JULIA A. OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
Wild Earth Advocates
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

ANDREA K. RODGERS (OR Bar 041029)
Andrearodgers42@gmail.com
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

PHILIP L. GREGORY (*pro hac vice*)
pgregory@gregorylawgroup.com
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

Attorneys for Plaintiffs

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; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT OPINION TESTIMONY OF PROFESSOR CATHERINE SMITH

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 26(a)(2), Plaintiffs timely offered the expert report of Professor Catherine Smith. In her expert report, Professor Smith provides a historical and sociological analysis of the factual circumstances underpinning the government's history of discrimination and protection of children throughout history. Defendants' Motion *in Limine* ("Motion"), citing Federal Rules of Evidence 401, 402, 403, and 702, seeks to exclude Professor Smith's testimony solely because, Defendants argue, "her testimony consists exclusively of legal opinions that are not relevant to any issues in dispute in this case." Defendants' Motion *in Limine* ("Defs. Mot."), Doc. 379 at 2.

On the contrary, Professor Smith's testimony is admissible both because it is relevant, and because it will inform and assist the Court, as trier of fact, in assessing Plaintiffs' legal claims. Defendants mischaracterize the nature and relevance of Professor Smith's testimony; misinterpret and incorrectly apply the law regarding expert testimony pertaining to an ultimate issue; and erroneously suggest that this Court's role would be usurped or unduly influenced by Professor Smith's testimony. Professor Smith's expert report does not provide legal conclusions on an ultimate legal issue in the case, but instead presents a historical and sociological analysis of children's disparate treatment, from before the founding of the Nation to present time, within the legal constructs in place. Professor Smith also opines on how societal and government treatment of children has evolved over time.

Importantly, Professor Smith's testimony does not and is not intended to offer legal conclusions as to whether Defendants' challenged conduct would withstand the applicable level of scrutiny. Professor Smith's testimony thus avoids offering an opinion on the ultimate issue in this case that this Court must resolve. As a result, and for the reasons described below, Professor

Smith's testimony is both admissible and relevant under Federal Rule of Evidence 702, and this Court should deny Defendants' Motion.

LEGAL STANDARD

Federal Rule of Evidence 702 provides that an expert may testify if their "specialized knowledge will help the trier of fact . . . to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* established that the "overarching subject [of Rule 702] is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." 509 U.S. 579, 594–95 (1993). Rule 702 is a flexible standard that "grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999); *United States v. Hankey*, 203 F.3d 1160, 1168-69 (9th Cir. 2000) (trial court must be given broad discretion to decide *whether* to admit expert testimony). Courts should apply Rule 702 consistent with the "'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'" *Daubert*, 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). If an expert satisfies the qualifications of Rule 702, he or she has "wide latitude to offer opinions." *Daubert*, 509 U.S. at 592.

"It is well-established . . . that expert testimony concerning an ultimate issue is not per se improper." *Mukhtar v. Cal. State Univ., Hayward,* 299 F.3d 1053, 1066 n.10 (9th Cir.2002). "Indeed, Fed. R. Evid. 704(a) provides that expert testimony that is 'otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'"

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004) (quoting *Mukhtar,* 299 F.3d at 1066 n.10). Relatedly, although "'matters of law' are generally inappropriate subjects for expert testimony . . . there may be 'instances in rare, highly complex and technical matters where a trial judge, utilizing limited and controlled mechanisms, and as a matter of trial management, permits some testimony seemingly at variance with the general rule.'" *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008*), as amended on denial of reh'g and reh'g en banc* (Apr. 17, 2008), *rev'd sub nom. Horne v. Flores*, 557 U.S. 433 (2009) (internal citations omitted).

Furthermore, in a bench trial there is "little danger . . . that the court would [be] unduly impressed by [an] expert's testimony or opinion." *Shore v. Mohave Cty., State of Ariz.*, 644 F.2d 1320, 1322–23 (9th Cir. 1981); *Mabrey v. Wizard Fisheries, Inc.*, 2008 U.S. Dist. LEXIS 9985, at *8 (W.D. Wash. Jan. 8, 2008); see also 11 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2885, at 454 (3d ed.) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence."); Edward J. Imwinkelried, EVIDENTIARY FOUNDATIONS § 1.03[2] (6th ed. 2005) ("As the Advisory Committee Note to Rule 104(a) states, the technical evidentiary rules are generally viewed as 'the child of the jury system,' and therefore there is no need to apply those rules when the judge is the factfinder.")

ARGUMENT

I. Professor Smith's Opinions are Relevant to Plaintiffs' Remaining Claims.

Defendants incorrectly argue that, because this Court rejected the argument that Plaintiffs are members of a suspect class for the purposes of their Equal Protection claims, and because Professor Smith "does not directly analyze fundamental rights in her report," Professor Smith's

testimony is irrelevant. Defs. Mot. 16. Defendants misstate both this Court's rulings on Defendants' motions for summary judgment and judgment on the pleadings, and Professor Smith's testimony during her deposition. This Court's October 15, 2018 Opinion and Order stated that, while Plaintiffs as members of "posterity" were not members of a suspect class, "*strict scrutiny* is also triggered by alleged infringement of a fundamental right." Doc. 369 at 56-58 (emphasis added).

The issue of whether Plaintiffs' Equal Protection claims might require an intermediate level of scrutiny or some form of heightened scrutiny, such as where Plaintiffs are found to be members of a "quasi-suspect" or "semi-suspect" class, or in other *sui generis* circumstances, has not been determined by this Court and has not been briefed by Defendants. *See* Pls. Pretrial Memo., Doc. 384, at 61, 65, 70, 72. Professor Smith's testimony explicitly does not concern Plaintiffs' Equal Protection claims that would attract strict scrutiny, but instead is relevant to those claims that might plausibly attract intermediate or heightened scrutiny. *See* Smith Rep., Doc. 265-1, at 30 n.132, 35; Smith Dep. Tr. 81:15-19. Additionally, the historical and sociological circumstances surrounding the treatment and protection of young people, as explained through Professor Smith's testimony, is highly relevant to Plaintiffs' Substantive Due Process and Public Trust claims. Pls. Pretrial Memo. 45, 49-50. Defendants therefore overstate the effect of this Court's October 15, 2018 Opinion and Order on Plaintiffs' preserved claims for trial with respect to the relevancy of Professor Smith's testimony.

While strict scrutiny is required because Plaintiffs' Equal Protection claims involve an infringement of a fundamental right, Doc. 369 at 56-58, a multi-tiered analysis is appropriate in the trial court in the event an appellate court rules differently with respect to the fundamental rights at stake. *See* Doc. 369 at 49 ("further factual development of the record will help this

Court *and other reviewing courts* better reach a final conclusion as to plaintiffs' claims . . . ." (emphasis added)). Judge Vaughn Walker of the U.S. District Court for the Northern District of California performed such an analysis when he held that Proposition 8—an amendment to the California Constitution providing that "only marriage between a man and a woman is valid or recognized in California"—violated both the Due Process and Equal Protection Clauses of the U.S. Constitution's Fourteenth Amendment. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010). In his Due Process analysis, Judge Walker found that Proposition 8 infringes on "the fundamental right to marry" and was therefore subject to "strict scrutiny." *Id.* at 994. In his Equal Protection analysis, Judge Walker found that Proposition 8 discriminates based on sexual orientation and was subject to strict scrutiny on this additional ground. *Id.* at 997. Applying both clauses, Judge Walker went on to find that Proposition 8 also failed to satisfy even "rational basis review," because it was "not rationally related to a legitimate state interest," *id*., and, indeed, was based on nothing more than "a private moral view that same-sex couples are inferior to opposite-sex couples." *Id*. at 1003.

A similar analysis of each potentially-applicable level of scrutiny is warranted here, as Plaintiffs advance their claims under multiple Due Process and Equal Protection theories.[1] Professor Smith's expert opinions provide important historical, sociological, and institutional bases for the Court to consider when determining whether to apply a heightened standard of

[1] For instance, Plaintiffs assert that constitutional claims involving children are *sui generis* and, even apart from a fundamental rights analysis where strict scrutiny is applied, children are entitled to a heightened standard of judicial review when government action imposes significant risks and injury to children's well-being for matters beyond their control. Doc. 384 at 61-65; *see also, e.g., Plyler v. Doe*, 457 U.S. 202, 220, 223-24 (1982). Plaintiffs also assert that, even under a traditional Equal Protection analysis, invidious discrimination against children requires intermediate or some heightened level of scrutiny, as children are entitled to extraordinary protection as a quasi-suspect class. Doc. 384 at 61, 65-73.

judicial review in cases about discrimination against children as a class – discrimination which acts not for their benefit and protection, but to their detriment. Professor Smith's testimony is therefore relevant to Plaintiffs' remaining claims and admissible on those grounds.

II. Professor Smith's Testimony Does Not Impermissibly Express a Legal *Conclusion* Regarding an Ultimate Issue of Law.

Defendants correctly concede that expert testimony that concerns or "embraces an ultimate issue" is not *per se* inadmissible. Defs. Mot. 8 (citing *Mukhtar*, 299 F.3d at 1065 n.10; Fed. R. Evid. 704(a)). Nevertheless, Defendants argue that Professor Smith's testimony is supposedly "permeated with legal advocacy." *Id.* at 11. Defendants' arguments, however, muddle the legal issues to be decided in this case and fundamentally mischaracterize whether and in what way Professor Smith's testimony will assist the Court in this case.

Specifically, Defendants fail to draw a distinction between expert testimony that opines on the underlying factual bases that inform the legal standard applicable to a plaintiff's claims, and expert testimony that draws conclusions by *applying* that standard to the facts of a case. While the latter category is improper,[2] Professor Smith's testimony falls squarely within the former category. Smith Rep. 4, 24, 35-36, 39, 41, 46. The appropriate standard of review for Equal Protection claims necessitates a factual inquiry, as "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–04 (2015)*; see also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100–01 (1st Cir. 1997) ("we acknowledge that it is often difficult to draw the line between what are questions of law, what are

[2] *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 352 F.Supp.2d 1037, 1042 (D. Ariz. 2005) ("federal courts typically prohibit lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case.").

questions of fact, and what are mixed questions."). The principal function of Professor Smith's expert report is to elaborate on the historical unequal treatment of children and the "new insights and societal understandings" revealed by her eighteen years of legal scholarship, and her analysis of the historical and sociological underpinning of law "as a set of institutional practices that have evolved over time and developed in relation to . . . cultural, economic, sociopolitical structures and institutions." Declaration of Julia A. Olson ("Olson Decl.") Exhibit 1 (Smith Dep. Tr. 13:22-14:1 (Sept. 19, 2018)). *See also id.* at 26:13-27:3, 43:18-44:22, 46:11-47:8, 56:6-57:8, 58:5-58:08, 62:9-62:10, 62:23-63:8, 65:15-66:15, 86:22-87:10, 141:23-143:1.

That courts have looked to similar sources as those referenced in Professor Smith's testimony does not render that testimony improper or inadmissible, and Defendants do not cite to any authority for such a proposition. Additionally, Professor Smith's methodology incorporates sources and information beyond traditional legal authorities like the Constitution, Presidential initiatives, and case law, including: reports from the United Nations (Smith Rep. 16, 17, and 41); books (*Id.* at 4, 7-10, 21); law review articles (*Id.* at 3, 5, 6, 8-11, 17, 18, 20, 21, 24-28, 30, 33, 34); and scientific journals (*Id.* at 5, 6, 14, 40, 42-45). Professor Smith's testimony thus "assists the trier of fact" by "provid[ing] information beyond the common knowledge of the trier of fact" with respect to the empirical considerations that must be assessed in order for the Court to ascertain whether government actions that harm children, as a quasi-suspect class or because of *sui generis* circumstances, are reviewable using heightened scrutiny. *United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002) (citing *Daubert*, 509 U.S. at 591).

With respect to their constitutional claims, Plaintiffs use the expert assistance of Professor Smith's historical and sociological analysis in a manner similar to the historical background of discrimination identified in *Arlington Heights v. Metropolitan Housing*

Development Corp., 429 U.S. 252, 265-68 (1977). Similar expert testimony has been used by federal courts. For instance, a three-judge court in a Voting Rights Act case involving redistricting in Texas cited such an historical analysis in finding that the state intentionally discriminated against minority voters. *Texas v. Holder*, 887 F.Supp.2d 133 (D.D.C. 2012).

Similarly, while Professor Smith discusses case law, secondary legal sources, and historical and sociological insights in opining as to what factual considerations have informed the question of whether children as a class warrant heightened scrutiny under the Equal Protection Clause, Professor Smith refrains from *applying* heightened scrutiny to the conduct of Defendants that is challenged in this case. Smith Rep. 4, 24, 35-36, 39, 41, 46; Olson Decl. Exhibit 1 (Smith Dep. Tr. 12:22-14:21, 38:17-41:09, 43:12-48:01, 70:01-72:12, 79:19-81:05, 117:17-118:25). Contrary to Defendants' suggestion, Part II of Professor Smith's expert report does not draw "legal conclusions" when she describes contexts in which Equal Protection claims brought by children have received heightened scrutiny in the past. Rather, Professor Smith is again providing historical analysis on empirical bases that are relevant for the Court to consider in determining and applying the applicable level of scrutiny for Plaintiffs' Equal Protection claims given the specific facts of this case.

III. Professor Smith's Expert Report Does Not Usurp the Role of the Judiciary.

Professor Smith's testimony describing and analyzing the evolving legal history of constitutional discrimination cases involving children does not "usurp" the functions of the judiciary as Defendants urge. Defs. Mot. 13. Importantly, Professor Smith's testimony does not tell the trier of fact "what result to reach" but instead describes the historical and sociological underpinnings to consider when applying a heightened standard of review when harm to children is alleged. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1060 (9th Cir. 2008).

Expert testimony pertaining to the relevant standard of liability of a defendant's conduct has been found to be admissible in other contexts, provided that the testimony does not take the additional step of applying that standard to the defendant's conduct. *See, e.g.*, *Hangarter*, 373 F.3d at 1016–17 (permitting the plaintiff's expert to testify as to issues going to the relevant standard of care – bad faith – as long as the testimony did not "reach[]a legal conclusion that Defendants actually acted in bad faith . . . ."); *Halsted v. City of Portland,* No. 3:10-CV-00619-AC, 2012 WL 13054271, at *2 (D. Or. Mar. 7, 2012) (finding that "expert testimony in excessive force cases is generally admitted to establish the *standards applicable* to the use of force." (emphasis added)).

This is so even if the expert is a legal expert. *Pinal Creek Group*, 352 F. Supp. at 1043 (allowing law professors to opine on corporate norms and whether the conduct of the parties complied with the norms); *McDevitt v. Guenther*, 522 F.Supp.2d 1272, 1294 (D. Haw. 2007) (allowing expert law professor "to testify about the standard of care amongst family law practitioners here in Hawai'i."). As other courts have recognized, the rule on prohibiting experts whose testimony involves legal analysis "is easy to state but difficult to apply and the outcome depends upon how the expert expresses [her] opinion." *Fidelity Nat. Financial, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 2014 WL 1286392, *8 (S.D. Cal. 2014). Denying Defendants' Motion will not preclude Defendants at trial from objecting to Professor Smith's testimony to the extent that it enters the realm of legal conclusions. *Boeing Co. v. KB Yuzhonoye*, 2015 WL 12803452, *3 (C.D. Cal. 2015) (allowing Defendants to call law professor as expert witness in bench trial and stating "to the extent Plaintiffs take issue with Professor Cunningham's testimony and report come trial, the Court expects Plaintiffs to point out those issues in the crucible of cross-examination.").

Defendants' suggestion that Professor Smith's testimony purports to resolve "disputed questions of law" is also unavailing. At no point in the instant Motion or in their prior briefing in this case, including their Trial Memorandum, do Defendants expressly dispute that even without a fundamental right at stake or suspect classification, Plaintiffs' Equal Protection claims are entitled to heightened review—that is, that Plaintiffs are capable of being considered a quasi- or semi-suspect class or that in particular *sui generis* circumstances children need protection from a heightened standard of review. As an expert on "law as a set of institutional practices," Olson Decl. Exhibit 1 (Smith Dep. Tr. 13:22-23), and on "the American legal system's historic, sociologic, and present treatment of children and the meaning of equality with respect to children's rights," Smith Rep. 1, Professor Smith's testimony permissibly informs rather than occupies the role of the Court. *Specht v. Jensen,* 853 F.2d 805, 809 (10th Cir.1988) ("a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible.").

Additionally, Professor Smith's testimony indicates that the historical, social, legal, and cultural development in the treatment of children and other marginalized social classes, and the influences of these developments on the evolution of Equal Protection Clause jurisprudence, have often been overlooked or misunderstood. Smith Rep. 3-4, 24; Smith Dep. Tr. 78:14-20. Indeed, the Equal Protection Clause has been recognized to be a nuanced, idiosyncratic, and evolving area of constitutional law. *Fortson v. Morris*, 385 U.S. 231, 248 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."); *Dillenburg v. Kramer*, 469 F.2d

1222, 1226 (9th Cir. 1972) ("[C]onstitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber."). Professor Smith's expert testimony is therefore analogous to select areas in which courts have previously found testimony pertaining to legal issues to be admissible. *See*, *e.g., Hangarter,* 373 F.3d 998 (9th Cir. 2004); *Halsted*, 2012 WL 13054271; *Ford v. Allied Mut. Ins. Co.,* 72 F.3d 836, 841 (10th Cir.1996) (finding that expert witness testimony on the issue of bad faith, which relied on interpretations of Iowa law, was admissible); *Highland Capital Mgmt., L.P. v. Schneider*, 551 F.Supp.2d 173, 178–79 (S.D.N.Y. 2008) (noting the regular practice in securities cases of permitting expert testimony on securities law); *Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F.Supp.2d 1069, 1076–78 (D. Or. 2013) (permitting expert testimony as to the regulatory framework of the Oregon University System); s*ee also* William B. Rubenstein, *Using Law Professors as Expert Witnesses in Class Action Lawsuits*, 6(20) BNA Expert Evidence Report 561 (2006) (describing the routine use of law professor expert witnesses in class action proceedings).

Furthermore, there is essentially no prospect that this Court would be unduly influenced by Professor Smith's testimony. First, this is a bench trial, in which the typical rules of admissibility may be somewhat relaxed. *Vatyan v. Mukasey*, 508 F.3d 1179, 1187 (9th Cir. 2007) ("The rules of evidence are not ordinarily applied as stringently in bench trials . . . as in jury trials."); *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014). The Ninth Circuit has confirmed that the better approach to *Daubert* in a bench trial is to permit contested expert testimony and "allow 'vigorous cross-examination, presentation of contrary evidence' and careful weighing of the burden of proof to test 'shaky but admissible evidence.'" *Fierro v. Gomez*, 865 F. Supp. 1387, 1395 n.7 (N.D. Cal. 1994), *aff'd* 77 F.3d 301 (9th Cir. 1996), *vacated and remanded on other grounds*, 519 U.S. 918 (1996), *modified on other grounds on remand*,

147 F.3d 1158 (9th Cir. 1998) (quoting *Daubert*); *see also United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (citing numerous cases for the principle that the *Daubert* gatekeeper function is less relevant in a bench trial). Second, this Court has already determined that Plaintiffs' Equal Protection Claims may go forward even where children as a class have not been given suspect classification. Doc. 369 at 58-59. As a result, the judiciary's role would not be usurped simply because Professor Smith opines on the historical and sociological factual bases within systems of law for the applicable standard of review for some of Plaintiffs' Equal Protection claims.

CONCLUSION

Professor Smith's expert report and testimony do not present legal conclusions, will not unreasonably influence or supplant the role of this Court, and are relevant to Plaintiffs' claims to be proven at trial. If necessary, this Court can limit Professor Smith's testimony at trial to that which does not render legal conclusions, while still benefiting from the empirical analysis she provides on the historical, sociological, and legal treatment of children from the time of the founding of the Nation up to the present day. For the above reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to exclude Professor Smith's expert report and testimony.

DATED this 6th day of November, 2018.

/s/ Julia A. Olson

JULIA A. OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (*pro hac vice*)
pgregory@gregorylawgroup.com
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS (OR Bar 041029)
andrearodgers42@gmail.com
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Plaintiffs