiffs' evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government. *See* 30 U.S.C. §§ 181-196 (establishing legal framework governing the disposition of fossil fuels on federal land), § 201 (authorizing the Secretary of the Interior to lease land for coal mining).

Relying on Washington Environmental Council v. Bellon, 732 F.3d 1131, 1141-46 (9th Cir. 2013), the government argues that the causal chain is too attenuated because it depends in part on the independent actions of **[**19]** third parties. *Bellon* held that the causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was "too tenuous to support standing" because the refineries had a "scientifically indiscernible" impact on climate change. Id. at 1143-44. But the plaintiffs here do not contend that their injuries were caused by a few isolated agency decisions. Rather, they blame a host of federal policies, from subsidies to drilling permits, spanning "over 50 years," and direct actions by the government. There is at least a genuine factual dispute as to whether those policies were a "substantial factor" in causing the plaintiffs' injuries. Mendia, 768 F.3d at 1013 (quoting Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 308, 350 U.S. App. D.C. 40 (D.C. Cir. 2001)).

3.

The more difficult question is whether the plaintiffs' claimed injuries are redressable by an Article III court. In analyzing that question, we start by stressing what the plaintiffs do and do not assert. They do not claim that the government has violated a statute or a regulation. They do not assert the denial of a procedural right. Nor do they seek damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Rather, their sole claim is that the government has deprived them of a substantive constitutional right to **[**20]** a "climate system capable of sustaining human life," and they seek remedial declaratory and injunctive relief.

Reasonable jurists can disagree about whether the asserted constitutional right exists. *Compare* Clean Air

Council v. United States, 362 F. Supp. 3d 237, 250-53 (E.D. Pa. 2019) (finding no constitutional right), *with Juliana, 217 F. Supp. 3d at 1248-50*; *see also In re United States, 139 S. Ct. at 453* (reiterating "that the 'striking' breadth of plaintiffs' **[*1170]** below claims 'presents substantial grounds for difference of opinion'"). In analyzing redressability, however, we assume its existence. *See* M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018). But that merely begins our analysis, because "not all meritorious legal claims are redressable in federal court." *Id.* To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Id.* Redress need not be guaranteed, but it must be more than "merely speculative." *Id.* (quoting Lujan, 504 U.S. at 561).

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their **[**21]** alleged injuries absent further court action. *See* Clean Air Council, 362 F. Supp. 3d at 246, 249; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *see also* Friends of the Earth, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, *see, e.g.*, 30 U.S.C. § 201 (authorizing the Secretary of the Interior to lease land for coal mining), but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress **[**22]** shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

As an initial matter, we note that although the plaintiffs contended at oral argument that they challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries.[6] The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. Nor does any expert contend that elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs. Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources.

Indeed, the plaintiffs' experts make plain that reducing the global consequences of climate change demands much more than cessation **[**23]** of the government's **[*1171]** promotion of fossil fuels. Rather, these experts opine that such a result calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world. One expert opines that atmospheric carbon reductions must come "largely via reforestation," and include rapid and immediate decreases in emissions from many sources. "[L]eisurely reductions of one of two percent per year," he explains, "will not suffice." Another expert has opined that although the required emissions reductions are "technically feasible," they can be achieved only through a comprehensive plan for "nearly complete decarbonization" that includes both an "unprecedently rapid build out" of renewable energy and a "sustained commitment to infrastructure transformation over decades." And, that commitment, another expert emphasizes, must include everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft.

The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their "injuries would be to some extent ameliorated." Relying on *Massachusetts v. EPA*, the district **[**24]** court apparently found the redressability requirement satisfied because the requested relief would likely slow

[6] The operative complaint, however, also seems to challenge the government's inaction.

or reduce emissions. *See* 549 U.S. at 525-26. That case, however, involved a procedural right that the State of Massachusetts was allowed to assert "without meeting all the normal standards for redressability;" in that context, the Court found redressability because "there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 517-18, 525-26 (quoting *Lujan*, 504 U.S. at 572 n.7). The plaintiffs here do not assert a procedural right, but rather a substantive due process claim.[7]

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, **[**25]** supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. *See* *Brown*, 902 F.3d at 1086 (finding the plaintiff's requested declaration requiring the **[*1172]** government to issue driver cards "incompatible with democratic principles embedded in the structure of the Constitution"). These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 128-29, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); *see* *Lujan*, 504 U.S. at 559-60 ("[S]eparation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches **[**26]** can decide what policies will best "phase out fossil fuel emissions and draw down excess atmospheric CO2." To be sure, in some circumstances, courts may order broad injunctive relief while leaving the "details of implementation" to the government's discretion. *Brown v. Plata*, 563 U.S. 493, 537-38, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). But, even under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary. "But we cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Hawaii*, 138 S. Ct. at 2421 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 92 L. Ed. 568 (1948)). And, given the complexity and long-lasting **[**27]** nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. *See* *Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief could involve extraordinary supervision by this court. . . . [and] may be inappropriate where it requires constant supervision.").[8]

[7] The dissent reads *Massachusetts* to hold that "a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms." Diss. at 47. But *Massachusetts* "permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011), finding that as a sovereign it was "entitled to special solicitude in [the] standing analysis," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 n.10, 192 L. Ed. 2d 704 (2015) (quoting *Massachusetts*, 549 U.S. at 520). Here, in contrast, the plaintiffs are not sovereigns, and a substantive right, not a procedural one, is at issue. *See* *Massachusetts*, 549 U.S. at 517-21, 525-26; *see also* *Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

[8] However belatedly, the political branches are currently debating such action. Many resolutions and plans have been

[*1173] As the Supreme Court recently explained, "a constitutional directive or legal standards" must guide the courts' exercise of equitable power. *Rucho v. Common Cause, 139 S. Ct. 2484, 2508, 204 L. Ed. 2d 931 (2019)*. *Rucho* found partisan gerrymandering claims presented political questions beyond the reach of Article III courts. *Id. at 2506-07*. The Court did not deny extreme partisan gerrymandering can violate the Constitution. *See id. at 2506*; *id. at 2514-15* (Kagan, J., dissenting). But, it concluded that there was no "limited and precise" standard discernible in the Constitution for redressing the asserted violation. *Id. at 2500*. The Court rejected the plaintiffs' proposed standard because unlike the one-person, one-vote rule in vote dilution cases, it was not "relatively easy to administer as a matter of math." *Id. at 2501*.

Rucho reaffirmed that redressability questions implicate the separation of powers, noting that federal courts "have no commission to allocate political power and influence" without standards **[**28]** to guide in the exercise of such authority. *See id. at 2506-07, 2508*. Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role." *Id. at 2507*; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (noting the "separation-of-powers principles underlying" standing doctrine); *Brown, 902 F.3d at 1087* (stating that "in the context of Article III standing, . . . federal courts must respect their 'proper—and properly limited—role . . . in a democratic society'" (quoting *Gill v. Whitford, 138 S. Ct. 1916, 1929, 201 L. Ed. 2d 313 (2018)*). Because "it is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change,'" *Brown, 902 F.3d at 1087* (quoting *Obergefell v. Hodges, 135 S. Ct. 2584, 2605, 192 L. Ed. 2d 609 (2015)*), some questions—even those existential in nature—are the province of the political branches. The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage. *See 139 S. Ct. at 2500-02*. It is impossible to reach a different conclusion here.

The plaintiffs' experts opine that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate. But, even accepting those opinions as valid, they do not suggest how **[**29]** an order from this Court can achieve that level, other than by ordering the government to develop a plan. Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a "climate system capable of sustaining human life." We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.

C.

Our dissenting colleague quite correctly notes the gravity of the plaintiffs' evidence; we differ only as to whether an Article III court can provide their requested redress. In suggesting that we can, the **[*1174]** dissent reframes the plaintiffs' claimed constitutional right variously as an entitlement to "the country's perpetuity," Diss. at 35-37, 39, or as one to freedom from "the amount of fossil-fuel emissions that will irreparably devastate our Nation," *id.* at 57. But if such broad constitutional rights exist, we doubt that the plaintiffs would have Article III standing to enforce them. Their alleged **[**30]** individual injuries do not flow from a violation of these claimed rights. Indeed, any injury from the dissolution of the Republic would be felt by all citizens equally, and thus would not constitute the kind of discrete and particularized injury necessary for Article

introduced in Congress, ranging from discrete measures to encourage clean energy innovation to the "Green New Deal" and comprehensive proposals for taxing carbon and transitioning all sectors of the economy away from fossil fuels. *See, e.g.*, H.R. Res. 109, 116th Cong. (2019); S.J. Res. 8, 116th Cong. (2019); Enhancing Fossil Fuel Energy Carbon Technology Act, S. 1201, 116th Cong. (2019); Climate Action Now Act, H.R. 9, 116th Cong. (2019); Methane Waste Prevention Act, H.R. 2711, 116th Cong. (2019); Clean Energy Standard Act, S. 1359, 116th Cong. (2019); National Climate Bank Act, S. 2057, 116th Cong. (2019); Carbon Pollution Transparency Act, S. 1745, 116th Cong. (2019); Leading Infrastructure for Tomorrow's America Act, H.R. 2741, 116th Cong. (2019); Buy Clean Transparency Act, S. 1864, 116th Cong. (2019); Carbon Capture Modernization Act, H.R. 1796, 116th Cong. (2019); Challenges & Prizes for Climate Act, H.R. 3100, 116th Cong. (2019); Energy Innovation and Carbon Dividend Act, H.R. 763, 116th Cong. (2019); Climate Risk Disclosure Act, S. 2075, 116th Cong. (2019); Clean Energy for America Act, S. 1288, 116th Cong. (2019). The proposed legislation, consistent with the opinions of the plaintiffs' experts, envisions that tackling this global problem involves the exercise of discretion, trade-offs, international cooperation, private-sector partnerships, and other value judgments ill-suited for an Article III court.

III standing. *See* Friends of the Earth, 528 U.S. at 180-81. A suit for a violation of these reframed rights, like one for a violation of the Guarantee Clause, would also plainly be nonjusticiable. *See, e.g.*, Rucho, 139 S. Ct. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.") (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149, 32 S. Ct. 224, 56 L. Ed. 377 (1912)); Luther v. Borden, 48 U.S. 1, 36-37, 39, 12 L. Ed. 581 (1849).

More importantly, the dissent offers no metrics for judicial determination of the level of climate change that would cause "the willful dissolution of the Republic," Diss. at 40, nor for measuring a constitutionally acceptable "perceptible reduction in the advance of climate change," *id.* at 47. Contrary to the dissent, we cannot find Article III redressability requirements satisfied simply because a court order might "postpone[] the day when remedial measures become insufficiently effective." *Id.* at 46; *see* Brown, 902 F.3d at 1083 ("If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability[.]"). **[**31]** Indeed, as the dissent recognizes, a guarantee against government conduct that might threaten the Union—whether from political gerrymandering, nuclear proliferation, Executive misconduct, or climate change—has traditionally been viewed by Article III courts as "not separately enforceable." *Id.* at 39. Nor has the Supreme Court recognized "the perpetuity principle" as a basis for interjecting the judicial branch into the policy-making purview of the political branches. *See id.* at 42.

Contrary to the dissent, we do not "throw up [our] hands" by concluding that the plaintiffs' claims are nonjusticiable. *Id.* at 33. Rather, we recognize that "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." Stern v. Marshall, 564 U.S. 462, 483, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not confer the power of "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness;" rather, we are bound "to exercise a discretion informed by tradition, methodized by analogy, disciplined by **[**32]** system.'" Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).[9]

[*1175] The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals. But, although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts. *See* Rucho, 139 S. Ct. at 2507-08; Gill, 138 S. Ct. at 1929 ("'Failure of political will does not justify unconstitutional remedies.' . . . Our power as judges . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (quoting Clinton v. City of New York, 524 U.S. 417, 449, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Kennedy, J., concurring))); Brown, 902 F.3d at 1087 ("The *absence* of a law, however, has never been held to constitute a 'substantive result' subject to judicial review[.]").

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, **[**33]** and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. Diss. at 45-46, 49-50, 57-61. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

III.

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[9] Contrary to the dissent, we do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns. Diss. at 51-61; Republic of Marshall Islands v. United States, 865 F.3d 1187, 1192 (9th Cir. 2017) ("Whether examined under the . . . the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines . . . there is significant overlap.").

For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.[10]

REVERSED.

Dissent by: STATON

Dissent

STATON, District Judge, dissenting:

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government **[**34]** bluntly insists that it has the absolute and unreviewable power to destroy the Nation.

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. **[*1176]** And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional **[**35]** rights without exceeding the Judiciary's province. For these reasons, I respectfully dissent.[1]

I.

As the majority recognizes, and the government does not contest, carbon dioxide ("CO_2") and other greenhouse gas ("GHG") emissions created by burning fossil fuels are devastating the planet. Maj. Op. at 14-15. According to one of plaintiffs' experts, the inevitable result, absent immediate action, is "an inhospitable future . . . marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species." Even government scientists[2] project that, given current warming trends, sea levels will rise two feet by 2050, nearly four feet by 2070, over eight feet by 2100, 18 feet by 2150, and over 31 feet by 2200. To put that in perspective, a three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities. So, as described by plaintiffs' experts, the injuries experienced by plaintiffs **[**36]** are the first small wave in an oncoming tsunami—now visible on the horizon of the not-so-distant future—that will destroy the United States as we currently know it.

What sets this harm apart from all others is not just its magnitude, but its irreversibility. The devastation might look and feel somewhat different if future generations could simply pick up the pieces and restore the Nation. But plaintiffs' experts speak of a certain level of global warming as "locking in" this catastrophic damage. Put more starkly by plaintiffs' expert, Dr. Harold R. Wanless, "[a]tmospheric warming will continue for some 30 years after we stop putting more greenhouse gasses into the atmosphere. But that warmed atmosphere will continue warming the ocean for centuries, and the accumulating heat in the oceans *will persist for millennia*" (emphasis added). Indeed, another of plaintiffs' experts echoes,

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[10] The plaintiffs' motion for an injunction pending appeal, Dkt. 21, is **DENIED**. Their motions for judicial notice, Dkts. 134, 149, are **GRANTED**.

[1] I agree with the majority that plaintiffs need not bring their claims under the APA. *See Franklin v. Massachusetts, 505 U.S. 788, 801, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992); Webster v. Doe, 486 U.S. 592, 603-04, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)*.

[2] NOAA, Technical Rep. NOS CO-OPS 083, Global and Regional Sea Level Rise Scenarios for the United States 23 (Jan. 2017).

"[t]he fact that GHGs dissipate very slowly from the atmosphere . . . and that the costs of taking CO_2 out of the atmosphere through non-biological carbon capture and storage are very high means that *the consequences of GHG emissions should be viewed as effectively irreversible*" (emphasis added). In other words, **[**37]** "[g]iven the self-reinforcing nature of climate change," the tipping point may well have arrived, and we may be rapidly approaching the point of no return.

Despite countless studies over the last half century warning of the catastrophic consequences of anthropogenic greenhouse gas emissions, many of which the government conducted, the government not only failed to act but also "affirmatively promote[d] fossil fuel use in a host of ways." Maj. Op. at 15. According to plaintiffs' evidence, our nation is crumbling—at our government's own hand—into a wasteland. **[*1177]** In short, the government has directly facilitated an existential crisis to the country's perpetuity.[3]

II.

In tossing this suit for want of standing, the majority concedes that the children and young adults who brought suit have presented enough to proceed to trial on the first two aspects of the inquiry (injury in fact and traceability). But the majority provides two-and-a-half reasons for concluding that plaintiffs' injuries are not redressable. After detailing its "skeptic[ism]" that the relief sought could "suffice to stop catastrophic climate change or even ameliorate [plaintiffs'] injuries[,]" Maj. Op. at 23-25, the majority concludes **[**38]** that, at any rate, a court would lack any power to award it. In the majority's view, the relief sought is too great and unsusceptible to a judicially administrable standard.

To explain why I disagree, I first step back to define the interest at issue. While standing operates as a threshold issue distinct from the merits of the claim, "it often turns on the nature and source of the claim asserted." *Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. And, unlike the majority, I believe the government has more than just a nebulous "moral responsibility" to preserve the Nation. Maj. Op. at 31-32.

A.

The Constitution protects the right to "life, liberty, and property, to free speech, a free press, [and] freedom of worship and assembly." *W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)*. Through "reasoned judgment," the Supreme Court has recognized that the *Due Process Clause*, enshrined in the *Fifth* and *Fourteenth Amendments*, also safeguards certain "interests of the person so fundamental that the [government] must accord them its respect." *Obergefell v. Hodges, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015)*. These include the right to marry, *Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*, to maintain a family and rear children, *M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)*, and to pursue an occupation of one's choosing, *Schware v. Bd. of Bar Exam., 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957)*. As fundamental rights, these "may not be submitted to vote; they depend on the outcome of no elections." *Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964)* (quoting *Barnette, 319 U.S. at 638*).

Some rights serve as the necessary predicate for **[**39]** others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections. *Cf., e.g., Timbs v. Indiana, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019)* (deeming a right fundamental because its deprivation would "undermine other constitutional liberties"). For example, the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*. Because it is "preservative of all rights," the Supreme Court has long regarded suffrage "as a fundamental political right." *Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)*. This holds true even though the right to vote receives imperfect express protection in the Constitution itself: **[*1178]** While several amendments proscribe the denial or abridgement of suffrage based on certain characteristics, the Constitution does not guarantee the right to vote *ab initio*. *See U.S. Const. amends. XV, XIX, XXIV, XXVI; cf. U.S. Const. art. I, § 4, cl. 1*.

Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights," *Plyler v. Doe, 457 U.S. 202, 217 n.15, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)*. "Civil liberties, as guaranteed by the Constitution, imply

[3] My asteroid analogy would therefore be more accurate if I posited a scenario in which the government itself accelerated the asteroid towards the earth before shutting down our defenses.

the existence of an organized society . . . ." *Cox v. New Hampshire, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 1049 (1941)*; *see also Ex parte Yarbrough (The Ku Klux Cases), 110 U.S. 651, 657-58, 4 S. Ct. 152, 28 L. Ed. 274 (1884)*. And, of course, in our system, that organized society consists of the Union. **[**40]** Without it, all the liberties protected by the Constitution to live the good life are meaningless.

This observation is hardly novel. After securing independence, George Washington recognized that "the destiny of unborn millions" rested on the fate of the new Nation, cautioning that "whatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independency of America[.]" President George Washington, Circular Letter of Farewell to the Army (June 8, 1783). Without the Republic's preservation, Washington warned, "there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness." *Id.*

When the Articles of the Confederation proved ill-fitting to the task of safeguarding the Union, the framers formed the Constitutional Convention with "the great object" of "preserv[ing] and perpetuat[ing]" the Union, for they believed that "the prosperity of America depended on its Union." The Federalist No. 2, at 19 (John Jay) (E. H. Scott ed., 1898); *see also* Letter from James Madison to Thomas Jefferson **[**41]** (Oct. 24, 1787)[4] ("It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States."). In pressing New York to ratify the Constitution, Alexander Hamilton spoke of the gravity of the occasion: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed—the fate of an empire, in many respects the most interesting in the world." The Federalist No. 1, at 11 (Alexander Hamilton) (E. H. Scott ed., 1898). In light of this animating principle, it is fitting that the Preamble declares that the Constitution is intended to secure "the Blessings of Liberty" not just for one generation, but for all future generations—our "Posterity."

The Constitution's structure reflects this perpetuity principle. *See Alden v. Maine, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)* (examining how "[v]arious textual provisions of the Constitution assume" a structural principle). In taking the Presidential Oath, the Executive must vow to "preserve, protect and defend the Constitution of the United States," *U.S. Const. art. II, § 1, cl. 8*, and the *Take Care Clause* obliges the President to "take Care that the Laws be faithfully executed," *U.S. Const. art. II, § 3*. Likewise, though **[**42]** generally not separately enforceable, *Article IV, Section 4* provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against **[*1179]** Invasion; and . . . against domestic Violence." *U.S. Const. art. IV, § 4*; *see also New York v. United States, 505 U.S. 144, 184-85, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992)*.

Less than a century after the country's founding, the perpetuity principle undergirding the Constitution met its greatest challenge. Faced with the South's secession, President Lincoln reaffirmed that the Constitution did not countenance its own destruction. "[T]he Union of these States is perpetual[,]" he reasoned in his First Inaugural Address, because "[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination." President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861). In justifying this constitutional principle, Lincoln drew from history, observing that "[t]he Union is much older than the Constitution." *Id.* He reminded his fellow citizens, "one of the declared objects for ordaining and establishing the Constitution was 'to form a *more perfect* Union.'" *Id.* (emphasis added) (quoting **[**43]** U.S. Const. pmbl.). While secession manifested the existential threat most apparently contemplated by the Founders—political dissolution of the Union—the underlying principle applies equally to its physical destruction.

This perpetuity principle does not amount to "a right to live in a contaminant-free, healthy environment." *Guertin v. Michigan, 912 F.3d 907, 922 (6th Cir. 2019)*. To be sure, the stakes can be quite high in environmental disputes, as pollution causes tens of thousands of premature deaths each year, not to mention disability and diminished quality of life.[5] Many abhor living in a

[4] Available at https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

[5] *See, e.g.*, Andrew L. Goodkind et al., *Fine-Scale Damage Estimates of Particulate Matter Air Pollution Reveal Opportunities for Location-Specific Mitigation of Emissions, in*

polluted environment, and some pay with their lives. But mine-run environmental concerns "involve a host of policy choices that must be made by . . . elected representatives, rather than by federal judges interpreting the basic charter of government[.]" *Collins v. City of Harker Heights, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*. The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic.[6]

That the principle is structural **[**44]** and implicit in our constitutional system does not render it any less enforceable. To the contrary, our Supreme Court has recognized that "[t]here are many [] constitutional doctrines that are not spelled out in the Constitution" but are nonetheless enforceable as "historically rooted principle[s] embedded in the text and structure of the Constitution." *Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485, 1498-99, 203 L. Ed. 2d 768 (2019)*. For **[*1180]** instance, the Constitution does not in express terms provide for judicial review, *Marbury v. Madison, 5 U.S. 137, 176-77, 2 L. Ed. 60 (1803)*; sovereign immunity (outside of the *Eleventh Amendment's* explicit restriction), *Alden, 527 U.S. at 735-36*; the anticommandeering doctrine, *Murphy v. NCAA, 138 S. Ct. 1461, 1477, 200 L. Ed. 2d 854 (2018)*; or the regimented tiers of scrutiny applicable to many constitutional rights, *see, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*. Yet these doctrines, as well as many other implicit principles, have become firmly entrenched in our constitutional landscape. And, in an otherwise justiciable case, a private litigant may seek to vindicate such structural principles, for they "protect the individual as well" as the Nation. *See Bond v. United States, 564 U.S. 211, 222, 225-26, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011)*; *INS. v. Chadha, 462 U.S. 919, 935-36, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)*.

In *Hyatt*, for instance, the Supreme Court held that a state could not be sued in another state's courts without its consent. Although nothing in the text of the Constitution expressly forbids such suits, the Court concluded that they contravened "the 'implicit ordering **[**45]** of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.'" *Hyatt, 139 S. Ct. at 1492* (quoting *Nevada v. Hall, 440 U.S. 410, 433, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979)* (Rehnquist, J., dissenting)). So too here.

Nor can the perpetuity principle be rejected simply because the Court has not yet had occasion to enforce it as a limitation on government conduct. Only over time, as the Nation confronts new challenges, are constitutional principles tested. For instance, courts did not recognize the anticommandeering doctrine until the 1970s because "[f]ederal commandeering of state governments [was] such a novel phenomenon." *Printz v. United States, 521 U.S. 898, 925, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)*. And the Court did not recognize that cell-site data fell within the *Fourth Amendment* until 2018. In so holding, the Court rejected "a 'mechanical interpretation' of the *Fourth Amendment*" because "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes[.]" *Carpenter v. United States, 138 S. Ct. 2206, 2214, 201 L. Ed. 2d 507 (2018)*. Thus, it should come as no surprise that the Constitution's commitment to perpetuity only now faces judicial scrutiny, for never before has the United States confronted an existential threat that has not only gone unremedied but is actively backed by **[**46]** the government.

The mere fact that we have alternative means to enforce a principle, such as voting, does not diminish its constitutional stature. Americans can vindicate federalism, separation of powers, equal protection, and voting rights through the ballot box as well, but that does not mean these constitutional guarantees are not independently enforceable. By its very nature, the Constitution "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette, 319 U.S. at 638*. When fundamental

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116 Proceedings of the National Academy of Sciences 8775, 8779 (2019) (estimating that fine particulate matter caused 107,000 premature deaths in 2011).

[6] Unwilling to acknowledge that the very nature of the climate crisis places this case in a category of one, the government argues that "the Constitution does not provide judicial remedies for every social and economic ill." For support, the government cites *Lindsey v. Normet, 405 U.S. 56, 74, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)*, which held Oregon's wrongful detainer statute governing landlord/tenant disputes constitutional. The perpetuity principle, however, cabins the right and avoids any slippery slope. While the principle's goal is to preserve the most fundamental individual rights to life, liberty, and property, it is not triggered absent an existential threat to the country arising from a "point of no return" that is, at least in part, of the government's own making.

rights are at stake, individuals "need not await legislative action." Obergefell, 135 S. Ct. at 2605.

Indeed, in this *sui generis* circumstance, waiting is not an option. Those alive today are at perhaps the singular point in history where society (1) is scientifically aware of **[*1181]** the impending climate crisis, and (2) can avoid the point of no return. And while democracy affords citizens the right "to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[,]" *id.* (quoting Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 312, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014)), that process cannot override the laws of nature. **[**47]** Or, more colloquially, we can't shut the stable door after the horse has bolted.

As the last fifty years have made clear, telling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse. The political branches must often realize constitutional principles, but in a justiciable case or controversy, courts serve as the ultimate backstop. To this issue, I turn next.

B.

Of course, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). So federal courts are not free to address *every* grievance. "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." Sierra Club v. Morton, 405 U.S. 727, 731-32, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Standing is "a doctrine rooted in the traditional understanding of a case or controversy," developed to "ensure that federal courts do not exceed their authority as it has been traditionally understood." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

A case is fit for judicial determination only if the plaintiff **[**48]** has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); then citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). As to the first two elements, my colleagues and I agree: Plaintiffs present adequate evidence at this pre-trial stage to show particularized, concrete injuries to legally-protected interests, and they present further evidence to raise genuine disputes as to whether those injuries—at least in substantial part—are fairly traceable to the government's conduct at issue. *See* Maj. Op. at 18-21. Because I find that plaintiffs have also established the third prong for standing, redressability, I conclude that plaintiffs' legal stake in this action suffices to invoke the adjudicative powers of the federal bench.

1.

"Redressability" concerns whether a federal court is capable of vindicating a plaintiff's legal rights. I agree with the majority that our ability to provide redress is animated by two inquiries, one of efficacy and one of power. Maj. Op. at 21 (citing M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018)). First, as a causal matter, is a court order likely to actually remediate the plaintiffs' injury? If so, does the judiciary **[**49]** have the constitutional authority to levy such an order? *Id.*

Addressing the first question, my colleagues are skeptical that curtailing the government's facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs' harms. *See* Maj. Op. at 22-25. I am not, as the nature of the injury at **[*1182]** stake informs the effectiveness of the remedy. *See* Warth, 422 U.S. at 500.

As described above, the right at issue is not to be entirely free from any climate change. Rather, plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*. Plaintiffs have begun to feel certain concrete manifestations of this violation, ripening their case for litigation, but such prefatory harms are just the first barbs of an *ongoing* injury flowing from an *ongoing* violation of plaintiffs' rights. The bulk of the injury is yet to come. Therefore, practical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return. Hence, **[**50]** the injury at issue is not climate change writ large; it is climate change beyond the threshold

point of no return. As we approach that threshold, the significance of every emissions reduction is magnified.

The majority portrays any relief we can offer as just a drop in the bucket. *See* Maj. Op. at 22-25. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot.* Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.

And "something" is all that standing requires. In *Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)*, the Supreme Court explicitly held that a non-negligible reduction in emissions—there, by regulating vehicles emissions—satisfied the redressability requirement of Article III standing:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack **[**51]** jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.
>
> . . . .
>
> . . . The risk of catastrophic harm, though remote, is nevertheless real.

Id. at 525-26 (internal citation omitted).

In other words, under Article III, a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms. Full stop. The majority dismisses this precedent because *Massachusetts v. EPA* involved a procedural harm, whereas plaintiffs here assert a purely substantive right. Maj. Op. at 24. But this difference in posture does not affect the outcome.

While the redressability requirement is relaxed in the **[**52]** procedural context, that does not mean (1) we must engage in a similarly relaxed analysis whenever we invoke **[*1183]** *Massachusetts v. EPA* or (2) we cannot rely on *Massachusetts v. EPA's* substantive examination of the relationship between government action and the course of climate change. Accordingly, here, we do not consider the likelihood that plaintiffs will prevail in any newly-awarded agency procedure, nor whether granting access to that procedure will redress plaintiffs' injury. *Cf. Massachusetts v. EPA, 549 U.S. at 517-18*; *Lujan, 504 U.S. at 572 n.7*. Rather, we assume plaintiffs *will* prevail—removing the procedural link from the causal chain—and we resume our traditional analysis to determine whether the desired outcome would in fact redress plaintiffs' harms.[7] In *Massachusetts v. EPA*, the remaining substantive inquiry was whether reducing emissions from fossil-fuel combustion would likely ameliorate climate change-induced injuries despite the global nature of climate change (regardless of whether renewed procedures were themselves likely to mandate such lessening). The Supreme Court unambiguously answered that question in the affirmative. That holding squarely applies to the instant facts,[8] rendering the

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[7] The presence of a procedural right is more critical when determining whether the first and second elements of standing are present. This is especially true where Congress has "define[d] injuries and articulate[d] chains of causation that will give rise to a case or controversy where none existed before" by conferring procedural rights that give certain persons a "stake" in an injury that is otherwise not their own. *Spokeo, 136 S. Ct. at 1549* (quoting *Lujan, 504 U.S. at 580* (Kennedy, J., concurring)). But who seeks to vindicate an injury is irrelevant to the question of whether a court has the tools to relieve that injury.

[8] Indeed, the majority has already acknowledged as much in finding plaintiffs' injuries traceable to the government's misconduct because the traceability and redressability inquiries are largely coextensive. *See* Maj. Op. at 19-21; *see also Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1146 (2013)* ("The Supreme Court has clarified that the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.' The two are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief.") (internal citation omitted). Here, where the requested relief is simply to stop the ongoing misconduct, the inquiries are nearly identical. *Cf. Allen v. Wright, 468 U.S. 737, 753 n.19, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* ("[I]t is important to keep the inquiries separate"

absence of a procedural right here irrelevant. **[**53]** [9]

2.

The majority laments that it cannot step into the shoes of the political branches, *see* **[*1184]** Maj. Op. at 32, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles. Our tripartite system of government is often and aptly described as one of "checks and balances." The doctrine of standing preserves *balance* among the branches by keeping separate questions of general governance and those of specific legal entitlement. But the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes "the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders **[**54]** the alteration of an institutional organization or procedure that causes the harm." *Lewis, 518 U.S. at 350*; *cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."). In my view, this Court must confront and reconcile this tension before deciding that thorny questions of standing preclude review in this case. And faithful application of our history and precedents reveals that a failure to do so leads to the wrong result.

Taking the long (but essential) way around, I begin first by acknowledging explicitly what the majority does not mention: our history plainly establishes an ambient presumption of judicial review to which separation-of-powers concerns provide a rebuttal under limited circumstances. Few would contest that "[i]t is emphatically the province and duty of the judicial department" to curb acts of the political branches that contravene those fundamental tenets of American life so **[**55]** dear as to be constitutionalized and thus removed from political whims. *See Marbury, 5 U.S. at 177-78*. This presumptive authority entails commensurate power to grant appropriate redress, as recognized in *Marbury*, "which effectively place[s] upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special." *Ziglar v. Abbasi, 137 S. Ct. 1843, 1874, 198 L. Ed. 2d 290 (2017)* (Breyer, J., dissenting). That is, "there must be something 'peculiar' (*i.e.*, special) about a case that warrants 'excluding the injured party from legal redress and placing it within that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.'" *Id.* (cleaned up) (quoting *Marbury, 5 U.S. at 163-64*). In sum, although it is the plaintiffs' burden to establish injury in fact, causation, and redressability, it is the government's burden to establish why this otherwise-justiciable controversy implicates grander separation-of-powers concerns not already captured by those requirements. We do not otherwise abdicate our duty to enforce constitutional rights.

Without explicitly laying this groundwork, the majority nonetheless suggests that this case is "special"—and beyond our redress—because plaintiffs' requested relief requires (1) the messy **[**56]** business of evaluating competing policy considerations to steer the government away from fossil fuels and (2) the

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where "the relief requested goes well beyond the violation of law alleged."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*; *see also infra* Part II.B.3.

[9] Nor am I persuaded that *Massachusetts v. EPA* is distinguishable because of the relaxed standing requirements and "special solicitude" in cases brought by a state against the United States. *Massachusetts v. EPA, 549 U.S. at 517-20*. When *Massachusetts v. EPA* was decided, more than a decade ago, there was uncertainty and skepticism as to whether an individual could state a sufficiently definite climate change-induced harm based on gradually warming air temperatures and rising seas. But the Supreme Court sidestepped such questions of the *concreteness* of the plaintiffs' injuries by finding that "[Massachusetts's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id. at 519*. Here and now, the plaintiffs submit *undisputed scientific evidence* that their distinct and discrete injuries are caused by climate change brought about by emissions from fossil-fuel combustion. They need not rely on the "special solicitude," *id. at 520*, of a state to be heard. Regardless, any distinction would go to the concreteness or particularity of plaintiffs' injuries and not to the issue of redressability.

intimidating task of supervising implementation over many years, **[*1185]** if not decades. *See* Maj. Op. at 25-27. I admit these are daunting tasks, but we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude.

3.

I readily concede that courts must on occasion refrain from answering those questions that are truly reserved for the political branches, even where core constitutional precepts are implicated. This deference is known as the "political question doctrine," and its applicability is governed by a well-worn multifactor test that counsels judicial deference where there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate **[**57]** branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *see also Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 195-201, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012)* (discussing and applying *Baker* factors); *Vieth v. Jubelirer, 541 U.S. 267, 277-90, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)* (same); *Nixon v. United States, 506 U.S. 224, 228-38, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)* (same); *Chadha, 462 U.S. at 940-43* (same).[10] In some sense, these factors are frontloaded in significance. "We have characterized the first three factors as 'constitutional limitations of a court's jurisdiction' and the other three factors as 'prudential considerations.'" *Republic of Marshall Islands v. United States, 865 F.3d 1187, 1200 (9th Cir. 2017)* (quoting *Corrie v. Caterpillar, Inc., 503 F.3d 974, 981 (9th Cir. 2007)*).[11] Moreover, "we have recognized that the first two are likely the most important." *Marshall Islands, 865 F.3d at 1200* (citing *Alperin v. Vatican Bank, 410 F.3d 532, 545 (9th Cir. 2005)*). Yet, we have also recognized that the inquiry is highly case-specific, **[*1186]** the factors "often collaps[e] into one another[,]" and any one factor of sufficient weight is enough to render a case unfit for judicial determination. *See Marshall Islands, 865 F.3d at 1200* (first alteration in original) (quoting *Alperin, 410 F.3d at 544*). Regardless of any intra-factor flexibility and flow, however, there is a clear mandate to apply the political question doctrine both shrewdly and sparingly.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground **[**58]** of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

Baker, 369 U.S. at 217; *see also Corrie, 503 F.3d at 982* ("We will not find a political question 'merely because [a] decision may have significant political overtones.'") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y,*

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[10] The political question doctrine was first conceived in *Marbury*. *See Marbury, 5 U.S. at 165-66* ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."). The modern incarnation of the doctrine has existed relatively unaltered since its exposition in *Baker* in 1962. Although the majority disclaims the applicability of the political question doctrine, *see* Maj. Op. at 31, n.9, the opinion's references to the lack of discernable standards and its reliance on *Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019)*, as a basis for finding this case nonjusticiable blur any meaningful distinction between the doctrines of standing and political question.

[11] The six *Baker* factors have been characterized as "reflect[ing] three distinct justifications for withholding judgment on the merits of a dispute." *Zivotofsky v. Clinton, 566 U.S. at 203* (Sotomayor, J., concurring). Under the first *Baker* factor, "abstention is warranted because the court lacks authority to resolve" "issue[s] whose resolution is textually committed to a coordinate political department[.]" *Id.* Under the second and third factors, abstention is warranted in "circumstances in which a dispute calls for decisionmaking beyond courts' competence[.]" *Id.* Under the final three factors, abstention is warranted where "prudence . . . counsel[s] against a court's resolution of an issue presented." *Id. at 204*.

478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986)). Rather, when detecting the presence of a "political question," courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from "resolution by any semantic cataloguing." Baker, 369 U.S. at 217.

Here, confronted by difficult questions on the constitutionality of *policy*, the majority creates a minefield of *politics* en route to concluding that we cannot adjudicate this suit. And the majority's map for navigating that minefield is Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019), an inapposite case about gerrymandering. My colleagues conclude that climate change is too political for the judiciary to touch by likening it to the process of political representatives drawing political maps to elect **[**59]** other political representatives. I vehemently disagree.

The government does not address on appeal the district judge's reasoning that the first, third, fourth, fifth and sixth *Baker* factors do not apply here. Neither does the majority rely on any of these factors in its analysis. In relevant part, I find the opinion below both thorough and well-reasoned, and I adopt its conclusions. I note, however, that the absence of the first *Baker* factor—whether the Constitution textually delegates the relevant subject matter to another branch—is especially conspicuous. As the district judge described, courts invoke this factor only where the Constitution makes an unambiguous commitment of responsibility to one branch of government. Very few cases turn on this factor, and almost all that do pertain to two areas of constitutional authority: foreign policy and legislative proceedings. *See, e.g.*, Marshall Islands, 865 F.3d at 1200-01 (treaty enforcement); *Corrie, 503 F.3d at 983* (military aid); Nixon, 506 U.S. at 234 (impeachment proceedings); *see also* Davis v. Passman, 442 U.S. 228, 235 n.11, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) ("[J]udicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause[,] . . . [which is] a paradigm example of a textually demonstrable constitutional commitment of [an] issue to a coordinate **[**60]** political department.") (internal quotation marks omitted); Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 135 S. Ct. 2076, 2086, 192 L. Ed. 2d 83 (2015) ("The text and structure of the Constitution grant the President the power to recognize foreign nations and governments.").

Since this matter has been under submission, the Supreme Court cordoned off an additional area from judicial review based in part on a textual commitment to another branch: partisan gerrymandering. **[*1187]** *See* Rucho, 139 S. Ct. at 2494-96.[12] Obviously, the Constitution does not explicitly address climate change. But neither does climate change *implicitly* fall within a recognized political-question area. As the district judge described, the questions of energy policy at stake here may have rippling effects on foreign policy considerations, but that is not enough to wholly exempt the subject matter from our review. *See Juliana v. United States, 217 F. Supp. 3d 1224, 1238 (D. Or. 2016)* ("[U]nlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision."); *see also* Baker, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

Without endorsement from the constitutional text, **[**61]** the majority's theory is grounded exclusively in the second *Baker* factor: a (supposed) lack of clear judicial standards for shaping relief. Relying heavily on *Rucho*, the majority contends that we cannot formulate standards (1) to determine what relief "is sufficient to remediate the claimed constitutional violation" or (2) to "supervise[] or enforce[]" such relief. Maj. Op. at 29.

The first point is a red herring. Plaintiffs submit ample evidence that there is a discernable "tipping point" at which the government's conduct turns from facilitating mere pollution to inducing an unstoppable cataclysm in violation of plaintiffs' rights. Indeed, the majority itself cites plaintiffs' evidence that "atmospheric carbon levels of 350 parts per million are necessary to stabilize the climate." *Id.* at 24. This clear line stands in stark contrast to *Rucho*, which held that—even assuming an excessively partisan gerrymander was unconstitutional—no standards exist by which to determine *when a rights violation has even occurred.* There, "[t]he central problem [wa]s not determining

[12] *Rucho* does not turn exclusively on the first *Baker* factor and acknowledges that there are some areas of districting that courts may police, notwithstanding the Elections Clause's "assign[ment] to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." Rucho, 139 S. Ct. at 2495. Instead, *Rucho* holds that a combination of the text (as illuminated by historical practice) and absence of clear judicial standards precludes judicial review of excessively partisan gerrymanders. *See infra* Part II.B.4.

whether a jurisdiction has engaged in partisan gerrymandering. It [wa]s determining when political gerrymandering has gone too far." **[**62]** Rucho, 139 S. Ct. at 2497 (internal quotation marks omitted); *see also* id. at 2498 ("[T]he question is one of degree: How to provide a standard for deciding how much partisan dominance is too much.") (internal quotation marks omitted); id. at 2499 ("If federal courts are to . . . adjudicat[e] partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from constitutional political gerrymandering.") (internal quotation marks and citation omitted).

Here, the right at issue is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation. That amount can be established by scientific evidence like that proffered by the plaintiffs. Moreover, we need not *definitively* determine that standard today. Rather, we need conclude only that plaintiffs have submitted sufficient evidence to create a genuine dispute as to whether such an amount can possibly be determined as a matter of scientific fact. Plaintiffs easily clear this bar. Of course, plaintiffs will have to carry their burden of **[*1188]** proof to establish this fact in order to prevail at trial, but that issue is not before us. We must not get ahead of ourselves.

The procedural **[**63]** posture of this case also informs the question of oversight and enforcement. It appears the majority's real concerns lie not in the judiciary's ability to draw a line between lawful and unlawful conduct, but in our ability to equitably walk the government back from that line without wholly subverting the authority of our coequal branches. My colleagues take great issue with plaintiffs' request for a "plan" to reduce fossil-fuel emissions. I am not so concerned. At this stage, we need not promise plaintiffs the moon (or, more apropos, the earth in a habitable state). For purposes of standing, we need hold only that the trial court could fashion some sort of meaningful relief should plaintiffs prevail on the merits.[13]

Nor would any such remedial "plan" necessarily require the courts to muck around in policymaking to an impermissible degree; the *scope* and *number* of policies a court would have to reform to provide relief is irrelevant to the second *Baker* factor, which asks only if there are judicially discernable standards to guide that reformation. Indeed, our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment **[**64]** to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. *See* Brown v. Plata, 563 U.S. 493, 511, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law.[14] *See* Brown v. Bd. of Educ. (Brown I), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake:

> To effectuate [the plaintiffs'] interest[s] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly **[**65]** take into account the public **[*1189]** interest in the elimination of such obstacles in a systematic and effective manner. But

[13] It is possible, of course, that the district court ultimately concludes that it is unable to provide meaningful redress based on the facts proved at trial, but trial has not yet occurred. Our present occasion is to decide only whether plaintiffs have raised a genuine dispute as to the judiciary's ability to provide meaningful redress under *any* subset of the facts at issue today. *See* Maj. Op. at 18 (citing Cent. Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002)).

[14] In contrast, we are haunted by the days we declined to curtail the government's approval of invidious discrimination in public life, *see* Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J., dissenting) ("[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."), and neglected to free thousands of innocents prejudicially interned by their own government without cause, *see* Trump v. Hawaii, 138 S. Ct. 2392, 2423, 201 L. Ed. 2d 775 (2018) ("*Korematsu* was gravely wrong the day it was decided[.]").

> it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> . . . [T]he courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300-01, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (1955).

As we are all too aware, it took decades to even partially realize *Brown*'s promise, but the slow churn of constitutional vindication did not dissuade the *Brown* Court, and it should not dissuade **[**66]** us here. Plaintiffs' request for a "plan" is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards. Busing mandates, facilities allocation, and district-drawing were all "complex policy decisions" faced by post-*Brown* trial courts, *see* Maj. Op. at 25, and I have no doubt that disentangling the government from promotion of fossil fuels will take an equally deft judicial hand. Mere complexity, however, does not put the issue out of the courts' reach. Neither the government nor the majority has articulated why the courts could not weigh scientific and prudential considerations—as we often do—to put the government on a path to constitutional compliance.

The majority also expresses concern that any remedial plan would require us to compel "the adoption of a comprehensive scheme to decrease fossil **[**67]** fuel emissions and combat climate change[.]" *Id.* at 25. Even if the operative complaint is fairly read as requesting an affirmative scheme to address *all* drivers of climate change, however caused, *see id.* at 23 n.6., such an overbroad request does not doom our ability to redress those drivers implicated by the conduct at issue here. Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case—such as those purely in the private sphere or within the control of foreign governments—speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights.

4.

In sum, resolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law.

As discussed above, the majority reaches the opposite conclusion not by marching purposefully through the *Baker* factors, which carve out a narrow set of nonjusticiable *political* cases, but instead by broadly **[*1190]** invoking *Rucho* in a manner that would **[**68]** cull from our dockets any case that presents administrative issues "too difficult for the judiciary to manage." Maj. Op. at 28. That simply is not the test. Difficult questions are not necessarily political questions and, beyond reaching the wrong conclusion in this case, the majority's application of *Rucho* threatens to eviscerate judicial review in a swath of complicated but plainly apolitical contexts.

Rucho's limitations should be apparent on the face of that opinion. *Rucho* addresses the political process itself, namely whether the metastasis of partisan politics has unconstitutionally invaded the drawing of political districts within states. Indeed, the *Rucho* opinion characterizes the issue before it as a request for the Court to reallocate political power between the major parties. *Rucho, 139 S. Ct. at 2502, 2507, 2508*. *Baker* factors aside, *Rucho* surely confronts fundamentally "political" questions in the common sense of the term. Nothing about climate change, however, is inherently political. The majority is correct that redressing climate change will require consideration of scientific, economic, energy, and other policy factors. But that endeavor does not implicate the way we elect representatives, assign governmental **[**69]** powers, or otherwise structure our

polity.

Regardless, we do not limit our jurisdiction based on common parlance. Instead, legal and constitutional principles define the ambit of our authority. In the present case, the *Baker* factors provide the relevant guide and further distinguish *Rucho*. As noted above, *Rucho*'s holding that policing partisan gerrymandering is beyond the courts' competence rests heavily on the first *Baker* factor, *i.e.*, the textual and historical delegation of electoral-district drawing to state legislatures. The *Rucho* Court decided it could not discern mathematical standards to navigate a way out of that particular political thicket. It did not, however, hold that mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in *any* context. Such an expansive reading of *Rucho* would permit the "political question" exception to swallow the rule.

Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns. *Cf.* *Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)* ("[T]he line between honest and thoughtful appraisal of the effects **[**70]** of past discrimination and paternalistic stereotyping is not so clear[.]"); *Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (stating that *Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)*, involved the "difficult question" of determining the "weight to be given [the] state interest" in light of the "strength of the woman's [privacy] interest"); *Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094, 204 L. Ed. 2d 452 (2019)* (Kavanaugh, J., concurring) (noting that determining the constitutionality of a large cross's presence on public land was "difficult because it represents a clash of genuine and important interests"). These issues may not have been considered within the purview of the judicial branch had the Court imported wholesale *Rucho*'s "manageable standards" analysis even in the absence of *Rucho*'s inherently political underpinnings. Beyond the outcome of the instant case, I fear that the majority's holding strikes a powerful blow to our ability to hear important cases of widespread concern.

III.

To be sure, unless there is a constitutional violation, courts should allow the **[*1191]** democratic and political processes to perform their functions. And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect fundamental rights is not **[**71]** an exact science. In this case, my colleagues say that time is "never"; I say it is now.

Were we addressing a matter of social injustice, one might sincerely lament any delay, but take solace that "the arc of the moral universe is long, but it bends towards justice."[15] The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

With respect, I dissent.

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[15] Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968). In coining this language, Dr. King was inspired by an 1853 sermon by abolitionist Theodore Parker. *See* Theodore Parker, *Of Justice and the Conscience, in* Ten Sermons of Religion 84-85 (Boston, Crosby, Nichols & Co. 1853).