Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon, No. 6:15-cv-01517-AA

BRIEF OF AMICUS CURIAE LAW PROFESSORS

IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* state that they are individuals representing only their interests and expertise as law professors. They are not a non-governmental corporate entity and do not have a parent corporation or relation to a publicly-held company.

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IDENTITY, INTERESTS, AND AUTHORITY OF THE AMICI CURIAE

Amicus curiae are law professors and scholars (listed on the signature page) who teach, research, and publish in the subject areas of constitutional, environmental, and administrative law.[1]

SUMMARY OF ARGUMENT

Amici present two points in support of Plaintiffs-Appellees' ("youth plaintiffs") Petition for Rehearing *En Banc*. *First*, the panel's majority incorrectly invoked the political question doctrine in determining whether youth plaintiffs possess standing under Article III of the United States Constitution. The political question doctrine does not apply in cases, like this, involving individual constitutional rights. *Second*, well-established judicially discoverable and manageable constitutional standards exist to evaluate and remedy youth plaintiffs' claims.

[1] *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. Plaintiffs and Defendants have consented to the filing of this brief. *Amici* certify that, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person funded the preparation or submission of this brief.

ARGUMENT

I. The Majority Wrongly Applied the Political Question Doctrine

All three judges of the Ninth Circuit panel and the district court agree on the following essential points: climate change is real "and occurring at an increasingly rapid pace," Slip Op. ("SO") 14; we are in the midst of a human-induced ecological "apocalypse," SO 1; Defendants have knowingly caused and facilitated emissions of massive amounts of greenhouse gases for decades, SO 11 ("substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."); Defendants' administrative policies and programs promote the use of fossil fuels, threatening the climate, SO 20-21 ("A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%."); Defendants *knew* their actions could contribute to "catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse," SO 11; these youth plaintiffs have pled a constitutionally valid fundamental right to be free from actions of the Defendants that destroys the capability of the climate system to sustain human life, SO 6; these youth plaintiffs have

suffered imminent, ongoing, concrete, and particularized injuries, SO 21 ("The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation."); the actions and inactions of Defendants caused these injuries, SO 29-21; there is a judicial role in administering justice, SO 32 ("We do not dispute that the . . . relief the plaintiffs seek could well goad the political branches into action."); action is needed, SO 15 ("Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies."); and the youth plaintiffs have pled meritorious claims, SO 31-32 ("The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, [and] that the government has had a role in causing it . . . .").

Despite agreement, the panel's majority dismissed the case, concluding the youth plaintiffs lack redressability under Article III standing, in large part on political question doctrine reasoning. We believe the majority's reasoning is incorrect because: (1) the political question doctrine does not apply to Article III standing; (2) the political question doctrine does not apply to individual rights; and (3) the case presents justiciable claims not subject to the political question doctrine.

A. The Political Question Doctrine Does Not Apply to Article III Standing

The majority misreads *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019), as injecting the political question doctrine into redressability analysis under Article III standing. SO 11 (citing *Rucho* at 2506–07, 2508). Yet, as the youth plaintiffs correctly note, the standing and political question doctrines are "distinct and separate." *See* Petition for Rehearing *En Banc* at 24 (citing cases).

Doubting its own authority, the majority improperly conflates separation of powers with standing. SO 28-29 ("Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life.' We doubt that any such plan can be supervised or enforced by an Article III court."). Then, "reluctantly," the majority concludes that youth plaintiffs' "impressive case for redress must be presented to the political branches of government." SO 11, 28, *citing Rucho* at 2506–07, 2508 ("*Rucho* reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the

exercise of such authority.").

As the dissent correctly observes, however, the majority's Article III analysis misperceives the role of federal courts in protecting youth plaintiffs' individual constitutional rights. SO 32-64. While the majority may be correct when saying "it is beyond the power of an Article III court to … design [] … or implement the plaintiffs' requested remedial plan," SO 25, the youth plaintiffs have not asked the district court to make or implement a plan or do anything otherwise committed to an elected branch of government. The youth plaintiffs seek declaratory relief and, if appropriate following a bifurcated trial's remedial phase, an injunction ordering *the Defendants* to develop and implement a plan to reduce fossil fuel emissions and atmospheric carbon dioxide. These youth plaintiffs simply request that federal courts recognize contravention of a constitutional right and, if necessary, use reasoned judgment to dispense a remedy for the Defendants to implement. SO 26 ("The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best 'phase out fossil fuel emissions and draw down excess atmospheric CO_2.'").

Rucho is inapposite. In *Rucho*, a 5-4 majority of the Supreme Court held that the Guarantee Clause and other structural attributes of the U.S.

Constitution consign certain political gerrymandering claims to the political branches. 139 S. Ct. 2484 (2019). This result follows a long line of cases regarding political apportionment. *Id*. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.").

As the majority notes, youth plaintiffs have presented a justiciable claim of an individual rights violation. SO 21 (in addition to violations of well established individual due process and equal protection rights, the youth plaintiffs claim "the government has deprived them of a substantive constitutional right to a 'climate system capable of sustaining human life,' and they seek remedial declaratory and injunctive relief"). Youth plaintiffs seek relief within the court's authority to grant, whether declaratory or remedial in nature. Either is sufficient for Article III standing. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("We may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation . . . by the District Court, even though they would not be directly bound by such a determination"); SO 22-24 (Plaintiffs seek "an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO_2.'") (*citing Massachusetts v. EPA*, 549 U.S.

497, 525–26 (2007) (finding redressability where "the requested relief would likely slow or reduce emissions."); SO 47 (Staton, J., dissenting) ("a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms").

Lastly, the majority misses how *Rucho* underscores each doctrine's distinctiveness. In *Rucho*, the Court upheld the plaintiffs' constitutional standing prior to turning to political question analysis. 139 S.Ct. at 2492 (discussing *Gill v. Whitford*, 138 S.Ct. 1916 (2018)). Here, Defendants did not contest the district court's thorough political question analysis. It should not be re-animated under the guise of the standing doctrine.

B. The Political Question Doctrine Does Not Apply to Individual Rights

Next, the majority incorrectly invoked the political question doctrine because the doctrine never applies to individual rights; hence, even Defendants did not appeal the district court's determination that the political question doctrine does not apply.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court listed "formulations" describing when prior cases had found an issue non-justiciable. These "formulations," are relevant to discerning questions committed to coordinate branches of government. Individual rights, by definition, stand outside the political process; they cannot be committed to it.

The Supreme Court makes clear, in the very next paragraph of *Baker*, that while courts should refer to these formulations in determining "whether some action denominated 'political' exceeds constitutional authority," they are not relevant in determining whether an action violates a *constitutional right. Id. See e.g.,* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 Sup. Ct. Rev. 125 (1993) ("To the *Baker* Court, *Gomillion* [*v. Lightfoot,* 364 U.S. 339 (1960)] was evidence that the political-question doctrine had no place in denying the enforcement of individual rights."). *See also, Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.").

None of the Supreme Court's subsequent cases applying the *Baker* formulations have found individual rights cases to be non-justiciable. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (Impeachment Trial Clause); *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 456 (1992) (Article I); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990) (Origination Clause); *Davis v. Bandemer*, 478 U.S. 109, 121-22 (1986) (Equal Protection Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248-50 (1985) (Indian Commerce Clause); *INS v. Chadha*, 462

U.S. 919, 940-42 (1983) (Article I); and *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969) (Article I).

The Supreme Court consistently reserves application of the political question doctrine to cases where plaintiffs seek structural changes in political governance or where a political realignment is necessary. *See, e.g.*, *Nixon*, 506 U.S. 224 (1993) (Impeachment Trial Clause); *Coleman v. Miller*, 307 U.S. 433 (1939) (Article V); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930) (Guarantee Clause); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (Tenth Amendment); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Guarantee Clause); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (same); *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (same); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (same); *Taylor v. Beckham*, 178 U.S. 548 (1900) (Guarantee Clause and Due Process Clause); *Georgia v. Stanton*, 73 U.S. 50 (1867) (Constitutional challenge to Reconstruction Acts). *See* Erwin Chemerinsky, *Federal Jurisdiction*, § 2.6 n.7 (5th ed. 2007) ("If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question.") (quoting Howard Fink & Mark Tushnet, *Federal Jurisdiction: Policy and Practice* 231 (2d ed. 1987)); Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States,* 1993

Sup. Ct. Rev. 125 (1993) ("The Court has tacitly reacted to the conflict between the political-question doctrine and the enforcement of individual rights by not applying the doctrine in a way that would defeat a right—but never for reasons arising out of the doctrine itself.").

The Supreme Court has dismissed cases that include individual rights claims only when it has found an express textual commitment of the issue to a political branch, such as in the Impeachment Trial Clause or the Guarantee Clause. See, e.g., *Rucho*, 139 S. Ct. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim."); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (textual commitment to Congress over districting in Article I §4); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (textual commitment to Congress over National Guard in Article I, §8, cl. 16). Absent an express textual commitment to a political branch, the Court has never found that the doctrine precludes an individual rights claim. This case presents clear individual rights questions under the Fifth Amendment, questions never committed to elected branches. *See* Michael A. Moorefield, *The Times Are They A-Changin'?: What Kivalina Says About the State of Environmental "Political Questions." Native Village of Kivalina v. Exxonmobil Corp.,* 17 Mo. Envtl. L. & Pol'y Rev. 606, 630 (2010) ("While the Judicial Branch is

not in the business of rulemaking, it is in the business of protecting an individual's rights if other branches are not, or are failing to do so."). This includes individual rights claims addressing government actions and inactions contributing to climate change. *See generally,* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 58 Denver U. L. Rev. 919 (2008); James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine,* 121 Yale L.J. Online 127 (2011).

C. The Political Question Doctrine Does Not Apply to Youth Plaintiffs' Claims

As the District Court found, and the Ninth Circuit assumed, the youth plaintiffs have established cognizable claims under the Fifth Amendment. These constitutional rights—like all others—are textually committed for *judicial branch* enforcement. Once a constitutional right is identified, it is the courts' province and duty to delineate the right's boundaries and to ensure governments do not transgress those limits. *Marbury v. Madison*, 5 U.S. 137, 176-177 (1803) ("The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the

Legislature may alter the Constitution by an ordinary act.")

Precluding jurisdiction in this case, and similar cases, would effectively eliminate judicial oversight of government actions knowingly violating individual constitutional rights. For 229 years, federal courts have decided constitutional claims. Some claims were novel. E.g., *McCulloch v Maryland,* 17 U.S. (4 Wheat.) 316 (1819) (whether Congress had the power to charter a bank). Some asked the courts to extend the understanding of an established constitutional principle. E.g., *Rochin v California,* 342 U.S. 165 (1952) (whether entry into a home and pumping defendant's stomach violated defendant's liberty interest); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (whether a prohibition on the distribution and use of contraceptives violated defendants' liberty interest)). Some asked the courts to apply constitutional rights to new situations. E.g., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (whether defendant had a reasonable expectation of privacy in location data stored in cell phones); *Kyllo v. United States*, 533 U. S. 27, 34 (2001) (whether using thermal technology constituted a search). Some asked courts to recognize for the first time values which, though not express, had always underlain our constitutional system. E.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (whether state sovereignty limited federal power); *Moore v City of East Cleveland*, 431 U.S. 494 (1977)

(whether liberty protections extended to non-nuclear family structures). And some asked courts to harmonize U.S. law with law in peer democratic countries. E.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (physician-assisted suicide); *Roper v Simmons*, 543 U.S. 551 (2005) (holding the death penalty unconstitutional for youths)). To be sure, federal courts have resolved the most contentious and profound questions of their time: slavery in *Pennsylvania v. Prigg*, 41 U.S. 539 (1842); Presidential authority in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); and discrimination and affirmative action in a series of cases spanning more than 50 years, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Some cases in which lower courts were asked to decide difficult questions of first impression were reversed when they reached the Supreme Court (e.g., *Brown v Board of Education*, 347 U.S. 483 (1954)) and some were not (e.g., *United States v. Nixon*, 418 U.S. 683 (1974)). But in each instance the court reached the merits, including when individual rights were at stake. *See* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States,* 1993 Sup. Ct. Rev. 125 (1993) ("Judges, at least in part, are the protectors in the constitutional scheme of individual rights.").

In these cases, regardless the novelty of the claim, the complexity of the issue, the importance of the case, or the social or political implications of the judicial determination, courts made their own independent judgment. Errors, if any, were corrected through the normal course of litigation in appellate courts and, where appropriate, in the Supreme Court.

II. The Standards Here Are Judicially Discoverable and Manageable

In analogizing to *Rucho's* determination that political re-apportionment involving a comparison to a baseline election map is too difficult for the judiciary to manage, 139 S. Ct. at 2500–02, the majority incorrectly decided that "it is impossible to reach a different conclusion here." SO 28. The majority overlooks that: (1) constitutional standards are well developed and familiar, (2) such standards are judicially discoverable and manageable, and (3) no amount of knowing child endangerment is constitutionally permissible.

A. The Constitutional Standards Here Are Well Developed and Familiar

The political question doctrine precludes jurisdiction not when the question is novel but when it is governed by *no standard at all*. In *Vieth*, the plurality determined that political gerrymandering claims are non-justiciable, not because they require courts to apply a broad standard like

reasonableness, but because courts could not articulate any meaningful standard whatsoever. *Vieth*, 541 U.S. at 278-90 (plurality opinion). *See also Coleman*, 307 U.S. at 450-54; *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (concluding that a Senator's challenge to the President's abrogation of a treaty is non-justiciable, because, while the Constitution sets forth the manner in which the Senate participates in the ratification of treaties, it provides no standards for the Senate's participation in their abrogation).

Youth plaintiffs allege violations of constitutional due process and equal protection rights, invoking well-established standards. Landmark decisions exist in almost every decade of the last century establishing and reaffirming that, in addition to incorporating most enumerated rights, the liberty clauses of the Fifth and Fourteenth Amendments include many of the interests these youth plaintiffs have pled. Previously recognized unenumerated liberty interests include the rights to direct the education and upbringing of one's children (*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)), procreation (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)), bodily integrity (*Rochin v. California*, 342 U.S. at 172-73 (1952)), contraception (*Griswold v. Connecticut*, 381 U.S. at 485-86 (1965)), abortion (*Planned*

Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); *Roe v. Wade,* 410 U.S. 113, 153 (1973)), sexual intimacy (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)), family (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), and marriage (*Loving v. Virginia*, 388 U.S. 1, 12 (1967)). *See also McDonald v City of Chicago*, 561 U.S. 742 (2010) (finding the Second Amendment's protection of firearms for the purpose of protecting one's home and family to be so deeply rooted in this Nation's history and traditions that it is encompassed in the Fourteenth Amendment's protection of liberty). In each case, upon finding a constitutional right, the Court identified appropriate standards by which to measure the violation.

The applicable standards are a function of the right or interest at issue, whether strict scrutiny, rational basis, or any other test or standard the Court has devised in its voluminous rights jurisprudence.

Balancing individual liberties against governmental interests, as due process analysis requires courts to do, is a task presumptively appropriate for federal courts. Indeed, in *Baker*, the Court held reapportionment claims as justiciable because "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Baker*, 369 U.S. at 226. Courts do exactly this in all cases involving fundamental individual rights. *See, e.g., Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) ("Judicial

standards for evaluating compliance with the constitutional dictates of due process and equal protection are well developed, although they have not often been applied to these facts.").

B. Standards for Evaluating These Youth Plaintiffs' Claims are Judicially Discoverable and Manageable

Under the law of the Ninth Circuit, "the crux of this 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." *Alperin v. Vatican Bank*, 410 F.3d 532, 552, 55 (9th Cir. 2005). Here, a legal framework of judicially discoverable and manageable standards exists for evaluating these youth plaintiffs' claims.

The standards youth plaintiffs have requested the court to apply are judicially discoverable. Courts regularly engage in deciding complex scientific issues and have readily available standards for resolving them through expert witnesses with scientific expertise in various disciplines. The *Daubert* standard for qualification of expert witnesses, for instance, serves as a discoverable manageable standard. *Daubert v. Merrill Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993). As Justice Breyer observes:

> The Supreme Court has . . . decided basic questions of human liberty, the resolution of which demanded an understanding of scientific matters . . . Scientific issues permeate the law . . .

> [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm.

Breyer, Stephen, J., "Science in the Courtroom," *Issues in Science and Technology* 16, no. 4 (Summer 2000). Courts also regularly employ the aid of scientific special masters to discern applicable standards.

The majority *accepted* the opinion of the youth plaintiffs' experts that a stable climate—safe for the youth plaintiffs and capable of sustaining human life—requires atmospheric CO_2 levels of no more than 350 parts per million. Regardless, the majority pretermitted a trial that would help it utilize the scientific testimony and evidence to decide, under established levels of scrutiny applicable to Fifth Amendment claims, whether the Defendant's knowing causation of catastrophic climate destabilization, and resulting endangerment of youth plaintiffs, violates their individual constitutional rights. Because it is "assumed that . . . executive officials . . . would abide by an authoritative interpretation of the Constitution," *Franklin*, 505 U.S. at 803, declaratory relief would prompt the Defendants to reduce their contributions to the climate crisis, sufficing for redressability. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). If, after the remedial phase of a bifurcated trial, the district court finds it necessary to order the Defendants to prepare and implement a remedial plan, the court could assess, utilizing the

best available science and the aid of special masters, whether the cumulative emissions reductions effectuated would put the Defendants on a path consistent with stabilizing the climate at 350 ppm by 2100. To remedy systemic constitutional violations, courts have overseen remedial plans of much greater complexity, touching on difficult issues of social science, when compared with the hard science involved here. *Compare Brown v. Bd.*, 347 U.S. at 495*, with Brown v. Plata*, 563 U.S. 493, 526 (2011).

C. *Rucho* Does Not Apply

The majority was simply incorrect to equate a baseline election map (as in *Rucho*) with the scientific body of knowledge detailing how to ensure the climate can sustain human life. *Rucho* is inapposite. *Rucho* ruled that no judicially discoverable and manageable standards exist to resolve political gerrymandering claims. Its reasoning stems directly from the Court's recognition of precedent that some amount of partisan motivation in districting is constitutionally permissible, which would force courts to decide when some gerrymandering goes "too far." *Rucho,* 139 S.Ct. at 2497 ("Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional

political gerrymandering' … The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far'").

In contrast, the Court has never ruled that "some amount" of government-known child endangerment is constitutionally permissible, nor would the proposition have been fathomable to the Framers. Rather, the Court has consistently held that children are entitled to special protection by the courts precisely because they are vulnerable, both psychologically and physically, and because they lack political recourse.

CONCLUSION

For the reasons given herein, the Court should grant Plaintiffs' Petition for Rehearing *En Banc*.

DATED: March 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,193 words (excluding the parts of the brief exempted) based on the word processing system used to prepare the brief. I also certify that this amicus brief complies with the word limit of Fed. R. App. P. 29(a)(5).

I further certify that, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae or their counsel—contributed money that was intended to fund preparing or submitting this brief.

DATED: March 11, 2020

/s/ James R. May
James R. May

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2020, I electronically filed the foregoing Brief of Amicus Curiae Law Professors in Support of Plaintiffs-Appellees' Answering Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via-email to the following counsel:

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