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 AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; CENTER ON RACE, INEQUALITY, AND THE LAW AT NYU LAW; AND CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

Jessica Levin, WSBA #40837
Robert S. Chang, WSBA #44083
Melissa R. Lee, WSBA #38808
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4167
levinje@seattleu.edu
changro@seattleu.edu
leeme@seattleu.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI

The identity and interest of amici, race centers at various law schools around the country ("Amici Race and Law Centers"), are set forth in the Motion for Leave to File that accompanies this memorandum.

INTRODUCTION

Amici Race and Law Centers are keenly aware that the remedy ordered by the U.S. Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (*Brown II*), was grossly inadequate. It allowed school and government officials to resist and impede the fulfillment of the precious promise implied when the Court, the year before, declared that "[s]eparate educational facilities are inherently unequal," and further declared "that the plaintiffs and others similarly situated" had been "deprived of their equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (*Brown I*). Imagine, though, if the Warren Court in 1954 had told the "minors of the Negro race…[who sought] the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis," *Brown I*, 347 U.S. at 487, that their claims were nonjusticiable because any remedy would be too complex or difficult to implement: judicial oversight might span decades; courts

lacked requisite expertise over complex education policy; and extensive intrusion into the province of the political branches and locally elected school boards would be improper.

While we have yet to achieve racial justice in schools, the declaratory relief expressed in *Brown I*, as well as judicial oversight of school desegregation efforts as contemplated by *Brown II*, played a critical role in moving this country toward racial justice. These two decisions brought the powerful force of the law to examine the delivery of education by state and local entities to ensure that it satisfied, at the very least, the minimum constitutional promise of equal protection. When the political branches infringe rights guaranteed by the constitution, the judicial branch has the duty and power to act. Great harm occurs when courts shy from this duty. As was true of Black children in 1954, the plaintiffs here need the courts to vindicate their rights when other branches of government have infringed their constitutional rights.

ARGUMENT

I. Review Is Warranted to Correct the Court of Appeals' Overly Expansive View of the Political Question Doctrine.

The broad remedial authority exercised in *Brown*[1] was necessary because the political branches failed to recognize and protect the

[1] Whether that broad remedial power would be necessary here is an open question, as plaintiffs are first seeking a declaration of their constitutional rights. Pet. for Rev. at 11.

constitutional rights of Black and Brown children. In first declaring that "[s]eparate educational facilities are inherently unequal," the *Brown* Court recognized that desegregation would not occur without judicial action. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. Rev. 1597, 1600 (2003). The broad remedial power exercised in *Brown* was also necessary because aggregate government actions had to be dismantled, and the trajectory of government decision-making reset along a constitutional path.

Here, the Court of Appeals' decision concludes that, although plaintiffs' fundamental rights are undeniably at stake and the political branches have grappled with the climate crisis for decades, their claims involve nonjusticiable political questions. *Aji P. by & through Piper v. State*, 16 Wn. App. 2d 177, 183, 480 P.3d 438 (2021). *Brown* demonstrates that the lower court's analysis is flawed. Where the political process is unavailable to those aggrieved—like the plaintiff children here, who are suffering and will suffer most profoundly from climate change, and who cannot yet vote—the judiciary must not only recognize the constitutional infringement, but is also capable of exercising its broad remedial authority if further relief is ultimately warranted. *Cf. Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143 (9th Cir. 2011) (reversing district court's finding of unitary status because "[d]ecades of Supreme

Court precedent dictate that, where good faith lacks and the effects of de jure segregation linger, *public monitoring and political accountability do not suffice*" (emphasis added)).

II. A Core Function of the Judiciary Is to Determine the Existence of Constitutional Rights and Decide If They Have Been Violated.

In conducting its political question analysis under the first *Baker* factor, the court below incorrectly relied upon a notion of the separation of powers doctrine that is not in accord with this Court's jurisprudence. *Cf. McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (affirming constitutional structure of co-equal branches whereby "the judiciary has the ultimate power and duty to interpret, construe and give meaning to words, sections and articles of the constitution" (quoting *Matter of Salary of Juv. Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976)); *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) ("different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances").

The Court of Appeals' misapprehension is evident in how it examined the first *Baker* factor, which asks whether there is a "textually demonstrable constitutional *commitment of the issue* to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (emphasis added). In *Baker*, the U.S. Supreme Court

makes clear that "commitment" should be understood as asking about "'the appropriateness under our system of government of attributing *finality* to the action of the political departments.'" *Id*. at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55, 59 S. Ct. 972, 83 L. Ed. 1385 (1939) (emphasis added). In examining the first factor, the Court of Appeals cited Article 2, section 1 of the Washington constitution for the general proposition that legislative authority is vested in the legislature and declared that "[f]or all intents and purposes, we [the court] would be writing legislation and requiring the legislature to enact it." *Aji P.*, 16 Wn. App. 2d at 189. This reflects a misunderstanding of the critical role courts play in our constitutional democracy and evades the core of what plaintiffs seek—a declaration that the political branches' approach to energy and transportation infringes upon their constitutional rights. Courts have the power and duty to declare the meaning and contour of constitutional rights, including issuing declaratory relief that recognizes those rights and declares whether those rights have been violated.

Review is warranted to correct the Court of Appeals' overly expansive view of the political question doctrine, to ensure it does not diminish the role of courts in our constitutional democracy. Review is also warranted to clarify that a claim for declaratory relief is justiciable independent of what other remedies may or may not ultimately flow from

the litigation. *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 481, 506, 585 P.2d 71 (1978) (declaratory relief is "peculiarly well-suited to a judicial determination of controversies concerning constitutional rights").

III. The Judiciary Is Empowered to Remedy Constitutional Violations Committed By the Political Branches, Even When Doing So Involves Complex Social Problems.

The corollary to declaring constitutional violations is the power to order the political branches to undertake remedial measures which can then be reviewed by courts for constitutional compliance. This question of remedial power and efficacy is also part of *Baker*'s political question analysis, permitting courts to consider under the second factor whether there is "a lack of judicially discoverable and manageable standards for resolving [the issue]." *Baker*, 369 U.S. at 210. In this case, and only if necessary after issuance of the declaratory relief requested, plaintiffs seek an order requiring Defendants to develop and submit to the Court a state climate recovery plan of their own devising to ensure its energy and transportation systems align with GHG emission reductions enshrined in state law. *Aji P.*, 16 Wn. App. 2d. at 186. Plaintiffs also request that the court retain jurisdiction "to approve, monitor and enforce compliance … and all associated orders of this Court." *Id.*

The court below failed to appreciate the judiciary's broad remedial powers and instead determined, without the benefit of an evidentiary

record, that what might be difficult to imagine and oversee is simply unmanageable. *Aji P.*, 16 Wn. App. 2d at 189. However, this easy way out disregards that continuing judicial oversight of the political branches' efforts to comply with constitutional obligations is precisely the course this Court charted in *McCleary*, 173 Wn.2d 477, in which this Court found a constitutional violation, "defer[ed] to the legislature's chosen means of discharging" its constitutional obligations, and retained jurisdiction to ensure constitutional compliance. *Id*. at 547.

This easy way out also disregards the lessons of *Brown I* and *Brown II*, where the desegregative efforts undertaken by district courts across the nation engaged the judiciary's sweeping remedial power to redress constitutional violations that are divisive, socially entrenched, and politically intractable. Recognizing that its declaration would be empty without the accompanying power to enforce the principle of integrated schools, the Court required the parties to fully develop proposals for how lower courts would manage desegregation efforts, including the possibility that each district court would frame decrees to define those efforts, and/or appoint a special master to craft the terms for the decrees. *Brown I*, 347 U.S. at 495 n.13 (setting forth questions for parties to further develop regarding how the Court would oversee implementation of the remedy). In *Brown II*, the Court sent the case back to lower courts to achieve

desegregation "with all deliberate speed." 349 U.S. at 301.

Ten years later, realizing that school boards were failing to implement *Brown*'s mandate, the Court began to issue a series of important desegregation decisions, signaling to district courts that they had broad authority both to carefully scrutinize school boards' attempts to skirt *Brown*'s mandate, and to implement effective tools for integrating schools. In *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964), the Court signaled to the States that it would more closely scrutinize state-sanctioned devices created to uphold separate but equal. The Court affirmed an injunction against paying tuition grants and giving tax credits to support private segregated schools while Prince Edward County schools remained closed. *Id.* at 232. The Court also indicated that the district court might find it necessary to direct the Board of Supervisors, the entity responsible for levies to finance public schools, "to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County." *Id.* at 233.

The Court in *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), explained to school boards that it was looking for a plan "that promises realistically to work, and promises realistically to work now," *id.* at 439. The decision reminded the

nation of the Court's role to actively encourage school boards to produce a "unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437–38. *Green* also demonstrated that the judiciary was capable of stringently assessing whether a proposed desegregation plan was sufficient, articulating a specific process through which 1) a school board would generate a plan, with the burden to establish that "proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation," 2) the district court would "weigh[] that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness," and 3) the district would determine that the plan provides effective relief where the board is acting in good faith and the proposed plan has "real prospects for dismantling the state-imposed dual system at the earliest practicable date." *Id.* at 439. Finally, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the Court reaffirmed the "breadth and flexibility…inherent in equitable remedies," *id*. at 15, that extended to use of specific tools that would achieve nondiscriminatory school assignments. The Court upheld the district court's mandated busing of students and other student assignment tools to eliminate racial segregation within a particular school district, recognizing that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do

equity and to mould each decree to the necessities of the particular case." *Id.* at 15 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30, 64 S. Ct. 587, 88 L. Ed. 754 (1944), cited in *Brown II*). These decisions demonstrate that courts can deftly assess efforts to redress constitutional violations by other government entities, and that ongoing exercise of equitable power allows courts to monitor progress towards constitutionally mandated ends.[2]

CONCLUSION

The Warren Court in 1954 could have punted and decided that remedying race discrimination in education was too political or too complex, requiring courts to address matters properly left to the political branches. Thankfully, it did not take that path. The Court should accept review pursuant to RAP 13.4(b)(3) and (4) to consider the judiciary's role in setting a constitutionally permissible path of climate redress.

DATED this 23rd day of June, 2021.

/s/ Jessica Levin
Jessica Levin, WSBA No. 40837
Robert S. Chang, WSBA No. 44083
Melissa R. Lee, WSBA No. 38808

Counsel for Amici Curiae

[2] The desegregation cases eventually became less effective in dismantling the legacy of de jure segregated schools when the Court refused to implement interdistrict remedies and address continuing de facto segregation. Nevertheless, those cases created useful standards for courts to draw on in assessing whether parties have resolved the harm to the extent practicable—standards the superior court could and should implement in this case.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on June 23, 2021, the forgoing 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/ Jessica Levin
Jessica Levin
Counsel for Amici Curiae

KOREMATSU CENTER FOR LAW AND EQUALITY

June 23, 2021 - 9:51 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99564-8
Appellate Court Case Title:	AJI P., et al. v. State of Washington, et al.

The following documents have been uploaded:

- 995648_Briefs_20210623094907SC205505_4523.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Aji P amicus memorandum final.pdf
- 995648_Motion_20210623094907SC205505_6601.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Aji P Motion for Leave to File Final.pdf

A copy of the uploaded files will be sent to:

- AHDOLYEF@ATG.WA.GOV
- ECYOlyEF@atg.wa.gov
- MattH4@atg.wa.gov
- andrea@ourchildrenstrust.org
- andrearodgers42@gmail.com
- andrew.welle@gmail.com
- changro@seattleu.edu
- chris.reitz@atg.wa.gov
- judyg@atg.wa.gov
- levinje@seattle.edu
- sandra.adix@atg.wa.gov

Comments:

Sender Name: Jessica Levin - Email: levinje@seattleu.edu
Address:
901 12TH AVE
KOREMATSU CENTER FOR LAW & EQUALITY
SEATTLE, WA, 98122-4411
Phone: 206-398-4167

Note: The Filing Id is 20210623094907SC205505