Court of Appeals No. 36506-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

William P. Quigley*
Professor of Law
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
T: 504.710.3074
quigley@loyno.edu

*Admitted to practice in the State of Louisiana

Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This appeal has a simple focus: may a jury see and hear relevant evidence? The trial judge in this case 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. The jury's right to view evidence, and its role as finder of fact — particularly as it relates to affirmative defenses in criminal cases — strikes at the core of constitutional law, public policy, and democracy itself.

Mr. Taylor engaged in civil disobedience to address the global emergency caused by the failure to mitigate 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 emissions will drive the world into a state of uncontrollable heating, and that cascading effects could lead to catastrophe.

Civil disobedience has a long tradition in our country dating back to resistance against British tyranny. The ability of nonviolent civil disobedience to strengthen democratic values and institutions is well established, but that ability is thwarted when courts bar testimony regarding its justification and efficacy.

This Court should reverse the decision of the Superior Court and

reinstate the trial court decision allowing Mr. Taylor's proffered defense.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae, listed in Exhibit A, 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. *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 exercise of civil liberties and political dissent in the state of Washington.

ARGUMENT

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

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

First Amendment jurisprudence has long recognized the public policy interest in the protection of free expression and debate 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). In addition to the pursuit of truth and the fostering of an engaged citizenry, freedom of speech promotes individual autonomy and self-government, both central to American values. Kathryn A. Sabbeth, *Towards an Understanding of Litigation As Expression: Lessons from Guantánamo*, 44 U.C. Davis L. Rev. 1487, 1496-1502 (2011).

Adversarial court 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.

A long history of political movements seeking legal redress for violations of fundamental rights has allowed courts to serve as a parallel pathway for society to understand the nature of the oppression.

> [Public interest] litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of [a] 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.

Lobel, *Courts as Forums* at 480. Enabling 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").

Here, the judicial process complements the political process in exposing unjust fossil fuel development that is projected to send the world into runaway heating. As fact-finding forums in which principled rules of evidence govern 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 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 a bulwark of citizen's liberty in the face of arbitrary governmental power).

This function is sorely needed in today's 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); Lawrence Lessig, Republic, Lost: How Money Corrupts Congress — And a Plan to Stop It (2011). 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 . . . advocacy organizations are the key . . . components of a well-organized climate change counter-movement . . . that has . . . confound[ed] public understanding of climate science [and] 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 69 ("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, "[the right of trial by jury] was so important to early Americans that it was the only procedural right included in the original Constitution. . . . [P]rotection against overbearing . . . judges was one of the main arguments of the proponents of jury trials when the Bill of Rights w[as] enacted.") *Id.* at 69 (internal citation and quotation marks omitted).

> [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.

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

The necessity defense puts these guiding values into action by allowing the jury to interpret a defendant's actions in the political, scientific, and moral context in which they took place, *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) — and to act as the "conscience of the community," John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. Rev. 111, 112 (2007). Hearing Mr. Taylor's climate necessity defense, jurors would receive evidence of climate disruption that they can translate to their own lives and property.

Real-life climate protest cases featuring necessity defenses have shown the civic and democratic value of such defenses. In 2008, an English judge found that six activists had averted more property damage than they had caused in a protest against coal-fired power plants, and former Vice President Al Gore used the occasion to urge the public to take similar action. Jonathan Mingle, *Climate-Change Defense, The* (Dec. 12, 2008), N.Y. Times Magazine, http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-A-t-004.html. Similarly, earlier this year an English jury decided that climate activists' spray-painting of a building was a proportionate response to the climate emergency. Sandra Laville, *Extinction Rebellion Founder Cleared Over King's College Protest* (May 9, 2019), The Guardian, https://www.theguardian.com/environment/2019/may/09/extinction-rebellion-founder-cleared-over-kings-college-protest.

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

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

The public interest in the full airing of arguments from both sides is particularly important in criminal prosecutions, in which the defendant's liberty is at stake. And yet 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); Washington Courts, *Superior Court Annual Caseload Reports*, Criminal Tables, 2018, https://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=s&freq=a&tab=criminal (showing that over 97 percent of criminal cases in Spokane County ended without trial in 2018, of which

nearly two-thirds ended in guilty pleas). In our criminal legal system, prosecutors have largely supplanted both judges and juries.

Even when defendants proceed to trial, 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. In most cases, defendants exercise lesser influence over the arguments and overall trial narrative, and the necessity defense is among the few tools available to expose abuses of political power. *See* Bauer & Eckerstrom at 1176 (differentiating the necessity defense from other strategies and noting that it provides a "structure for publicizing and debating political issues in the judicial forum").

The ability of the necessity defense to act as a corrective against abuses of power is especially important when political activists face harassment or retaliation by those whose policies they oppose, as has been the case for climate protesters in recent years. *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/; Susie Cagle, *"Protesters as Terrorists": Growing Number of States Turn Anti-Pipeline Activism Into a Crime*, The Guardian (July 8, 2019), https://www.theguardian.com/environment/2019/jul/08/wave-of-

new-laws-aim-to-stifle-anti-pipeline-protests-activists-say.

In the last several decades, courts have reinterpreted aspects of the criminal legal process as violations of defendants' rights. *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 this evolving context, courts are called upon to remain vigilant in safeguarding the system's protections. The treatment by courts of defendants such as Mr. Taylor has consequences for all criminal defendants and for the vitality of the justice movements that have improved our legal system as well as society at large.

II. THE NECESSITY DEFENSE IS APPROPRIATE IN CASES OF CIVIL DISOBEDIENCE, INCLUDING CLIMATE PROTEST.

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 . . . increased public attention to issues of social justice by appealing to a higher principle than the law being violated . . . .” Quigley at 17.

Civil disobedience and other forms of protest are widely recognized as a “legitimate part of democratic society,” Article 19, *The Right to Protest Principles: Background Paper* at 4 (2016), https://www.article19.org/data/files/medialibrary/38581/Protest-Background-paper-Final-April-2016.pdf, and nonviolent civil disobedience is more effective than violence in bringing about significant political change, 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). 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. While in many instances such defendants have won acquittal, this has not always been the case, demonstrating jurors' capacity to judge the facts in each instance *Id.* at 71. An individual who presented a climate necessity defense in Skagit County was convicted earlier this year. *See* Skagit County Superior Court case no. 17-1-01148-6.

Just adjudication of political protest cases, including civil disobedience cases, requires bearing in mind the public interest, whether the conduct was expressive in nature, whether or not the protest included violent acts, the extent of damage or harm caused, and whether the protest sought societal improvement rather than personal gain. *See* Article 19, *The Right to Protest Principles* at 21-22. The necessity defense provides a ready-made structure for integrating these considerations while properly tasking the jury with the ultimate determination of a defendant's guilt.

B. The Doctrinal Argument for the Necessity Defense in Climate Civil Disobedience Cases is Strong.

When supported with evidence, necessity defenses by climate protesters are doctrinally appropriate. Harms from climate change — rising seas, flooding, wildfires, droughts, and crop losses, to name a few — are more severe, pervasive, and irreversible than many of the harms targeted by political protesters in successful necessity defense cases. *See* Quigley at 27-37; *supra* at Part IIA. A 2012 report commissioned by 20 governments found that climate change was "already a significant cost to the world economy," and that "inaction on climate change" was a "leading global cause of death." Dara International, *Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet* 16 (2012), https://daraint.org/wp-content/uploads/2012/10/CVM2-Low.pdf.

Over 11,000 scientists recently issued a stark warning to the world's political leaders, urging the replacement of fossil fuels. Emma Tobin & Ivana Kottasova, *11,000 Scientists Warn of "Untold Suffering" Caused by Climate Change*, CNN (Nov. 5, 2019), https://www.cnn.com/2019/11/05/world/climate-emergency-scientists-warning-intl-trnd/index.html. Leading climate scientist James Hansen has warned that rapid reduction of carbon emissions is "urgently needed" to avoid "profound and mounting risks of ecological, economic and social collapse," Decl. Dr.

James E. Hansen Supp. Pls.' Compl. Declaratory and Injunctive Relief at 3, *Juliana v. U.S.*, 217 F.Supp.3d 1224 (2016).

As carbon emissions continue to rise, the world's political leaders have not risen to the occasion. *See, e.g.*, Tobin & Kottasova, *11,000 Scientists* (quoting scientists' report in stating that, "[d]espite 40 years of global climate negotiations . . . [policymakers] have generally conducted business as usual and have largely failed to address this predicament"). Through misinformation campaigns, lobbying, and other activities, the fossil fuel industry has gained purchase over government decisions so as to protect and expand fossil fuel production. *See* Kathy Mulvey et. al., *The Climate Deception Dossiers*, Union of Concerned Scientists (July 2015), https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf. Hawaii Senator Brian Schatz recently admitted that the industry has "structural control" of Congress. Justin Mikulka, *Senate Hearing Calls out the Influence of Dark Money in Blocking Climate Action*, DeSmog Blog (Oct. 29, 2019), https://www.desmogblog.com/2019/10/29/dark-money-climate-senate-hearing-whitehouse.

Particularly since the necessity defense is meant to be adapted pragmatically to any circumstance "where injustice would result from a too literal reading of the law," Quigley at 6, there are compelling reasons to allow it in climate protest cases. *See generally* Lance N. Long & Ted

Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases,* 38 Stan. Envtl. L.J. 57 (2018) (describing the doctrinal strength of typical climate necessity cases).

C. Evidentiary Rules Favor Defendants' Presentation of Arguments and Defenses When Admissibility is Ambiguous.

Both Washington and federal courts employ a presumption in favor of the liberal allowance of evidence. Relevant evidence is generally admissible. *See* Wash. ER 402; 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"), and the test for relevancy is a low bar, *see* Wash. ER 401 (defining as relevant evidence that has "*any* tendency" to make a fact "more . . . or less probable than it would be without the evidence") (emphasis added). *Accord State v. Darden*, 41 P.3d 1189, 1194 (Wash. 2002) ("The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible."); *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).

The standard of proof for presenting an affirmative defense at trial *prior to submission of a jury instruction* is also a low bar. Although the

defendant bears the burden of proof, she need only offer a prima facie case on each element of the defense. *State v. Adams*, 198 P.3d 1057, 1060 (Wash. App. 2009) (holding that defendant may raise primary caregiver affirmative defense under Medical Marijuana Act); *State v. Brown*, 269 P.3d 359, 361 (Wash. App. 2012) (holding that defendant may raise medical marijuana affirmative defense). *See also U.S. v. Bailey*, 444 U.S. 394, 414-16 (1980) (noting that defendant must make a "threshold showing" that is "[sufficient] to sustain" the defense "if believed"). Courts in other jurisdictions have echoed this analysis. *See, e.g.*, *U.S. v. Brodhead*, 714 F. Supp. 593, 596 (D. Mass. 1989) (warning, in a case involving justification and international law defenses, that pretrial exclusion of a defendant's affirmative defense via a motion *in limine* is warranted only when there is "no supporting evidence at all").

Courts' evaluation of pretrial necessity defense proffers in protest cases has not always accorded with these evidentiary rules. Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, 89 (1989) (noting the "disjunction" between the low standard articulated in "hypothetical evidentiary tests" versus the "extraordinarily high standard" imposed in practice). Here, the Superior Court appears to have made a similar error in contravention of the tests summarized above — tests that Mr. Taylor's evidence more than satisfies.

III. PRETRIAL EXCLUSION OF PROFFERED DEFENSES IN CRIMINAL CASES TRIGGERS HEIGHTENED CONSTITUTIONAL SCRUTINY.

Courts discussing pretrial exclusion of defenses typically focus on motions *in limine*, since such motions are the usual procedural method for barring evidence prior to trial. However, any effort by a prosecutor to exclude a defense wholesale in a criminal case deserves heightened constitutional scrutiny. The *Brodhead* court summarized these concerns:

> The motion *in limine* originated with attempts to [bar] prejudicial evidence from . . . civil litigation. The general approach . . . was that the motion *in limine* should be used, if used at all, as a rifle and not as a shotgun, [singling] out the objectionable material . . . .
>
> During the 1960's, however, use of the motion *in limine* expanded to become a prosecutorial tool for excluding evidence perceived to be irrelevant or prejudicial to the government's case. . . . Prosecutors have begun to test the outer limits of judicial receptivity by using the motion to exclude entire defenses . . . .
>
> Many of the concerns voiced about the . . . motion *in limine* touch upon the role of the jury in our judicial system. An accused is to be judged by her peers and the lens through which . . . the jury view[s] [her] should be neither overly focused nor distorted by a trial judge.

714 F. Supp. at 595-96 (internal citations and quotation marks omitted).[1]

[1] Scholars have voiced similar concerns. *See, e.g.*, Douglas Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan. L. Rev. 1271, 1274 (1987) ("[T]he motion in limine represents a direct attack on the accused's right to trial by jury. The motion in limine to exclude an entire defense first appeared just after juries had acquitted civil rights protestors, anti-war demonstrators, and black liberation activists in several highly publicized

The Washington Supreme Court has recognized these dangers. In *State v. Ellis*, the Court reversed the pretrial denial of a defendant's diminished capacity defense on the grounds that, once the minimum requirements of admissibility had been met, it was the province of the jury as trier of fact to determine what weight to give to the evidence. 136 Wn. 2d 498, 521-22 (Wash. 1998). Particularly since the state intended in that case to request the death penalty, the Court noted, it was error to exclude the defendant's entire proffered defense via a motion *in limine*. *Id.*

Courts in other jurisdictions have also sounded notes of caution, *see, e.g.*, *State v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979) (noting that "use [of the motion *in limine*] should be strictly limited" to excluding evidence that is both irrelevant and prejudicial), including in cases featuring affirmative defenses, *see, e.g.*, *People v. Brumfield*, 390 N.E.2d 589, 593 (Ill. App. 1979) (motion *in limine* should be used with restraint, particularly in criminal cases), and necessity defenses, *see, e.g.*, *Commonwealth v. O'Malley*, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982) ("In the usual case . . . it is far more prudent for the judge to follow the

---

trials in the late 1960s and early 1970s. . . . [T]he recent trend in the expansive use of the motion in limine is an attempt by the government to avoid sustaining similar legal defeats, which would . . . cripple its ability to formulate and implement controversial policies. . . . [T]he government thus seeks to prevent the courtroom from operating . . . as a popular referendum on government policies."); Quigley, *The Necessity Defense* 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.").

traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense.").[2] In *Commonwealth v. Hood*, 452 N.E.2d 188, 197 n.5 (Mass. 1983), the Massachusetts Supreme Judicial Court stated:

> [O]rdinarily a judge should not allow a motion which serves to exclude, in advance of its being offered, potential evidence of the defense. Since a judge is required to instruct on any hypothesis supported by the evidence, in most instances proffer of disputed matter at trial, ruled upon in the usual course, is more likely to be fair and result in correct rulings.

Here, the State's pretrial appeal sought indiscriminate exclusion of the entirety of Mr. Taylor's proffered defense, where such evidence would otherwise be presented to a jury. The policies defended by the State — the continued operation of coal and oil extraction and transport — are highly controversial. Particularly since the necessity defense is Mr. Taylor's primary strategy and theory of the case, it should not be done away with by pre-trial motion before the evidence has been tested.

CONCLUSION

Mr. Taylor accepted serious legal risks for the sake of catalyzing action on a public policy problem of outsized proportions and thereby to

[2] A motion *in limine* "must not be used to choke off a valid defense . . . or to 'knock out' the entirety of the evidence supporting a defense before it can be heard by the jury. Likewise, neither counsel nor the judge should permit a criminal trial by jury to be converted into a trial by motion, with the possible effect of directing a verdict against the defendant." *O'Malley*, 439 N.E.2d at 838.

preserve the possibility of an Earth habitable for future generations. He now seeks to explain and justify his actions to a jury of his peers. Mr. Taylor stands in the shoes of the American freedom fighters, the abolitionists, the suffragettes, and the civil rights campaigners of the 1960s. The use of the necessity defense in this case is not only doctrinally appropriate but strengthens the foundations on which our legal system rests — including the right to trial by jury, freedom of expression, and a natural environment capable of providing for human needs.

The undersigned *amici curiae* respectfully request that this Court reinstate the trial court decision allowing Mr. Taylor's proffered defense.

Respectfully submitted this 14th day of January, 2020,

/s/ William P. Quigley_____
William P. Quigley*
Professor of Law
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
504.710.3074
quigley@loyno.edu

*Admitted to practice in the State of Louisiana

/s/ Alice Meta M. Cherry___
Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served a copy of this amicus brief on counsel for the State of Washington via the electronic filing system, and by email at the address shown below:

Stephanie J. Richards
Deputy Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
County City Public Safety Building
1100 W. Mallon
Spokane, WA 99260
scpaappeals@spokanecounty.org

Dated: January 14, 2020

/s/ Alice Meta M. Cherry
Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

EXHIBIT A

List of amici curiae

Court of Appeals No. 36506-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

LIST OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

PROFESSOR AMICI

(The undersigned individuals have signed in their individual capacity and not as representative of their law schools. Institutional affiliations are listed for identification purposes only.)

Nadia Ahmad
Assistant Professor of Law
Barry University School of Law

Deborah Ahrens
Associate Professor
Seattle University School of Law

Amna Akbar
Associate Professor
The Ohio State University Moritz College of Law

Jessie Allen
Associate Professor
University of Pittsburgh School of Law

Angela Allen-Bell
Associate Professor & Director, Louis A. Berry Institute for Civil Rights and Justice
Southern University Law Center

Fran Ansley
Distinguished Professor of Law Emeritus
University of Tennessee College of Law

Stephen Arons
Professor Emeritus of Legal Studies
University of Massachusetts, Amherst

Frank Askin
Professor Emeritus
Rutgers Law School

Charles I. Auffant
Clinical Professor of Law
Rutgers Law School

Margaret Barry
Visiting Professor
American University Washington College of Law

Steven W. Bender
Professor of Law
Seattle University School of Law

Emily Benfer
Visiting Associate Clinical Professor of Law
Columbia Law School

Judith Berkan
Adjunct Professor, Civil Rights Clinic
Interamerican University School of Law

Ira Bloom
Professor of Law
Albany Law School

Eric Blumenson
Research Professor of Law
Suffolk University Law School

Mark Brodin
Professor of Law
Boston College Law School

William Brooks
Professor of Law
Touro Law Center

Eduardo R.C. Capulong
Professor of Law
CUNY School of Law

Leonard Cavise
Professor of Law Emeritus
DePaul College of Law

Faisal Chaudhry
Assistant Professor of Law & History
University of Dayton

Marjorie Cohn
Professor Emerita
Thomas Jefferson School of Law

Kim Diana Connolly
Professor of Law and Director,
Environmental Advocacy Clinic
University of Buffalo School of Law

Jessie A. Cook
Adjunct Professor
Indiana University Maurer School of Law

Benjamin G. Davis
Professor of Law
University of Toledo College of Law

Frank Edmund Deale
Professor of Law
CUNY School of Law

Charles R. DiSalvo
Woodrow A. Potesta Professor of Law
West Virginia University

Ciji Dodds
Assistant Professor
Albany Law School

Tim Duane
Professor-in-Residence
University of San Diego School of Law

Olympia Duhart
Professor of Law
Nova Southeastern University

Eric Bennett Easton
Professor of Law Emeritus
University of Baltimore School of Law

Frank Emmert
John S. Grimes Professor of Law and
Director, Center for International and
Comparative Law
Indiana University Robert H. McKinney
School of Law

Kathleen Engel
Research Professor of Law
Suffolk University Law School

Jules Epstein
Professor of Law and Director of
Advocacy Programs
Temple Beasley School of Law

Susan Jane Feathers
Assistant Dean
Rutgers Law School

Davida Finger
Clinic Professor
Loyola University New Orleans College of Law

Sally Frank
Professor of Law
Drake University

Katherine Franke
James L. Dohr Professor of Law
Columbia Law School

Alexi Freeman
Associate Professor of the Practice
University of Denver Sturm College of Law

Brian Glick
Clinical Associate Professor
Fordham Law School

Nicole B. Godfrey
Visiting Assistant Professor
University of Denver Sturm College of Law

Anne B. Goldstein
Professor of Law
Western New England University School of Law

Carmen G. Gonzalez
Professor of Law
Seattle University School of Law

James M. Grijalva
Friedman Professor of Law
University of North Dakota School of Law

Catherine M. Grosso
Professor of Law
Michigan State University College of Law

Peter Halewood
Professor of Law
Ryerson University

Angela P. Harris
Professor Emerita
University of California, Davis School of Law

Philip Harvey
Professor of Law and Economics
Rutgers Law School

Renee Camille Hatcher
Assistant Professor
Director, Community Enterprise and Solidarity Economy Clinic
UIC John Marshall Law School

Julia Hernandez
Assistant Professor of Law
CUNY School of Law

Helen Hershkoff
Herbert M. & Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
New York University School of Law

Kathy Hessler
Clinical Professor of Law
Lewis & Clark Law School

Sara Hildebrand
Clinical Fellow
University of Denver Sturm College of Law

Bill Hing
Professor of Law
University of San Francisco

Aila Hoss
Visiting Assistant Professor
Indiana University McKinney School of Law

Elizabeth Iglesias
Professor of Law
University of Miami School of Law

Tarek Ismail
Associate Professor
CUNY School of Law

Ulysses Jaen
Law Library Director and Assistant Professor
Ave Maria School of Law

Danielle C. Jefferis
Teaching Fellow
University of Denver Sturm College of Law

Joshua Aaron Jones
Visiting Assistant Clinical Professor
Indiana University Robert H. McKinney School of Law

Peter A. Joy
Professor of Law
Washington University in St. Louis
School of Law

Rob Kahn
Professor of Law
St. Thomas University Law School

Helen H. Kang
Professor of Law
Golden Gate University School of Law

Mehmet K. Konar-Steenberg
Professor of Law
Mitchell Hamline School of Law

Douglas Kysar
Deputy Dean and Joseph M. Field '55
Professor of Law
Yale Law School

Christopher N. Lasch
Professor of Law
University of Denver Sturm College of
Law

Jules Lobel
Professor of Law
University of Pittsburgh Law School

Stephen Loffredo
Professor of Law
CUNY School of Law

Lance N. Long
Professor of Law
Stetson University College of Law

Gerald P. Lopez
Professor of Law
UCLA School of Law

Mary A. Lynch
Kate Stoneman Professor in Law and
Democracy
Albany Law School

Beth Lyon
Clinical Professor of Law
Cornell Law School

Mari Matsuda
Professor of Law
University of Hawaii at Manoa

Martha T. McCluskey
Senior Research Scholar and Professor
Emerita of Law
University at Buffalo, State University
of New York

M. Isabel Medina
Ferris Family Distinguished Professor of
Law
Loyola University New Orleans College
of Law

Saul Mendlovitz
Professor Emeritus
Rutgers Law School

Kathryn L. Mercer
Professor
Case Western Reserve University School
of Law

Carlin Meyer
Professor Emeritus
New York Law School

Joel A. Mintz
Professor of Law Emeritus
Nova Southeastern University College of
Law

William Mock
Professor of Law
UIC John Marshall Law School

Gregory Munro
Professor Emeritus
University of Montana Blewett School of Law

Yxta Murray
Professor of Law
Loyola Law School

Chrystin Ondersma
Professor of Law
Rutgers Law School

Nancy Ota
Professor of Law Emerita
Albany Law School

Talia Peleg
Associate Professor of Law
CUNY School of Law

Zygmunt Plater
Professor of Law
Boston College Law School

Ellen S. Podgor
Professor of Law
Stetson University College of Law

James Gray Pope
Distinguished Professor of Law
Rutgers Law School

David Pratt
Jay and Ruth Caplan Distinguished Professor of Law
Albany Law School

Ora Prochovnick
Professor and Director of Clinical and Public Interest Law Programs
John F. Kennedy University College of Law

Fran Quigley
Clinical Professor
Indiana University McKinney School of Law

William P. Quigley
Professor of Law
Loyola University New Orleans College of Law

Alan Ramo
Professor Emeritus
Golden Gate University School of Law

Sara Rankin
Associate Professor of Law
Seattle University School of Law

James D. Redwood
Professor of Law
Albany Law School

Alison Rieser
Professor Emerita
University of Maine School of Law

Allie Robbins
Associate Professor of Law
CUNY School of Law

Anna Roberts
Professor of Law
St. John's University School of Law

Sarah Rogerson
Professor of Law
Albany Law School

Florence Wagman Roisman
William F. Harvey Professor of Law and Chancellor's Professor
Indiana University Robert H. McKinney School of Law

Daria Roithmayr
Professor of Law
University of Southern California Gould School of Law

Michael Rooke-Ley
Professor of Law Emeritus
Nova Southeastern School of Law

Laura Rovner
Professor of Law and Director, Civil Rights Clinic
University of Denver Sturm College of Law

Natsu Taylor Saito
Professor of Law
Georgia State University College of Law

Atieno Mboya Samandari
Adjunct Professor
Emory Law School

Amanda Schemkes
Visiting Assistant Professor of Lawyering Skills
Seattle University School of Law

Alex Seita
Professor of Law
Albany Law School

Anita Sinha
Associate Professor of Law and Director, International Human Rights Law Clinic
American University Washington College of Law

William Snape
Professor and Assistant Dean
American University Washington College of Law

Karen C. Sokol
Associate Professor of Law
Loyola University New Orleans College of Law

Amy H. Soled
Assistant Clinical Professor at Law
Rutgers Law School

Robin Walker Sterling
Associate Professor
University of Denver Sturm College of Law

Rebecca K. Stewart
Associate Professor of Law
Thurgood Marshall School of Law

Jeffrey Thaler
Visiting Associate Professor
University of Maine School of Law

Julia Vazquez
Associate Clinical Professor of Law
Southwestern Law School

Penny Venetis
Clinical Professor of Law, Judge Dickinson R. Debevoise Scholar, and Director of Human Rights Clinic
Rutgers Law School

Robert R.M. Verchick
Professor of Law and Gauthier-St. Martin Chair in Environmental Law
Loyola University New Orleans

Jessica West
Assistant Dean of Academic Success Programs
University of Washington School of Law

John Whitlow
Associate Professor of Law
CUNY School of Law

Mary Christina Wood
Philip H. Knight Professor
University of Oregon School of Law

William J. Woodward, Jr.
Professor of Law Emeritus
Temple University

Ellen Yaroshefsky
Professor of Legal Ethics
Maurice A. Deane School of Law
Hofstra University

Mary Marsh Zulack
Clinical Professor of Law
Columbia University School of Law