No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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I. INTRODUCTION

We live in times of political unrest. Many Americans have lost faith in the government's ability to hear their voices, and some of the most pointed criticisms of American government have been directed at the criminal legal system. The ability of criminal defendants to defend themselves and a jury of peers to hear them, particularly in cases involving political protest on momentous issues, is now more important than ever.

Mr. Taylor was arrested for an act of civil disobedience to address the global ecological emergency, one of many such acts by Americans over the last decade. Although scientists have repeatedly warned that climate change — caused primarily by the combustion of fossil fuels — may send the world into a state of runaway heating, political leaders have done little to abate the problem. Though perhaps the gravest, climate change is far from the only threat to Americans' well-being to which our political system has failed to adequately respond. The function of civil disobedience as a safety valve for a system under strain is now more needed than ever, and the necessity defense is part of that safety valve.

This Court should reverse the decision of the Appeals Court and reinstate the trial court decision allowing Mr. Taylor's proffered defense.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae, listed in Exhibit A, are professors who teach and research in the areas of constitutional law, criminal law and procedure, civil rights and civil liberties law, environmental law, and the law of evidence. *Amici* include practitioners with extensive experience litigating in the above areas and in defending the rights of individuals engaged in protest. They offer their understanding of the history and use of the necessity defense; the constitutional issues raised by Mr. Taylor's appeal; and the public policy issues informing recent political unrest, including the environmental crisis. *Amici* believe that the outcome of the appeal will have important consequences for freedom of expression, the protection of criminal defendants' constitutional rights, and the balance between judges and juries in the adjudication of criminal trials.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Mr. Taylor's Motion for Discretionary Review.

IV. ARGUMENT

A. THE NECESSITY DEFENSE CONTINUES TO PLAY AN IMPORTANT ROLE IN AMERICAN POLITICAL HISTORY.

The necessity defense has been widely employed in prosecutions for acts of nonviolent civil disobedience in the United States. Since the

1970s, hundreds of individuals representing a variety of causes have been acquitted by reason of necessity.[1] The use of "political necessity" defenses

[1] Despite the large number of successful political necessity defenses, there are few reported decisions upholding the right to present the defense to the jury, because courts are usually not called upon to issue an opinion in such cases, and acquittals are not appealable. However, in at least two unreported Washington cases, which the court may consider pursuant to GR 14.1(a), protesters were acquitted after a necessity instruction to the jury. *See Washington v. Heller*, PL-151/69 (Seattle Mun. Ct. Aug. 7, 1985) (defendants acquitted of trespass at home of South African consul during apartheid protest); *Washington v. Bass*, PL-219/73, Nos. 4750-038, -395 to -400 (Thurston Cty. Dist. Ct., Apr. 8/Nov. 9, 1987) (defendants acquitted after being arrested for a sit-in in support of South Africa divestment legislation at the state Capitol). An incomplete list of other successful political necessity defenses might also include: *Massachusetts v. Schaeffer-Duffy* (Worcester Dist. Ct. 1989) (protesters acquitted of trespass at a nuclear facility after necessity instruction); *Massachusetts v. Carter*, No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987) (defendants, including President Carter's daughter, acquitted of trespass and disorderly conduct in protest against CIA recruitment after necessity instruction); *Washington v. Mouer* (Columbia Co. Dist. Ct., Dec. 12-16, 1977) (protesters acquitted of trespass at nuclear site after instruction on necessity); *California v. Block* (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979) (one defendant acquitted of charges from protest at nuclear plant after necessity instruction, other defendants received split verdict and charges dropped); *California v. Lemnitzer*, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982) (hung jury for protester at nuclear research facility after instruction on necessity, at retrial no necessity instruction but instruction on malice); *Vermont v. Keller*, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984) (defendants acquitted of trespass in congressman's office to protest policy in Central America after extensive testimony and necessity instruction); *Michigan v. Jones et al.,* Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984) (defendants acquitted of charges related to blockade of cruise missile site after necessity instruction); *People v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985) (protesters acquitted after sit-in at naval training center to protest Central American policy when court gave necessity instruction that noted illegality of nuclear war); *Chicago v. Streeter*, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook County 11, May 1985) (defendants acquitted of trespass at office of South African consul after necessity instruction); *Colorado v. Bock* (Denver County Ct. June 12, 1985) (protesters acquitted of trespass at senator's office to protest policy in Central America after necessity instruction); *Michigan v. Lagrou*, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985) (defendants acquitted of charges related to blockade of cruise missile site, court noting absence of malice and absence of alternative methods); *Illinois v. Fish* (Skokie Cir. Ct. Aug. 1987) (protesters acquitted of trespass at an army recruiting center after necessity instruction); *California v. McMillan*, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987) (protesters acquitted on theory of necessity in bench trial related to demonstration at nuclear plant); *West Valley City v. Hirshi*, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990) (protesters at nuclear missile plant acquitted after necessity instruction); *California v. Halem*, No. 135842 (Berkeley Mun. Ct. 1991) (defendant acquitted of distributing clean

reflects not only the fact that protest actions often prevent serious harm through less-harmful law-breaking, but also the important role that civil disobedience plays in the nation's social progress. Judge Bright of the Eighth Circuit, dissenting in a case where anti-war protesters were convicted on several charges for damaging missile equipment, wrote:

> We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's . . . In these circumstances, the courts in assessing punishment for violation of laws have ordinarily acted with a degree of restraint as to the severity of the punishment, recognizing that, although legally wrong, the offender may carry some moral justification for the disobedient acts.

United States v. Kabat, 797 F.2d 580, 601 (8th Cir. 1986).

Given the dearth of published opinions, and in light of how recent is the use of the necessity defense in climate protest cases, proponents' record of success in introducing the climate necessity defense at trial is impressive. Excluding the trial court opinion in this case, eight courts in the United States and three courts abroad have allowed climate protest

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needles in response to AIDS crisis after necessity instruction); *People v. Bordowitz*, 155 Misc.2d 128 (N.Y.C. Crim. Ct. 1991) (defendants acquitted of distributing clean needles in response to AIDS crisis on necessity defense); *People v. Gray*, 150 Misc.2d 852 (N.Y.C. Crim. Ct. 1991) (defendants acquitted on necessity defense in bench trial after protest against pollution and safety effects of new vehicular lanes).

defendants to present necessity defenses since 2008, out of roughly thirty-seven attempts. *See* Climate Defense Project, *Climate Necessity Defense Case Guide* (Dec. 29, 2020), https://climatedefenseproject.org/wp-content/uploads/2020/12/CDP-Climate-Necessity-Defense-Case-Guide.pdf.[2] The first acquittal using the necessity defense prompted praise from former Vice President Al Gore. Mot. Discretionary Review, App. H at 7. These trends have not escaped notice by the fossil fuel industry, which since 2017 has embarked on a nationwide effort to secure harsh new penalties for protests at oil and gas sites. *See* Institute for Policy Studies, *Muzzling Dissent: How Corporate Influence Over Politics Has Fueled Anti-Protest Laws* (Oct. 2020), https://ips-dc.org/report-muzzling-dissent/.

[2] A number of these cases have taken place in Washington, with its significant fossil fuel infrastructure and proximity to Canadian suppliers and Asian markets. Here is a full list of cases of which *amici* are aware: *R. v. Hewke* (Maidstone Crown Court, UK, No. T20080116, Sep. 8, 2008); *Florida v. Block* (Fifteen Dist. Ct., Palm Beach Cty. Ct., Fla., 08MM003373AMB, Dec. 4, 2008); *Massachusetts v. O'Hara* (Fall River Dist. Ct., MA, No. 1332CR593, Sep. 8, 2014); *State v. Brockway*, 3 Wash.App.2d 1064, *review denied*, 191 Wash.2d 1020 (2018); *Minnesota v. Klapstein* (Ninth Jud. Dist. Ct. Clearwater Cty., Minn., No. 15-CR-16-413, Oct. 9, 2018) (scope of allowed necessity evidence narrowed by subsequent ruling); *State v. Ward*, 8 Wn.App.2d 365, 368, *review denied*, 193 Wn.2d 1031 (2019); *New York v. Cromwell* (Town of Wawayanda Justice Court, N.Y., No. 15120561, June 13, 2019); *State v. Delahalle* (Tribunal de Grande Instance de Lyon, 19168000015, Sep. 16, 2019); *Lausanne Climate Action* (Tribunal d'Arrondissement de Lausanne, PE 19.000742, Jan. 13, 2020); *Oregon v. Butler* (Multnomah Cty. Cir. Ct., Ore. No., 19-CR-28017, Feb. 27, 2020); *State v. Zepeda*, No. 80593-2-1 (Wash. Ct. App. Nov. 16, 2020). In several cases, following rulings to allow the necessity defense, or motions or notice from defense counsel seeking to present it, charges were dropped or reduced before trial took place. *See Climate Necessity Defense Case Guide* 7, 9, 10, 12, 18-19. The court may consider the unpublished cases in this list pursuant to GR 14.1(a).

B. THE AIRING OF DEFENSES FOR WHICH THERE IS PRIMA FACIE EVIDENCE IS ESSENTIAL TO TRIAL BY JURY.

The *amicus curiae* brief filed with the Court of Appeals explained why efforts to secure wholesale exclusion of a criminal defense prior to trial are incompatible with constitutional guarantees. Here, *amici* briefly note authorities not discussed previously.

In *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984), the defendants were political activists who had sought to present defenses of necessity and "claim of right." The state moved prior to trial to bar them from doing so. In reinstating the trial court's denial of the state's motion, the state supreme court noted that "[t]he use of a motion in *limine* against a defendant in a criminal case, particularly one as broad in scope as in this case, is questionable considering the constitutional rights of defendants. . . . We . . . disapprove of so broad an exclusionary order as employed in this case against a criminal defendant because it raises serious constitutional questions relating to a defendant's right to testify." *Id.* at 748, 751.

In cases of justification and self-defense, where the essential purpose and context for a defendant's actions is contained within the defense, it is particularly unfair to bar it outright at trial. Thus, for instance, at least one legislature has explicitly allowed the presentation of evidence relevant to self-defense even where a jury instruction on such a

defense has been denied, *see* Colo. Rev. Stat. Ann. § 18-1-704 ("In a case in which the defendant is not entitled to a jury instruction regarding self-defense . . . the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense."); in other states, courts' rulings have had a similar effect, *see, e.g.*, *Commonwealth v. O'Malley*, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982) ("In the usual case . . . it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense."); *see also* Mot. Discretionary Review App. H at 18-19.

Constitutional guarantees are not only meant to protect criminal defendants; they also help prevent courts from turning *jurors* into potted plants. The jury does more than find facts; it acts as a representative of the community, and its role is especially important in cases where the societal interest is in the balance:

> That the defendants should be allowed to present their defense is required by a proper respect for the role of the jury in the criminal justice system. The essential purposes of the jury trial are twofold. First, the jury temper the application of strict rules by bringing the common sense judgment of a group of laymen to the case. Second, the jury stand as a check on arbitrary enforcement of the law. 'Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.'

Commonwealth v. Hood, 452 N.E.2d 188, 198 (Mass. 1983) (Liacos, J., concurring) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Cases in which protest defendants have argued necessity defenses at trial demonstrate jurors' ability to weigh the evidence and reach a decision without unduly favoring the defendant. *See, e.g.*, *State v. Zepeda*, No. 80593-2-I, 2020 WL 6708240 (Wash. Ct. App. Nov. 16, 2020) (oil pipeline protest defendant convicted of burglary, attempted criminal sabotage, and malicious mischief following necessity defense at trial).[3]

C. THE REVIEWING COURTS ERRED IN REACHING FACTUAL CONCLUSIONS AND ADDING LEGAL RULES UNSUPPORTED BY CASE LAW.

Mr. Taylor's Motion for Discretionary Review describes the errors made by the reviewing courts in creating, in effect, a new legal rule not provided in the necessity defense as formulated in Washington common law or as provided in Washington case precedent, and premised on unsupported factual assumptions. *Amici* wish to add that the reviewing courts' reasoning — particularly the Appeals Court's assertions that

[3] For another political protest case involving facts similar to those of *Kabat*, see Judge Bright's discussion of the unreported case *United States v. LaForge and Katt*, Cr. 4–84–66, slip at 20 (D.Minn. November 8, 1984). *Kabat*, 797 F.2d at 593 n. 4 (Bright, J., dissenting). In *LaForge*, the judge allowed anti-nuclear weapons protesters to present a necessity defense at trial. The jury convicted the defendants and the judge delivered a speech at sentencing praising the protesters' motives. *Id.*; s*ee also* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury*, 38 New England L. Rev 3, 40 n. 136 (2003). The court may consider both *Zepeda* and *LaForge* pursuant to GR 14.1(a).

"[t]here are always reasonable legal alternatives to disobeying constitutional laws," that "a defendant is not entitled to receive a jury instruction that violating the law is permitted," and that the necessary defense is "tantamount to promoting jury nullification," *State ex rel Haskell v. Spokane County District Court*, 13 Wn.App.2d 573, 586, 587 (2020) — is troubling. Following this reasoning would eviscerate the necessity defense not just in political protest cases but in all others as well. The young African Americans who sat at lunch counters in 1960 disobeyed laws that were then constitutional. The hiker who breaks into a cabin to survive a snowstorm violates a constitutional law.

Amici also note that the necessity defense cannot be cabined without case-by-case analyses of the facts (analyses that the elements of the defense readily invite). Rather than legislate new rules categorically barring the necessity defense in certain cases — such as in cases of so-called "indirect" civil disobedience, a nonsensical category that excludes many real-life protests that changed the course of history[4] — courts are called upon to consider the defendant's proffered evidence.[5]

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[4] The *Schoon* distinction between "direct" and "indirect" civil disobedience, *United States v. Schoon*, 971 F.2d 193, 195-99 (9th Cir. 1991), *as amended* (Aug. 4, 1992), has been criticized by commentators on the grounds that it misunderstands the history of American civil disobedience, in which relatively few protesters have directly violated objectionable statutes. *See* Quigley, *The Necessity Defense in Civil Disobedience Cases* at 47. *Schoon* has been further criticized for assuming erroneously that lawful alternatives are always available, *see* John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. Rev. 111, 116 (2007), and for failing to account for a defendant's

D. THE REASONABLENESS OF LEGAL ALTERNATIVES CANNOT BE DIVORCED FROM THE FACTUAL CONTEXT OF THE CASE.

The reviewing courts erred in reaching factual conclusions reserved for the jury. However, since some factual analysis by this Court is necessary, *amici* wish to note that the reviewing courts' findings are erroneous, insofar as they misinterpret Washington law, ignore key facts and evidence, and apply identical facts inconsistently.

1. "Reasonable" Has Meaning Beyond "Available."

Reasonable alternatives to law-breaking are not limited to those that are effective immediately or in every case. However, reasonableness does require significant potential for effectiveness. As the comments to the Pattern Jury Instructions make clear, the use of the word "reasonable" is deliberate, and constitutes a distinct requirement. 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 18.02, at 292 (4th ed. 2016), Committee Cmt. 2016. In *State v. Parker*, Division II interpreted "reasonable" to mean that the defendant "had actually tried the alternative or had no time to try it, *or that a history of futile attempts revealed the*

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constitutional right to present a complete defense, *see* James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 Cal. L. Rev. 351, 352 (1993). The First Circuit declined to adopt *Schoon*'s indirect-direct civil disobedience distinction in *United States v. Maxwell*. 254 F.3d 21, 26 n.2 (1st Cir. 2001).

[5] Doing so does not require that courts undertake extensive analyses, since the bar for pre-trial evidentiary showings is low. *See* Supp. Br. Pet'r. 12-13.

illusionary benefits of the alternative." 127 Wn.App. 352, 355 (2005) (emphasis added). In *State v. Jeffrey*, Division III assessed reasonableness in terms of the adequacy of the defendant's alternative of calling the police in an unlawful possession of firearm case. 77 Wn.App. 222, 227 (1995). "Reasonable," in these cases, has meant that a legal alternative might justifiably be expected under the circumstances to be an adequate substitute for the illegal one chosen by the defendant.

The reasonableness requirement is a common-sense safeguard also found in other jurisdictions. *See, e.g.*, *People v. Gray*, 150 Misc.2d 852, 860 (N.Y. Crim. Ct. 1991) (finding that the defendants' history of unsuccessful attempts to minimize air pollution demonstrated that lawful avenues were ineffective). *See also* Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1179-80 (1987) ("Reasonable must mean more than available; it must imply effective."); Shaun Martin, *The Radical Necessity Defense*, 73 U. Cin. L. Rev. 1527, 1586 and n. 259 (2005) ("[T]he issue is not whether a lawful option exists; rather, it is whether any such alternative would effectively mitigate the forthcoming evil . . . Doing nothing, for example, is almost always a perfectly legal alternative, as is staring into space or pondering the purpose of life.").

Further supporting the conclusion that "reasonable" means more than "available," many courts have inferred from the reasonableness requirement that a defendant need not have exhausted *every* alternative. *See, e.g.*, *Commonwealth v. Magadini*, 52 N.E.3d 1041, 1050 (Mass. 2016) ("Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation."); *State v. Greenwood*, 237 P.3d 1018, 1026 (Ak. 2010) (finding that a defendant "is not required to present evidence that every possible alternative was unavailable to her"); *People v. Gray*, 150 Misc.2d at 860-66 (rejecting idea that necessity defense must be excluded simply because the defendant could have tried "just one more alternative").

2. Reasonableness Depends Upon the Nature of the Harms the Defendant Sought to Abate.

Any assessment of the effectiveness or futility of legal alternatives must consider the severity of the harms and the timeframe for addressing them. Imminence is relevant: the more imminent the peril, the less likely that alternative courses of action will abate it. *See Kabat*, 797 F.2d at 591.

Courts considering the effects of climate change have consistently concluded that its harms are imminent (and, indeed, are already occurring). *See, e.g.*, *Connecticut v. American Electric Power Co., Inc.*,

582 F.3d 309, 343 (2nd Cir. 2009) (finding that the plaintiffs had sufficiently pled imminence due to the ongoing nature of climate change harms); *Massachusetts v. E.P.A.*, 549 U.S. 497, 521-23 (2007) (noting that "[t]he harms associated with climate change are serious and well recognized," and that the EPA's refusal to regulate greenhouse gas emissions was an imminent harm to Massachusetts); *Los Angeles v. N.H.T.S.A*, 912 F.2d 478, 494 (D.C. Cir. 1990) (Wald, J., Opinion for the Court on NRDC standing and dissenting on the failure to issue an EIS) ("No one, including NHTSA, appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming.").

Imminence may refer to harms that are likely to occur but cannot be precisely predicted, as with many environmental threats. In *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007), a tar-like by-product of an oil refinery was an imminent hazard even though no one had yet been harmed by it: "[A]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public . . . Imminence, thus, refers to the nature of the threat rather than identification of the time when the endangerment initially arose" (citations omitted). In *People v. Gray*, a case involving protests against air pollution, the court rejected the argument that the targeted harm

had to be immediate and easily quantifiable, since there is a wealth of scientific proof that air pollution harms human health. 150 Misc.2d at 862.

Mr. Taylor did not seek single-handedly to "prevent climate change" as a whole, Supp. Br. Resp't. 8; he sought to reduce coal and oil train traffic through Spokane, and thus the risk of accidents, and to generate political will for a more-permanent solution to those trains' contribution to climate and pollution harms, *see* CP 159. Ecological degradation from the burning of fossil fuels is grave, ongoing, and rapidly worsening. CP 10-11, 61-75. The window of opportunity for keeping those harms within acceptable limits is closing fast. CP 75. Moreover, accidents and spills are a serious risk endemic to the operation of coal and oil trains, including those traveling through Spokane. CP 13. Mr. Taylor has made more than a prima facie showing that these harms are emergencies in need of quick and decisive action, and that such realities constrained the options available to him.

3. Democratic Dysfunction Has Rendered Traditional Means of Political Participation Ineffectual for Ordinary Americans.

Mr. Taylor was not presented with a democratic process that simply works too slowly for citizen activists impatient to see their political views vindicated. Rather, he faced state and federal governments that are now for most purposes structurally committed to representing only the

wealthy and well-funded interest groups. *See generally* Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America (2014) (showing zero statistical correlation between enacted federal policies and those preferred by ordinary Americans, versus a strong correlation with those preferred by wealthy citizens and business interests). [6] The discrepancy between ordinary Americans' preferred policies and those actually enacted is especially acute in the realm of business regulation. Lee Drutman, *Congress has very few working class members. Here's why that matters*, Sunlight Foundation (June 3, 2014), https://sunlightfoundation.com/ 2014/06/03/white-collar-government/. Meanwhile, winning election to public office has become too expensive for most citizens. *Id.*[7]

In Washington State, the Department of Ecology has testified in a court of law that it would be "futile" to make a recommendation to the Legislature to update existing greenhouse gas emission limits, even though it is statutorily obligated to do so. *See Foster, et al. v. Ecology*, King

[6] *See also* Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40(1) American Politics Research 29 (2012) (finding that "citizens with low incomes receive little substantive political representation (compared with more affluent citizens) in the policy decisions made by their state governments"); Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making (2013) (showing that the class backgrounds of elected representatives distorts policy).

[7] Elected representatives from working-class backgrounds comprise just two percent of the United States Congress and three percent of state legislatures, and this owes in part to the high cost of running a campaign. Drutman, *Congress has very few working class members*. In 2014, "[m]ore than half of sitting members of Congress [had] $1 million or more to their names." *Id.* (internal citation omitted).

County Superior Court No. 14-2-25295-1 SEA (Dep't of Ecology Resp. to Pet.'s Mot. for Relief Under CR 60(b)) (filed Apr. 19, 2016) (App. C) at 6 ("Ecology believes any attempt to persuade the 2016 Legislature to change the emission limits in RCW 70.235 would have been futile.").

Fossil fuel corporations donate generously to political campaigns in Washington State, and those donations appear to be correlated with the policy records of candidates who receive them. Eric de Place & Nick Abraham, *Which Washington Legislators Take the Most Coal, Oil, and Gas Money?*, The Sightline Institute (Jan. 15, 2015), https://www.sightline.org/2015/01/15/which-washington-legislators-take-the-most-coal-oil-and-gas-money/. Fossil fuel corporations also influence Washington politics through less-transparent means, including lobbyists and political action committees. Eric de Place & Nick Abraham, *Coal, Oil, and Gas Spent $3 Million on Washington Politics in 2014*, The Sightline Institute (Mar. 10, 2015), https://www.sightline.org/2015/03/10/3-million-in-fossil-fuel-spending-flooded-washington-in-2014/.

Of particular relevance to this case, fossil fuel and railroad companies spent at least $358,000 to defeat Proposition 2, a 2017 ballot initiative that would have levied a fee on coal and oil trains passing through Spokane. Public Disclosure Commission, *Comm to Protect Spokanes Economy, 2017*, https://www.pdc.wa.gov/browse/campaign-

explorer/committee?filer_id=COMMPS%20201&election_year=2017; Emily Schwing, *'Goliath' Spending Effort Blamed for Failure of Spokane Coal, Oil Train Ballot Measure*, KNKX.org (Nov. 8, 2017), https://www.knkx.org/post/goliath-spending-effort-blamed-failure-spokane-coal-oil-train-ballot-measure. This defeat occurred during an election in which the fossil fuel industry spent nearly $100 million to stymie three proposed climate initiatives in Western states: a carbon emissions fee in Washington, restrictions on hydraulic fracturing in Colorado, and improved renewable energy standards in Arizona. Amy Harder, *With deep pockets, energy industry notches big midterm wins*, Axios (Nov. 7, 2018), https://www.axios.com/2018-midterm-elections-energy-issue-results-83978294-55b4-4ebc-88c4-842a6e0f0c4e.html.

In a similar necessity defense case involving a protest against oil trains in Snohomish County, expert trial testimony described decades of failed attempts to spur governmental action to make crude oil transport safer, while defendant Abigail Brockway described her unsuccessful correspondence with elected officials and testimony before the Department of Ecology. *See* Verbatim Tr. Proceedings Vol. 3, *Washington v. Brockway* (Snohomish Co. Dist. Ct., Wash., No. 5053A-14D) (App. D) at 63-72, 91-93, 102-119, 121-25. In the *Ward* case, defendant Kenneth Ward testified to his disillusionment about the prospects of governmental

action to address climate change and crude oil transport after forty years as a leading advocate on environmental issues at high-powered organizations. *See* Jan. 24, June 5 & June 6, 2017 RP, *Washington v. Ward* (Skagit Co. Sup. Ct., Wash., No. 16-1-01001- 5) (App. E) at 90-115.

These realities give context to Mr. Taylor's testimony describing numerous failed attempts to activate political levers, CP 141-44, and his argument that political avenues were functionally unavailable to him. It is unrealistic to expect Mr. Taylor and his fellow advocates to secure political leadership when their own and other similar efforts have failed for decades. While theoretically available, political avenues are in fact illusionary and should not be cited to deny Mr. Taylor's necessity defense.

4. Facts Governing the Objective Reasonableness of the Defendant's Belief May Not Be Discarded When Analyzing Available Alternatives.

The second element of the necessity defense requires that the defendant "reasonably believed the commission of the crime was necessary to avoid or minimize a harm." *State v. Ward*, 8 Wn.App.2d 365, 368, *review denied*, 193 Wn.2d 1031 (2019); 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 18.02, at 292 (4th ed. 2016). This element incorporates not just a defendant's subjective belief in the necessity of her action, but whether that belief was objectively reasonable. *See, e.g.*, *State v. Gallegos*, 73 Wn.App. 644, 651 (1994)

(finding that the defendant's "belief that he had to flee from [a police officer] so the officer would follow him and help him assist [a friend]" was objectively unreasonable).[8] The fourth element of the defense is that no reasonable legal alternative existed. *Ward*, 8 Wn.App.2d at 368.

Here, nearly all of Mr. Taylor's evidence — the imminence and severity of the environmental dangers posed, the efficacy of nonviolent civil disobedience, and previous attempts by Mr. Taylor and others to reduce train traffic through Spokane using political mechanisms, CP 8-13 — addressed both the second and fourth elements. Nonetheless, in its de novo review the Appeals Court found that the evidence satisfied the second element but not the fourth. *Haskell*, 13 Wn.App.2d at 579, 584.

Proving the second element does not always prove the fourth. However, when the evidence supporting the two elements is identical, its treatment should be consistent. Evidence of ecological crisis and

[8] Judge Fearing's observation that "Washington law has never directly addressed" this question, *Haskell*, 13 Wn.App.2d at 611 (Fearing, J., dissenting), is not inaccurate. *Jeffrey* omitted the word "reasonably." *See* 889 P.2d at 957-58. However, *amici* believe that the reasonableness requirement can be inferred from other cases and the fact that most interpretations of the necessity defense in other jurisdictions contain an objective test. *See, e.g.*, *People v. Kucavik*, 854 N.E.2d 255, 259 (Ill.App. 2006) (finding that the Illinois necessity statute "creates both an objective and subjective test for the reasonableness of the accused's conduct under the circumstances"); *United States v. Seward*, 687 F.2d 1270, 1273 (10th Cir. 1983) (necessity defense requires "a showing that a reasonable man would think that" the defendant's conduct averted the targeted harm). *See also* Climate Defense Project, *Political Necessity Defense Jurisdiction Guide* (July 8, 2019), https://climatedefenseproject.org/wp-content/uploads/2019/07/Political-Necessity-Defense-Jurisdiction-Guide-Updated-July-2019.pdf. To help ensure the objective reasonableness of a defendant's belief, a large number of jurisdictions require a causal nexus between breaking the law and preventing the harm. *See id.* Finally, public policy calls for assessing objective reasonableness, so as to cabin the necessity defense.

democratic dysfunction that establishes the objective reasonableness of a defendant's actions may not be discounted when analyzing the reasonableness of alternatives. The reviewing courts were required to do more than make conclusory statements premised on the mere existence of democratic institutions without regard for the evidence proffered.[9]

V. CONCLUSION

Time and again, Mr. Taylor and others like him told political leaders of their concerns about trains carrying coal and oil. Their efforts fell on deaf ears. In turning to nonviolent civil disobedience, Mr. Taylor and his compatriots chose a time-tested strategy for exercising political power by those who have little. Mr. Taylor accepted serious legal risks for the sake of calling attention to dangers imperiling the well-being not only of Spokane residents, but of all humanity. He now seeks to explain and justify his actions to a jury.

The undersigned *amici curiae* respectfully request that this Court reinstate the trial court decision allowing Mr. Taylor to do so.

Respectfully submitted this 4th day of January, 2021,

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[9] That evidence includes the defense memorandum on the necessity defense submitted to the trial court, which is not contained in the appellate record. *See* Defense Mot. Allow Affirmative Defense (App. F).

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served a copy of this amicus brief on counsel for the State of Washington via the electronic filing system, and by email at the address shown below:

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APPENDIX A

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No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

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