

SKAGIT COUNTRY SUPERIOR COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

KENNETH ARTHUR WARD,

Defendant

Case No. 16-1-01001-5

MOTION TO RECONSIDER

Defendant, by and through his attorneys, moves this Court to reconsider its ruling denying the affirmative defense of necessity pursuant to Cr.R. 8.2 and the Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution. The denial of the opportunity to present this defense should be reconsidered for two reasons: (1) the denial was in error because the Court required Mr. Ward to offer preliminary proof of the imminence of the threat he sought to prevent, an element that does not appear in the Washington Pattern Instructions nor in the controlling precedent; and (2) had Mr. Ward been prepared to argue “imminence” as an element of the defense, he would have provided the Court with both case law and proffered expert testimony that satisfied this burden. Further, Mr. Ward’s own testimony during the trial now demonstrates the appropriateness of this defense, including ample basis for this Court to determine that the catastrophe Mr. Ward sought to avert was in fact imminent. Mr. Ward also makes an offer of proof regarding the scientific imminence of climate change, including the facts that (a) climate change is primarily caused by the combustion of fossil fuels, (b) the severe threat that climate change poses to humanity and the planet is imminent, and (c) more than 9 out of 10 climate scientists agree that carbon emissions cause global warming.

The purpose of a motion to reconsider is to conserve judicial resources and to provide the Court an opportunity to revisit potential appellate issues.

FACTS

On January 13, 2017, Mr. Ward notified the State that he intended to present a defense of necessity. The State filed a motion in limine to preclude the defense and to strike all witnesses pertinent to the defense. Mr. Ward filed a response including a brief offer of proof. At the pretrial hearing on January 24, the Court denied the admissibility of the defense, denied the relevant jury instruction, and ruled that no testimony related to the necessity defense would be heard, thus eliminating Mr. Ward's theory of the case before any evidence had been presented.

ARGUMENT

A. DEFENDANT HAS A RIGHT TO PRESENT HIS DEFENSE

As argued at the pretrial hearing, Mr. Ward maintains that denial of his affirmative defense prior to the presentation of any testimony denies him the right to a defense. *See* Wash. Const. art. I, § 22. US Constitution, 6th Amendment; WA Constitution Art. 1, Sec. 2. The Washington Pattern Instructions for necessity include four elements: “(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed.” WPIC § 18.02. Each of these elements is eminently factual in nature. The first element requires inquiry into Mr. Ward's state of mind prior to the charged actions. The second and third elements require a balancing of facts related to the harms of climate change. These facts will be presented by Mr. Ward's experts (and may be challenged by the State's own experts) and are incapable of resolution as a purely legal matter. The fourth element likewise hinges upon a factual inquiry into the nature and variety of legal alternatives to Mr. Ward's action and an assessment of the reasonableness of those alternatives. Mr. Ward's trial testimony demonstrated the numerous serious, diligent attempts he made to address the climate crisis before engaging in potential criminal action. Trial Tr. 170-176.

Mr. Ward's necessity defense argument cannot be properly analyzed without the presentation of testimony to develop these elements, including the testimony of globally preeminent climate scientists. Mr. Ward's own trial testimony now demonstrates that he has in fact presented evidence that satisfies each of the four elements of this defense. Considering the

hung jury that resulted in this mistrial, the question of whether Mr. Ward has satisfied the four elements then becomes the proper purview of the jury, which is the trier of fact. Should the Court decide that no reasonable juror could conclude that Mr. Ward has satisfied the elements of necessity, it may do so only after Mr. Ward has had the chance to present his evidence.

B. THE COURT ERRED BY ADDING THE ELEMENT OF IMMINENCE TO THE NECESSITY DEFENSE

At the pretrial hearing, the Court introduced an element of “imminence” or “immediacy” into the necessity defense despite its not appearing in the necessity defense as formulated in Washington common law or provided in Washington case precedent. Pretrial Tr. at 15. The Court of Appeals has defined the defense as follows: “The defendant must prove by a preponderance of the evidence that: (1) he or she believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the violation of the law, and (3) no legal alternative existed.” *State v. Jeffrey*, 889 P.2d 956, 957-58 (Wash. App. 1995) (quoting *State v. Gallegos*, 871 P.2d 621 (Wash. App. 1994)). The Washington Pattern Instructions (referenced above) do not mention imminence. It was thus improper to “read between the lines,” as the Court described its analysis, and to introduce an element that does not appear in the controlling law. Pretrial Tr. at 15.

The Court introduced the element of imminence after the State’s contention, during the pretrial hearing, that the necessity defense is “designed” for cases in which there is “imminent jeopardy” of harm. Pretrial Tr. at 5. In the Court’s words, the State “opined” that in order to use the defense, there must be an immediate and imminent harm. Pretrial Tr. at 14. Defendant countered that “if the drafters of the pattern instructions had recognized that there was a requirement that the harm to be avoided was an immediate harm we would have seen that in the words of the instruction and the language of the instruction. They are not there.” Pretrial Tr. at 9. The Court then stated that the necessity defense is “usually proposed in a situation where there’s some sort of immediate harm.” Pretrial Tr. at 14. Although noting that WPIC § 18.02 does not include a requirement of imminence or immediacy, Pretrial Tr. at 15, the Court nevertheless read in a requirement of imminence, stating “I believe the point is, as between the lines, it does need to have some immediacy, some imminence.” This element was introduced in error.

C. DEFENDANT NONETHELESS WILL ESTABLISH THAT CLIMATE CHANGE IS IMMINENT

Even if Mr. Ward were required to offer proof of the imminence of climate change, he can do so. Imminence may refer to harms that are certain to occur but cannot be precisely predicted, as is the case with many environmental threats. In *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007), for example, the Tenth Circuit found that a tar-like by-product of an oil refinery was an imminent hazard even though no one had yet been harmed by it: “[A]n ‘imminent hazard’ may be declared at any point in a chain of events which may ultimately result in harm to the public . . . Imminence, thus, refers to the nature of the threat rather than identification of the time when the endangerment initially arose” (citations omitted). Similarly, in *People v. Gray*, 571 N.Y.S.2d 851, 858-89 (Crim. Ct. 1991), the New York City Criminal Court, in acquitting defendants by reason of necessity for trespassing during a protest against a new vehicular lane, rejected the prosecution’s argument that the defendants had to provide evidence that deaths from pollution were likely in the near future in order to satisfy the imminence requirement. Pointing to the wealth of scientific proof that air pollution is injurious to human health, the court found that “the grave harm in this case is occurring every day. The additional pollution breathed by all New Yorkers . . . as a result of [the targeted harm] is a concrete harm being suffered by the population at this moment.” *Id.* at 859.

Courts considering the effects of climate change have concluded that its harms are imminent. In *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), the Supreme Court found that the EPA’s refusal to regulate greenhouse gas emissions was an “imminent” harm to Massachusetts as a consequence of the wealth of negative effects, including sea level rise, that resulted from climate change. *Id.* at 52. The Court went on to note that “[t]he harms associated with climate change are serious and well recognized” and held that the fact that these harms were widely distributed did not minimize their significance at an individual or state-wide level.

The finding in *Massachusetts v. EPA* is consistent with other courts’ conclusions on climate change imminence. As early as 1990, the D.C. Circuit found in favor of the standing claim of a group of cities, states, and environmental groups who had sued the National Highway Traffic Safety Administration (NHTSA) for failing to address global warming in its Environmental Impact Statements for new fuel economy standards. “No one, including NHTSA,

appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming.” *Los Angeles v. N.H.T.S.A.*, 912 F.2d 478, 494 (D.C. Cir., 1990) (Wald, J., Opinion for the Court on NRDC standing and dissenting on the failure to issue an EIS). In *Connecticut v. American Electric Power Co., Inc.*, the Second Circuit discussed the “imminent injury” requirement of Article III standing and noted that the Supreme Court rested the requirement not on “a strict temporal requirement that a future injury occur within a particular time period” but rather “on the *certainty* of that injury occurring in the future.” 582 F.3d 309, 342 (2nd Cir. 2009), *rev’d on other grounds*, *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 564 n. 2 (1992)) (emphasis in the original). The court went on to find that the plaintiffs — eight states, a city, and three land trusts suing electricity generators for harms resulting from greenhouse gas emissions — had sufficiently pled imminence thanks to the ongoing nature of climate change harms. *Id.* at 343.

More recently, in *Juliana v. U.S.*, 2016 U.S. Dist. LEXIS 156014, the District Court of Oregon found that plaintiffs bringing public trust and constitutional claims against the federal government for failure to ameliorate climate change had sufficiently demonstrated imminence because climate change harms are “ongoing and likely to continue in the future.” * 21.

The state of Washington has recognized the severity of the climate crisis, even as it has failed to adequately respond to its own warnings. Chapter 80.80 of the Revised Code of Washington includes legislative findings that “Washington is especially vulnerable to climate change because of the state’s dependence on snow pack for summer streamflows and because the expected rise in sea levels threatens our coastal communities. Extreme weather, a warming Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting Washington’s economy, environment, and communities.” R.C.W. § 80.80.005(1)(a). The chapter emphasizes that “there is a need to assess the trend of greenhouse gases emissions statewide over the next several decades, and to take sufficient actions so that Washington meets its responsibility to contribute to the global actions needed to reduce the impacts and the pace of global warming.” R.C.W. § 80.80.005(1)(f). The state Department of Ecology has put the case even more strongly:

Climate change is not a far-off risk. **It is happening now** globally and the impacts are worse than previously predicted, and are forecast to worsen . . . If we delay action by

even a few years, the rate of reduction needed to stabilize the global climate would be beyond anything achieved historically and would be more costly [emphasis added].

Dep't of Ecology, Washington Greenhouse Gas Emission Reduction Limits, Prepared Under RCW 70.235.040 (Dec. 2014). *Attached* as Exhibit S

In light of these findings and scientific consensus, the King County Superior Court labeled global warming an “imminent threat” when considering a suit challenging the Department of Ecology’s failure to issue adequate greenhouse gas emissions. Order Affirming the Department of Ecology’s Denial of Petition for Rule Making, *Foster v. Wash. Dep’t. of Ecology*, No. 14-2-25295-1, 1 (Wash. Super. Ct., Nov. 19, 2015):

Petitioners assert, the Department does not dispute, and this court finds, that current scientific evidence establishes that rapidly increasing global warming causes an unprecedented risk to earth, including land, sea, the atmosphere and all living plants and creatures . . . In fact, as Petitioners assert and this court finds, their very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming by accelerating the reduction of emissions of GHG’s before doing so becomes first too costly and then too late.

Id. at 4-5. *Attached* as Exhibit T.

Even if an imminence element was part of the Washington law of necessity, it would be a subjective test, dependent upon Mr. Ward’s own assessment of the threat. The analogy to the defense of self-defense is instructive. It is well established that “[a] jury may find self-defense on the basis of the defendant’s *subjective*, reasonable belief of imminent harm from the victim Given this subjective component, there need be no finding of actual imminent harm.” *State v. Studd*, 137 Wash. 2d 533, 545 (1999), *as amended* (July 2, 1999), *quoting State v. LeFaber*, 128 Wash.2d 896, 899 (1996) (emphasis in the original). In *LeFaber*, the Supreme Court ruled that in self-defense cases “[a] finding of actual imminent harm is unnecessary. Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant.” 128 Wash. 2d at 899-900 (citations omitted). If imminence was a requirement for necessity, it would follow the self-defense standard because “[s]elf-defense finds its basis in necessity.” *State v. Janes*, 121 Wash. 2d 220, 237 (1993). Mr. Ward would thus simply have to show that he subjectively perceived climate change as an imminent threat prior to taking his action, which he will do through his testimony and certainly attempted to do so in his first trial testimony despite the limitations set forth by the Court by denying the necessity defense. *See, e.g.*, Trial Tr. at 176-178; 181-184.

Under any reasonable definition of “imminence,” the harms targeted by Mr. Ward are imminent. As his experts will testify, and as he believed at the time of his action, severe effects of climate change are already felt in Washington and around the world, and worse effects are scientifically certain without swift action to avert them.

D. CLIMATE CHANGE IS AN IMMINENT HARM—OFFER OF PROOF

As an offer of proof, Mr. Ward further provides expert testimony and evidence that demonstrates that climate change is “not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). Mr. Ward’s list of expert witnesses includes three climate scientists who can testify about the scientific basis and imminence of climate change. *See* Exhibits A-C: CVs for expert witnesses Dr. James Hansen, Dr. Richard Gammon, and Dr. Cecilia Bitz.

As described in Mr. Ward’s earlier trial brief, the burning of fossil fuels and resulting emissions of carbon dioxide (CO₂) cause global warming, leading to deleterious effects on human health, the environment, and the economy. Defendant’s Trial Memorandum at 3-10. CO₂ is a naturally occurring molecule that is a by-product of organic processes. Prior to the development of fossil-fuel burning technologies, the average level of CO₂ in the earth’s atmosphere was 280 parts per million (ppm). Andrew Lacis, *CO₂: The Thermostat that Controls Earth’s Temperature*, NASA Goddard Institute for Space Studies (Oct. 10, 2010), http://www.giss.nasa.gov/research/briefs/lacis_01/. A CO₂ concentration of 350 ppm is widely recognized as the maximum that the earth’s atmosphere can sustain before feedback loops trigger unprecedented and disastrous warming. *See* Exhibit L: Hansen et al., *Target Atmospheric CO₂: Where Should Humanity Aim?* 2 *Open Atmos. Sci.* 217, 217 (2008) (“If humanity wishes to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted, Paleoclimate evidence and ongoing climate change suggest that CO₂ will need to be reduced . . . to at most 350 ppm.”) (Exhibit L); Lacis, *supra*. Since the Industrial Revolution, however, this level has risen rapidly as previously buried CO₂ has been burned in the form of coal, gas, and oil. The average level of atmospheric CO₂ in October 2016 was 401.57 ppm. National Oceanic and Atmospheric Administration, *Recent Monthly Average at Mauna Loa CO₂*, <http://www.esrl.noaa.gov/gmd/ccgg/trends/>. If CO₂ levels remain above 350 ppm at the end of the present century, the result would be “an environment far outside the range that has been experienced by humanity, and there will be no return within any foreseeable generation.”

See Exhibit M (Hansen, *Tipping Point: Perspective of a Climatologist* (2009) in Wildlife Conservation Society, *State of the Wild 2008-2009* at 9.

Higher levels of CO₂ interact with water vapor and other greenhouse gases to trap warmth in the earth's atmosphere. *Lacis, supra*. In this way, CO₂ works as a "thermostat" for the earth, producing higher temperatures as its prevalence increases. *Id.* Recent science demonstrates that climatic "positive feedback loops" exacerbate the warming effects of CO₂: for example, as climate change causes ice to melt, the resulting water traps more heat, magnifying the effects of global warming. James Hansen, *Tipping Point* at 9. Because of such feedback loops and the earth's long retention of released CO₂, the warming effects of any given emission last up to one thousand years. Environmental Protection Agency (EPA), *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* 17 (December 9, 2009) at 16.

According to the United Nations Intergovernmental Panel on Climate Change (IPCC), a group of scientists tasked with assessing the science and risks of global warming and whose work is endorsed by 195 nations, there is now forty percent more CO₂ in the atmosphere than in pre-industrial times, primarily due to fossil fuel emissions. IPCC, *Climate Change 2013: The Physical Science Basis: Summary for Policymakers. Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (2013) at 11. Ice core sampling, a method of measuring atmospheric makeup over time, shows that current CO₂ levels are "unprecedented in at least the last 800,000 years." *Id.* As a result, global temperatures rose around 0.85 degrees Celsius from 1880 to 2012. *Id.* at 5.

With CO₂ emissions already above safe levels, global warming has affected and continues to affect the natural environment, human health, and the economy in negative ways. As the United States Supreme Court noted in *Massachusetts.*, 549 U.S. at 499,

The harms associated with climate change are serious and well recognized . . . [T]he relevant science and a strong consensus among qualified experts indicate that global warming threatens, *inter alia*, a precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease and the ferocity of weather events.

The EPA has called the case for the connection between global warming and such injuries "overwhelming," noting that "climatic changes are already occurring that harm our

health and welfare.” E.P.A., Proposed Endangerment Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886, 18904 (April 24, 2009). As a result of warming and melting ice, global sea level has risen eight inches since 1880. Union of Concerned Scientists, *Global Warming Science and Impacts: Sea Level Rise and Global Warming* (April 30, 2014), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/infographic-sea-level-rise-global-warming.html. The recent collapse of a large swath of the West Antarctica ice sheet is directly linked to global warming and could cause further sea level rise at a more rapid pace than originally predicted — a meter by 2100 and fifteen meters by 2500 without emissions reductions. Robert M. DeConto & David Pollard, *Contribution of Antarctica to past and future sea-level rise*, *Nature* 531, 591-597 at 591 (March 31, 2016), <http://www.nature.com/nature/journal/v531/n7596/full/nature17145.html>.

In North America, global warming has caused higher temperatures and more frequent bouts of extreme hot weather. IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Chapter 26: North America. Contribution of Working Group II to the Fifth Assessment Report of the IPCC* (2014) at 46. This has resulted in increased drought, more frequent wildfires, and a rise in forest infestations. *Id.* 2016 will go down as the hottest year on record (1.2°C above preindustrial levels), breaking the record for 2015, while sixteen of the seventeen hottest years ever have been in this century. Sewell Chan, *2016 Likely to Top 2015 as Hottest Year on Record, Scientists Say*, *N.Y. Times* (Nov. 14, 2016), http://www.nytimes.com/2016/11/15/science/2016-hottest-year-on-record.html?_r=0. In the Northern Hemisphere, spring now arrives ten days earlier than it did fifty years ago, leading to earlier snowpack melt, drier forests, and more frequent fires. Union of Concerned Scientists, *Global Warming Science and Impacts: Early Spring’s Domino Effect* (May 12, 2010), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/springs-domino-effect.html. The United States has experienced increases in heavy precipitation and severe storms, including more frequent hurricanes and floods. IPCC, *Climate Change 2014, supra* at 46. This has caused disruptions in agricultural production and water supplies and harms to human health. *Id.* In the western United States, temperatures have risen on average 1.9°F since 1970, lengthening the wildfire season from five months to over seven months and causing more than a seventy-five percent increase in annual fires larger than 1,000 acres. Union of Concerned Scientists, *Global Warming Science and Impacts: Western Wildfire and Impacts* (July 23, 2013),

http://www.ucsusa.org/global_warming/science_and_impacts/impacts/. Such effects cause disruption of ecosystems, biological resources useful for humans, and agriculture. *Climate Change 2014: Synthesis Report* 13-16 (2014), Intergovernmental Panel on Climate Change, https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf. Many of the physical changes to ecosystems caused by climate change, including the extinction of plant and animal species, the melting of the polar ice caps, ocean acidification, sea level rise, and changing climate zones, are irreversible on a human timescale. *Id.* at 16.

Impacts in Washington State are projected to include sea level rise, warmer temperatures, reduced snow pack, and more frequent extreme weather. “Climate Change: Disrupting our Economy, Environment and Communities,” Washington State Dept. of Ecology, <http://www.ecy.wa.gov/climatechange/effects.htm>. Local effects can be dramatically viewed at the *Surging Seas* online, which collects the best peer-reviewed science to model sea level rise around the country. *Surging Seas*, Climate Central (2016), <http://sealevel.climatecentral.org>. In November, President Obama’s climate envoy Jonathan Pershing indicated at an international conference that five feet of sea level rise is possible by 2050. Daphne Wysham, *U.S. Climate Envoy Jonathan Pershing: Five Feet of Sea Level Rise by 2050 Possible*, Huffington Post (Nov. 18, 2016), http://www.huffingtonpost.com/daphne-wysham/us-climate-envoy-jonathan_b_13070296.html. Should that occur, many areas along the Skagit River, including Edgewater Park, will be entirely underwater. *Surging Seas*, Climate Central.

The burning of fossil fuels such as coal, oil, and gas releases CO₂ into the atmosphere and is the primary cause of global warming. IPCC, *Climate Change 2014, supra, passim*; Hansen, *Tipping Point, supra*; Lacic, *supra*. Other so-called “greenhouse gases” such as nitrous oxide and methane contribute to global warming to a much lesser degree. IPCC, *Climate Change 2013: Summary, supra* at 11. Because of the way CO₂ interacts with the climate system, temperature effects are felt long after the fuels are burned; if all emissions were stopped today, the climate would still warm moderately before stabilizing for centuries. IPCC, *Climate Change 2013: The Physical Science Basis: Chapter 12: Long Term Climate Change: Projections, Commitments, and Irreversibility: Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (2013) at 1107. The inertia in the carbon cycle means that the total amount of CO₂ in the atmosphere effects warming more than does the specific timing of carbon emissions. As such, there is a “carbon budget” that links total historical emissions to discrete temperature

increases. *Id.* The longer that the burning of fossil fuels continues or even increases, the more rapid and substantial emissions reductions will have to be in the future. To avoid a temperature increase of two degrees Celsius — warming that would produce profound and harmful changes in the global climate — the total amount of CO₂ emissions since the Industrial Revolution would have to be limited to at most 800 gigatons. IPCC, *Climate Change 2013: Summary*, *supra* at 27. About 555 gigatons had already been emitted by 2013. Global Carbon Project, *Global Carbon Budget 2016: Summary Highlights* (2016), <http://www.globalcarbonproject.org/carbonbudget/16/highlights.htm>. Current emissions are at least ten gigatons per year and increasing. *Id.* While it took 250 years to burn half of the carbon budget, conservative estimates predict that the rest of the budget will be exhausted in less than three decades if current energy consumption patterns continue. Kelly Levin, *World's Carbon Budget to Be Spent in Three Decades*. World Resources Institute (Sep. 27, 2013), <http://www.wri.org/blog/2013/09/world%E2%80%99s-carbon-budget-be-spent-three-decades>.

About 2,800 gigatons of proven fossil fuel reserves still exist underground. Malte Meinshausen et al., *Greenhouse-gas emissions targets for limiting global warming to 2°C*, *Nature* 458 (April 30, 2009) at 1158. Burning these reserves “would produce a different, practically uninhabitable, planet,” with a temperature increase of sixteen degrees Celsius. Exhibit N: James Hansen, et al., *Climate Sensitivity, Sea Level, and Atmospheric CO₂*, *Philosophical Transactions of the Royal Society* (2013) at 24. Indeed, the carbon budget can accommodate only a small fraction of the approximately 762 gigatons of publicly listed reserves, whose value is based upon the assumption that they will be extracted and burned. Carbon Tracker Initiative, *Wasted Capital: Unburnable carbon 2013: Wasted capital and stranded assets* (2014), <http://www.carbontracker.org/site/wastedcapital>.

In order to reduce CO₂ levels to 350 ppm by 2100 and avoid rapidly accelerating warming, global emissions must be reduced by at least fifteen percent annually beginning in 2020. Exhibit O: Hansen et al., *The Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature* (Mar. 23, 2012), <http://arxiv.org/pdf/1110.1365>. Dr. James Hansen has noted that “continued high [carbon dioxide] emissions from fossil fuel burning will . . . impose profound and mounting risks of ecological, economic and social collapse.” Exhibit P: Declaration of Dr. James E. Hansen in Support of Plaintiffs’ Complaint for Declaratory and Injunctive Relief at 3, *Juliana v. U.S.*, 2016 U.S. Dist. LEXIS 156014 (D. Or., filed Aug. 12,

2015) (Civil Action No. 6:15-cv-1517-TC). Rapid reduction of carbon dioxide emissions, according to Hansen, is “urgently needed to reduce the atmospheric [carbon dioxide] concentration to no more than 350 [parts per million].” *Id.* There remains a “real, but highly time-limited, opportunity to rapidly phase-down [carbon dioxide] emissions, restore energy balance, and stabilize the climate system.” *Id.* The opportunity for action appears shorter thanks to recent research completed by Dr. Hansen indicating that the rapid melting of the Antarctic and Greenland ice sheets is exacerbating climate change at a faster pace than previously anticipated: warming of even two degrees Celsius — which current emissions trends would easily surpass — could lead to multi-meter sea level rise. Hansen et al., *Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2°C global warming could be dangerous*, *Atmos. Chem. Phys.* 16, 3761-3812 at 3800 (2008).

Without swift action to address emissions and keep fossil fuel reserves untapped, “climate stresses will cause profound impacts on ecosystems and society — including the possibility of species extinction or severe adverse socio-economic shocks.” IPCC, *Climate Change 2014, supra* at 47. The Arctic may be ice-free by 2050, causing global sea level rise of up to a meter by 2100. IPCC, *Climate Change 2013: Summary, supra* at 25. The climate is on track for more extreme storms and weather events, *id.* at 23, including forty percent greater rainfall during heavy precipitation events in North America and municipalities experiencing increased flooding. Union of Concerned Scientists, *Global Warming Science and Impacts: Heavy Flooding and Global Warming: Is There a Connection?* (March 19, 2010), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/heavy-flooding-and-global-warming.html. By the middle of the century, over seventy percent of summers are predicted to exceed record high temperatures across much of the continent. IPCC, *Climate Change 2014, supra* at 14. Even with a temperature increase of around two degrees Celsius, daily temperature extremes will be more exaggerated: by the end of the century, maximum daily temperatures during the summer will likely be at least five degrees Celsius higher than today. *Id.* Water quality is expected to decrease as a result of greater rainfall, the effects of wildfires, and changes in the chemical composition of water supplies. *Id.* at 16. Annual economic damage from flooding may increase from two billion dollars to between seven and nineteen billion dollars by the end of the century. *Id.* at 17. As winters grow milder and soil temperatures rise, there will be an increase in insect and larval infestations, especially affecting North American forests. *Id.* at

19. The rapidity of climate change will make it difficult for ecosystems and species to adapt to changing conditions. *Id.* at 18. Wetlands will disappear, and invasive species will threaten resident populations such as Chinook salmon in the Northwest. *Id.* at 20. Crop yields for cotton, soy, and corn will be reduced between thirty and eighty-two percent by 2100, *id.* at 23, and warming will increase outdoor air pollution and the risk of waterborne disease. *Id.* at 28.

Tar sands oil, such as that carried by the Trans-Mountain Pipeline, poses special problems in that effort. Tar sands oil derives its name from bitumen, a sticky substance made of hydrocarbons that is extracted from sand deposits and refined to produce fossil fuels. Union of Concerned Scientists, *What Are Tar Sands and Why Do They Matter?* (Jan. 29, 2014), http://www.ucsusa.org/clean_vehicles/why-clean-cars/oil-use/what-are-tar-sands.html. The world's largest reserves of tar sands oil are in Alberta, Canada, where energy-intensive mines extract the substance to ship via pipeline, road, rail, and freighter to export markets. Because of the need to separate sand from the bitumen and the difficulty of refining, the development of tar sands oil is far more energy-intensive than with other forms of fossil fuel: each barrel of tar sands oil contributes fourteen percent more greenhouse gas emissions than average, David Biello, *How Much Will Tar Sands Add to Global Warming?*, *Scientific American* (Jan. 23, 2013), <http://www.scientificamerican.com/article/tar-sands-and-keystone-xl-pipeline-impact-on-global-warming/>, and each gallon of gasoline made from tar sands contributes twenty-percent more CO₂ emissions than average, Union of Concerned Scientists, *What Are Tar Sands?*, *supra*. A rise in “in-situ” mining, which extracts bitumen by forcing steam through tar sands, has made the process even more carbon-intensive than in the past. Biello, *supra*. Furthermore, “petroleum coke,” a coal-like residue of the bitumen refining process, is often collected and sold as fuel, producing thirty percent more in CO₂ emissions than the lowest-quality coal available. *Id.*

Most important, however, is the total amount of CO₂ that the tar sands reserves represent. Proven tar sands reserves contain 240 gigatons of carbon, roughly equivalent to or exceeding the maximum emissions remaining in the carbon budget. *Id.* Although current technology can only recover about twenty-two gigatons, industry history and the rise of processes like in-situ mining demonstrate that technological improvements should be anticipated. *Id.* Tar sands oil production is increasing: in 2011, 1.8 billion barrels per day from the Alberta fields produced 47.1 million metric tons of CO₂ emissions, and current projects aim to expand production to five million barrels a day within fifteen years. Biello, *supra*. Because Alberta tar sands oil may by itself

exhaust the carbon budget and because its intensive development will lock the global economy into continuous burning of emissions-intensive fossil fuels for decades, Dr. Hansen has called the full development of tar sands “game over for the climate.” Exhibit P: Hansen, *Game Over for the Climate*, New York Times (May 10, 2012).

While the *politics* of climate change may be controversial, its basic scientific facts are not: the overwhelming majority of scientific experts agree that climate change is happening now, that it is caused primarily by CO₂ emissions from the combustion of fossil fuels, and that without swift action its consequences for humanity and the planet will be severe. Mr. Ward’s experts are prepared to testify to these facts and it is the jury’s purview to determine their weight and merit.

E. THE COURT ERRED IN RULING THAT DEFENDANT HAD REASONABLE LEGAL ALTERNATIVES

In denying Mr. Ward’s motion, the Court stated that the “biggest problem” was showing that there is no reasonable legal alternative in existence. Pretrial Tr. at 16. Whether an alternative is reasonable is a question for the jury. The Court assumed, without proof, that there are reasonable legal alternatives to address the imminent threat of climate change. However, Mr. Ward can provide ample evidence that the existing legal methods to address the climate crisis are inadequate, ineffective, or unavailable. Because the inquiry into the existence of reasonable legal alternatives is fact-intensive, it was error for the Court to decide the issue without first hearing testimony on this question from Mr. Ward and his experts.

Hypothetical courses of action are not alternatives, much less reasonable alternatives, if they are ineffective in avoiding or minimizing a harm. As such, the mere existence of hypothetical, but potentially ineffective, legal options does not close the alternatives inquiry.

Although not binding on this Court, in a recent discussion of this element the Supreme Judicial Court of Massachusetts emphasized the importance of context in assessing the viability of legal alternatives: “Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.” *Commonwealth v. Magadini*, 474 Mass. 593, 601 (2016). At the offer stage, the defense “does not require a showing that the defendant has exhausted or shown to be futile all conceivable alternatives, only that a jury could reasonably find that no alternatives were available . . . so long as the defendant’s evidence, taken

as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies” the element. *Id.* at 600-01.

Indeed, disproving any and all alternative courses of action is impossible. As such, “[w]hile the availability of legal alternatives may be relevant to the reasonableness of an actor’s conduct, the unavailability of alternative legal courses of conduct is not a requirement of the defense of necessity.” *Brazleton v. State*, 947 S.W.2d 644 (Tx. App. 1997) (reversing denial of necessity instruction for marijuana possession charge); *see also State v. Greenwood*, 237 P.3d 1018, 1026 (Ak. 2010) (“To meet the ‘some evidence’ test for the fourth element, [the defendant] is not required to present evidence that every possible alternative was unavailable to her”). Even where potential alternatives exist, they are relevant only to the extent that they are reasonable — that is, actually capable of averting the harm targeted by the defendant.

Not all legal alternatives are reasonable. “Reasonable must mean more than available; it must imply effective.” Steven M. Bauer Peter J., *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 *Stan. L. Rev.* 1173, 1179-80 (1987). This logic applies to cases of civil disobedience. In *Gray*, 571 N.Y.S.2d at 860, for example, the court held that the defendants’ history of unsuccessful attempts to minimize air pollution demonstrated that the legal means were ineffective. Writing that the necessity defense “does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal acts,” *id.*, the court found that the legal alternative requirement does not preclude the justification of civil disobedience altogether, and suggested that courts not rule out the presentation of the defense simply because there is always a mere logical possibility of further legal action:

It has been asserted that because a democracy creates legal avenues of protest, alternatives must always exist [H]owever, to dispense with the necessity defense by assuming that people always have access to effective legal means of protest circumvents the purpose of the defense. When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives, they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity.

Id. at 860-6.

Consideration of legal alternatives must also take a realistic view of our existing political system. Despite our democratic ideals, economic elites control policymaking at all levels,

allowing the profit motive to trump the public interest. Traditional legal methods like lobbying, petitioning, and organizing stand little chance against entrenched interests in federal and state government. In such a situation, legal political activity by average citizens like Mr. Ward stands almost no chance against the clout of entities like the fossil fuel industry. One of Mr. Ward's experts, Martin Gilens, Professor of Politics at Princeton University, is prepared to testify to this phenomenon. *See* Exhibit R, Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, *Perspectives on Politics* 12, 564-581 (2014). The Court has also heard Mr. Ward testify to his long history of attempted legal efforts to address climate change, all of which failed to avoid or minimize the harm of climate change. Trial Tr. at 170-75, 184-87.

The ineffectiveness of legal methods in addressing the climate crisis is so pronounced that the courts of this State have taken notice. In *Foster*, the King County Superior Court pointed out that “the scientific evidence is clear that the current rates of reduction mandated by Washington law cannot achieve the GHG reductions necessary to protect our environment and to ensure the survival of an environment in which Petitioners can grow to adulthood safely.” No. 14-2-25295-1, at 5 (Wash. Super. Ct., Nov. 19, 2015). Regulators have taken notice, as well: The Washington Department of Ecology has testified in a court of law that it would be “futile” to make a recommendation to the Legislature to update existing greenhouse gas emission limits, even though it was statutorily obligated to do so. *Id.* (Dep't of Ecology Resp. to Pet.'s Mtn. for Relief Under CR 60(b)) (filed April 19, 2016) at 6 (“Ecology believes any attempt to persuade the 2016 Legislature to change the [greenhouse gas] emission limits in RCW 70.235 would have been futile”).

The federal situation is at least as dire. The most significant climate regulatory effort to date, the Clean Power Plan, falls well short of internationally recognized targets for reduced emissions. Earth Institute, *What is the U.S. Commitment in Paris?*, <http://blogs.ei.columbia.edu/2015/12/11/what-is-the-u-s-commitment-in-paris/>. Now even that effort is at risk of being scaled back or eliminated by the current Administration. Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. Times (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html?_r=0. In light of the fact that all greenhouse gas emissions must cease within nine years to keep warming within

minimally safe levels, Oil Change International, *The Sky's Limit: Why the Paris Climate Goals Require a Managed Decline of Fossil Fuel Production* (Sep. 22, 2016), <http://priceofoil.org/2016/09/22/the-skys-limit-report/>, legal efforts have clearly been inadequate to the task of spurring pro-climate action. In addition, Mr. Trump has already stated that he will repeal and destroy the Clean Power Plan as part of his climate change denial.

The existence of reasonable legal alternatives to avoid or minimize the harm of climate change is a factual question. Mr. Ward and three of his experts — Eric de Place, Bill McKibben, and Martin Gilens (See Exhibits D, E, and G) — are prepared to testify regarding the ineffectiveness of such alternatives, and their evidence should be presented to the jury to decide this element.

F. THE COURT ERRED IN RULING THAT DEFENDANT DID NOT ACTUALLY AVOID OR MINIMIZE THE TARGETED HARM

The Court likewise erred in ruling that Mr. Ward's actions could not avoid or minimize the targeted harm. In denying Mr. Ward's motion, the Court stated that the effect of turning any particular valve would be "astronomically small," concluding that the targeted harm could not be avoided by such an action. Pretrial Tr at. 15-16. Again, the efficacy of Mr. Ward's actions is a question of fact within the province of the jury, and his experts can offer testimony that his conduct was reasonably anticipated to ameliorate the climate crisis. As such, the Court's ruling was premature and should be reversed to allow Mr. Ward to develop his evidence.

In its Response to Defendant's defense of necessity, the State referred to an old rule of common law necessity requiring that the targeted harm be natural and not human-caused. State's Response to Defense of Necessity, pp 2-3. The modern rule — recognized by most jurisdictions including the Supreme Court of Washington — eliminates this requirement and allows the targeted harm to be human-caused. In *State v. Kurtz*, 178 Wn.2d 466 (2013), the Washington Supreme Court considered a medical marijuana necessity defense (non-natural harm), recognizing that the defense was potentially viable and remanding for a hearing on the sufficiency of the proffered evidence. While the Washington Court of Appeals maintained the "physical causes" rule as late as *State v. Turner*, subsequent decisions have reversed the rule. In *State v. Parker*, 127 Wn.App. 352 (2005) and *State v. Jeffrey*, 77 Wn. App. 222 (1995), the court analyzed defenses where the targeted harm was human aggression. Even earlier, in *State v. Diana*, the court considered a medical marijuana necessity case. 24 Wn. App. 908 at 913 (1979).

Clearly, then, by considering multiple necessity arguments in which the targeted harms were human-caused, Washington has abandoned the old physical causes rule.

This is consistent with modern versions of the rule and Washington's abandonment of the physical causes rule is in line with the natural trend:

More significantly, most but not all of the modern recodifications (following the Model Penal Code in this respect) contain a broader choice-of-evils defense which is not limited to any particular source of danger.

Wayne R LaFave, *Criminal Law*, 4th ed (St Paul, Minn: West, 2003) at 523-524 (citations omitted); *see also*, Model Penal Code § 3.02, comment (1985) ("Over time, courts have moved away from the idea that only natural forces can create a necessity situation").

Regardless, Mr. Ward's targeted harms include extreme storms, drought, and other phenomena that are clearly "physical forces of nature," even if they are partly caused and exacerbated by human-caused climate change.

As with the legal alternatives inquiry, deciding whether Mr. Ward's action was reasonably calculated to be effective in averting the imminent harm of climate change requires expert testimony and evidence to be presented at trial. It is important to note that the Washington jury instructions on necessity require a defendant to prove that "the commission of the crime was necessary to avoid *or minimize* a harm" WPIC § 18.02 (1) (emphasis added). Given the fact that every additional quantum of combusted fossil fuels degrades the climate and could potentially trigger irreversible climate feedback loops, *see supra* Section D, Mr. Ward's temporary shut-down of tar sands oil flowing through the Trans-Mountain Pipeline certainly minimized the harm flowing from that quantum's contribution to climate change and its potential to create irreversible feedback loops, and from the use of tar sands in particular. Certainly Mr. Ward's ability to use the necessity defense cannot be circumvented by some future action by another person beyond Mr. Ward's control—i.e. an employee or agent re-starting the tar sands pipeline thus negating Mr. Ward's action to stop it.

More importantly, Mr. Ward reasonably anticipated that his act of civil disobedience would lead to governmental action to further curb emissions. At the time of his action, Mr. Ward called on President Obama to use his emergency powers to keep the pipeline non-operational and mobilize the nation for an extraordinary response to climate change. Such an outcome was well within the realm of possibility: President Obama had previously indicated his willingness to shut

town tar sands infrastructure projects with his rejection of the Keystone XL permit. See Suzanne Goldenberg and Dan Roberts, *Obama rejects Keystone XL pipeline and hails US as leader on climate change*, The Guardian (Nov. 6, 2015), <https://www.theguardian.com/environment/2015/nov/06/obama-rejects-keystone-xl-pipeline>.

This nation's history demonstrates the efficacy of civil disobedience. "The courts could easily take judicial notice of the historical fact that movements opposing slavery, supporting women's suffrage, civil rights, and other peace and justice efforts, as well as the actions of people who chose the lesser of two evils, have demonstrated a causal connection between civil disobedience and the evils protestors have sought to overcome." Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury*, 60. At least one court has followed this reasoning: in *Gray*, 571 N.Y.S.2d at 861, the court found that protesters charged with disorderly conduct in obstructing traffic had a reasonable belief that their civil disobedience would lead to the reopening of a pedestrian and bicycle lane. The court criticized judicial application of "an after-the-fact requirement of an immediate relationship . . . [that amounts to] a rule of per se unreasonableness," *id.* at 862., ruling that because the defendants could show that civil disobedience had in the past contributed to changes in municipal transportation policy, they had satisfied this requirement and were entitled to a necessity defense. "In the opinion of this Court, a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success." *Id.*

Put somewhat differently, necessity is not the same as sufficiency. To be effective, civil disobedience need not be the *only* factor leading to a minimization of the harm. As Judge Edmund Spaeth wrote in his concurrence in *Commonwealth v. Father Berrigan*, 472 A.2d 1099, 1115 (Pa. Super. 1984), *rev'd*, 501 A.2d 226 (Pa. 1985), where a Pennsylvania Superior Court found that nuclear-arms protesters had a right to present the defense:

Appellants do not assert that their action would *avoid* nuclear war (what a grandiose and unlikely idea!). Instead, at least so far as I can tell from the record, their belief was that their action, *in combination with* the actions of others, *might accelerate a political process* ultimately leading to the abandonment of nuclear missiles. And *that* belief, I submit, should not be dismissed as "unreasonable as a matter of law." A jury might-or might not-find it unreasonable as a matter of *fact*. But that is for a jury to say, not for a court.

Furthermore, Mr. Ward can draw from his own experience in successfully using civil disobedience to reduce fossil fuel consumption, as he attempted to testify at trial. Trial Tr. 187-

193. Notably, after Mr. Ward used a lobster boat to block coal shipments to a power plant in Massachusetts in 2013, the new owners of the plant announced its closing. *See* Dave Eisenstadter, *Lobster Boat Blockade: Two Activists Stand Trial After Helping Close Down a Coal Plant* (Sep. 5, 2014) <http://www.occupy.com/article/lobster-boat-blockade-two-activists-stand-trial-after-helping-close-down-coal-plant#sthash.hT1OGLp8.dpbs>. Later, Mr. Ward contributed to the Shell No! protests against Arctic drilling, which contributed to Shell Oil's decision to cease operations in the Arctic. *See* Terry Macalister, *Shell Abandons Alaska Arctic Drilling*, *The Guardian* (Sep. 28, 2015), <https://www.theguardian.com/business/2015/sep/28/shell-ceases-alaska-arctic-drilling-exploratory-well-oil-gas-disappoints>. These protests followed the actions of protester Tim DeChristopher, who in 2008 disrupted a Bureau of Land Management auction of oil leases in Utah, leading to popular mobilization that resulted in the ultimate cancellation of the leases. *Bush-era energy drilling leases in Utah canceled*, *NBCNews.com* (Feb. 4 2009), http://www.nbcnews.com/id/29017638/ns/us_news-environment/t/bush-era-energy-drilling-leases-utah-canceled/#.WE8nldIDq0.

Mr. Ward is prepared to testify to the effectiveness of his action. Experts Bill McKibben, Tom Hastings, and Mollie Pepper are likewise prepared to testify regarding the effectiveness of civil disobedience in avoiding or minimizing targeted harms (*see* Exhibits E, F, and H).

G. ONGOING VIOLATIONS OF THE PUBLIC TRUST DOCTRINE AND THE CONSTITUTIONAL RIGHT TO A STABLE CLIMATE SUPPORT THE NECESSITY OF DEFENDANT'S ACTION

In his trial memorandum, Mr. Ward underscored the importance of the public trust doctrine and the constitutional right to a healthy climate. Because these issues are relevant to an analysis of climate change's imminence and the existence of legal alternatives, the Court should take them into account in reconsidering its ruling on the necessity defense.

The public trust doctrine requires sovereigns, like the governments of the United States and Washington, to hold certain natural resources in trust for the people. Washington's state Constitution establishes public ownership of the beds and shores of navigable lakes and rivers and tidal waters, Wash. Const, art. XVII, § 1. The Washington Supreme Court has defended this trust interest, *see, e.g., Eisenbach v. Hatfield*, 26 P. 539 (Wash. 1891); *Wilbour v. Gallagher*, 462 P.2d 232 (Wash. 1969); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) (explicitly recognizing the "public trust doctrine").

Climate change causes significant, ongoing damage to natural entities, including navigable waters, that are protected by the public trust. *See supra* Section D. Governmental failure to prevent such harms thus constitutes an abrogation of public trust duties. In *Foster*, the King County Superior Court ruled that the Washington Department of Ecology has legal obligations under the public trust doctrine to protect at least the state’s navigable waters, which are intertwined with the atmosphere and likewise harmed by global warming. No. 14-2-25295-1, 8 (Super. Ct. Wash., Nov. 19, 2015). In a recent ruling, the court ordered *sua sponte* that

petitioners are granted leave to amend their petition to plead therein a complaint for declaratory judgment or other action regarding their claims that respondent Ecology and/or others are violating their rights to a healthy environment as protected by statute, by Article I, Section 30, Article XVII, Section 1, and Article XVII, Section 1 of the Washington State Constitution and the Public Trust Doctrine embodied therein. The Court takes this action due to the emergent need for coordinated and science based action by the State of Washington to address climate change before efforts to do so are too costly and too late.

No. 14-2-25295-1 SEA, 2 (King Cnty. Sup. Ct. Dec. 19, 2016) (Order Denying Motion for Order of Contempt and Granting Sua Sponte Leave to File Amended Pleading).

The *Foster* ruling followed a decision by Judge Aiken of the federal District Court of Oregon in *Juliana* that likewise acknowledged the public trust implications of climate change. 2016 U.S. Dist. LEXIS 156014 at *40-48. In the same decision, Judge Aiken held that the federal government’s failure to adequately address climate change could amount to a violation of Fifth Amendment due process rights and unenumerated rights under the Ninth Amendment, concluding that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.” *Id.* at *33.

Thus, the rights and duties imposed on Washington by the public trust doctrine shed light on the harms implicated in cases of climate necessity. Climate change is not simply a political dispute, but implicates constitutionally reserved rights. The state and federal governments’ ongoing violation of their public trust duties and of their citizens’ right to a stable climate elevates this case above the realm of speculative or diffuse harms, placing it instead within the realm of public, legally cognizable injuries. Through his actions at the Trans-Mountain Pipeline, Mr. Ward sought to avoid or minimize these injuries.

The public trust and constitutional analyses likewise clarify the legal alternatives inquiry in this case. In light of the systematic and decades-long failure of executives, legislatures, and

courts to defend legally protected interests in a healthy climate, described above, it is unreasonable to assume that recourse to traditional legal methods is an effective way of addressing climate change. Instead, individuals like Mr. Ward must take exceptional action to confront and correct these abuses.

H. CONCLUSION

Mr. Ward must be afforded the opportunity to present the factual basis for his defense of necessity to the serious crimes charged against him. He is prepared to do so by his own testimony as well as the testimony from indisputable qualified experts, at which time the jury may decide whether he has met his burden to prove the justification of his actions. Mr. Ward requests this Court to reconsider the previous denial of his right to a defense and permit evidence, expert testimony, and Washington Pattern Jury Instruction 18.02.

Dated: April 27, 2017

Respectfully submitted,

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