No. 99564-8

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

AMICUS CURIAE BRIEF OF LEAGUE OF WOMEN VOTERS OF WASHINGTON

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I. STATEMENT OF INTEREST

This *amicus curiae* brief is filed on behalf of the League of Women Voters of Washington (the "League"). The League is a grassroots, nonpartisan, nonprofit organization, whose primary mission and focus is ensuring effective representative government. The League files this brief in support of the thirteen Washington Youth Petitioners (the "Youth") to explain how the Court of Appeals erred as a matter of law by foreclosing the Youth's access to the courts on matters implicating the Youth's constitutional rights. This brief emphasizes the proper role of the courts to serve as a check and balance on the executive branch, particularly where its actions, as here, have infringed upon the fundamental rights of individuals who cannot yet vote.

The children of Washington, including the Youth here, will experience disproportionate harm from climate change impacts,[1] yet have no direct representation in our government. The Youth's fundamental rights

[1] The Youth's disproportionate harms include, but are not limited to, more severe and frequent extreme weather events, higher temperatures, sea level rise, and the disruption of access to education, healthcare, and nutrition. *See, e.g.*, REBEKAH FRANKSON ET AL., WASHINGTON STATE CLIMATE SUMMARY, 149 WA NOAA TECH. REPORT NESDIS 1, 4 (2017), https://statesummaries.ncics.org/chapter/wa/ (last visited June 22, 2021) (stating Washington state is predicted to have more frequent and severe wildfires due to drier summers, higher temperatures, and earlier melting snowpack); EPA, FACT SHEET: CLIMATE CHANGE AND THE HEALTH OF CHILDREN 1–4 (May 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-10/documents/children-health-climate-change-print-version_0.pdf (last visited June 22, 2021) (detailing the health-related harms and impacts of climate change on children).

have been and continue to be infringed by the Respondents' historical and present exacerbation of a dangerous climate system. Yet, the Youth lack a voice in the political process; many cannot vote to protect their rights and lack the political power to influence Washington's energy and transportation systems. Redressability through the courts is their only option to safeguard their fundamental rights.

II. STATEMENT OF THE CASE

The League concurs with and incorporates by reference the statement of the case set forth in the Youth's Petition for Discretionary Review ("Petition"), pages 1 to 4.

III. SUMMARY OF THE ARGUMENT

The League joins the Youth's request that the Court grant their Petition for review of the opinion of the Court of Appeals, *Aji P. v. State*, 480 P.3d 438, No. 80007-8-I (Wash. Ct. App. 2021). *See* Appendix A to the Petition ("App. A"). The Court must accept review because, in addition to the case involving a significant question of constitutional law and an issue of substantial public interest, the Court of Appeals' decision conflicts with precedent applying the political question doctrine. RAP 13.4(b).

The Court of Appeals assumed, for purposes of resolving the political question issue, that the Youth have a fundamental right to a healthy and pleasant environment. App. A at 9. The Court of Appeals then correctly

found that the test for determining nonjusticiable political questions is set forth in *Baker v. Carr,* 369 U.S. 186 (1962). In applying the *Baker* test, however, the Court of Appeals erred as a matter of law. The panel transformed the narrow political question doctrine in a manner that would broadly foreclose constitutional claims on the mere basis of the Washington constitution's general dedication of legislative power to the legislature. In doing so, the panel fundamentally mischaracterized Petitioners' claims and requested relief.

Both the Court of Appeals, *see* App. A at 7–18, and the State in its answering brief, *see* State's Answer in Opposition to Petition for Discretionary Review at 7–13, incorrectly frame the Youth's argument as requiring the courts to "legislate." This case presents no such request. Rather, this case is about the constitutionality of the *executive branch's* affirmative actions in causing climate change. Judicial intervention is necessary to ensure that the executive branch abides by the constitution and acts consistent with the legislature's direction.

Indeed, Respondents already have ample statutory authority to reduce emissions consistent with the Youth's constitutional rights. *See, e.g.*, Chap. 70A.45 RCW – Limiting Greenhouse Gas Emissions (mandating the State to accomplish science-based emissions reductions); *see also* RCW 43.21A.010 ("The legislature recognizes and declares it to be the policy of

this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources."). The Youth allege that Respondents continue in a course of affirmative conduct that violates the Youth's fundamental rights.[2] No new statutory authority is needed for the executive branch to cease affirmative conduct violating the constitution; the Court simply can declare the conduct unconstitutional.

The Court of Appeals shirked its responsibility to safeguard the Youth's constitutional rights by misconstruing the Youth's arguments and requested relief. Review is necessary because, if allowed to stand, the Court of Appeals' political question ruling would upend Washington's system of checks and balances.

IV. ARGUMENT

In *Baker v. Carr,* the Supreme Court outlined the test to determine whether a case contains a nonjusticiable political question, as required by the doctrine of separation of powers. 369 U.S. at 217; *see also Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 504–10, 585 P.2d 71 (1978) (applying the *Baker* factors). The political question doctrine

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[2] The most recent data published by Ecology show that "Washington's greenhouse gas emissions rose 1.3 percent from 2017 to 2018," reaching their highest total since 2007. *See* DEP'T ECOLOGY, WASHINGTON STATE GREENHOUSE GAS EMISSIONS INVENTORY: 1990–2018 7 (2021) https://apps.ecology.wa.gov/publications/documents/2002020.pdf (visited June 22, 2021).

precludes judicial review if one or more of the six *Baker* factors are "inextricable from the case at bar." *Baker*, 369 U.S. at 217. A case that merely implicates political ramifications does not automatically mean the case involves a "political question." *See id.* "In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (internal citation and quotations marks omitted). The political question doctrine is a "narrow exception to that rule[.]" *Id.* at 195.

The Court of Appeals erred in its application of the first four *Baker* factors,[3] upending the political question doctrine in a manner that would broadly foreclose constitutional claims.

A. The Court of Appeals' Application of the First, Third, and Fourth *Baker* Factors Abdicates the Judicial Role.

The Court of Appeals determined that this case implicates the first, third, and fourth *Baker* factors on the erroneous grounds that resolving the Youth's claims "would require the judiciary to legislate[.]" App. A at 10; *see also id.* at 9 ("For all intents and purposes, we would be writing

[3] *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question" is (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable or manageable standards for resolving it"; (3) "the impossibility of" resolving a claim "without an initial policy determination of a kind clearly for nonjudicial discretion"; and (4) "the impossibility of a court's undertaking of independent resolution without expressing lack of the respect due coordinate branches of government . . . .").

legislation and requiring the legislature to enact it."). Contrary to the Court of Appeals' opinion, Petitioners do not ask the Court to step beyond its powers, create new legislation, and replace the legislature's judgment or policy discretion. *See Baker*, 369 U.S. at 217 (explaining that the political question doctrine requires a "discriminating inquiry into the precise facts and posture of the particular case").[4]

Instead, the Youth ask the Court to declare that Respondents' continuing affirmative conduct, which is contrary to the legislature's directive in Chapter 70A.45 RCW, violates the Youth's constitutional rights. App. B at 70–72. This request is well within the Court's core role to protect the individual rights of citizens. Holding otherwise is in conflict the judiciary's longstanding duty "to decide the rights of individuals[.]" *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

That Article 2, section 1 of the Washington State Constitution vests all legislative authority in the legislature and in the people is of no moment. *Contra* App. A at 9. The Court of Appeals' ruling that Article 2, section 1

[4] The Supreme Court of the Netherlands recently rejected this characterization in a case involving similar climate change claims. *See Urgenda Foundation v. The State of The Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2006, English translation ECLI:NL:HR:2019:2007, Case No. 19/00135 (Dec. 20, 2019) (https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007) (last accessed June 22, 2021) ("Urgenda's claim is not intended to create legislation, either by parliament or by lower government bodies, and [] the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation'.").

suffices to implicate the first *Baker* factor would foreclose constitutional challenges to any legislation or executive conduct. Such an expansive reading of the constitution would entirely usurp the judiciary's role and conflicts with precedent. *See I.N.S. v. Chadha*, 462 U.S. 919, 943 (1983) ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress."); *see also Seattle Sch. Dist.*, 90 Wn.2d at 496 (it is the court's duty to declare the law "even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch").

The cases cited by the Court of Appeals are inapposite. In particular, *Northwest Greyhound Kennel Association v. State* and *Northwest Animal Rights Network v. State* dealt with the legislature's prerogative to define criminal conduct. 8 Wn. App. 314, 318–19, 506 P.2d 878 (1973); 158 Wn. App. 237, 243–45, 242 P.3d 891 (2010). These cases asked the court to replace the legislature's choice about criminalizing certain activities. In contrast, the Youth's claims in this case are more akin to those raised in *Braam v. State*, asking the court to review whether the executive branch violated the constitutional rights of children in foster care. 150 Wn.2d 689, 698, 81 P.3d 851 (2003) ("[W]e must decide whether foster children possess

substantive due process rights that the State, in its exercise of executive authority, is bound to respect.").

The Youth do not ask the Court to "second-guess the wisdom of the legislature." *Nw. Animal Rights Network*, 158 Wn. App. at 245. Rather, the Youth ask the Court to declare their fundamental rights and to hold the executive branch accountable to those constitutional rights *consistent with* the initial policy determination the legislature has already made. Thus, the Court of Appeals' statement that the Youth ask the Courts to "create a regulatory regime to replace one already enacted," App. A at 11, is at once a strawman and a misapplication of the third *Baker* factor. Chapter 70A.45 RCW sets standards for mandatory greenhouse gas reductions—standards against which the Court can measure whether Respondents' actions are violating the Youth's constitutional rights. *See infra* Section IV(B). The third *Baker* factor is implicated only in the "*absence of a yet [] unmade* policy determination," and is therefore inapplicable here. *See Zivotovsky*, 566 U.S. at 204 (Sotomayor, J., concurring) (emphasis added).

Likewise, the fourth *Baker* factor is not implicated because, contrary to the Court of Appeals' statements, the Youth do not ask the courts to "wad[e] into the waters of what policy approach to take[.]" App. A at 12. The Youth's request for a judicial declaration of the constitutionality of the executive branch's conduct is an entirely appropriate, and fundamental,

exercise of judicial power. *See N.L.R.B. v. Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring) ("[P]olicing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court.") (internal quotations omitted). A proper framing of the Youth's claims demonstrates that neither the first, third, nor fourth *Baker* factors are implicated by this case.

B. The Court of Appeals Overlooked the Judicially Manageable Standard Created by the Legislature.

The Court of Appeals also erred in its application of the second *Baker* factor. Contrary to the Court of Appeals' analysis, the Youth *have* asserted a clear judicially discoverable and manageable standard to resolve their constitutional violations. *Contra* App. A at 10 ("[W]e cannot imagine a judicially manageable standard[.]").

The Court can look to Chapter 70A.45 RCW—which is in line with the best available science—to judge the constitutionality of Respondents' ongoing causation of climate change. *See* App. G at 7 (Transcript of Ct. App. Oral Argument) ("Because the recent amendments to RCW 70.235 align with what the youth [allege is] needed to protect their constitutional rights in the long term, the legislation can serve as a judicially manageable

standard against which the Court can gauge the constitutionality of the State's actions."); *see also* Petition at 14.[5]

Chapter 70A.45 RCW is the clear statutory directive the Court can use to determine that the Respondents' actions have, and continue to, violate the Youth's constitutional rights. This existing standard, if met by the executive branch, would cure the Youth's constitutional harms. *See* Petition at 14–15. The Court of Appeals had no basis to find the second *Baker* factor is implicated here.

V. CONCLUSION

It is the judiciary's duty to safeguard the individual rights enshrined in the constitution. Given the urgency of climate change and the disproportionate harms children will suffer from it, the Court must act now to safeguard the Youth's constitutional rights. Because the Court of Appeals miscast the Youth's claims and misapplied the *Baker* factors in a manner inconsistent with precedent, the Court must accept review to reaffirm the judiciary's core role to serve as a check on the unconstitutional conduct of coequal branches.

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[5] The Court of Appeals acknowledged that the Youth withdrew the appeal of their sixth claim, challenging the previous statutory emissions reduction targets, after the State enacted this legislation. *See* App. A at 5 n.7.

RESPECTFULLY SUBMITTED this 23rd day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23rd, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered e-portal users will be served by the appellate system.

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