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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**KELSEY CASCADIA ROSE JULIANA;**  
**XIUHTEZCATL TONATIUH M.,** through his  
Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

**The UNITED STATES OF AMERICA;** et al.,

Defendants.

Case No.: 6:15-cv-01517-AA

**DECLARATION OF JULIA A. OLSON in  
Support of Plaintiffs' Response in  
Opposition to Defendants' Motion *in  
Limine* to Exclude Expert Opinion  
Testimony of Professor Catherine Smith**

**DECLARATION OF JULIA OLSON in Support of Plaintiffs' Response in Opposition to  
Defendants' Motion *in Limine* to Exclude Expert Opinion Testimony of Professor  
Catherine Smith**

I, Julia A. Olson, hereby declare and if called upon would testify as follows:

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of Plaintiffs' Response in Opposition to Defendants' Motion *in Limine* to Exclude Expert Opinion Testimony of Professor Catherine Smith (ECF No. 379). I have personal knowledge of the facts stated herein, except as to those stated on information and belief.
2. On Wednesday, September 19, 2018, Defendants took the deposition of Professor Smith at the offices of U.S. Department of Justice, Denver Field Office, 999 18th Street, South Terrace, Suite 370, Denver, Colorado, pursuant to Federal Rule of Civil Procedure 30. I attended the deposition. A true and correct copy of the transcript pages of Professor Smith's deposition cited in Plaintiffs' Response is attached to this declaration as **Exhibit 1**.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of November, 2018.

Respectfully submitted,

/s/ Julia Olson  
Julia Olson

# **Exhibit 1**

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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION  
Case No. 6:15-cv-01517-TC

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KELSEY CASCADIA ROSE JULIANA, )  
et al., )  
Plaintiffs, )  
VS )  
UNITED STATES OF AMERICA, )  
et al., )  
Defendants. )  
-----)

VIDEOTAPED DEPOSITION OF CATHERINE SMITH  
Wednesday, September 19, 2018, 8:38 a.m.  
Denver, Colorado

REPORTED BY:  
Lisa J. Gretarsson, CSR, RPR, CRR

1           VIDEOTAPED ORAL DEPOSITION OF CATHERINE SMITH,  
2           produced as a witness at the instance of the  
3           Defendants, and duly sworn, was taken in the  
4           above-styled and above-numbered cause on the 19th day  
5           of September, 2018, from 8:30 a.m. to 2:18 p.m., before  
6           Lisa J. Gretarsson, CSR, RPR, CRR, reported by machine  
7           shorthand at the offices of U.S. Department of Justice,  
8           Denver Field Office, 999 18th Street, South Terrace,  
9           Suite 370, Denver, Colorado, pursuant to the Federal  
10          Rules of Civil Procedure and the provisions stated on  
11          the record.

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## A P P E A R A N C E S

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## ALSO PRESENT:

Dan Schmitz, videographer

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I N D E X

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WITNESS: CATHERINE SMITH

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E X H I B I T S

NUMBER	DESCRIPTION	MARKED
Exhibit 1	- Expert Report of Catherine Smith.....	6
Exhibit 2	- Amicus brief of Catherine Smith.....	6

(exhibit index concluded)



1 P R O C E E D I N G S

2 (Exhibits Number 1-2 marked.)

3 THE VIDEOGRAPHER: My name is Dan Schmitz of  
4 Veritext. The date today is September 19th, 2018,  
5 and the time is approximately 8:38.

6 This deposition is being held in the office  
7 of the United States Department of Justice, Denver  
8 Field Office, located at 999 18th Street, South  
9 Tower, Suite 370, Denver, Colorado.

10 The caption of this case is Juliana, et al.,  
11 versus United States of America, in the  
12 U.S. District Court for the District of Oregon.  
13 The name of the witness is Catherine Smith.

14 At this time, the attorneys will identify  
15 themselves and the parties they represent, after  
16 which our court reporter, Lisa Gretarsson, of  
17 Veritext, will swear in the witness and we can  
18 proceed.

19 MR. GREGORY: Phillip Gregory, counsel for  
20 Plaintiffs.

21 MS. OLSON: Julia Olson, counsel for  
22 Plaintiffs.

23 MS. BORONOW: Clare Boronow on behalf of the  
24 United States.

25 ///

1                                   CATHERINE SMITH,  
2           having been first duly sworn, testified as follows, to  
3           wit:

4                                   EXAMINATION

5           BY MS. BORONOW:

6                   Q.    Good morning.

7                   A.    Good morning.

8                   Q.    So my name is Clare Boronow.  I'm one of the  
9           attorneys for the United States in this case.  And I'm  
10          going to start with some preliminary matters.

11                   So have you been deposed before?

12                   A.    Yes.

13                   Q.    Okay.  So you know the drill.

14                   A.    (Nods head.)

15                   Q.    You understand that you're under oath and are  
16          sworn to tell the truth.

17                   A.    Yes.

18                   Q.    Okay.  And is there any reason you can't  
19          testify truthfully and fully today?

20                   A.    No.

21                   Q.    Okay.  And, as you know, the court reporter  
22          here is transcribing everything we say, so please  
23          answer my questions verbally so the court reporter can  
24          record your responses.

25                   A.    Okay.

1 systems as I describe in the report.

2 Q. Okay. And you say in your first sentence  
3 here that you consider historical and sociological  
4 legal analysis; is that correct?

5 A. Yes.

6 Q. Okay. And you would still agree with that  
7 statement?

8 A. Yes.

9 Q. Okay. What does a historical legal analysis  
10 mean to you?

11 A. I think it means -- I think it means a number  
12 of things but includes looking at history and how we  
13 can look back and think about and view a particular  
14 issue and the evolution of that issue over time.

15 Q. And when you say issue there, you mean a  
16 legal issue?

17 A. I think the -- legal, social, political,  
18 cultural. It can include many things.

19 Q. Okay.

20 A. I -- I -- I include those different things in  
21 the report.

22 Q. Well, to confirm, you consider this a legal  
23 analysis.

24 MR. GREGORY: Objection, misstates the prior  
25 testimony.

1 Q. (BY MS. BORONOW) When you -- I'll rephrase.  
2 When you say the terms "historical" and  
3 "sociological legal analysis," ultimately what you're  
4 doing is a legal analysis?

5 A. Well, I think it includes -- I think -- I --  
6 it says that -- I think that it says I include that  
7 based on the historical and sociological legal  
8 analysis, so I think that's what it says. I think it  
9 includes more than just a legal analysis but a lot of  
10 different things.

11 Q. Okay.

12 A. And if you look -- I -- I talk about, in the  
13 report, that within this area, I consider legal  
14 structures, i.e. the legal system, legal processes, how  
15 law is made, and the interaction of the laws, societal  
16 changes, social control.

17 My scholarship and expertise is also informed  
18 by the importance of critically analyzing the impact,  
19 positive and negative, of law on age, race, class,  
20 gender, and other socially constructed differences.

21 And my theoretical approach in historical,  
22 sociological aspects of law is regarding law as a set  
23 of institutional practices that have evolved over time  
24 and developed in relation to and through interaction  
25 with cultural, economic, sociopolitical structures, and

1 institutions.

2 Q. Okay. And you refer to your scholarship  
3 there, right?

4 A. Uh-huh.

5 Q. And to confirm, that's your legal scholarship  
6 in your capacity as a law professor?

7 A. Yes.

8 Q. Okay. And going back to historical and  
9 sociological legal analysis, what does sociological  
10 legal analysis mean to you?

11 A. I think it includes the things that I just  
12 read from the -- this previous expert -- excerpt --  
13 sorry -- and so looking at social behaviors, practices,  
14 structures, law is not a separate entity or animal  
15 separate from those practices, and so those social  
16 meaning and -- and -- is really important and so that's  
17 what I would include as a sociological study.

18 Q. Okay. So is it fair to say that your legal  
19 analysis is informed by your research and study into  
20 the historical aspects and sociological aspects?

21 A. Yes.

22 Q. Okay. What did you do to prepare this  
23 report?

24 A. I'm not quite sure what you're asking.

25 Q. Okay. Let me break it down.

1 Q. Have you reviewed any of the written  
2 declarations prepared by the plaintiffs?

3 A. I have reviewed some of them. And to the  
4 extent they're included in the first amended  
5 complaint -- I mean, I've probably seen them by reading  
6 the complaint, but I haven't reviewed all of them in  
7 great detail.

8 Q. Okay. And would you agree that your expert  
9 report doesn't state any opinions about specific  
10 plaintiffs?

11 MR. GREGORY: Objection. The document speaks  
12 for itself.

13 A. To the extent that, in my report, I talk  
14 about children as a class. If you look on page 5 of my  
15 report, I talk about and describe children along other  
16 classes of people battling historic and ongoing  
17 discrimination and -- and reference children as a class  
18 or as a classification as a group.

19 The children in this case, the plaintiffs,  
20 are certainly members of that class or classification,  
21 and so it's certainly speaking to them as members of  
22 that class.

23 And if you'll look at page 41 through 43, I  
24 talk about, in the report, the harms to children,  
25 economic deprivation, stigmatic and psychological

1 harms, barriers to family formation, health impacts,  
2 and I think that certainly encompasses the children in  
3 this case.

4 And I'd have to -- I don't recall. I'd have  
5 to spend more time with the report in terms of did I  
6 use a specific example of a -- of a child in this case  
7 and their actual harms, but I certainly think that it  
8 encompasses, as a class, children harmed by climate  
9 change.

10 And then the last thing I would add is that  
11 on page 44 it says certain groups of children are more  
12 vulnerable in -- with respect to -- to climate change,  
13 and these specific groups also include children who are  
14 plaintiffs in this case.

15 So, for example, native and indigenous  
16 children across the United States, including Alaska and  
17 the Pacific rim, are suffering disproportion  
18 consequences of climate change on their lands,  
19 resources, and people, sovereignty, culture, economy,  
20 and the ways of life developed by native communities  
21 over thousands of years are under assault, and that  
22 would include, as a class, specific children in this --  
23 in this case.

24 Q. (BY MS. BORONOW) Okay.

25 A. It would be a part of that -- that class.

1 Q. Okay. So let's turn back to the beginning of  
2 the report.

3 MR. GREGORY: Excuse me, Counsel. We've been  
4 going about an hour. Can we take a quick break?

5 MS. BORONOW: Yeah. This is a good time for  
6 a break.

7 THE VIDEOGRAPHER: The time is 9:36 and we're  
8 off the record.

9 (Recess taken 9:36 to 9:56)

10 THE VIDEOGRAPHER: The time is 9:56 and we're  
11 back on the record.

12 Q. (BY MS. BORONOW) Okay. Welcome back.

13 A. Thanks.

14 Q. So I think where we left off was discussing  
15 the structure of the report.

16 A. Uh-huh.

17 Q. And looking at the table of contents, I  
18 believe the first half of your report discusses the  
19 history and tradition of children's rights in the  
20 United States and internationally. Is that right?

21 A. I add history and tradition and also, as the  
22 heading says, being recognized as a class.

23 Q. Right. You beat me to it. That was my next  
24 question. So you use that history and tradition to  
25 conclude that children are a special class that have



1 certain rights?

2 A. Well, that it's -- it's -- you know, so if  
3 you -- in my report, on page 3, the Executive Summary,  
4 it says that, "In Obergefell v. Hodges, the landmark  
5 decision on the fundamental right to same-sex marriage,  
6 the Supreme Court explained that when interpreting the  
7 Due Process and the Equal Protection Clauses, "new  
8 insights and societal understandings can reveal  
9 unjustified inequality within our most fundamental  
10 institutions that once passed unnoticed and  
11 unchallenged." New insights and society's evolved  
12 understanding over time about the individual and  
13 societal harms of racial, gender, and sexual  
14 orientation discrimination led to the eradication of  
15 anti-miscegenation and male coverture laws, as well as  
16 same-sex marriage bans. This iterative process of  
17 gaining advanced understanding and then incorporating  
18 the lessons learned into the fabric of constitutional  
19 law is not reserved solely for adults; it also pertains  
20 to the unequal treatment of children."

21 And so I -- it does sort of document the  
22 history and tradition, but it's also speaking to how,  
23 as time evolves, we've gotten this more -- more of an  
24 understanding of children, but also how the things we  
25 do might harm children, and recognizing that children

1 are different than -- than adults.

2 And so it's really that -- that history is --  
3 is not just about a history and tradition like in the  
4 context of fundamental rights argument, but also saying  
5 that it also evolves -- children have evolved as a  
6 class as well, and -- and -- and so that's really where  
7 I'm coming from in -- in developing that history in the  
8 report.

9 Q. And when you say class, do you mean a  
10 protected class?

11 A. Yes. But protected class as -- as the report  
12 talks about, not in the classic sense that we think of  
13 of a race, gender as protected class, but children as a  
14 class, as a unique class that -- that warrants when  
15 certain things happen to kids at the hands of the  
16 government, a heightened level of review --

17 Q. Okay.

18 A. -- under the equal protection clause.

19 Q. Okay. So your discussion of the history and  
20 tradition and these Supreme Court cases informs your  
21 conclusion that children are a protected class, and  
22 then informs, as well, your development of this -- of  
23 this test to be applied to certain government actions  
24 that deny children rights or benefits and when those  
25 actions should be subject to heightened scrutiny.

1 A. Right. Yes.

2 Q. Okay.

3 A. And it's relying on the series of cases  
4 that -- that I'm drawing on to say that that's -- that  
5 that -- that history is present, and in the cases what  
6 happens is they get overlooked often.

7 Q. Okay.

8 A. And my expertise is to push those cases out  
9 and say we can look at them from a different way.

10 Q. Okay. And is it fair to say that the second  
11 half of your report essentially applies that test that  
12 you formulated in the first half to government policies  
13 related to climate change?

14 A. I think that the -- that it's laying out --  
15 hold on. Let me see if I can pull this for us.

16 If you look on page 24, when I'm talking  
17 about the cases that I'm thinking about as children's  
18 cases, in the -- after the -- right after footnote 94,  
19 I say, In my expert opinion, we readily understand this  
20 foundational principle from the -- from the -- the --  
21 that legislation imposing special disability groups --  
22 it's referencing the sentence before it -- that this  
23 foundational principle in the context of race and  
24 gender, we understand that --

25 MR. GREGORY: Slow down so Lisa can --

1           And I point out the different pieces that we  
2           can take away from -- you could call it a test, but you  
3           could also say, hey, these are guidelines, these are  
4           guiding principles that a Court can look at, or even a  
5           legislature, or people trying to think about where's a  
6           line when we're thinking about state actions that  
7           imposes significant harms on children, and that's what  
8           I'm pulling out of these cases, saying it's present,  
9           because it often gets overlooked because we're looking  
10          at those cases from the lens of an adult and from adult  
11          lenses and adult interests.

12          Q.     (BY MS. BORONOW) Okay. So then going back  
13          to the second half of your report, is -- is it fair to  
14          say that you're applying your interpretation of those  
15          cases or those guidelines, as you said, that you  
16          developed specifically to climate change?

17          A.     Well, I think that I'm -- once again, as I  
18          pointed out, the first part of the paper and the second  
19          part of the paper are connected because it's a  
20          continuum of this notion that there's a historical and  
21          sociolegal context here.

22                 And even in the law, children have  
23          traditionally been thought of as property. And as a  
24          result of the history of Brown and creating our kind of  
25          modern equal protection jurisprudence and the

1 subsequent cases, that history is important for all of  
2 us to think about when we're talking about this very  
3 unique context of climate change and the federal  
4 government's role in -- in that change and its harm and  
5 impact to children.

6 And so they're really looking at those cases  
7 and pulling out guidelines and factors and things that  
8 the Court considers -- the Court has considered in  
9 those cases that are different than how it thinks about  
10 adults and how our society think about adults, children  
11 are different, and those can be taken into  
12 consideration.

13 And so when we talk about a protected class,  
14 we're not talking about the protected class in the  
15 typical sense that we learn about in our constitutional  
16 law courses or that we hear about on the street when we  
17 think about, oh, our race is really protected, and it  
18 is, and how we got there. But how we get there with  
19 children has been a different route, and I don't think  
20 that's been highlighted across the board. So that's  
21 what I'm -- I'm doing in the report, is trying to lay  
22 those things out so it's apparent.

23 Q. Okay. And when you talk about what these  
24 child-centered cases tell us, you're interpreting those  
25 cases, right?

1           A.    I say that there is interpretation of those  
2 cases, but not just interpreting them in terms of the  
3 doctrine but the -- looking at the social and  
4 historical context and how those cases have evolved and  
5 how to look at or think about or talk about cases, not  
6 necessarily doctorially or just the legal analysis of  
7 them, but the role they've played in our history with  
8 respect to children and how that has often -- is often  
9 overlooked socially, historically, and legally, and  
10 politically because of adult interests.

11           Q.    Okay.  So, again, I guess going back to this  
12 historical and social context, you're looking at or  
13 interpreting these cases in the -- in the context of  
14 history, in the context of sociology, and in the  
15 context of these other aspects.  Is that accurate?

16           A.    Can you rephrase -- can you say that again?  
17 Sorry.

18           Q.    Sure.

19                    So when you're interpreting these cases,  
20 you're interpreting them in light of the broader  
21 historical and social context.  Is that a fair  
22 statement?

23           A.    What -- I don't think it's just a matter  
24 of -- it's because we, as lawyers, think about and talk  
25 about interpreting cases, meaning, you know, we might

1 look at a doctrine and say, I interpret this to mean X  
2 or Y, so I want to be clear what you mean by  
3 interpretation.

4 Q. So I guess what I'm thinking of as an  
5 interpretation may be broader than that, maybe a  
6 broader analysis of the case, and what it means, and  
7 how it can be used in future legal arguments like the  
8 ones you develop in your report.

9 A. Uh-huh. So in other words, broadly looking  
10 at it and saying this history has -- has -- because  
11 remember that I'm stepping back and saying we have  
12 evolved in our understanding, as Justice Kennedy  
13 phrased it in Obergefell, our understanding of children  
14 and their capacities and their vulnerabilities. We've  
15 evolved in our understanding of harm and discrimination  
16 and we're using -- and -- and rights and protections,  
17 and as a society we're gaining greater understanding  
18 that influences how we think about previous treatment  
19 and the rules we apply to -- to children.

20 And so if you're thinking about  
21 interpretation in that broader sense, then I -- as  
22 opposed to a narrow interpretation of a case and it  
23 sort of -- the precedent and the doctrine behind it,  
24 then -- then I'd say, yes, it encompasses all of those  
25 things as a way to inform us about the progression of

1 our understanding of children, of conduct and behavior  
2 that we engage in that harms children, and what that  
3 means in the context of climate change.

4 And I think there -- I'm pointing out things  
5 that are factors or guidelines or principles that are  
6 consistent with our equal protection values with  
7 respect to children and that they're unique with  
8 respect to children.

9 Q. Okay.

10 A. And so -- and I think I'm drawing on all of  
11 those to -- to say this is one way -- this is a way to  
12 think about these cases as opposed to kind of the  
13 traditional framework of equal protection law, product  
14 factors solely, like we do with adults in  
15 sex-orientation cases or some race cases or gender  
16 cases. Those cases have traditionally been focused on  
17 adults, and so...

18 Q. So is it your opinion that the child-centered  
19 cases that you discuss reflect this evolution, this  
20 evolution in the understanding of children? Is that  
21 accurate?

22 A. Yes. My opinion is that it reflects that  
23 evolution, but it -- and it is a continuum. It's not  
24 separated or divorced from the previous history that's  
25 been, you know, documented or talked about in the -- in



1 the -- in the report.

2 Q. Okay. All right. Can we turn to the first  
3 part of your report, section 1(a), which I think is on  
4 page 6. And this section discusses the founding  
5 documents, and you state your opinion that the founding  
6 documents lay the groundwork for recognizing the  
7 interests of children in future generations; is that  
8 right?

9 A. Uh-huh.

10 Q. And when you refer to founding documents  
11 here, are you referring to the Constitution?

12 A. I say in the introduction -- I say in the  
13 introduction to the first paragraph, A(1), "The Whole  
14 Constitutional Construct Protects Our Posterity and Our  
15 Children Across Generations. It has remained a central  
16 tenet of our democracy that the Union was about  
17 ensuring each child had equal opportunity to invent him  
18 or herself and that the blessings of that liberty we  
19 pass down from generation to generation. The founders  
20 opened the Constitution with their intergenerational  
21 concern."

22 Q. So you are referring to the Constitution as a  
23 founding document?

24 A. (Nods head.)

25 Q. Yes?

1 referencing the founding documents, but it certainly is  
2 referencing cases that are referencing the founding  
3 documents. And so if you look at the footnote on  
4 page 4 -- I'm sorry -- page 3, note 4 --

5 Q. Okay.

6 A. -- it says that -- there's a cite to  
7 Obergefell about this interpreting the due process and  
8 equal protection clause. It says that "New insights  
9 and societal understanding can reveal unjustified  
10 inequality within our most fundamental institutions  
11 that once passed unnoticed and unchallenged." And it  
12 goes on to talk about that evolution in the context of  
13 racial discrimination, gender discrimination, and male  
14 coverture laws, and ultimately sexual-orientation  
15 discrimination, as the Court found that same-sex  
16 couples had a fundamental right to marry.

17 And if you'll look at that footnote it cites  
18 Pierce v. Society of the Sisters of the Holy Names of  
19 Jesus & Mary from 1924. And that case -- we talked  
20 about -- it talks about the -- there's a quote from it.  
21 "The fundamental theory of liberty upon which all  
22 governments in this Union repose excludes any general  
23 power of the state to standardize its children by  
24 forcing them to accept instruction from public teachers  
25 only. The child is not the mere" -- sorry -- "The

1 child is not the mere creature of the state; those who  
2 nurture him and direct his destiny have the right,  
3 coupled with the high duty, to recognize and prepare  
4 him for additional obligations." And those are  
5 certainly referencing our founding and constitutional  
6 provisions within, you know, the Fifth Amendment and  
7 the Fourteenth Amendment, due process and equal  
8 protection clauses.

9 Q. Okay. So it's appropriate, in your view, for  
10 the Court to consider the founding documents in  
11 developing this understanding of certain inequalities.  
12 Is that fair?

13 A. Well, I think it's appropriate for the Court  
14 to consider what the Court considers, as I would tell  
15 my students. The -- you know, the -- sure, the Court  
16 could consider founding documents and other sources and  
17 materials and arguments or evidence.

18 Q. And could a Court consider, for example,  
19 these -- these statements from presidents and  
20 presidential conferences if it was looking into this  
21 issue on equal protection rights for children?

22 A. In what context?

23 Q. So, for example, in this case.

24 A. As to what issue?

25 Q. As to the issues you talk about in your

1 report, Fourteenth Amendment equal protection rights  
2 and the application of heightened scrutiny for  
3 children.

4 A. Well, I think my point here is to say that  
5 the Court can -- my point here is that these are  
6 examples of our evolution and understanding of children  
7 as a class and the evolution of the rights of children  
8 from a historical perspective. But if the Court  
9 chooses to reference the president's statements or  
10 other, you know -- historically for other reasons, I  
11 mean I don't really have much to say about that.

12 Q. That's understandable. But in your position  
13 as a law professor, you wouldn't think it inappropriate  
14 for a Court to look at these presidential statements in  
15 reaching its conclusion that there's been this  
16 evolution over time of children's rights and in  
17 reaching a conclusion about the level of scrutiny to be  
18 applied?

19 A. I think it goes back to looking at social  
20 shifts and changes in society, and I think the Court  
21 does that often, and it can reference lots of different  
22 provisions, statements, speakers in doing so, whether  
23 it's a presidential statement or a statement from civil  
24 rights activists or -- or anyone else.

25 But I -- I would say that I think it's

1 Sixteen, on page 16, if you turn to international  
2 jurisprudence on children's rights and the convention  
3 of rights -- convention on the rights of a child.

4 A. Uh-huh.

5 Q. Why did you look at the convention on the  
6 rights of the child for this expert report?

7 A. I would say similar to my response about  
8 looking at precedence and the Constitution, that it's a  
9 part of our evolved understanding of children and the  
10 rights of children.

11 (Interruption in the proceedings.)

12 THE WITNESS: That's really funny. Sorry.

13 A. That -- that it's a part of our evolved  
14 understanding of the rights of children and on a global  
15 scale; and that the United States led this  
16 international effort in drafting the United Nations  
17 convention on the rights of the child, and that also  
18 shows our country's appreciation of this shifting view  
19 of children as a class.

20 Q. (BY MS. BORONOW) And when you reference  
21 evolved understanding there, whose evolved  
22 understanding are you referring to?

23 A. Well, I -- I'd say of -- going back to the  
24 historical and sociolegal understanding and study of  
25 law, I'd say that evolved understanding or more of an

1 appreciation of the interests of children for society,  
2 the United States, and for the -- for the political  
3 process for courts and decision makers, you know,  
4 decision makers, and for families and parents, sort  
5 of -- that's the sort of social component of this.  
6 It's cultural, it's social, and it is -- is, and has,  
7 shifted, and is shifting, and it's okay for us to  
8 recognize that and recognize unique to children.

9 Q. And can you see the same evolved  
10 understanding in the U.S. in like the Supreme Court  
11 cases, you say, for example, the child-centered cases?

12 A. I think that there is an evolved  
13 understanding. And if you look at the cases, we see  
14 that. And it's not a linear trajectory. It's this  
15 dialogue that's taking place in some ways with -- in  
16 different directions.

17 There's this dialogue that's taking place  
18 with -- between the public goers, social media, and  
19 the -- you know, individuals and people. There's a  
20 dialogue between the legislature and courts. There's a  
21 dialogue with the Supreme Court and the lower level  
22 courts, both at the state level and the federal level,  
23 that's taking place. It's not linear, necessarily, but  
24 if you look at it, there's a movement. And I think I  
25 talk about this in the report. Let's see if I can find

1 unique constitutional protections in a number of  
2 contexts, including substantive due process in juvenile  
3 proceedings, reproductive rights, freedom of  
4 expression, and equal protection. With children  
5 "rarely seen as bearers of due process and equal  
6 protection rights" *Brown v. Board of Education* served  
7 as a catalyst for the expansion of children's rights."

8           And I think that -- this is where I think  
9 people see this and they recognize this. Scholars and  
10 jurist and lawyers, they think what gets lost is this  
11 next series of cases that I think are -- and articulate  
12 as children's rights cases and post *Brown*, *Levy v.*  
13 *Louisiana*, and all the non-marital status cases that  
14 are -- stem from that.

15           And remember that *Levy* -- there were a series  
16 of cases for the non-marital status or kids of  
17 unmarried parents. And what's really striking about  
18 that is, you know, through this back and forth, the  
19 Supreme Court having this dialogue, and having this  
20 dialogue, whether it's through a case going up to the  
21 Supreme Court and then lower courts having to percolate  
22 on what the Supreme Court meant, it was in the, you  
23 know, mid 1980s that the Supreme Court said, after a  
24 series of these cases, we're going to apply  
25 intermediate scrutiny or heightened scrutiny to

1 children of unmarried parents. Why? Because when the  
2 government goes too far and engages in harms to  
3 children because of things they don't have control  
4 over, like the fact that their parents aren't married,  
5 the Court steps in and says that's a violation of their  
6 equal protection rights. We've said in Gault they're  
7 persons, and we're saying now that -- that -- that this  
8 is impermissible because it harms children.

9           And Plyler is even stronger. Plyler says,  
10 hey, you know, you can't -- you can't do this to kids.  
11 We can't harm kids in this way psychologically,  
12 economically, through family formation, and render them  
13 essentially an underclass, second-class citizens in our  
14 country, and I think that evolution is really critical  
15 for this discussion as well on climate change.

16           Q.    Okay. So your understanding of the evolution  
17 of children's rights and their status as a class flows  
18 from this long line of Supreme Court cases that begins  
19 in the nineteen -- well, I don't want to say begins,  
20 maybe that's unfair, but there's cases in the '20s  
21 leading up to Brown, which I think you referred to as a  
22 catalyst --

23           A.    Uh-huh.

24           Q.    -- and then flowing from Brown through these  
25 other lines of cases you refer to as the child-centered



1 Q. Okay. And on page 17 you also mention a case  
2 by the Supreme Court of Colombia.

3 A. Uh-huh.

4 Q. And that's in this past paragraph.

5 A. Uh-huh.

6 Q. And this case, to confirm, is a judicial  
7 opinion by a Colombian court; is that right?

8 A. Uh-huh. Let me take a look. It says -- on  
9 page 17, just this month, April 2018, the Supreme Court  
10 of Colombia issued an important ruling in favor of 25  
11 young people, including children.

12 Q. Okay. So it is a judicial opinion by a  
13 Colombian court.

14 A. Yes.

15 Q. And are you saying here that it's appropriate  
16 for a U.S. court to look to this case by the Supreme  
17 Court of Colombia in determining equal protection  
18 issues?

19 A. I would take us back to the point that I've  
20 been making; that I drafted the report as a way to talk  
21 about the evolution of children's rights, and -- and  
22 the convention of rights of the child clearly is a  
23 representation of that over time, historically,  
24 socially, and politically, so that's a part of my  
25 report and why I have it as a part of the report.

1           The question on whether the Court could look  
2 to this convention or an international opinion is -- I  
3 know can be a dicey question, but the Court has done so  
4 with respect to children's cases with the death penalty  
5 and other cases. So I think the answer is the Court  
6 certainly could, but it also could not, right? It's  
7 the Court, so I think sure.

8           Q.    Would you testify at trial that the Court  
9 should look to this specific Colombian case?

10          A.    I think that that's up to the Court in terms  
11 of what the Court chooses to do. I just offer it as an  
12 example of the evolution on the rights of kids. As a  
13 descriptive matter, as a normative matter, that's  
14 certainly for the Court to make that call.

15          Q.    Okay. So does that mean you would testify  
16 that the Court should look to it?

17          A.    I think your original question said -- was as  
18 to equal protection clause, and I'm saying that this is  
19 information in the context of my expert report  
20 demonstrating the evolution of the rights of kids, as  
21 an example. So if the Court is looking for examples of  
22 that, I would say this could be an example of that  
23 progression.

24          Q.    Okay. I guess I'm just trying to understand  
25 if you're on the stand at trial --

1 A. Uh-huh.

2 Q. -- and you're testifying about this  
3 convention in this Colombian case, is your testimony to  
4 the Court that these are documents that the Court  
5 should take into account and consider in its analysis  
6 of equal protection issues?

7 A. I don't -- I'd have to think about it. I  
8 don't think I would -- I think I'd be standing behind  
9 the report in saying this is an example of the  
10 evolution of children's rights and that the -- there  
11 are other countries that have recognized that this is  
12 an important issue.

13 Q. Okay. All right. Let's turn to page 35.  
14 Okay. So at the top of page 35, in the first full  
15 paragraph, you say, "In my expert opinion, based on a  
16 historical and sociological analysis, the  
17 child-centered cases tell us that when large-scale  
18 government systems leads to economic deprivation,  
19 stigmatic psychological harm, and family formation  
20 barriers that place significant obstacles in the path  
21 of children, imposing a lifetime of hardship for  
22 matters beyond their control, the Court takes a closer  
23 and more in-depth look at the government's actions."

24 A. Uh-huh.

25 Q. And when you say the child-centered cases

1 A. Uh-huh.

2 Q. -- that a Court should consider when deciding  
3 whether to apply --

4 A. Uh-huh.

5 Q. -- heightened reviews. Is that right?

6 A. I would think of them as factors and as an  
7 example of -- of thinking about kids as kids in a class  
8 in a particular context.

9 Q. And to be clear, these are factors that  
10 lawyers or a Court would consider in determining the  
11 appropriate standard of review in a case.

12 A. The Court could. I think there are other  
13 factors that a Court could draw on from those cases as  
14 well. By way of example are important ones when we  
15 think about the equal protection values historically  
16 and also the -- what the kid's cases, the  
17 child-centered cases that get overlooked, seem to be  
18 pushing on, or at least advancing, but I do think there  
19 could be other factors for a Court to pull out and draw  
20 on.

21 Q. And when you created this test, would you  
22 agree that this test is informed by everything we've  
23 discussed so far in the rest of the report, the  
24 founding documents, the evolution of the United States'  
25 understanding of children, and the line of Supreme

1 Court cases -- oh, and the international -- evolution  
2 of the international understanding of children?

3 A. I think that that's by way of -- yeah, I  
4 think it informed that in terms of by way of an example  
5 of what Kennedy says in Obergefell about the evolution  
6 of rights, and the -- saying, hey, let's not -- we have  
7 this history and this evolution and it can continue --  
8 it can continue and it's evolving and it's continuing  
9 to change. So I very much think of it as an example  
10 and factors that a Court consider, that a legislative  
11 body could consider, and it's informed by those things  
12 that you mentioned.

13 Q. And how did you develop these specific  
14 factors in this paragraph?

15 A. Just through eight to ten years of research  
16 and writing on the constitutional rights and equal  
17 protection rights, rights of children, Fourteenth  
18 Amendment, in general, but also of children.

19 Q. So did you draw these factors from any  
20 particular case or source, or is it more your -- your  
21 personal thought process of all the information that  
22 you've read, all the cases you've read and coming up  
23 with your own factors?

24 A. Yeah, I did -- it's my own work and thoughts  
25 and research and writing in this area, and that's why I

1 think it's critically important, because very few  
2 scholars -- very few scholars are -- are making this  
3 point that children are their own class and can be  
4 their own class under the equal protection clause.

5 And there's a lot of information we can draw  
6 on to look at it that way, as opposed to they're  
7 invisible, or they have to be sorted into the products  
8 factors as some sort of a test to the get heightened  
9 classification.

10 Q. And do you plan to testify in trial that the  
11 Court should consider these factors in this paragraph?

12 A. I think that they're important factors and  
13 the Court will have to decide whether to consider them  
14 or not. I mean, the report is what the report is.

15 Q. So, again, I'm just trying to understand what  
16 you would say if you were actually on the stand. Would  
17 you set forth these factors as something that you  
18 thought the Court should consider in its analysis of  
19 equal protection for children?

20 A. It's a part of my expert report so I don't  
21 know how I would be able to retreat from them or not  
22 say that they weren't important or that the Court  
23 shouldn't at least think about these set of cases and  
24 what they're saying and the back drop in terms of  
25 history and the evolution of the rights of kids, so...

1 Q. So to be clear, that's a yes, you would  
2 present these factors to the Court as something you  
3 think the Court should consider?

4 A. I think there are factors that are important  
5 for the Court's consideration.

6 Q. Okay. You used the terms "intermediate  
7 scrutiny" and "heightened scrutiny" in this report.

8 A. Uh-huh.

9 Q. Do you use those interchangeably?

10 A. That's a -- I do use them interchangeably,  
11 but heightened scrutiny could also include strict  
12 scrutiny as well, or it could also include rational  
13 basis or rational basis plus, depending on how -- how  
14 one sorts them or looks at them, the different tiers.

15 Q. So in terms of your opinion as to the  
16 appropriate level of scrutiny for children, is it your  
17 opinion that intermediate scrutiny is the appropriate  
18 level?

19 A. Yes.

20 Q. Okay. So when you use heightened scrutiny in  
21 your report to refer to the appropriate level of  
22 scrutiny for children, what you mean is intermediate  
23 scrutiny?

24 A. In referencing the cases and the history  
25 of -- of -- of how the Court has evolved, it's a

1 about the appropriate standard of review for an alleged  
2 equal protection violation in their brief; is that  
3 right?

4 MR. GREGORY: Objection, incomplete  
5 hypothetical, calls for speculation.

6 A. I think anything can happen. You know,  
7 lawyers certainly could articulate these sorts of  
8 factors in a brief. I think that what I'm bringing to  
9 this is a history, years of studying the historical and  
10 sociological and legal dynamics and institutions that  
11 is difficult for a lawyer to do.

12 Q. (BY MS. BORONOW) I understand. What I'm  
13 getting at, though, is in a case involving an alleged  
14 equal protection violation --

15 A. Uh-huh.

16 Q. -- would a lawyer identify the level of  
17 scrutiny that that lawyer's client thinks is  
18 appropriate?

19 MR. GREGORY: Objection, incomplete  
20 hypothetical, lacks foundation, calls for  
21 speculation.

22 A. I think lawyers, or a lawyer, might argue the  
23 level of review based off prior precedent that they've  
24 read in a case, based off their lack of knowledge about  
25 the history of the rights of children, and the



1 progression of the evolution of the rights of children,  
2 and I think that that's why -- or their lack of time to  
3 study the culture and social development of these  
4 issues because they're, you know -- and I think that's  
5 what I'm bringing to bear here as an expert, is -- are  
6 those insights. And these insights aren't out there,  
7 and I think it's because it requires someone with a  
8 certain level of expertise and study and reflection on  
9 the social and historical and legal context to draw  
10 them out and to talk about them.

11 Q. (BY MS. BORONOW) But to be clear, there's  
12 nothing that would prevent a lawyer, if that person  
13 engaged in the analysis and consideration of these  
14 documents like you do, from making those arguments in a  
15 brief.

16 A. I think that's true for almost everything. I  
17 mean, there would be nothing that would stop me from  
18 become -- you know, going out and trying to figure out  
19 how to become a meteorologist or to -- I mean, that's  
20 true for almost everything. I don't know how that's  
21 unique in this -- in this context.

22 Q. Right, but you would agree that lawyers know  
23 about law and routinely consider the constitution, for  
24 example. Is that a yes?

25 A. Yes, lawyers do know about law and consider

1 sufficient -- that based off the evolution and -- based  
2 off the historical and social understanding of the  
3 evolution of the right to children, that a court could  
4 find that the federal government's controls, the -- has  
5 control over climate change and poses a risk to  
6 children that could result in a lifetime of hardship.

7 Q. And are you prepared to testify at trial that  
8 the U.S. government's control over the energy system  
9 and over climate change could harm children in these  
10 ways and thereby result in a lifetime of hardship?

11 A. Once again, the report relies on the  
12 assumptions and evidence in other expert reports and  
13 the testimony that's provided, and the Court could  
14 certainly find that those harms are present from the  
15 government's action and find a -- and apply heightened  
16 scrutiny based off the -- my analysis of the report.

17 Q. Okay. Again, though, I'm not sure that  
18 answered my question.

19 Do you plan to testify that the U.S.  
20 government's control over the energy system will deny  
21 rights and benefits to children and thereby result in a  
22 lifetime of hardship?

23 A. I think I'll be testifying to what's a part  
24 of my report, I'm saying in my report. I'm not sure if  
25 I'm saying something different than what you're asking.

1 I think I might be missing what you're saying, but...

2 Q. Okay. So are you saying you can't answer  
3 that question?

4 A. I think I answered it.

5 Q. Well, it was a yes or no question of whether  
6 you're prepared to testify specifically that the U.S.  
7 government's control over the energy system will deny  
8 rights and benefits to children and thereby result in a  
9 lifetime of hardship.

10 A. Well, I think that the statement includes a  
11 number of conclusions that the Court will have to  
12 ultimately decide. But I think that what I'm saying is  
13 that if the Court finds those things, intermediate  
14 scrutiny could certainly apply and the Court finding  
15 intermediate scrutiny could conclude that that's  
16 accurate.

17 Q. Okay.

18 A. Could conclude that there's a lifetime of  
19 hardship on children in terms of these different  
20 economic deprivations, stigmatic and psychological  
21 harm, but once again, as I said earlier, the report is  
22 depending on the expert testimony of others --

23 Q. Okay.

24 A. -- and has a number of assumptions built into  
25 it.

1 A. Uh-huh.

2 Q. Plyler, Weber, Levy; is that right?

3 A. And you said -- what page are you on?

4 Q. I'm starting on page 18 --

5 A. Uh-huh.

6 Q. -- under Roman Numeral I, and then through  
7 that section, which continues on the following pages --

8 A. Uh-huh.

9 Q. -- you discuss many of the same cases that  
10 you've discussed in your expert report.

11 A. Uh-huh.

12 Q. Is that correct?

13 A. And that's just on page 18 or --

14 Q. No, page 18 and the following pages within  
15 Roman Numeral one, so I think it's 18 through 29. But,  
16 for example, on page 25, there's a paragraph that  
17 starts with, "Levy, Weber, and Plyler establish that  
18 discrimination against children cannot be justified  
19 based on moral disapproval of parents' marital or  
20 immigration status."

21 A. Uh-huh, yes, I see that those are some  
22 similar -- many of the same cases.

23 Q. And you're making a similar point here,  
24 correct, that these cases stand for the fact that  
25 discrimination cannot be justified based on moral

1 disapproval of parents' marital or immigration status?

2 A. Well, it's a slightly different point. My  
3 research is building on these cases to argue that --  
4 that when the state goes too far in terms of harming  
5 kids for matters beyond their control, and I'm making  
6 that argument that this is a scenario that it could be  
7 applied to for matters beyond their control.

8 In those cases they're focused on the matter  
9 beyond their control that they can't control their  
10 parents. And I think what I'm saying in my expert  
11 opinion is that these issues -- these cases are giving  
12 us guideposts about equal protection values and  
13 principles, and one of those guideposts is that when  
14 children are faced with state action or the creation of  
15 a risk or that -- that threaten to harm them by  
16 relegating them to some sort of second-class status or  
17 significant injury, that it's appropriate for the Court  
18 to step in and say we're going to apply a heightened  
19 level of review because children are different, and  
20 they're unique, and we need to step in, like I talked  
21 about all the vulnerabilities about kids, because they  
22 can't vote and because they're not a part of the  
23 political process, they don't have economic power. And  
24 so it's really taking it and arguing -- it's the  
25 development of my research agenda for Obergefell until

1 now.

2 Q. Okay. On page 29 of Exhibit 2, you conclude  
3 that state marriage bans harm children of same-sex  
4 couples by depriving them of the important legal,  
5 economic, and social benefits of marriage without  
6 justification. Do you see that?

7 A. Uh-huh.

8 Q. And then you go on to say that state marriage  
9 bans impose legal, economic, and social harms on  
10 children of same-sex couples.

11 A. Uh-huh.

12 Q. And on page 31 you talk about familial  
13 formation harms.

14 A. Uh-huh.

15 Q. And on page 35 you talk about economic harms.

16 A. Uh-huh.

17 Q. And on page 37 you talk about psychological  
18 harms.

19 A. Uh-huh.

20 Q. And are these types of harms also derived  
21 from the same child-centered cases that we've discussed  
22 earlier?

23 A. Yes. They're the type of harm or the kinds  
24 of harms that in my expert opinion are saying that the  
25 Court has found to be important considerations when it