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No. 99564-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

MEMORANDUM OF AMICUS CURIAE ENVIRONMENTAL LAW
ALLIANCE WORLDWIDE—US IN SUPPORT OF PETITION FOR
DISCRETIONARY REVIEW

Charles M. Tebbutt, WSBA #47255
Law Offices of Charles M. Tebbutt
941 Lawrence Street
Eugene, Oregon 97401
Tel: (541) 344-3505
charlie@tebbuttlaw.com

David Hunter
DC Bar No. 413016
American University
Washington College of Law
4300 Nebraska Ave, NW
Washington, DC 20016
(301) 335-5902 (cell)
(202) 274-4415 (landline)
dhunter@wcl.american.edu
Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Environmental Law Alliance Worldwide-U.S. (ELAW-US) files this brief pursuant to Washington's Rule of Appellate Procedure, Rule 13.4. ELAW-US is a nonprofit corporation registered in the state of Oregon. For over 30 years, ELAW-US has assisted lawyers and scientists around the world to protect the environment and rights of this and future generations.

The Washington State Court of Appeal's dismissal of Petitioner's climate change-based constitutional claims ignores the profound and unprecedented impacts that climate change will have on the ecology, well-being, and rights of this and future generations. In dismissing the Petitioners' claims as non-justiciable, the Court denied Petitioners' access to the one branch of government whose essential role is to adjudicate the obligations of the State vis-à-vis threats (even unprecedented ones) to individual rights. *Murphy v. Campbell*, 486 P.2d 1080 (Wash. Sup. Ct. 1971). ELAW-US files this *Amicus Curiae* brief because when facing the same arguments to dismiss climate change-based threats to fundamental rights, the courts from no fewer than ten countries have found similar claims at least implicitly justiciable. We ask the Washington State Courts do the same.

STATEMENT OF THE CASE

ELAW-US relies on Petitioners' statement of the case.

ARGUMENT

I. The Court of Appeals Erred in Concluding that Petitioners' Claims Are Not Justiciable as Suggested by an Increasing Number of Foreign Courts Facing Similar Claims

The Court of Appeals erred in finding non-justiciable the Petitioners' claims. Petitioners allege that the State's action has resulted in greenhouse gas (GHG) emissions that exceed statutory limits and violate their Constitutional rights. At a minimum, the Court should evaluate the State's action in light of what is necessary to limit global warming to the levels agreed to by the United States and 190 other countries. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, arts. 2.1(a), 4.1. The Courts in no fewer than ten countries have decided at least implicitly that climate-based claims like those of Petitioners are justiciable. This includes courts in Belgium, Canada, Colombia, France, Germany, India, Ireland, the Netherlands, New Zealand, and Pakistan. We recognize that these decisions are not precedents that bind the Washington State Courts, but we believe they are individually instructive and collectively powerful guidance on how this Court should view justiciability issues in the context of fundamental

rights threatened by climate change. While each of these cases reflect slightly different approaches to the separation of political from judicial functions and endorse various standards of judicial review, they all confirm that the judicial review of climate change policies does not infringe the separation of powers. (ELAW-US has made all of the foreign cases cited in this brief available for the Court's and Parties' convenience at https://elaw.org/Government_Cases).

In Canada, an Ontario Court permitted a case similar to Petitioners' to proceed over the provincial government's objections to justiciability. The Court rejected the arguments that the claims were too "speculative" and were not capable of scientific proof. *Mathur v. Ontario*, 2020 ONSC 6918 (Superior Ct. of Justice Ontario) (13 July 2020), para. 30. The Court concluded that the youth Applicant's constitutional climate change claims "are precisely the type of issue that engages this Court's obligation to interpret and apply the *Charter*." *Id.* at para 120. Even though no explicit constitutional provision obliges Ontario to prevent harms associated with climate change, the Court found the claims were justiciable because of identifiable risks to the Applicants' constitutionally protected life, liberty, and personal security interests. *Id.* at paras. 153-159.

Germany's Federal Constitutional Court has acted similarly in striking down parts of Germany's Federal Climate Protection Act

(*Bundesklimaschutzgesetz* or *KSG*). *Neubauer, et al. v. Germany*, BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270 [Order of the First Senate of 24 March 2021]. On April 29, 2021, the Court found that the plaintiffs had presented a justiciable claim, *id.* at para. 197, and that parts of the statute violated plaintiffs' fundamental human rights, *id.* at para. 266, by, *inter alia*, not taking sufficient steps to achieve carbon neutrality, *id.* at para. 144. The Court found that the legislature had violated its obligation to plaintiffs by failing to adopt a carbon cap that reflected the country's fair share of the global carbon budget necessary to limit warming to the Paris Agreement standards (incidentally, standards also accepted by the United States and endorsed by the state of Washington). The Court ordered the legislature to update the greenhouse gas reduction targets for periods after 2030 which placed too much of the GHG emission reduction burden on future generations. *Id.* at para 268. The German Parliament responded ten days later.

In 2019, the Supreme Court of the Netherlands rejected the position that judicial review of the Dutch climate policy was a political question, finding that the government's conduct could be evaluated against scientifically based and politically accepted minimum standards. *The State of the Netherlands v. Urgenda Foundation*, H.R. 20 December 2019, No. 19/00135, ECLI:NL:HR:2029:2006, ¶ 8.3.2. The court rejected the

government's separation of powers argument "because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order." *Id.* at 19. The Court found that the government failed to meet the State's obligations to take all reasonable steps to protect plaintiffs' fundamental rights to life, privacy, and health under the European Convention on Human Rights. The Court ordered that the government strengthen its greenhouse gas emissions reduction target. *Id.* at ¶ 7.5.1.

Many other foreign courts facing similar objections from their respective government defendants that the cases are non-justiciable have, like their siblings in Canada, Germany and the Netherlands, upheld the judicial responsibility to review rights-based challenges in the context of climate change. These decisions include: in Belgium, **the Brussels Court of First Instance** in *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Belgium Court of First Instance, No. 167, at 83 (Jun. 17, 2021) (holding the plaintiffs' claims to be admissible and that the government had not "taken all the necessary measures to prevent the effects of climate change on the life and privacy of the plaintiffs as they are obliged to do under Articles 2 and 8 of the [European Convention on Human Rights]"); the **Colombia Supreme Court** in *Barragán, et al. v. Presidencia de la República et al.*,

Corte Suprema de Justicia [C.S.J.], 5 abril 2018, MP Luis Armando Tolosa Villabona, STC4360-2018, at 48 (Colom.) (ordering the government to “formulate a short-, medium-, and long-term action plan within the next four (4) months ... to counteract the deforestation rate in the Amazon ...”); the **Paris (France) Administrative Court**, in *Notre Affaire à Tous and Others v. France*, No. 1904967, 1904968, 1904972, 1904976/4-1, 33 Paris Administrative Court (Feb. 3, 2021) (enjoining the State to prevent further ecological damage and to take appropriate measures to achieve the State’s climate objectives by reducing greenhouse gas emissions; the **National Green Tribunal of India**, in *India Council for Enviro-Legal Action v. Ministry of Environment, Forest, and Climate Change*, Nat’l Green Trib., App. No. 170 of 2014 (requiring the Ministries to take *some* action to curb the emissions of HFC-23, because of its impact on climate change); the **High Court of Ireland**, in *Friends of the Irish Environment v. Ireland*, Appeal No: 205/19, at ¶89 (Supreme Court of Ireland) (31 July 2020) (explicitly affirming that it is the judiciary’s role to review climate policies for compatibility with constitutional obligations); the **High Court of New Zealand**, *Thomson v. Minister for Climate Change Issues*, CIV 2015-485-919 [2017] NZHC 733, at [132] (concluding after reviewing foreign jurisprudence that “courts have recognized the significance of the issue for the planet and its inhabitants and that those within the court’s jurisdiction

are necessarily amongst all who are affected by inadequate efforts to respond to climate change”); the **Lahore High Court in Pakistan**, *Leghari v. Pakistan*, (2015) WP No. 25501/201 (Punjab) (ordering establishment of a Climate Change Commission to monitor implementation of the climate change framework).

The Petitioners’ claims are similar to those found justiciable in these foreign courts, as they all seek protection from government infringement of fundamental rights. Some of the Courts above also explicitly rejected one or more non-justiciability arguments, like those advanced here by Respondents, including separation of powers, political question, and lack of specificity of standards.

II. Foreign Courts Around the World Have Found Climate Change Threatens Human Rights, including the Right to Life

Petitioners claim violations of several rights guaranteed explicitly and implicitly by the Washington State Constitution. Because GHGs emitted today will continue to warm the climate for decades, decisions made today will have particularly significant impacts on the rights of younger generations such as the Petitioners. At the very least, their constitutional claims deserve the development of a full record and full deliberation by the trial court below.

Such an approach is supported by Courts around the world that have determined that fundamental rights, including the right to life and personal security, can be impaired by government conduct that contributes to climate change. As described above, the Courts of the Netherlands, Germany and Colombia all found that the failure of their respective governments to adequately address climate change violated plaintiffs’ fundamental rights, including the right to life. For example, in *Urgenda*, the Netherlands Supreme Court found the Dutch emissions caps were not sufficiently protective of plaintiffs’ rights to life or to respect private and family life (¶8.3.4); in *Neubauer*, the German Constitutional Court found climate change impacts impaired rights to life and health (para. 144), property (para. 171), and freedom (para. 184)); and in *Barragán, et al.* the Colombian Supreme Court held: “the fundamental rights to life, health, the vital minimum, liberty and human dignity are substantially connected and determined by the environment and the ecosystem.” (Consideración 2 (unofficial translation)).

The Inter-American Court of Human Rights (IACtHR) has declared that “the full enjoyment of all human rights depends on a suitable environment,” including the right to life under Article 1 of the American Convention on Human Rights (to which the United States is a party). Advisory Opinion, American Court of Human Rights Series A No 23,15).

According to the IACHtR, the right to life is “particularly vulnerable to environmental impact.” *Id.* para. 67. Elsewhere the IACtHR has written that with regard to the conditions necessary for sustaining “a decent life”, “[t]he State has the duty to take positive, concrete measures geared toward fulfillment of the right” *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs), Paras. 161-162 (internal footnotes omitted).

Even more courts have linked the right to life to the right to a healthy environment—which could be instructive in interpreting Washington’s constitutional right to life, given its Legislature’s endorsement of a right to a healthy and pleasant environment. RCW 43.21A.010. In *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 A.I.R (AP) 171, the High Court of Andhra Pradesh in India has held that: “There can be no reason why . . . [the] violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution [(the right to life)]. The slow poisoning of the polluted atmosphere caused by environmental pollution . . . should also be regarded as amounting to violation of Art. 21.” *Id.* at paras. 24-25; *see also*, *e.g.*, *Shantistar Builders v. Narayan Khimalal Totame* [1990] 1 SCC 520, at para. 9 (Indian Supreme Court recognized “The right to life is guaranteed in any civilized society. That would take within its sweep the . . . right to [a] decent environment.”); *West Pakistan Salt Miners Labour Union v.*

Industries and Mineral Development, 1994 S.C.M.R. 2061 (Supreme Court of Pakistan determined the right to life includes the right to clean water); *Mohiuddin Farooque v. Bangladesh* [1997] 17 B.L.D. (A.D.) 1 (Supreme Court of Bangladesh determined the right to life “encompasses within its ambit, the protection and preservation of the environment, [including] ecological balance free from pollution of air ... without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.”); *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] AHRLR 151 (Federal High Court of Nigeria determined that an oil company’s gas flaring from petroleum operations “is a gross violation of [the applicants’] fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution.” *Id.* at para. 5.4.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for review.

DATED this 23rd day of June, 2021.

/s/ Charles M. Tebbutt
Charles M. Tebbutt, WSBA #47255

Counsel for Amicus Curiae

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on June 23, 2021, the foregoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 23rd day of June, 2021.

/s/ Charles M. Tebbutt
Charles M. Tebbutt
Counsel for Amicus Curiae

LAW OFFICES OF CHARLES M. TEBBUTT, P.C.

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Comments:

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Address:
941 LAWRENCE ST
EUGENE, OR, 97401-2815
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