No. A17-1649
No. A17-1650
No. A17-1651
No. A17-1652

STATE OF MINNESOTA
IN COURT OF APPEALS

STATE OF MINNESOTA,
Appellant,

v.

EMILY NESBITT JOHNSTON,
ANNETTE MARIE KLAPSTEIN,
STEVEN ROBERT LIPTAY,
and
BENJAMIN JOLDERSMA,
Respondents.

BRIEF OF LAW PROFESSORS AND LEGAL EDUCATION ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici curiae, listed in Exhibit A,[1] are professors who teach and research in the areas of constitutional law, criminal law and procedure, civil rights and civil liberties law, environmental law, and the law of evidence, joined by organizations dedicated to legal education. *Amici* include practitioners with extensive experience litigating in the above areas and in defending the rights of protesters and political activists. They offer their understanding of the public policy values behind the First Amendment, the history and use of the necessity defense, and the constitutional issues raised by the instant appeal. *Amici* believe that the outcome of the appeal will have important consequences for freedom of expression under the First Amendment, the protection of criminal defendants' constitutional rights, and the free exercise of civil liberties and political dissent in the state of Minnesota.

STATEMENT OF FACTS

On October 11, 2016, the four individuals named above traveled to a site owned by Enbridge Inc. near Leonard, Minnesota, on County Road 23. Contested Omnibus Hr'g Tr. 17:11-14; 37:23-25; 58:12-15; 65:16-19, Aug. 15, 2017. The site houses manual shut-off valves for a pipeline transporting tar sands-derived crude oil from Canada to the United States. *Id.* at 17:16-18. The four individuals, who were concerned about catastrophic climate change and its effects on public health and the environment, had traveled to the site for the purpose of shutting

[1] Alice M. Cherry, of Climate Defense Project, contributed to the writing of this brief. No party or counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

down the pipeline. *Id.* at 16:15-25; 38:1-2; 39:2-3; 58:17-59:3.

After alerting Enbridge of their intent to close the two valves located at the site in fifteen minutes' time, *id.* at 18:7-11, Ms. Klapstein and Ms. Johnston used bolt cutters to break the chains securing the site and entered the fenced-in areas, *id*. at 18:16; 38:7-8. Once they were inside the enclosed area, Mr. Joldersma called Enbridge again to alert the company that they were about to close the valves. *Id.* at 18:11-14; 38:9-10; 58:4-15.

Ms. Klapstein and Ms. Johnston began to turn the valves. Shortly thereafter, they observed that Enbridge had activated an automated shut-off system and that the pipeline appeared to be closing on its own. *Id.* at 18:16-22; 38:9-17.

In all other respects, *amici* adopt the Statement of Facts in Appellant's Pretrial Appeal Brief.

INTRODUCTION

This appeal has a simple focus: can a jury see and hear evidence? The trial judge ruled, after a hearing, that the jury could see and hear evidence supporting the defense of necessity at trial. The prosecution seeks to preclude the jury from doing so. Whether the jury can or cannot see and hear evidence — particularly necessity evidence in criminal cases — strikes at the core of constitutional law, public policy, and democracy itself.

The four people charged in this matter engaged in a civil disobedience action to highlight the global emergency caused by the failure to address climate change. Climate change, caused by the emission of greenhouse gases and the

combustion of fossil fuels in particular, is already driving widespread destruction, loss of life and property, and business disruption. Scientists warn that continued fossil fuel emissions will drive the world into a state of uncontrollable heating, jeopardizing the habitability of Earth for humans. The world now faces climate tipping points that, if passed, would trigger cascading effects leading to catastrophe. Tar sands-derived oil is among the most emissions-intensive forms of fossil fuel energy.

Civil disobedience has a long tradition in our country. Indeed, highlighting injustice by engaging in nonviolent civil disobedience is an important part of the way this country was founded.

The ability of nonviolent civil disobedience and resulting criminal trials to strengthen democratic and constitutional values and institutions is well established. However, that ability is diminished when defendants are denied the benefit of jury deliberation on the key issues presented by the case — here, the necessity or lack of necessity of the defendants' actions as a means of galvanizing action to address the climate emergency.

Part I discusses the policy interests — in truth-seeking, individual autonomy, self-government, and democratic constitutionalism generally — furthered by the full airing of arguments and defenses by defendants in criminal cases. Part II provides historical, political, and doctrinal perspective on the merits of the necessity defense proffered in this case.

Part III outlines the implications of this appeal for protection of the constitutional rights of criminal defendants, including the individuals charged in this matter. Part IV describes the constitutional harms the individuals in this case sought to avert by their civil disobedience action.

For the reasons offered herein, and in addition to those outlined in Respondents' Pretrial Appeal Brief, this Court should affirm the trial court's decision allowing Respondents' proffered necessity defense.

ARGUMENT

I. THERE IS A STRONG PUBLIC POLICY INTEREST IN ALLOWING CRIMINAL DEFENDANTS TO PRESENT ARGUMENTS AND DEFENSES SUPPORTING THEIR THEORY OF THE CASE, PARTICULARLY IN SENSITIVE POLITICAL CASES.

At least three public policy arguments weigh in favor of the allowance of the necessity defense in political protest cases, including this one. First, there is an incontrovertible public interest in the debate and exchange of political ideas, and courts, as fact-finding forums, are essential to the vindication of that interest. Second, presentation of the necessity defense in political protest cases strengthens democratic and constitutional norms, particularly those grounded in the First Amendment and due process. Finally, the policy stakes are higher than usual in criminal cases and those in which politically sensitive issues are presented. The State's attempt to bar Respondents' presentation of arguments at trial contravenes these interests.

A. Courts Are Essential Forums for Expression and Debate Under the First Amendment.

First Amendment jurisprudence and commentary have long recognized the value in protecting free expression and debate, particularly speech on matters of public concern. "[C]ommenting on matters of public concern [is a] classic [form] of speech that lie[s] at the heart of the First Amendment," *Schenck v. Pro–Choice Network of Western New York,* 519 U.S. 357, 358 (1997), contributing to an informed and engaged citizenry so valued in democratic societies.

Protections on speech have been thought to foster a "marketplace of ideas," in which the level of acceptance of an idea functions as rough proxy for its merit. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* John Stuart Mill, On Liberty 9 (1859). In addition to the pursuit of truth, freedom of speech furthers interests — long considered central to American values — in the protection of individual autonomy and the promotion of self-government. Kathryn A. Sabbeth, *Towards an Understanding of Litigation As Expression: Lessons from Guantánamo*, 44 U.C. Davis L. Rev. 1487, 1496-1502 (2011).

Courts, with their adversarial proceedings, have played an important role as forums for political expression and debate. "[M]uch public interest litigation has as a purpose furthering public education and discourse." Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477, 490 (2004-2005). Civil rights litigation "has been recognized for over fifty years as core First Amendment activity," and "attorneys' communications in support of litigation reflect

fundamental First Amendment values tied to political expression." Sabbeth at 1487. Indeed, "a considerable amount of civil rights litigation is in some sense a 'public statement of protest.'" Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 Vill. L. Rev. 105, 118 (1991).

There is a long history in which political movements have sought redress in court to announce fundamental rights in the context of oppression. The court process then becomes a parallel pathway for society to understand the nature of the oppression. Professor Lobel explains:

> [Public interest] litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously.

Courts as Forums for Protest, 52 UCLA L. Rev. 477, 480 (2004-2005). Enabling each of these functions is the adversarial, fact-finding process that is the hallmark of our judicial system. *See* Sabbeth at 1498 (noting that "the adversarial model mimics the philosophy of the marketplace of ideas").

The duality of judicial and political processes is crucial to the ability of defendants to expose oppression from fossil fuel development that is projected to send the world into runaway heating. As rigorous fact-finding forums in which principled rules of evidence govern the validity of the truth-seeking process, courts are much-needed sites of argumentation on politicized and urgent civilizational issues such as the impending climate emergency.

B. Presentation of Necessity Defenses in Political Protest Cases Furthers First Amendment Values and Provides a Democratic Check on Abuses of Power.

Part of the function of jury trials, especially of the political variety, is to hold government and other powerful decision-makers accountable. *See* William V. Dorsaneo III, *Reexamining the Right to Trial by Jury*, 54 SMU L. Rev. 1695, 1696-97 (2001) (noting that "[m]odern commentators generally agree" on the role of juries as extensions of popular sovereignty and guardians against tyranny); 4 William Blackstone, Commentaries on the Laws of England 409-10 (1765) (describing the jury as bulwark of citizen's liberty in the face of arbitrary governmental power).

That function is sorely needed in the current political climate, in which money is increasingly a prerequisite for political representation. *See generally* Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America (2014). Average citizens lack effective access, in particular, to decision-making bodies that control fossil fuel policy. *See, e.g.*, Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 Climatic Change 681, 682 (2014) ("[A] number of conservative think tanks, trade associations, and advocacy organizations are the key organizational components of a well-organized climate change counter-movement (CCCM) that has not only played a major role in confounding public understanding of climate science, but also successfully delayed meaningful government policy actions to address the issue.").

Juries have provided a check not only on governmental power but also on that of judges. Professor William Quigley writes:

> Juries were always thought to be an important counterweight to judges. The right to trial by jury was a cornerstone of this country; judges, as an appointee of government and naturally partisan to the prosecution, were intended to be kept in check by the jury and to take up their proper role as referee . . . .

The Necessity Defense in Civil Disobedience Cases: Bring In the Jury, 38 New Engl. L. Rev. 3, 76 (2003) (citing Leonard W. Levy, The Palladium of Justice: Origins of Trial by Jury 36, 40 (1999)). *See also id.* at 67-68 ("[J]uries were prized in part because they were believed to offer protection from the power of judges . . ."), 69 ("[The right of trial by jury] was so important to early Americans that it was the only procedural right included in the original Constitution. The Supreme Court has repeatedly stressed the importance of juries and has warned judges to retreat from attempts to limit the authority of juries. Indeed, protection against overbearing and oppressive judges was one of the main arguments of the proponents of jury trials when the Bill of Rights were enacted.") (citations and quotation marks omitted).

Kristen K. Sauer tells a similar story:

> [E]ven after establishing direct representation and an independent judiciary, colonists continued to fear potential executive and legislative overreaching as well as arbitrary exercises of power by judges, whom they believed would tend to favor the government. The founders therefore allocated juries considerable power to assure community oversight over potential misuses of governmental power. By involving ordinary citizens in the execution of the laws, trial by jury was intended to safeguard individual liberty and prevent unjust governmental action.

Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences, 95 Colum. L. Rev. 1232, 1248 (1995) (citations omitted).

The necessity defense helps realize all three First Amendment values — in truth-seeking, individual autonomy, and self-government — summarized *supra* in Part I.A. Quite apart from the advantages it confers on individual defendants, the necessity defense allows juries in protest cases to interpret a defendant's actions in their full context. *See* Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1187-88 (1987) (describing role of jury in necessity cases). That context includes political issues that are not only germane to the trial but frequently matters of immense public concern — most notably, in this case, the existence and severity of the climate crisis and the failure of ordinary political avenues to adequately address it. Hearing the necessity defense, the jurors would receive evidence of climate disruption that they can translate to their own lives and property.

The core and indispensable function of the necessity defense lies in submitting to a jury of the defendant's peers the question of whether the defendant's protest actions were justified by the social, political, scientific, and moral context in which they took place. Jurors are called upon to weigh a wider range of evidence than they would without a necessity defense, and — by virtue of the elements of the defense — to act as the "conscience of the community." John

Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. Rev. 111, 112 (2007). The necessity defense, then, gives the community a stake in the case and allows it to play a meaningful role in determining a defendant's guilt.

In addition to its benefits for popular sovereignty and political accountability, this kind of jury deliberation directly furthers the societal interest in citizens' engagement with matters of public concern:

> Each political necessity trial exposes twelve members of the community to a situation in which they must assess difficult political issues and consider arguments about the adequacy of our democratic processes. But the trial presents more than an extended civics lesson: It empowers the jury to make a legally binding decision. The jurors make a politically potent choice in a context where their individual judgment is not drowned out by thousands or millions of other electors. Moreover, the jury makes its decision after hearing a discussion of the issues that is considerably more thorough than the quick generalities, slogans, and encapsulated presentations that are routine in mass media politics.

Bauer & Eckerstrom at 1187-88.

Finally, the necessity defense is among the few tools available to political protest defendants that allow them to shine a light on the abuses of power that motivated their protest actions. *See* Bauer & Eckerstrom at 1176 (differentiating the necessity defense from other legal strategies and noting that "the elements of the necessity defense provide . . . [a] structure for publicizing and debating political issues in the judicial forum.").

Barring Respondents' proffered necessity defense would effectively shift decision-making power from the jury to a judge. It would also exclude argument on the core issues presented by the case, denying the jury the function that it was

designed to perform. If there is no necessity defense, then there is no jury trial on the issues of injustice and political unaccountability that motivated Respondents' action. Whether or not barring a proffered defense in such a scenario would violate a defendant's rights — and *amici* believe that it would, *see infra* Part III — it would "invade the province" of the jury. *Morissette v. United States*, 342 U.S. 246, 274 (1952).

C. Special Policy Considerations in Criminal Cases, Particularly Politically Sensitive Cases, Weigh Against Barring Defendants' Proffered Defenses.

The public interest in full airing of arguments from both sides is of added importance in criminal prosecutions, in which the defendant's liberty is at stake. However, a very large proportion of criminal cases now end in plea bargains rather than proceeding to trial. *See* U.S. Dept. of Justice Exec. Office for U.S. Attorneys, *United States' Attorneys Annual Statistical Report, Fiscal Year 2013* at 9, https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf (noting that 97 percent of defendants convicted at the federal level in 2013 took a plea bargain); Minnesota Officer of the Legislative Auditor, *Evaluation Report: Public Defender System (February 2010)* at 44, http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf (noting that, between 2004 and 2009, "the percentage of public defender cases settled with a plea agreement ranged from 80 percent to 82 percent" in Minnesota). In today's criminal legal system, prosecutors have to a significant degree supplanted both judges and juries.

Even for defendants who proceed to trial, the structure of the criminal legal process discourages defendants' articulation of the reasons for their allegedly criminal conduct: prosecutors control which charges are brought, and the most common defenses, rather than offering a justification, contest the sufficiency of the evidence, the alleged mental state, or the procedural grounds. *See, e.g.*, 9 Minn. Prac., Crim. Law & Procedure § 47:1 (4th ed.) (describing the difference between "ordinary" and "affirmative" defenses). The burden of proof required of defendants who would offer affirmative or justificatory defenses is higher. *Id.* Defendants, then, must usually contend with disparities in the ability of defendant and prosecutor to influence which arguments are heard at trial and the overall trial narrative. It is not only in political protest cases that such an arrangement, though perfectly lawful, is frequently unjust.

Recognition of the liberty interests at stake in criminal cases, and the structural protections required to effectuate them, is evolving. Courts have in the last several decades reinterpreted then-existing aspects of the criminal legal process as violations of defendants' constitutional rights, or as otherwise unjust, thus precipitating reform. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendants possess right to counsel in state felony cases); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (statutory right to trial de novo may be exercised free of threat of vindictive prosecution); *United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993) (package deal plea agreements pose risk of coercion and should be scrutinized). In all criminal cases but especially in politically sensitive ones, courts

must guard against overzealous prosecutions running roughshod over the system's protections.

Treatment of political protesters by courts has consequences for other criminal defendants and for the vitality of the justice movements that have played an integral role in the evolution of criminal law and procedure. Whether courts choose to allow presentation of affirmative arguments and defenses at trials of protesters — or, conversely, impose obstacles — affects the willingness and ability of other actual and would-be criminal defendants to participate in socially valuable First Amendment activity, to stand trial, and to argue their cases vigorously and completely. Likewise, whether courts allow prosecutors to restrict the presentation of protesters' arguments has consequences for the legitimacy of the criminal legal system generally and for the fairness of that system toward politically disadvantaged defendants, whose legal options are so often severely restricted.

II. THE NECESSITY DEFENSE IS APPROPRIATE IN CASES OF CIVIL DISOBEDIENCE, INCLUDING WHEN UNDERTAKEN TO COMBAT CLIMATE CHANGE.

The appropriateness of the necessity defense in trials of political activists has been a subject of debate. Professor Quigley observes:

> As a policy matter, the law of the necessity defense in civil disobedience trials pits significant concerns about protecting law and order against serious concerns about social justice, dissent, and individual freedom. . . . Some judicial opinions reflect the eternal and important tension between order and freedom. They indicate a fear that by allowing civil disobedience defendants the chance to argue the necessity and comparative worth of their minor illegal

> actions to juries of their peers, terrible consequences of disorder will be unleashed upon society.

The Necessity Defense at 5. As Quigley goes on to explain, those fears are misplaced. There are important historical, doctrinal, and constitutional reasons for treating political protest cases in a similar fashion to other necessity cases, including the value of civil disobedience as a driver of social progress, the strength of necessity arguments when applied to the facts of climate civil disobedience, and presumptions in favor of the liberal allowance of evidence.

A. For Decades, Political Protesters Have Coupled Civil Disobedience with the Necessity Defense To Create Political Change and Drive Social Progress.

Civil disobedience is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." John Rawls, A Theory of Justice 374 (1971). People engaging in civil disobedience "intend[] to bring about increased public attention to issues of social justice by appealing to a higher principle than the law being violated — the need to stop more severe violations of the rights of others, or appeals to natural law, religious beliefs, international law, justice, conscience, or other moral principles." Quigley at 17. Civil disobedience is widely recognized as a "legitimate form of protest," Article 19, *The Right to Protest: Principles on the Protection of Human Rights in Protests* at 21 (2016), https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf, is "almost invariably nonviolent in character," Carl Cohen, Civil

Disobedience: Conscience, Tactics, and the Law 40 (1971), and is more effective than violence in bringing about significant political change, such as changes in political leadership, Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33(1) International Security 7 (2008). Numerous historical examples demonstrate the value of civil disobedience as a driver of social progress:

> [C]ivil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's. More recently, disobedience of "Jim Crow" laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam War.

United States v. Kabat, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting). Thus one scholar has dubbed civil disobedience "a singular hallmark of a free country." Cohan at 113.

Since the 1970s, those engaging in civil disobedience have frequently raised necessity defenses in court. Their causes have included antiwar and anti-apartheid protests as well as protests against nuclear weapons, United States policy in Central America, corruption among local elected officials, and advertising by alcohol and tobacco companies. *See* Quigley at 27-37. In addition to their immediate benefits for justice movements, the tradition in which principled protesters have argued the necessity of their actions in court has contributed to the

vitality of the First Amendment and constitutional culture, as discussed *supra* at Parts I.A-B. While in many instances political protesters invoking the necessity defense have won acquittal, that has not invariably been the case. "[T]here are . . . numerous examples of the government successfully persuading juries to convict in political trials." *Id.* at 71.

There is broad consensus that just adjudication of political protest cases, including civil disobedience cases, requires bearing in mind not only technical legal requirements but also considerations of the public interest, mitigating circumstances (including whether the conduct was expressive in nature), whether or not the protest included violent acts, the extent of damage or harm caused, and whether or not the protest was grounded in a desire for societal improvement rather than personal gain, particularly when it implicates fundamental rights. *See* Article 19, *The Right to Protest Principles: Background Paper* at 21-22 (2016), https://www.article19.org/data/files/medialibrary/38581/Protest-Background-paper-Final-April-2016.pdf. The necessity defense provides a ready-made structure for integrating those considerations while properly tasking the jury with the ultimate determination of a defendant's liability.

B. The Argument for Necessity Evidence in Climate Civil Disobedience Cases is Unusually Strong.

Climate protest cases in which necessity defenses were argued before juries have borne out observations of the value — educational, civic, and constitutional — of necessity defenses. In 2008, an English jury acquitted six activists of charges

related to a demonstration against coal-fired power plants; the activists had argued that they averted more property damage than they caused. John Vidal, *Not Guilty: The Greenpeace Activists Who Used Climate Change as a Legal Defence*, The Guardian (Sept. 10, 2008), https://www.theguardian.com/environment/2008/sep/11/activists.kingsnorthclimatecamp. Former Vice President Al Gore used the occasion to call upon the public to take similar action. Jonathan Mingle, *Climate-Change Defense, The*, The New York Times Magazine (Dec. 12, 2008), http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-A-t-004.html.

In 2016, following a trial of individuals who had blocked coal and oil trains in Washington State, three jurors told reporters that they appreciated the educational content of the necessity evidence they had heard and felt more motivated than they had before trial to participate in climate-related advocacy. Stephen Quirke, *Delta 5 Defendants Acquitted of Major Charges*, Earth Island Journal (Jan. 28, 2016), http://www.earthisland.org/journal/index.php/elist/eListRead/delta_5_defendants_acquitted_of_major_charges/.

Nowhere are free speech protections more necessary than in circumstances where political activists face violence, harassment, or intimidation by those whose policies they criticize. Such has been the case for climate protesters in recent months. *See, e.g.*, Antonia Juhasz, *Paramilitary Security Tracked and Targeted DAPL Opponents as 'Jihadists,' Docs Show*, Grist (June 1, 2017),

http://grist.org/justice/paramilitary-security-tracked-and-targeted-nodapl-activists-as-jihadists-docs-show/; Alleen Brown, Will Parrish, & Alice Speri, *TigerSwan Responded to Pipeline Vandalism by Launching Multistate Dragnet*, The Intercept (Aug. 26, 2017), https://theintercept.com/2017/08/26/dapl-security-firm-tigerswan-responded-to-pipeline-vandalism-by-launching-multistate-dragnet/; Andrew Harris & Tim Loh, *Energy Transfer Suit Claims Greenpeace Incites Eco-Terrorism with Dakota Access Interference*, World Oil (Aug. 22, 2017), http://www.worldoil.com/news/2017/8/22/energy-transfer-suit-claims-greenpeace-incites-eco-terrorism-with-dakota-access-interference. In such circumstances the necessity defense not only serves an educational function but acts as a corrective against abuses of power intended to silence or censor.

In addition to their policy benefits, necessity defenses by climate protesters are unusually appropriate from a doctrinal perspective. Climate protesters' targeted harm — perhaps the greatest threat currently facing humanity — poses a threat more severe, pervasive, and irreversible than that posed by war, political corruption, harmful advertising, or United States foreign policy, all of which were among the targeted harms in successful civil disobedience cases. *See* Quigley at 27-37. The harms caused or worsened by climate disruption — rising seas, extreme weather, flooding, wildfires, droughts, and crop losses, to name a few — are currently taking a human death toll and causing widespread property loss and economic disruption. These harms exist on a scale of magnitude that overwhelms

those posed in more-traditional necessity cases. Indeed, they threaten civilization itself and the survival of humanity.

Moreover, the ability and willingness of political leaders to tackle the climate crisis, or of individuals to do so by means other than principled lawbreaking, is no less doubtful than it was in those other instances. *See, e.g.*, Elizabeth Kolbert, *Going Negative* 73, The New Yorker (Nov. 20, 2017) (noting that a United Nations Environment Programme report "labelled the difference between the emissions reductions needed to avoid dangerous climate change and those which countries have pledged to achieve as 'alarmingly high.'"). Through campaign contributions and other activities, the fossil fuel industry has gained purchase over government decisions so as to protect and expand fossil fuel production. *See, e.g.*, Brulle at 682 (describing "political lobbying, contributions to political candidates, and a large number of communication and media efforts that aim at undermining climate science").

Particularly given that necessity doctrine is meant to be adapted pragmatically to a range of circumstances, Quigley at 6 ("the [necessity] defense is purposefully defined loosely in order to allow it to be applicable to all the myriad of situations where injustice would result from a too literal reading of the law"), there are compelling doctrinal reasons for allowing it in climate protest cases, including this one. *See also* Lance N. Long & Ted Hamilton, *Case Comment*: *Washington v. Brockway*: *One Small Step Closer to Climate Necessity,* 13 McGill J. Sustainable Dev. L. 151 (2017) (noting the doctrinal

strength of typical climate necessity cases and arguing for the democratic importance of jury deliberation).

The former head UN climate chief, with leading scientists and climate thinkers, has warned that the world has at most only three years left to push the emissions curve downward to avert global disaster. Justin Worland, *We Only Have 3 Years Left to Prevent a Climate Disaster, Scientists Warn*, Time (June 29, 2017), http://time.com/4839039/climate-change-christiana-figueres-g20/. At this late hour, as climate risks become potentially catastrophic, *see* Kolbert at 69 ("No one can say exactly how warm the world can get before disaster . . . becomes inevitable."), and as climate obstructionism lodges itself at the highest levels of the United States government, *see, e.g.*, Toly Rinberg & Andrew Bergman, *Censoring Climate Change*, The New York Times (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/opinion/censoring-climate-change.html, civil disobedience may well be necessary to stave off disaster. Climate civil disobedience cannot be properly understood, from a legal perspective or otherwise, absent that context.

C. Evidentiary Presumptions Weigh in Favor of Allowing Defendants to Present Arguments and Defenses When Admissibility is Ambiguous.

Consistent with the First Amendment tradition discussed *supra* in Part II, both Minnesota and federal courts employ a presumption in favor of the liberal allowance of evidence. Relevant evidence is generally admissible. *See* Minn. R. Evid. 402 (providing that relevant evidence is admissible unless provided

otherwise in authorities enumerated in those rules); Fed. R. Evid. 402 (same). *See also* Fed. R. Evid. 402, 1972 Proposed Rules Advis. Comm. Notes (observing that "congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules").

Furthermore, the test for relevancy is a low bar. *See* Minn. R. Evid. 401 (defining as relevant evidence that is probative and that has "*any* tendency" to make a fact "more . . . or less probable than it would be without the evidence") (emphasis added); Fed. R. Evid. 401 (same); Minn. R. Evid. 401, Comm. Cmt. 1977 ("The rule adopts a liberal as opposed to restrictive approach to the question of relevancy. . . . The liberal approach . . . is consistent with Minnesota practice."). *Accord Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (noting the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to opinion testimony") (internal quotation marks omitted); Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 631 (1991) ("[W]e should not be quick to abandon the principle of easy admissibility of expert and other testimony embodied in the Federal Rules of Evidence, as "[t]he Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts").

Courts' evaluation of pretrial necessity defense proffers has not always accorded with the applicable standard of proof, much less liberal evidentiary presumptions. Laura J. Schulkind writes:

There is a disjunction . . . between the low standard of production

> courts hearing the necessity defense articulate in their hypothetical evidentiary tests, and the extraordinarily high standard which many of these same courts ultimately impose on civil disobedients raising the necessity defense.

Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. Rev. 79, 89 (1989). In this case, the necessity defense is central to Respondents' ability to present their theory of the case and provides context crucial to the jury's understanding of the charges. So long as Respondents have met their pretrial *prima facie* burden, and in the absence of a compelling reason to bar the evidence, they should be permitted to present it at trial.

III. DENIAL OF THE NECESSITY DEFENSE IN CASES WHERE THE FACTS ARE UNCONTESTED ABRIDGES THE CONSTITUTIONAL RIGHT OF CRIMINAL DEFENDANTS TO PRESENT A COMPLETE DEFENSE.

The United States Constitution guarantees the right of criminal defendants to trial by an impartial jury. U.S. Const. amend. VI. In the words of the Supreme Court:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power . . . found expression in . . . this insistence upon community participation in the determination of guilt or innocence. It has long been settled that due process protects persons charged with criminal conduct by permitting them to present exculpatory evidence to the jury.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). The Minnesota Constitution likewise protects the right of criminal defendants to a fair jury trial. Minn. Const.

art. I, § 6 ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .").

To fully realize Sixth Amendment guarantees, defendants must be given a "meaningful opportunity to present a complete defense," *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), including an opportunity for defendants to "to present [their] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies," *Washington v. Texas*, 388 U.S. 14, 19 (1967). *See also State v. Richards*, 552 N.W.2d 197, 208 (Minn. 1996). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

A defendant's ability to call witnesses in her defense is especially important to the vindication of her Sixth Amendment rights. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. *See also id.* at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."); *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015) (recognizing due process right).

Courts and commentators have recognized the constitutional dangers of denying presentation of affirmative defenses at trial, including the necessity

defense. *See* Quigley at 66 ("Pre-trial preclusion of the right to admit evidence of the necessity defense strips the protestors' constitutional right to a jury" and is "contrary to the purpose of a trial by jury."); *People v. Johnson*, 2013 COA 122, ¶ 35, 327 P.3d 305, 310 (Colo. 2013) ("To raise an affirmative defense, a defendant need only present "some credible evidence" supporting the defense. . . . This relatively low, "scintilla of evidence" standard means that the evidence necessary to justify an affirmative defense instruction may come solely from the defendant's testimony, even if the evidence is improbable.") (citation omitted).

Some courts and legislatures have addressed these concerns by allowing presentation of evidence relevant to an affirmative defense even in cases where a jury instruction on such a defense has been denied. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-1-704 ("In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense.").

In this case, necessity evidence is indispensable to Respondents' "version of the facts." The bare facts of Respondents' conduct — the facts giving rise to the charges — are not just uncontested but have been video-recorded and disseminated publicly by Respondents. Br. of Appellant at 3, 4. The question to be answered is not whether Respondents were factually responsible but whether they are legally culpable, and it is constitutionally imperative that Respondents be permitted some means of contesting their culpability.

IV. THE RESPONDENTS SOUGHT TO AVERT CONSTITUTIONALLY RECOGNIZED HARMS.

A federal district court in Oregon recently held that there is a fundamental substantive due process right to a stable climate system capable of supporting human life. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). The court also found that the public trust doctrine — an ancient doctrine requiring sovereigns to hold common resources in trust for the people — exists at the federal level and that the plaintiffs in that case, a group of young people concerned about climate change, had alleged violations of public trust duties by the United States government sufficient to give them standing to bring suit. *Id.* at 1242-48, 1256-59.

A growing number of lawsuits have asked courts to recognize, as the *Juliana* court did, that governmental failure to impose adequate limits on greenhouse gas pollution violates public trust duties. *See, e.g., id.* at 1254 ("[A] wave of recent environmental cases assert[] [that] state and national governments have abdicated their responsibilities under the public trust doctrine.").[2]

Rather than providing a distinct criminal defense or mandating specific conduct by a trial judge in criminal cases, these doctrines underscore the serious

[2] No court has ruled on whether the Minnesota public trust doctrine extends to protection of the atmosphere from greenhouse gas pollution. A suit brought in 2012 was dismissed on procedural grounds without discussion of the merits. *Aronow v. State*, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012). However, public trust duties are implicated by greenhouse gas pollution even in the absence of judicial declarations that such duties extend to the atmosphere, since climate change harms public waterways and other resources long considered to form part of the trust *res*. For judicial support of this view, *see Juliana* at 1255-56; *Foster, et al. v. WA State Dept. Ecology*, 2015 WL 7721362 (2015) at *4; *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1103 (Alaska 2014).

constitutional implications of the ongoing climate crisis and the strength of Respondents' proffered necessity defense. The harms Respondents sought to avert through civil disobedience are matters not of personal political opinion but of constitutional rights and duties.

Constitutional doctrines rooted in due process and public trust duties support Respondents' necessity defense proffer in at least two ways. First, they shed light on Respondents' balancing of harms. If public trust duties to combat climate change exist at the state and federal level — as many legal commentators now point out, *see generally* Michael C. Blumm and Mary C. Wood, *'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1 (2017) — then governmental abrogation of those duties contributes to the harms targeted by Respondents. Likewise, if there is a federal constitutional right to a stable climate system capable of supporting human life, then governmental permitting of fossil fuel projects abrogates that right, constituting yet another harm. Respondents have cited both doctrines in support of their balancing of harms. *See* Defense Resp. State's Mem. Opp'n Affirmative Defense Necessity at 19-20, 25.

Second, because governments are recognized fiduciaries of public trust resources, the absence of lawful alternatives to climate civil disobedience becomes clearer. Public trust duties are attributes of sovereignty and are not within the province of legislatures to abrogate. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the

whole people are interested . . . than it can abdicate its police powers in the administration of government . . . ."; *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) ("The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign."). Thus, redress to persuade a state legislature not to abrogate those duties is categorically unavailable as a matter of law and cannot be invoked to argue that the defendant failed to exhaust lawful alternatives.

CONCLUSION

The four individuals named in this case accepted serious legal risks for the sake of catalyzing action on a public policy problem of outsized proportions and thereby to preserve the possibility of an Earth habitable for future generations. Their actions were undertaken with great care and were supported by overwhelming scientific consensus as to the state of climate tipping points and the gravity of global harm presented by climate disruption. They now seek to explain and justify their actions to a jury of their peers.

Nonviolent civil disobedience is part of the American democratic tradition. The four individuals named above stand in the shoes of the American freedom fighters, the abolitionists, the suffragettes, the civil rights campaigners of the 1960s, and the antiwar protesters that followed. Criminal trials in which protesters have explained and argued their views are an integral part of that tradition.

The use of the necessity defense in this case is not only doctrinally appropriate but strengthens the constitutional bedrock on which our legal system

rests. That bedrock includes the right to trial by jury, freedom of expression and debate, and a natural environment capable of providing for human needs.

For the foregoing reasons, and those described *supra* in Parts I-IV, the undersigned *amici curiae* respectfully request that this Court affirm the trial court decision allowing Respondents' proffered necessity defense.

Respectfully submitted this 4th day of December, 2017,

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I hereby certify that on December 4, 2017, I filed an electronic copy of the foregoing brief with the Clerk of Court for the Minnesota Court of Appeals using the electronic filing system. By filing electronically, I thereby served the brief on counsel for all parties.

Dated: December 4, 2017

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1. This brief complies with the word limit specified in the Office of Appellate Courts order granting leave to file, *see* Order (November 14, 2017), and in Minnesota Rule of Civil Appellate Procedure 132.01, Subdivision 3(c), because it contains less than 7,000 words, as determined by the word-count function of Microsoft Word 2011, excluding the cover page, Table of Contents, Table of Authorities, and Certificate of Service.

2. This brief complies with the typeface requirements in Minnesota Rule of Civil Appellate Procedure 132.01, Subdivision 1, because it has been prepared in a proportionally spaced 13-point Times New Roman font.

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EXHIBIT A

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No. A17-1651
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STATE OF MINNESOTA
IN COURT OF APPEALS

STATE OF MINNESOTA,
Appellant,

v.

ANNETTE MARIE KLAPSTEIN,
EMILY NESBITT JOHNSTON,
STEVEN ROBERT LIPTAY,
and
BENJAMIN JOLDERSMA
Respondents.

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