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No. 101600-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE CIVIL SURVIVAL PROJECT, ET AL.,

Petitioners,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

MEMORANDUM OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS 1

INTRODUCTION... 1

STATEMENT OF THE CASE 2

ARGUMENT 3

A. The decision below creates additional obstacles to relief from LFOs and other collateral consequences ... 3

B. The Court of Appeals' decision conflicts with the State's long-standing approach to class actions........... 6

C. The Court of Appeals' decision undermines the purpose and role of the Uniform Declaratory Judgment Act 11

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE.. 18

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Alim v. City of Seattle,
14 Wn. App. 2d 838, 474 P.3d 589 (2020).......................... 12

Bloome v. Haverly,
154 Wn. App. 129, 225 P.3d 330 (2010).............................. 11

Branson v. Port of Seattle,
152 Wn.2d 862, 101 P.3d 67 (2004)..................................... 11

Chavez v. Our Lady of Lourdes Hosp. at Pasco,
190 Wn.2d 507, 415 P.3d 224 (2018)..................................... 7

In re Dependency of K.W.,
199 Wn.2d 131, 504 P.3d 207 (2022)..................................... 5

Johnson v. Moore,
80 Wn.2d 531, 469 P.2d 334 (1972).................................. 7, 8

Lane v. City of Seattle,
164 Wn.2d 875, 194 P.3d 977 (2008)..................................... 9

Nelson v. Appleway Chevrolet, Inc.,
160 Wn.2d 173, 157 P.3d 847 (2007)..................................... 8

Scott v. Cingular Wireless,
160 Wn.2d 843, 161 P.3d 1000 (2007)................................... 7

Smith v. Behr Process Corp.,
113 Wn. App. 306, 54 P.3d 665 (2002).................................. 8

State ex rel. Distilled Spirits Inst., Inc. v. Kinnear,
80 Wn.2d 175, 492 P.2d 1012 (1972)................................... 15

State ex rel. O'Connell v. Dubuque,
68 Wn.2d 553, 413 P.2d 972 (1966).................................... 15

State v. Bennett,
161 Wn.2d 303, 165 P.3d 1241 (2007)................................ 10

State v. Blake,
197 Wn.2d 170, 481 P.3d 521 (2021)................................ 1, 3

State v. D.L.,
197 Wn.2d 509, 484 P.3d 448 (2021).................................... 5

State v. Wadsworth,
139 Wn.2d 724, 991 P.2d 80 (2000).................................... 10

Wash. St. Coal. for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 949 P.2d 1291 (1997)..................... 15

Wash. St. Council of Cnty. & City Emps. v. City of Spokane,
— Wn.2d —, 520 P.3d 991 (2022)....................................... 12

Wash. St. Housing Fin. Comm'n v. Nat'l Homebuyers Fund, Inc., 193 Wn.2d 704, 445 P.3d 533 (2019).............. 12, 13, 14

Williams v. City of Spokane,
199 Wn.2d 236, 505 P.3d 91 (2022).................................... 13

Other Authorities

Blake Motions, Jefferson Cnty., https://tinyurl.com/2p8jktbs ... 3

Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims, Institute for Justice (Oct. 2021),
https://tinyurl.com/3k2bz37j 5

Policing for Profit, Institute for Justice (3d ed. 2020),
https://tinyurl.com/3vvnctte 5

State v. Blake, Cowlitz Cnty., https://tinyurl.com/ycksmxf8..... 3

IDENTITY AND INTEREST OF AMICUS

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society. IJ's interest in this case is explained in its accompanying motion to participate as amicus curiae.

INTRODUCTION

When this Court decided *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), it altered the course of thousands of lives in Washington and beyond. The Court's holding, in effect, means those thousands have spent months, years, or even decades, suffering the consequences of convictions that never should have happened in the first place. Righting that wrong requires more than vacating convictions; it requires confronting their significant collateral consequences. These include return and cancellation of legal financial obligations (LFOs)—the subject of this suit—and return of property taken by civil forfeiture. This is a massive task.

Since *Blake*, this Court—and agencies across the state—have worked to identify ways to effectively implement that decision and vindicate the rights of those impacted. The decision below is a step in the wrong direction. It creates additional obstacles to restoring of the rights of *Blake* litigants and threatens constitutional rights more broadly. As shown below, it is contrary to this Court's precedent, conflicts with the relevant text, and undermines important tools for vindicating Washingtonians' rights. The result is to neuter important tools of class action litigation and declaratory relief when constitutional rights are violated in contexts that go far beyond *Blake*. If allowed to stand, the decision below will further rarify access to justice. Such an outcome should not be taken lightly.

STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Statement of the Case set forth in the Petition for Review.

ARGUMENT

A. The decision below creates additional obstacles to relief from LFOs and other collateral consequences.

"[T]housands upon thousands" of individuals were impacted by *Blake*'s holding that Washington's strict liability drug possession statute was facially unconstitutional. PFR 10; *see also State v. Blake*, Cowlitz Cnty., https://tinyurl.com/ycksmxf8 ("unprecedented" number of post-conviction motions for relief after *Blake*); *Blake Motions*, Jefferson Cnty., https://tinyurl.com/2p8jktbs (same). As this Court recognized in *Blake*, these now-invalid convictions carried with them not only the "harsh penalties" of conviction and incarceration but also the lasting "stigma[] and the many collateral consequences that accompany every felony drug conviction." 197 Wn.2d at 174, 481 P.3d at 524; *see also id.* at 184, 481 P.3d at 529 ("drug offenders in particular are subject to countless harsh collateral consequences affecting all aspects of their lives"). Financial costs incurred alongside arrest and conviction are one such consequence. These include LFOs as

well as the civil forfeiture of property in connection with arrests and convictions made under the now-invalid statute.

The Court of Appeals recognized the return and cancellation of LFOs is a legal and moral necessity. *See* Op'n 20. It agreed that CrR 7.8 is not an effective means of accomplishing such an expansive project, acknowledging this individualized approach carries a substantial risk of ending in disparate and conflicting remedies in different counties and for different defendants. *Id.* Yet, it still concluded that—to recover money and property that never should have been taken to begin with—each individual defendant must fight their own fight.

This decision is not only damaging in the LFO context; it has implications for other collateral consequences post-*Blake*. Specifically, it has alarming ramifications for individuals' ability to recover assets taken by civil forfeiture as part of now-invalidated arrests and convictions. Abuse of civil forfeiture is a

widespread issue in the United States.[1] And it has affected the lives of many *Blake* defendants. Forfeiture tends to have a disparate impact on those already facing additional obstacles due to racial and economic barriers. *See Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, Institute for Justice (Oct. 2021), https://tinyurl.com/3k2bz37j. This Court has repeatedly expressed its concern and interest in accounting for and addressing the systems that give rise to such inequities in its decision-making. *See, e.g.*, *In re Dependency of K.W.*, 199 Wn.2d 131, 155, 504 P.3d 207, 219 (2022); *State v. D.L.*, 197 Wn.2d 509, 521, 484 P.3d 448, 455 (2021) (Montoya, C.J., concurring). The Court of Appeals' decision does the opposite.

Consider just two *Blake* defendants as examples. Robert Maddaus had $39,530 seized from him in conjunction with now-vacated simple possession charges. Randall Mauel had nearly

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[1] *See generally Policing for Profit*, Institute for Justice (3d ed. 2020), https://tinyurl.com/3vvnctte. As discussed in IJ's Motion for Leave to file this amicus brief, identifying and combatting such abuse is a central focus of IJ's work.

$10,000 seized. Under the Court of Appeals' approach, both men are left to individually identify and navigate a maze of legal and administrative processes to benefit from the vacatur of their facially invalid convictions, recover LFOs, and seek return of the property taken from them by civil forfeiture. These procedures are not consistent or clearly established and vary by county. This is not only impractical but raises serious due process and judicial oversight concerns that bear consideration by this Court. *See* PFR 20–24.

Review is therefore needed not only because LFOs impacting thousands are themselves a matter of public importance but because this decision reaches beyond LFOs to impede the protection of other rights implicated under *Blake*.

B. The Court of Appeals' decision conflicts with the State's long-standing approach to class actions.

Review is also needed because the decision has consequences for anyone seeking to vindicate their constitutional rights in Washington, even beyond *Blake*. One significant

ramification is to limit access to class actions to protect constitutional rights (a conflict with this Court's precedent).

Washington "courts favor a liberal interpretation of [class actions] as the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 856, 161 P.3d 1000, 1007 (2007) (cleaned up)); *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 514, 415 P.3d 224, 229 (2018) ("courts should err in favor of certifying a class"). And courts have long used class actions to address unconstitutional laws and practices. *See, e.g.*, *Johnson v. Moore*, 80 Wn.2d 531, 469 P.2d 334 (1972) (unconstitutional police practice); *Zimmer v. City of Seattle*, 19 Wn. App. 864, 869, 578 P.2d 548, 551 (1978) (unconstitutional child-abuse statute).

The scope of class relief does not depend on the circumstances of the class members' claims. For instance, in *Johnson*, the court used a class action to invalidate a general

police practice of holding individuals without bail "on suspicion" for an impermissibly long period. This Court was unconvinced by defendants' argument that different circumstances of arrest and detention foreclosed a class action: "[a] class action is not precluded by the possibility that individual issues may predominate once the general illegality of the questioned practice is determined." *Johnson*, 80 Wn.2d at 535–36, 496 P.2d at 336–37. Nor are differences in damages a reason to deny a class. *See, e.g., Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189–90, 157 P.3d 847, 855 (2007) (class action appropriate for recovery of damages, even though damages differed between class members, because "all damages can be objectively determined"); *see also Smith v. Behr Process Corp.*, 113 Wn. App. 306, 323, 54 P.3d 665, 675 (2002) ("That class members may eventually have to make an individual showing of damages does not preclude class certification").

The Court of Appeals did not grapple with these principles, despite acknowledging that a one-off resolution

system is not efficient. Instead, it summarily concluded there was insufficient evidence that "a civil class action would do better" at resolving the return of LFOs than individualized litigation because "LFO repayment will require a similar amount of individual treatment even through a class action." Op'n 18. There is a significant difference in burden on litigants—and the system—if individual litigation about *entitlement* to LFOs is required, as opposed to administrative determination of the amount of LFO return or cancellation to which each litigant is entitled. The court below did not address that reality; this Court should.

The opinion also ignored that the principle "'[j]ustice delayed is justice denied' is literally true for money." *Lane v. City of Seattle*, 164 Wn.2d 875, 888, 194 P.3d 977, 982 (2008). As explained in the Petition for Review, the class representatives in this case allege that "the one-off vacation process required by the [Court of Appeals] could take 4,000 years." PFR 15 (citing SAC ¶ 1.23). Yet, the Court of Appeals discounted—without

explanation—that a class action could be a legitimate exercise of judicial power that would streamline the process and ensure that affected individuals receive the relief to which they are entitled. *See State v. Wadsworth*, 139 Wn.2d 724, 740–41, 991 P.2d 80, 89–90 (2000) (highlighting "inherent power and obligation of the judiciary to control all its necessary functions to promote the effective administration of justice"); *State v. Bennett*, 161 Wn.2d 303, 305, 165 P.3d 1241, 1243 (2007) (exercising "inherent supervisory powers to maintain sound judicial practice").[2]

This approach to class actions not only undermines and limits the remedies available to *Blake* litigants; it undercuts the ability of citizens generally to seek recourse for constitutional violations as a class. Both in the interest of protecting the vulnerable populations impacted by *Blake*—and in the broader

[2] Another cause for concern—detailed in the Petition for Review—is the failure to account for the difference in situation of some of the proposed class members who have already gone through the CrR 7.8 process and still have not received their refunded LFOs.

interest of ensuring the long-term protection of class actions as a tool to vindicate constitutional rights—this Court should grant review.[3]

C. The Court of Appeals' decision undermines the purpose and role of the Uniform Declaratory Judgment Act.

This Court should also grant review to address the Court of Appeals' analysis and approach to the UDJA. The UDJA's explicit purpose "is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations,' and courts should liberally construe and administer it." *Bloome v. Haverly*, 154 Wn. App. 129, 140, 225 P.3d 330, 335 (2010). Any person whose "rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by a court." *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d

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[3] The trial court decided class certification at the pleadings stage, and the court of appeals did not address the procedural posture or whether it was premature to decide class issues at the pleadings stage.

67, 74 (2004); *see also Wash. St. Housing Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 712, 445 P.3d 533, 537 (2019) ([S]tanding is not intended to be a particularly high bar."). And plaintiffs do seek—and obtain—equitable and injunctive relief for constitutional violations under the UDJA. *See, e.g., Wash. St. Council of Cnty. & City Emps. v. City of Spokane*, — Wn.2d —, 520 P.3d 991 (2022) (declaratory judgment regarding unconstitutionality of collective bargaining ordinance); *see also Alim v. City of Seattle*, 14 Wn. App. 2d 838, 851, 474 P.3d 589, 596 (2020) (seeking declaratory judgment regarding unconstitutionality of firearm regulation). Indeed, the availability of such relief is crucial in the constitutional context, where it may be the only means by which individuals' rights can be safeguarded.

The UDJA is intended to be a tool providing clarity for individuals on their rights, not another source of formalistic hoops designed to frustrate litigation. Its role should not be lightly circumscribed. But the Court of Appeals' opinion adopts

a much narrower view of UDJA standing than that of this Court. And it did so summarily, with a page and a half of analysis focused on a single, distinguishable case: *Williams v. City of Spokane*, 199 Wn.2d 236, 505 P.3d 91 (2022). This does not track the significance that the UDJA historically has had in the context of constitutional rights. Nor does it adequately grapple with the "liberal" construction to be afforded UDJA claims or long-standing lenient standing requirements. This Court should take this case to conduct a principled analysis of the standing of the plaintiffs.

In addition, the court below devoted barely a page to consideration of the "public importance" doctrine. Traditional standing requirements are further relaxed under the UDJA when a case involves issues of "major public importance." *Wash. St. Housing Fin. Comm'n*, 445 P.3d at 538 ("we sometimes relax these [standing] requirements when a matter of substantial public importance would otherwise evade review"). "An issue is of substantial public importance when it 'immediately affects

substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally.'" *Id.* at 718, 445 P.3d at 540.

Blake and its aftereffects, including handling of LFO refunds and cancellations, indisputably implicate matters of public importance: thousands of individuals are being deprived of their property rights in monies paid in LFOs, as well as subjected to other collateral consequences without cause (including deprivation of their rights in property taken by civil forfeiture). Such deprivations, of course, have direct and significant ramifications and bearing on commerce, finance, and labor.

Yet the Court of Appeals concluded without any meaningful analysis that the public importance exception should not apply because "permitting declaratory judgment and its unclear consequences[] would not enhance public interest but instead further complicate an already complicated problem." Op'n 23.

This result conflicts with the Court's tradition of taking up major cases under the public importance doctrine's "relaxed" standing approach. *See, e.g., Wash. St. Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 917, 949 P.2d 1291, 1303 (1997) (compliance with statutes regarding care for homeless children); *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012, 1014 (1972) (constitutionality of excise tax increase); *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 559–60, 413 P.2d 972, 976–77 (1966) (eligibility to run for election). And allowing the Court of Appeals' opinion to stand would limit the ability of Washington litigants to use the public importance exception to obtain judgments in other cases going forward—including to address additional consequences of *Blake* and in other constitutional contexts.

The importance of protecting the UDJA—which provides an important tool to redress constitutional violations that often

affect the state's most vulnerable populations—cannot be overstated. This alone is also sufficient to warrant review.

CONCLUSION

For these reasons, as well as those identified in the Petition for Review, this Court should grant review.

Dated: February 27, 2023

Respectfully submitted,

By: s/ Wesley Hottot

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CERTIFICATE OF COMPLIANCE

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Respectfully submitted February 27, 2023.

s/Wesley Hottot
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, the foregoing Memorandum of Amicus Curiae Institute for Justice In Support of Petition for Review was filed through the Court's electronic filing system, which will cause a copy to be served on all parties of record.

s/Wesley Hottot
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