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King County Superior Court No 21-2-03266-1 SEA

SUPREME COURT OF THE STATE OF WASHINGTON

THE CIVIL SURVIVAL PROJECT, ET AL,

Petitioners,

v.

THE STATE OF WASHINGTON, ET AL.,

Respondents.

PETITIONERS' RESPONSE TO AMICUS CURIAE MEMORANDUM OF THE INSTITUTE FOR JUSTICE

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INTRODUCTION

Petitioners, through their undersigned counsel, submit this response to the Amicus Curiae Memorandum filed by the Institute of Justice ("IJ" or the "Amicus") on February 27, 2023, which further supports their Petition for Discretionary Review.

In *State v. Jennings*, 199 Wn.2d 53, 65 (2022), the Washington Supreme Court held that *Blake* convictions are unconstitutionally invalid on their face. Petitioners filed this class action to facilitate the refund of millions of dollars in legal financial obligations ("LFOs") – the fines and fees assessed as a result of a felony conviction – to thousands of individuals who had their unconstitutional convictions vacated by *Blake*. The Court of Appeals ("CoA") wrongly affirmed the Superior Court's dismissal of the case, which held that that individuals with *Blake* or *Blake*-related convictions must file individual CrR 7.8 motions to obtain refunds of the illegally retained LFOs. The Amicus demonstrates that reversal is necessary by highlighting

three additional, grave consequences if the CoA's decision is affirmed:

First, the Amicus explains that the impact of the CoA's ruling will extend beyond LFOs, and frustrate the recovery of property and assets seized through civil forfeiture by individuals with now-invalidated *Blake* and *Blake*-related convictions. *Second*, the Amicus shows that the CoA disregarded Washington's "liberal interpretation" of class actions, improperly – and prematurely – concluding that a class action is not a proper procedural vehicle for the relief Petitioners' seek. This decision will make it easier for trial courts to dismiss, at the pleading stage, class claims seeking to protect core constitutional rights. *Third*, the Amicus highlights that the CoA improperly narrowed the requirements for standing under the Uniform Declaratory Judgment Act ("UDJA") and failed to account for this case's clear public importance.

A. The Amicus Highlights the Serious Impact of Civil Forfeiture on *Blake* Defendants.

In addition to LFOs, many *Blake* defendants also had property and assets seized through civil forfeiture in connection with now-invalidated *Blake* and *Blake*-related convictions. Memorandum of Amicus Curiae Institute for Justice in Support of Petition for Review ("Amicus") at 4. As the Amicus explains, many such individuals will be unable to recover their property if forced into one-off, individual hearings.

Studies show that placing the onus on individuals entitled to recover their property seized through civil forfeiture frequently results in those individuals never succeeding. Amicus at 5-6; *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, Institute for Justice (Oct. 2021), https://tinyurl.com/3k2bz37j (hereinafter "Civil Forfeiture"); *Policing for Profit*, Institute for Justice (3d ed. 2020), https://tinyurl.com/3vvnctte. More than two thirds of forfeiture victims in Philadelphia, for example, never recover

illegally seized property because navigating the court system – which often involved appearing in court multiple times, sometimes more than 10 times – was too difficult and time-consuming, especially for people with jobs. Civil Forfeiture at 19-20. Many individuals decide simply to cut their losses instead of spending time and money to recover property they are legally entitled to. *Id.* at 20.

Obstacles to recovering property exist in all states, including Washington, which forfeited approximately $145 million from individuals between 2001 and 2018, yet does not report on the type of property forfeited, data to assess the value of the forfeitures, or information on how the forfeiture funds are spent. *See Policing for Profit* at 154-44 (discussing, *inter alia*, that third parties seeking to recover forfeited property must affirmatively prove innocence).

The Amicus explains that requiring *Blake* defendants to navigate these systems individually, and on their own initiative, when many already face obstacles due to low socioeconomic

status, lower educational attainment, and systemic racism, imposes a burden that is frequently too great. The result will be that Defendants continue to possess property that was taken as the result of an unconstitutional statutory scheme. A systemic solution is the only way to ensure that individuals harmed by *Blake* receive full and true relief.

B. A Class Action is an Appropriate Procedural Vehicle for the Relief Sought by Petitioners.

In addition, the Amicus highlights that the Court of Appeal's decision will limit the ability of civil rights plaintiffs to protect constitutional rights through class action litigation.

Under Washington law, "the trial court must adequately consider the criteria of CR 23 in making that class certification decision and must then express its decision in light of the provisions of the rule." *Wash. Educ. Ass'n v. Shelton Sch. Dist.*, 93 Wash. 2d 783, 793 (1980). Reversal is appropriate where a trial court reaches its decision "without appropriate consideration *and articulate reference to* the criteria of CR 23." *Miller v.*

Farmer Bros. Co., 115 Wash. App. 815, 821 (2003) (quoting *Wash. Educ. Ass'n*, 93 Wash. 2d at 793). In *Washington Education Association v. Shelton School District*, the Supreme Court affirmed the reversal of the trial court's decision that, "as a practical matter," denied class certification at the pleadings stage. *Wash. Educ. Ass'n*, 93 Wash. 2d at 792. This Court explained that the trial court's conclusion was inappropriate because it failed to provide "any studied consideration of the provisions of CR 23(a) and (b)." *Id.* at 792-93.

Affirmance would create a rule permitting the premature dismissal of class actions based on no record evidence or analysis of the requirements of CR 23. As discussed above, this is flatly contrary to the law in Washington. *See also, e.g., Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wash. 2d 507, 515 (2018) ("[I]f the trial court fails to articulate its application of the CR 23 criteria to the facts relevant to class certification, an appellate court will reverse the denial of class certification."); *Miller v. Farmer Bros. Co.*, 115 Wash. App. 815, 820 (2003) ("[T]he trial

court must conduct a 'rigorous analysis' of the CR 23 requirements to determine whether a class action is appropriate in a particular case." (quoting *Oda v. State*, 111 Wn. App. 79, 94, *review denied*, 147 Wn.2d 1018 (2002))). To permit the Superior Court's opinion on the suitability of a class action here, at the pleading stage based on no record evidence, will circumscribe litigants' ability to vindicate their rights through that procedural mechanism. As the Amicus illustrates, this impacts individuals seeking to bring class actions to remedy violations of constitutional rights, which is at odds with authority favoring a "liberal interpretation" of CR 23. Amicus at 7-11.

Under the CoA decision, not only Petitioners, but also individuals entitled to other relief under *Blake* would be foreclosed from obtaining it through a class action. More broadly, it would provide a roadmap for Washington courts to reject the class allegations of civil rights plaintiffs if the court disagreed on the merits, potentially closing the courthouse doors on meritorious and important claims.

C. Petitioners Have Standing to Seek Relief Under the Uniform Declaratory Judgment Act.

Finally, the Amicus appropriately highlights the purpose of the UDJA, pointing out that relief under the Act "may be the only means by which individuals' rights can be safeguarded." Amicus 12. The CoA disregarded the intent and policy behind the UDJA, instead circumscribing the requirements for standing under the Act by interpreting the relief sought by Petitioners as limited to the relief available under CrR 7.8. Petition for Discretionary Review at 30-31.

As the Amicus further notes, the CoA failed to adequately consider the "public importance" doctrine, a separate doctrine providing for a more lenient standard for standing in cases impacting "substantial segments" of the population. *See id.*; Amicus at 13-16.

The Amicus is correct that the significant and state-wide impact of *Blake* is an issue of clear public importance. As Petitioners allege in their complaint, judicial intervention is

essential because Washington's 36 counties have been left to address the fallout of *Blake* and all have come up short – if they have even implemented a response at all. Direct Review App. Ex. 1 (Second Amended Complaint) ¶¶ 1.20-1.21. And, in some cases, as Respondents admit, individuals have vacated *Blake* convictions but the counties still have not refunded their LFOs. Direct Review App. Reply Br. at 5-6. Such a piecemeal approach to returning the illegally retained LFOs has resulted in thousands of individuals receiving no or partial reimbursement of LFOs to which they are entitled. *Id.* This is sufficient to show standing under the UDJA and the CoA erred in ruling otherwise.

CONCLUSION

The Amicus presents compelling support for Petitioners' argument that the CoA erred by affirming the Superior Court's holding requiring every *Blake*-impacted person in Washington to file an individual CrR 7.8 motion as a condition precedent for receiving an LFO refund. For the reasons set forth in Petitioners'

briefing, and as reinforced by the Amicus here, this Court should reverse and remand.

RESPECTFULLY SUBMITTED this 21st day of March, 2023.

I certify that the foregoing contains 1,445 words in compliance with RAP 18.17(c)(6).

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