1. Plan B’s original amicus curiae brief was submitted to the Honourable Commission on 18 October 2016.

2. This supplementary brief is submitted in light of two recent developments, which are relevant to the Honourable Commission’s investigation:
   
   • The confirmation of Donald Trump as President elect of the United States of America on 9 November 2016.
   
   • The Decision of the US Federal Court in Eugene, Oregon, on 10 November, 2016, rejecting arguments to dismiss a claim against the US Government. The claims alleges that by failing to take sufficient action on climate change, the Government is violating the constitutional rights of young people in America, including the Fifth Amendment protection of life, liberty and property.

The implications of the US General Election for the People of the Philippines

3. In December 2008, Donald Trump signed the following open letter to President Obama, published in the New York Times:
Dear President Obama & The United States Congress,

Tomorrow leaders from 192 countries will gather at The UN Climate Change Conference in Copenhagen to determine the fate of our planet.

As business leaders we are optimistic that President Obama is attending Copenhagen with emission targets. Additionally, we urge you, our government, to strengthen and pass United States legislation, and lead the world by example. We support your effort to ensure meaningful and effective measures to control climate change, an immediate challenge facing the United States and the world today. Please don’t postpone the earth. If we fail to act now, it is scientifically irrefutable that there will be catastrophic and irreversible consequences for humanity and our planet.

We recognize the key role that American innovation and leadership play in stimulating the worldwide economy. Investing in a Clean Energy Economy will drive state-of-the-art technologies that will spur economic growth, create new energy jobs, and increase our energy security all while reducing the harmful emissions that are putting our planet at risk. We have the ability and the know-how to lead the world in clean energy technology to thrive in a global market and economy. But we must embrace the challenge today to ensure that future generations are left with a safe planet and a strong economy.

Please allow us, the United States of America, to serve in modeling the change necessary to protect humanity and our planet.

In partnership,

[Signatures and affiliations]

If you want to go quickly, go alone. If you want to go far, go together. African proverb

Business leaders, sign onto this initiative: businessleadersenvironmentalchange.us
4. This is compelling evidence that Donald Trump believes that:

‘If we fail to act now, it is scientifically irrefutable that there will be catastrophic and irreversible consequences for humanity and the planet.’

5. Nevertheless, as is well documented, for the purposes of his election campaign, he adopted a different line, signaling an intention to withdraw US support for the intergovernmental political process.¹

6. Such circumstances emphasise that the Petitioners can not rely upon the political process to safeguard their constitutional rights, which they must consequently pursue through other means.

**Decision of the US Federal Court, Eugene, Oregon**

7. On 10 November 2016, the US Federal Court of Eugene, Oregon, rejected the motions of the US government and fossil fuel industry intervenors to dismiss a claim alleging that inadequate action on climate change constitutes a violation of young people’s rights (in particular the Fifth Amendment protection of life, liberty and property).

8. The Court squarely rejected the contention that climate change policy was a non-justiciable ‘political question’:

   The science may well be complex, but logistical difficulties are immaterial to the political question analysis. See Alperin, 410 F.3d at 552, 555 (“[T]he crux of the political question inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate ... claims in a reasoned manner." ) ... Intervenors would have this Court hold the political question doctrine prevents a court from determining whether the federal government has violated a plaintiff’s constitutional rights so long as the government has taken some steps to mitigate the damage. However, intervenors cite no cases - and this Court is aware of none - to support such a broad application of the fourth Baker factor.

   Although the United States has made international commitments regarding climate change, granting the relief requested here would be fully consistent with those commitments. There is no contradiction between promising other nations the United States will reduce CO2 emissions and a judicial order directing the United States to go beyond its international commitments to more aggressively reduce CO2 emissions.

¹ See for example: *Donald Trump Could Put Climate Change on Course for ‘Danger Zone’,* New York Times, 10 November 2016
At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary.

9. The Court affirmed that inaction on climate change was, in principle, a threat to constitutional rights:

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without "due process of law." ... When the government infringes a "fundamental right," ... a reviewing court applies strict scrutiny ... Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." ...

In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "[h]istory and tradition guide and discipline this iniquity but do not set its outer boundaries." ... The genius of the Constitution is that its text allows "future generations [to] protect ... the right of all persons to enjoy liberty as we learn its meaning." ...

Exercising my "reasoned judgment," ... I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress." ...

Plaintiffs do not object to the government's role in producing any pollution or in causing any climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irrevocably damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives. Echoing Obergefell's reasoning, plaintiffs allege a stable climate system is a necessity condition to exercising other rights to life, liberty, and property ...

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase "capable of sustaining human life" should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate
act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right...

With limited exceptions, the Due Process Clause does not impose on the government an affirmative obligation to act, even when "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989). This rule is subject to two exceptions: "(1) the 'special relationship' exception; and (2) the 'danger creation' exception." ...

The "danger creation" exception permits a substantive due process claim when government conduct "places a person in peril in deliberate indifference to their safety[.]

Plaintiffs allege that "[a]cting with full appreciation of the consequences of their acts, Defendants knowingly caused, and continue to cause, dangerous interference with our atmosphere and climate system." ...

In sum: plaintiffs allege defendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions. Accepting the allegations of the complaint as true, plaintiffs have adequately alleged a danger creation claim ...

10. In considering the related issues of causation and redressability, the Court held as follows:

Defendants and intervenors essentially argue that because many entities contribute to global warming, an injunction operating on one entity - even a major player - would offer no guarantee of an overall reduction in greenhouse gas emissions. But whether the Court could guarantee an overall reduction in greenhouse gas emissions is the wrong inquiry for at least two reasons. First, redressability does not require certainty, it requires only a substantial likelihood that the Court could provide meaningful relief. Second, the possibility that some other individual or entity might
later cause the same injury does not defeat standing - the question is whether the injury caused by the defendant can be redressed.

11. The court criticised the approach adopted by US Government and the fossil fuel industry intervenors:

A deep resistance to change runs through defendants' and intervenors' arguments for dismissal: they contend a decision recognizing plaintiffs' standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal. This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly. Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it. As Judge Goodwin recently wrote,

The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits .... [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. ... The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.

"A strong and independent judiciary is the cornerstone of our liberties." These words, spoken by Oregon Senator Mark O. Hatfield, are etched into the walls of the Portland United States courthouse for the District of Oregon. The words appear on the first floor, a daily reminder that it is "emphatically the province and duty of the judicial department to say what the law is." Marbury, 5 U.S. at 177. Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.

12. In both the Netherlands and the US, courts have endorsed the proposition that inadequate action on climate change engages fundamental human rights, such as the right to life.

13. In both the Urgenda judgement, and the case referred to above, the essence of the claim is that national governments need to do more to reduce greenhouse gas emissions. Such a claim is not, however, available to the Petitioners. As demonstrated by the graphics below, it would be difficult to
argue the Government of the Philippines is emitting more than its ‘fair share’ of greenhouse gases:

14. Whereas the US, for example, is running a ‘carbon debit’ of 79 Gt Carbon, the Philippines has a ‘carbon credit’ of 4.4 Gt Carbon.

15. Nor are the Petitioners in a position to commence action against foreign governments.

16. Consequently they must ask the Honourable Commission to conduct an investigation into responsibility, in order that their rights can be secured.

For a full explanation of the methodology behind these charts, see http://www.gci.org.uk/Documents/Blueprint.pdf
17. It is respectfully submitted that two principles of the 1992 Rio Declaration are germane to the Honourable Commission’s investigation:

**Principle 13:** States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

**Principle 16:** National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Plan B respectfully makes itself available to the Honourable Commission to answer any questions arising out of the submissions above.

Signed:

[Signature]

Timothy Crosland  
Director, Plan B  

21 November 2016