No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Ex Rel. LAWRENCE H. HASKELL,

Respondents,

v.

SPOKANE COUNTY DISTRICT COURT, JUDGE DEBRA R. HAYES,
Defendants.

GEORGE E. TAYLOR,
Petitioner.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, THE CIVIL LIBERTIES DEFENSE CENTER AND THE SEATTLE CHAPTER OF THE NATIONAL LAWYERS GUILD

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A. IDENTITY AND INTEREST OF AMICI CURIAE

As explained in the accompanying Motion, the American Civil Liberties Union of Washington, the Civil Liberties Defense Center and the Seattle Chapter of the National Lawyers Guild are deeply concerned about the precedential effect of the majority opinion in *State ex rel. Haskell v. Spokane County Dist. Court*, 13 Wn. App. 2d 573, 465 P.3d 343, *rev. granted* 196 Wn.2d 1016 (2020). All three organizations have extensive current and historical experience representing political protesters in Washington State and around the country. Some of amici's clients engage in activities that are viewed as illegal by the police, and thus may lead to their arrest. In this context, amici's client's often raise the necessity defense. In this brief, amici place the *Haskell* case into a broader context and ask this Court to reverse the decision of the Court of Appeals.

B. ISSUES OF CONCERN TO AMICI CURIAE

1. Civil disobedience has deep roots in American history as an accepted tool to achieve lasting change. How will the *Haskell* majority interfere with protesters engaging in civil disobedience in the future?

2. What is the historic context for the use of the necessity defense both in Washington State and around the country?

C. STATEMENT OF FACTS

Amici join in the statement of the case put forth by the petitioner at pages 3 to 7 of the *Supplemental Brief of Petitioner*.

D. ARGUMENT

1. The Necessity Defense Must Be Available to Individuals Who Engage in Civil Disobedience

Civil disobedience is an integral thread in the fabric of American democracy. Non-violent protest to address systemic problems has a long history of moral approval in our society, even if the police or prosecutors consider the actions to be violations of the law. A judicial determination that protesters who engage in civil disobedience cannot present the necessity defense[1] undermines the history of validating civil disobedience as an appropriate means of challenging an entrenched status quo. Moreover, barring a broad class of defendants from presenting their chosen defense unreasonably deprives them of their due process rights and negates the balance of power that permits a jury of peers to be the factfinder in our legal

[1] This Court has recognized the common law defense of necessity to a charge if (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed. *State v. Vander Houwen*, 163 Wn.2d 25, 32, 177 P.3d 93 (2008); WPIC 18.02.

system. The standard adopted by the Court of Appeals is an unworkable rule, not in accord with past precedent and Washington's common law.

a. ***Civil disobedience is a historically sanctioned means of opposing unjust laws and policies***

Civil disobedience has shaped American law, policy, and public opinion in meaningful ways throughout our history. "We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protesters' views has on occasion served to change and better our society." *United States v. Kabat*, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J. dissenting).

The American Revolution was fueled by acts of civil disobedience, from the Boston Tea Party in 1773 (the illegal boarding of ships in Boston Harbor where colonists threw 342 chests of tea into the water to protest the Crown's tax on tea) to the signing of the Declaration of Independence itself. *See* W. Quigley, "The Necessity Defense in Civil Disobedience Cases: Bring in the Jury," 38 *New Eng. L. Rev*. 3, 20-21 (2003); Note, "The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience," 39 *Stan. L. Rev*. 1173, 1175-76 (1987). During the early to mid-nineteenth century, the Underground Railroad operated to enable enslaved African

Americans to escape into free states and Canada. The scheme was assisted by abolitionists and other sympathetic individuals in violation of the Fugitive Slave Act. *See* W. Quigley, 38 *New Eng. L. Rev*. at 21 & n.66; *Haskell*, 13 Wn. App. 2d at 621 (Fearing, J., dissenting).

Other examples of civil disobedience abound that, with the benefit of historical perspective, are widely seen to have contributed to ending unjust governmental policies and constitutional or statutory provisions, including routine labor picketing or strikes until the 1930s,[2] and the 1917 arrests of suffragettes for picketing the White House.[3]

The civil rights movement is a particularly pertinent contemporary example. Protesters employed sit-ins and other acts of civil disobedience to protest systemic discriminatory practices in public accommodations.[4] As a

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[2] Until the adoption of statutes such as the Wagner Act of 1935 (49 Stat. 449), many jurisdictions, including Washington State, banned routine labor picketing which was seen as an illegal restraint of trade. *See, e.g., Dorchy v. Kansas*, 272 U.S. 306, 47 S. Ct. 86, 71 L. Ed. 248 (1926) (upholding conviction of union official for calling a strike); *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069 (1905) (upholding injunction against labor picketing).

[3] *See* T. McArdle, "'Night of terror': The suffragists who were beaten and tortured for seeking the vote," *Washington Post*, Nov. 10, 2017 (https://www.washingtonpost.com/news/retropolis/wp/2017/11/10/night-of-terror-the-suffragists-who-were-beaten-and-tortured-for-seeking-the-vote/) (accessed 12/27/20).

[4] *See, e.g., Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963) (reversal for sit-in at a white's-only lunch counter to protest segregated service at restaurants); *Hamm v. Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964) (vacating trespass charges for sit-ins protesting policy of not serving Black people).

result, the government pursued over 3,000 prosecutions for criminal trespass and other related offenses. J. Cohan, "Civil Disobedience and the Necessity Defense," 6 *Pierce L. Rev*. 111, 115-16 (2007). Despite the enormity of challenge in confronting institutional racism, and the fact that such actions were pursued outside of traditional legal channels, these acts of civil disobedience generated significant public pressure on legislators and society to change the status quo. Most importantly, these actions succeeded in hastening the passage of the Civil Rights Act of 1964 (Pub.L. 88–352, 78 Stat. 241). *Id*.

Today, civil disobedience remains a vital tool in confronting some of our greatest ongoing systemic and societal challenges. Public discourse and legislative debates around catastrophic climate change, institutional racism, policing, and other social issues are all impacted by protesters who engage in civil disobedience. Given the central role of civil disobedience as a legitimate and historically sanctioned mode of confronting the unjust application of laws towards the powerless, this Court should remain suspect of any attempt to limit the due process rights of protesters who engage in these activities.

b. *Determining as a matter of law that the necessity defense cannot apply to individuals who engage in civil disobedience fails to recognize the complexity and questions of fact inherent in cases of civil disobedience*

In holding that Rev. Taylor was not entitled to present a necessity defense to the jury, the Court of Appeals found that "[t]he necessity defense does not apply to persons who engage in civil disobedience by intentionally violating constitutional laws. This is because such persons knowingly place themselves in conflict with the law and, if the law is constitutional, courts should not countenance this. There are always reasonable legal alternatives to disobeying constitutional laws." *Haskell*, 13 Wn. App. 2d at 585-8. The Court of Appeals has introduced an unreasonable bar to the presentation of evidence that fails to recognize the complexity and questions of fact inherent in a necessity defense for civil disobedience.

i. **Whether reasonable legal alternatives are available is a fact-intensive question that cannot be answered in the absolute**

Determining as a matter of law that there are always reasonable legal alternatives to disobeying constitutional laws is a sweeping judicial finding that takes away the role of the jury as factfinder. Assuming that such alternatives are always available not only negates the explicit reasonableness

requirement, but also overlooks the practical and highly fact-based complexities of determining whether effective legal alternatives are available in the diverse circumstances in which these cases arise.

In effect, the court is "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." *People v. Gray*, 150 Misc. 2d 852, 866, 571 N.Y.S.2d 851, 860-61 (Crim. Ct. 1991). Such a finding sets the bar to present evidence of necessity to a jury far too high and nullifies the defense for protesters who engage in civil disobedience.[5]

In fact, the plain wording of the "no reasonable legal alternatives existed" requirement demonstrates that alternatives must be more than simply available. *See State v. Vander Houwen*, 163 Wn.2d 25, 32, 177 P.3d 93 (2008) (adopting "no reasonable legal alternatives existed" as one of the four

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[5] *See State v. Darden* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) ("The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible."); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) ("When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.").

elements of the defense of necessity). An alternative is, by definition, available, but the inclusion of "reasonable" implies that such alternatives must be more than just available, and in fact must be effective. Note, 39 *Stan. L. Rev*. at 179-80 (1987). The Court of Appeals' standard bars this necessary fact-based reasonableness assessment in all cases of civil disobedience.

An assessment of what is reasonable must consider the individual circumstances of each case. Instead, the Court of Appeals' standard assumes that legal alternatives, such as persuading elected officials, are uniformly available to all concerned citizens. While this may reflect our best democratic ideals, it unfortunately does not reflect political reality. As Judge Fearing observed below, "[a]ll candidates and office holders, regardless of party affiliation, will meet with and listen to large donors, not pensioner military veterans or retired ministers lacking a largesse. Money buys access to power." *Haskell*, 13 Wn. App. 2d at 617 ((J. Fearing, dissenting).

Evaluation of legal alternatives will always be intensely fact-based and variable in each case. These questions are appropriately resolved by a jury, not by a court in the absolute.

ii. Laws may be constitutional but nonetheless unjust

The Court of Appeals' focus on constitutional laws[6] is misplaced. This Court has stated that statutes enjoy an ongoing presumption of constitutionality until a party proves their unconstitutionality beyond a reasonable doubt. *Island Cty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). In other words, a law is constitutional until it is adjudicated otherwise. A law violated through civil disobedience will always, by definition, be a constitutional law.

Barring a protester from raising a claim of necessity because they violated a presumptively constitutional law is counter to the fundamental purpose of the necessity defense. The necessity defense is meant to sanction justified but nonetheless illegal acts. *See* Note, 39 *Stan. L. Rev*. at 1173-74. Excluding a necessity defense on the grounds that a constitutional law was broken effectively entrenches the status quo and short-circuits efforts to demonstrate the risks of a given law or policy.

Many laws may be constitutional but nonetheless unjust. Many of the underlying violations of law in the civil rights movement were of

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[6] *See Haskell*, 13 Wn. App. 2d at 584-88.

indisputably constitutional laws (e.g. trespass, permit violations). As Martin Luther King, Jr. observed from his jail cell in Birmingham:

> I was arrested Friday on a charge of parading without a permit. Now there is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation and to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it becomes unjust.

Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963).[7] Dr. King's violation of an otherwise constitutional permit requirement would bar him from raising a necessity defense under the Court of Appeals' standard.

Moreover, it is often the very acts of civil disobedience that the Court of Appeals below diminishes that are instrumental in bringing about the adjudication of once constitutional laws and policies as unconstitutional.[8] Under the Court of Appeals' formulation, the people involved in these historically sanctioned acts would be unable to raise a defense of necessity in a Washington court.

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[7] Https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (accessed 12/26/20).

[8] *See, e.g., Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (challenging a conviction under Virginia's antimiscegenation laws after marrying in the District of Columbia and returning to their home in Virginia).

iii. Washington's necessity defense does not distinguish between "direct" and "indirect" civil disobedience

The *Haskell* majority heavily relied on the Ninth Circuit case *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991), which itself was relied on by the Montana Supreme Court in *State v. Higgins*, 399 Mont. 148, 458 P.3d 1036 (2020).[9] *Schoon* was a case where protesters against U.S. policy in El Salvador chanted slogans in an IRS office which disrupted the operation of the office. *Schoon*, 971 F.2d at 195. In upholding the convictions, the Ninth Circuit rejected the use of a necessity defense while creating a line of demarcation, not argued by the parties in that case, between "direct" and "indirect" civil disobedience. In the court's view, "direct" civil disobedience is protest against the very existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow. "Indirect" civil disobedience, again per that opinion, involves violating a law or interfering with a government policy that is not, itself, the object of protest. *Id*. at 196.[10]

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[9] *See Haskell*, 13 Wn. App. 2d at 584-86. *See also Supplemental Brief of Respondent* at 6,10.

[10] Interestingly, the Ninth Circuit's analysis would support the giving of the necessity instruction in Rev. Taylor's case because he sought to block trains dangerously carrying oil and coal from entering his city. *See Schoon*, 971 F.2d at 196 (if city passed

(continued...)

There is simply no support for the Ninth Circuit's distinction between "direct" and "indirect" civil disobedience in Washington law. WPIC 18.02 sets out the common law test in Washington that focuses on the *defendant's* reasonable belief that the commission of the crime was necessary to avoid or minimize a harm and the determination by the jury that no reasonable legal alternative existed.[11] Our law does not include a "direct" versus "indirect" component.

Functionally, most acts of civil disobedience are "indirect" because there is no realistic way to challenge directly the law or practice which is the target of civil disobedience. As noted above, there are many examples of indirect civil disobedience that contributed to ending unjust governmental policies and constitutional or statutory provisions, such as the Boston Tea Party or the suffragettes who were arrested picketing the White House. *See supra* at 4. Even those arrested at lunch counters in the South were often arrested for trespassing-type crimes rather than being convicted of a direct

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[10](...continued)
law "requiring immediate infusion of a suspected carcinogen into the drinking water," and protesters who physically blocked its delivery would be engaged in "direct" civil disobedience).

[11] WPIC 18.02 has its origins in a Court of Appeals' decision, *State v. Diana*, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979), which this Court has cited with approval. *State v. Aver*, 109 Wn.2d 303, 311, 745 P.2d 479 (1987).

violations of laws that banned Black patrons from "white-only" restaurants.[12] Under the Ninth Circuit's mistaken analysis in *Schoon*, those sitting-in in the 1960s in the South would have been denied the necessity defense due to the "indirect" nature of their civil disobedience. This Court should reject the distinction between so-called "direct" and "indirect" civil disobedience as untenable and inconsistent with the purposes of the necessity defense.[13]

iv. Juries are particularly appropriate for evaluating claims of necessity based on civil disobedience

Questions of necessity related to civil disobedience are particularly appropriate for evaluation by a jury sitting as the conscience of the community. *See* Note, 39 *Stan. L. Rev*. at 1186. The function of the constitutional right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 21 and 22 of the Washington Constitution is to protect those accused of crimes from

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[12] See, e.g., *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963); *Hamm v. Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964).

[13] Even assuming a direct/indirect action component to the necessity defense, Rev. Taylor's attempt to halt the ongoing destruction of our environment by stopping the train was direct action. The imminent danger to our communities from oil trains was just illustrated last week by a derailment in Whatcom County. *See* King5, "Removal of derailed train cars in Whatcom County begins," Dec. 29, 2020 (https://www.king5.com/article/news/local/oil-train-derailment-car-removal-to-start-monday-whatcom-county/281-289cbf7e-f4be-4dd3-84e4-d62e58a1c5fd) (accessed 12/30/20).

the power of the state.[14] The necessity defense provides an opportunity for the community to evaluate whether an action taken for the greater good in fact maximizes social utility. Note, 39 Stan. L. Rev. at 1174. Moreover, reasonableness is traditionally an element evaluated by juries. *Haskell*, 13 Wn. App. 2d at 621 (Fearing, J. dissenting) (citing *Stephens v. Omni Insurance Co.*, 138 Wn. App. 151, 170, 159 P.3d 10 (2007), *aff'd sub nom*. *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009); *Towe v. Sacagawea, Inc*., 357 Or. 74, 347 P.3d 766, 778 (2015)).

Protesters who engage in civil disobedience are making a value judgment on behalf of their community: that avoiding a particular harm contributes more to the greater good than adherence to a particular law. The role of a jury in a necessity case is to ratify or reject that calculation. These assessments are intensely fact-based and are core to a jury's fundamental role as a factfinder. As explained in section 2, *infra*, sending these questions to the jury in no way guarantees a successful defense, but it does situate that decision-making with the appropriate body to channel the community

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[14] *See Alleyne v. United States*, 570 U.S. 99, 114, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (noting "the historic role of the jury as an intermediary between the State and criminal defendants"); *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

interest. The Court of Appeals' standard usurps this important role of the jury and should not be adopted by this Court.

2. The Necessity Defense is Well-Established Both in Washington State and Around the United States and Its Use Does Not Mean that Protesters Will Necessarily Be Acquitted

The use of the necessity defense by protesters is well established in Washington State and throughout the US; and while the necessity defense enjoys an increasingly brighter spotlight in the legal community and our culture, it is far from a forgone conclusion that a protester who asserts the defense will be acquitted.

The defense was most recently addressed in Washington State in *State v. Ward*, 8 Wn. App. 2d 365, 438 P.3d 588, *rev. denied*, 193 Wn.2d 1031, 447 P.3d 161 (2019). *Ward* involved a Skagit County conviction for burglary where a climate change protester manually turned off a valve that stopped the flow of oil. The court unanimously held that Mr. Ward presented a sufficient quantum of evidence to demonstrate that he could meet each element of the necessity defense, and that the denial of the necessity instruction violated his right to present a complete defense. *Id*. at 372-76.

This Court has also considered necessity in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), a case involving *pro se* defendants who protested

against a "White Train" carrying nuclear weapons. Rather than ruling that the necessity defense is unavailable to all defendants who engage in civil disobedience, this Court upheld the pretrial denial of the necessity defense because the *pro se* defendants' offer of proof had failed to satisfy a "minimum standard" to justify the defense. *Id*. at 311-12. In contrast, in *Haskell*, the trial judge conducted an extensive pretrial hearing and already determined that Rev. Taylor had presented a sufficient amount of evidence to permit presentation of the defense.[15]

In keeping with these principles of a case-by-case analysis of whether the protesters have met their burden, Washington trial courts have often allowed those engaged in civil disobedience to rely on the necessity defense with mixed results.[16] For instance, in 2019, a jury convicted another protester

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[15] Another case where the protesters failed to meet their burden in the trial court is *State v. Brockway*, 3 Wn. App. 2d 1064, 2018 Wash. App. LEXIS 1251, 2018 WL 2418485 (No. 76242-7-I, 2018) (unpub.). Significantly, the Court of Appeals held:

> *Aver* does not support the State's position. It does not stand for the proposition that a defendant cannot request the necessity defense when blocking a train or that, as a matter of law, the necessity defense is unavailable to defendants who were engaged in civil disobedience. Aver, 109 Wn.2d at 311-12. The defense may be available where the evidence supports all necessary elements.

2018 Wash. App. LEXIS 1251 at *11-*12.

[16] These trial court cases are not cited as precedential authority, but rather are cited simply to reveal the historic record. *See State v. Diana*, 24 Wn. App. 908, 914-15, 604 P.2d 1312 (1979) (citing to a District of Columbia Superior Court case to support

(continued...)

in Skagit County of burglary, criminal sabotage and malicious mischief after hearing presentation of the necessity defense. *See State v. Zepeda*, 2020 Wash. App. LEXIS 3026, at *3, 2020 WL 6708240, at *3 (80593-2-I, Nov. 16, 2020) (unpub.) ("Zepeda did not dispute any of the evidence presented against him. Instead he relied on a necessity defense, emphasizing the dire consequences of climate change."). In some other Washington cases, protesters have successfully raised the necessity defense resulting in acquittal.[17]

Washington is not the only State that permits the defense of necessity for defendants whose charges stem from civil disobedience. There are few reported decisions upholding the right to present the defense to the jury for the simple reason that appellate courts are usually not called upon to issue an

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[16](...continued)
necessity instruction in medicinal marijuana case). Most of the cases cited in footnotes 17, 18 and 19 are documented at Quigley, *supra* at 26-37 and the Meiklejohn Civil Liberties Institute Archives ("Meiklejohn"), *Human Rights and Peace Law Docket, 1945-1993* (http://sunsite.berkeley.edu/meiklejohn/meik-peacelaw/meik-peacelaw-16.html). Other contemporary press accounts are noted where appropriate.

[17] *See State v. Bass*, Thurston Cnty. Dist. Ct. Nos. 4750-038, -395 to -400 (11/9/1987) (acquittal of anti-apartheid occupation of the Washington State Capitol); *Seattle v. Heller*, Seattle Mun. Ct., Aug. 7, 1985 (physicians acquitted of trespassing at the home of South African consul based on necessity defense) (both noted in Quigley, *supra* at 32-33 and Meiklejohn, *supra* n.16). *See also* Val Varney, "Eight Apartheid Protesters Win Acquittal," *Seattle Times*, Aug. 8, 1985, at D2; AP, "Seattle Demonstrators Taking Their Apartheid Protest to Municipal Court," *Longview Daily News*, Aug. 6, 1985 at 11.

opinion in such cases -- acquittals are not appealable and if the defense is granted and the defendant is still convicted, any appeal will likely center on issues other than the necessity defense. Contained in the margin are trial court cases where protesters were able to offer the necessity defense, sometimes leading to "not guilty" verdicts[18] and other times leading to convictions or hung juries.[19]

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[18] *See People v. Bordowitz*, 155 Misc. 2d 128, 588 N.Y.S.2d 507 (1991) (not guilty based on necessity for defendants charged with criminal conduct for distributing free needles in response to the AIDs crisis); *People v. Gray*, *supra* (acquittal for protest against pollution and safety effects of new vehicular lanes). *See also* Meiklejohn, *supra* n. 16, and Quigley, *supra* at 27, 30-35 (citing *State v. Mouer,* Columbia Cnty Dist. Ct. (Ore.), Dec. 12-16, 1977 (acquittal of trespass at nuclear site); *People v. McMillan*, San Luis Obispo Jud. Dist. Mun. Ct. (Cal.), No. D 00518, Oct. 13, 1987 (anti-nuclear protest, acquittal at bench trial); *People v. Halem*, Berkeley Mun. Ct. (Cal.), No. 135842 (1991) (acquittal of those charged with distributing clean needles in response to AIDS epidemic); *Vermont v. Keller*, Vt. Dist. Ct., No. 1372-4-84-CNCR, Nov. 17, 1984 (acquittal for trespassing in congressional office over Central America policies); *Michigan v. Jones et al.*, Oakland Cnty. Dist. Ct. (Mich.), Nos. 83-101194-101228, 1984; *Michigan v. Lagrou*, Oakland Cnty. Dist. Ct. (Mich.) Nos. 85-000098, 99, 100, 102, 1985) (acquittal re: blockade of cruise missile site); *People v. Jarka*, 19th Jud Cir Ct, Lake Cty. (Ill.), Nos 002170, 002196-002212, 00214, 00236, 00238), Apr. 15, 1985 (acquittal for those protesting nuclear war at sit-in at naval training center); *Chicago v. Streeter*, Cook Cnty. Cir. Ct. (Ill.), Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27, May 1985 (acquittal for trespass at S. African Consulate); *Illinois v. Fish*, Skokie Cir. Ct. (Ill.), May 1988 (acquittal for trespass at army recruiting center);*Massachusetts v. Carter*, Hampshire Dist. Ct. (Mass.), No. 86-45 CR 7475, April 15, 1987 (President Carter's daughter and others acquitted of trespass and disorderly conduct for protest against CIA recruitment); *Massachusetts v. Schaeffer-Duffy*, Worcester Dist. Ct. (Mass), Nov. 1, 1989 (acquittal for trespass at nuclear facility); *Colorado v. Bock*, Denver County Ct. (Colo.), June 25, 1986) (acquittal for trespass at senator's office over Central America policy); *West Valley City v. Hirshi*, Salt Lake Cnty Cir. Ct. (Utah), No. 891003031-3 MC, Jan. 26, 1990 (acquittal for action at nuclear missile plant)).

[19] *See New York v. Cromwell*, 64 Misc. 3d 53, 104 N.Y.S.3d 825 (2019) (protesters convicted at bench trial after blocking traffic at a fracked gas construction site despite necessity defense); *Quigley, supra*, at 27-28, 30; Meiklejohn*, supra* at n.16 (citing *People* (continued...)

Interestingly, in a "valve turner" case that occurred the same day as the civil disobedience in *State v. Ward*, *supra*, a Minnesota trial court ruled pretrial to allow for the presentation of the necessity defense. As in Rev. Taylor's case, the State attempted to appeal pretrial, but the Minnesota Court of Appeals rejected the interlocutory appeal because the trial court's rulings were not final. *State v. Klapstein*, 2018 Minn. App. Unpub. LEXIS 312, 2018 WL 1902473 (unpub.), *rev. denied* 2018 Minn. LEXIS 418 (2018) (unpub.). On remand, the court dismissed the charges for lack of sufficient evidence.[20]

Ultimately, a trial court ruling that protesters in a particular case proffered sufficient evidence to justify a necessity instruction neither

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[19](...continued)
v. Block, Galt Muni Ct, Sacramento Cty (Cal.), Crim Nos 3235-3245), Aug. 14, 1979 (nuclear plant protest, hung jury); *People v. Lemnitzer*, Pleasanton-Livermore Mun. Ct. (Cal.), No. 27106E, Feb. 1, 1982) (hung jury for protesting at nuclear research facility; on retrial judge denied instruction but jury acquitted)). *See also* J. Burdi, "Seven convicted in FPL protest," *S. Fl. Sun-Sentinel*, Dec. 5, 2008 (https://www.nydailynews.com/fl-xpm-2008-12-05-0812040538-story.html) (accessed 12/29/20) (discussing *Florida v. Block,* Fifteen Dist. Ct., Palm Beach Cty. Ct. (Fla.), No. 08MM003373AMB, Dec. 4, 2008 (environmental protesters convicted and sentenced to jail despite necessity defense)); *State v. Butler et al.*, Multnomah Ct. Cir. Ct. (Ore), No.19-CR-28017, Feb. 27, 2020 (hung jury for Extinction Rebellion climate change protesters after presenting necessity defense in response to trespass related charges) (as noted by "Oregon Climate Protesters Use Necessity Defense, and It Works," *Corvallis Advocate*, March 4, 2020 (https://www.corvallisadvocate.com/2020/oregon-climate-protesters-use-necessity-defense-and-it-works/) (accessed 12/29/20) and CLDC, https://cldc.org/climate-necessity-defense/ (accessed 12/31/20))

[20] See J. Shearer, "UPDATED: Judge tosses case against pipeline valve turners," *The Bemidji Pioneer*, Oct. 9, 2018 (https://www.bemidjipioneer.com/news/4511079-updated-judge-tosses-case-against-pipeline-valve-turners) (accessed 12/26/20).

forecloses disposal of the case on other grounds, nor guarantees a finding of "not guilty" by the jury The majority opinion in *Haskell*, though, interferes with what has for years been common practice in civil disobedience cases around the country and represents a change in the law that this Court should reject.

E. CONCLUSION

This Court should reverse the decisions of the Court of Appeals and the superior court and remand the case for trial.

DATED this 4th day of January 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On January 4, 2021, I served a copy of this BRIEF OF AMICI CURIAE on counsel for the Petitioner and the Respondent as well as on:

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Matthew Crossman – mtcrossman@gmail.com
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Ralph Hurvitz – ralph@hurvitz.com

by filing this pleading through the Portal.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of January 2021 at Seattle, Washington.

s/ Alex Fast
Legal Assistant

LAW OFFICE OF NEIL FOX PLLC

January 04, 2021 - 10:39 AM

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