

Case No. 18-36082

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)

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

William John Snape, III
DC Bar No. 455266
American University,
Washington College of Law
4300 Nebraska Ave, NW
Washington, DC 20016
(202) 536-9351/(202) 274-4443
wsnape@wcl.american.edu

David Hunter
DC Bar No. 41306
American University,
Washington College of Law
4300 Nebraska Ave, NW
Washington, DC 20016
(202) 274-4415
dhunter@wcl.american.edu

*Counsel for Amici Curiae Center for International Environmental Law and
Environmental Law Alliance Worldwide—US*

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Center for International Environmental Law (CIEL) is a nonprofit corporation incorporated in the District of Columbia and designated a tax-exempt public charity in accordance with Sections 501(c)(3) and 509(a)(1) of the Internal Revenue Code. CIEL has no corporate parent company and no publicly held corporation owns stock in CIEL.

Amicus curiae Environmental Law Alliance Worldwide—US (ELAW) is a nonprofit corporation registered as a public charity in Oregon (Secretary of State Corporation Division Registry #165926-85, July 26, 1989) and designated as a tax-exempt public charity in accordance with Sections 501(c)(3) and 509(a)(1) of the Internal Revenue Code. ELAW has no corporate parent company and no publicly held corporation owns stock in ELAW.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF <i>AMICI</i>	1
ARGUMENT	2
I. An international scientific and political consensus supports the District Court’s recognition that fundamental rights are threatened by disruption to the climate system	5
A. Climate change is already causing and is projected to cause severe impacts on human life, liberty, and property	5
B. Projected climate change impacts threaten the enjoyment of the right to life and other rights.....	7
II. Under international law, the U.S. obligation to protect the right to life extends to the protection of a climate system capable of sustaining life. 13	
A. The United States is obligated under international law to protect the right to life.	14
B. Under international law, the right to life encompasses environmental conditions, including a climate system, necessary to sustain life.....	15
III. The constitutional jurisprudence of other countries supports the District Court’s opinion that the right to life includes an obligation to maintain a climate system capable of sustaining human life.	19
CONCLUSION	26
CERTIFICATE OF COMPLIANCE.....	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. V.....	2
---------------------------	---

Federal Cases

<i>Juliana v. United States</i> , 217 F. Supp. 3d 1224 (D. Or. 2016).....	3, 4, 24, 26
<i>Juliana v. United States</i> , 339 F. Supp. 3d 1062 (D. Or. 2018).....	3
<i>Murray v. The Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804)	15
<i>Paquette Habana</i> , 175 U.S. 677 (1900).....	15
<i>Procopio v. Wilkie</i> , 913 F.3d 1371 (Fed. Cir. 2019)	15
<i>Stop H-3 Ass’n v. Dole</i> , 870 F.2d 1419 (9th Cir. 1989)	26
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988).....	19
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958).....	20
<i>Twining v. New Jersey</i> , 211 U.S. 78 (1908)	20
<i>Latta v. Otter</i> , 779 F.3d 902 (9th Cir. 2015).....	20

International Treaties

Am. Convention on Human Rights art 4, Nov. 22, 1969, 1144 U.N.T.S 123.....	14
Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.....	14
Int’l Covenant on Civil and Political Rights, Dec. 16 1966, 999 U.N.T.S. 171	14
Paris Agreement, Dec. 15, 2015, T.I.A.S. No. 16-1104.....	13

United Nations Framework Convention on Climate Change (UNFCCC),
 Mar. 21, 1994, 1771 U.N.T.S. 10713
 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 33115

Foreign Cases

Ashgar Leghari v. Federation of Pakistan, W.P. No. 25501/2015 20, 21
Budayeva and Others v. Russia, 2008 - Eur. Ct. H.R.....17
 Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, abril
 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018 (Colom.)21
Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. [2005] AHRLR 15124
 Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous
 Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and
 Costs) 15, 16
 Inter-American Court of Human Rights, *Official Summary Issued by the Inter-*
American Court: Environment and Human Rights, Advisory Opinion OC-23-17
 (Nov. 15, 2017).....17
Merriman et al. v. Fingal County Council et al. [2017] IR 695 (Ir.).....23
Mohiuddin Farooque v. Bangladesh [1997] 17 B.L.D. (A.D.) 124
Netherlands v. Urgenda Foundation, Hague Ct. of App.,
 Case No. 200.178.245/01 (Oct. 9, 2018).....18

Öneryildiz v. Turkey, 2004 - Eur. Ct. H.R. 16, 17

Sentencia 6240-93, la Sala Constitucional de la Corte Suprema de Justicia
(26 de noviembre de 1993) (Costa Rica).....24

Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 52024

Shehla Zia v. WAPDA, (1994) PLD (SC) 693 (Pak.) 21, 24

T. Damodhar Rao v. Municipal Corp. of Hyderabad, 1987 A.I.R (AP) 17123

Urgenda Foundation v. The State of the Netherlands,
C/09/456689/HA ZA 13-1396 (24 June 2015).....18

Other Materials

Alejandra Bodura, *How a Warmer World Primed California for Large Fires*, Nat’l
Geographic (Nov. 15, 2018)5

Comm. on Econ., Soc. & Cultural Rights, *Climate change and the International
Covenant on Economic, Social and Cultural Rights* (Oct. 8, 2018)10

Comm. on the Rights of the Child, *Concluding observations on the combined fifth
and sixth reports of Belgium*, U.N. Doc. CRC/C/BEL/CO/5-6 (Feb. 1, 2019)....12

Comm. on the Rights of the Child, *Concluding observations on the combined
fourth and fifth periodic reports of Japan*, U.N. Doc. CRC/C/JPN/CO/4-5 (Feb.
1, 2019)12

Constitution of India23

G.A. Res. 217 A (III): Universal Declaration of Human Rights (Dec. 10, 1948)...14

Henry Fountain, *The Hurricanes, and Climate-Change Questions Keep Coming*.
Yes, They're Linked, N.Y. Times (Oct. 10, 2018)5

Human Rights Comm., General Comment No. 36 (2018) on article 6 of the
ICCPR, on the right to life, CCPR/C/GC/36 (Oct. 30, 2018)9

Human Rights Committee, General Comment No. 6:
Article 6 (Right to life) (1982).....15

Human Rights Council, Human rights and climate change,
U.N. Doc. A/HRC/35/L.32 (June 19, 2017)8

Human Rights Council, Res. 32/33: Human rights and climate change,
U.N. Doc. A/HRC/RES/32/33 (July 18, 2016).....8, 11

Human Rights Council, Res. 38/4: Human rights and climate change,
U.N. Doc. A/HRC/RES/38/4 (July 16, 2018).....7

Human Rights Council Res. 31/8,
U.N. Doc. A/HRC/Res/31/8, (Apr. 22, 2016)8

Human Rights Council Res. 35/20, U.N. Doc. A/HRC/35/20 (July 7, 2017)8

Intergovernmental Panel on Climate Change, *Global Warming of 1.5°* (2018).....2

James R. May & Erin Daly,
Global Environmental Constitutionalism (Cambridge Univ. Press 2015).....26

NASA, *Global Temperatures*, Earth Observatory.....5

Note by the Secretary-General, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* , U.N. Doc. A/73/188, (July 19, 2018)..... 11, 26

Office of the United Nations High Commissioner for Human Rights (OHCHR), *Analytical Study on the relationship between climate change and rights of the child*, U.N. Doc. A/HRC/35/13 (May 4, 2017) 11, 12

Organization of American States General Assembly, AG/RES. 2818 (XLIV-O/14) (June 4, 2014).....10

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/37/5812

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).....10

U.N. Office of High Commissioner for Human Rights, *Joint statement by UN Special Procedures on the occasion of World Environment Day*11

U.S. Global Change Research Program, Fourth National Climate Assessment: Impacts, Risks, and Adoption in the United States, Volume II, (2018).....3

U.S. Mission to International Organizations in Geneva, *U.S. Explanation of Position on HRC Climate Change Resolution* (June 22, 2017).....8

IDENTITY AND INTEREST OF *AMICI*

Amici submit this *amicus curiae* brief, consented to by both Parties, pursuant to Fed. R. App. P. 29.¹ *Amici* Center for International Environmental Law (CIEL) and Environmental Law Alliance Worldwide (ELAW) are nonprofit corporations that use the rule of law to protect the environment and human rights. Since 1989, CIEL has been a leader in the development of environmental and human rights law, including with respect to climate change. ELAW serves as Secretariat of a global network of public interest environmental lawyers that among other things promotes a human rights-based approach to environmental protection.

Amici promote legal approaches to protecting the global environment, including the ecological foundations of human progress. The current challenge to the District Court's recognition that allegations that governmental policies that affirmatively and substantially damage the climate system could provide a basis for violations of due process rights is contrary to the missions, interests, and experience of *amici*. International law and foreign case law support the recognition that impacts from climate change impair human rights and that

¹ No party's counsel contributed to writing this brief in whole or in part or contributed funds for preparation or submission of this brief. No person other than *amici* or their counsel contributed funds specifically intended to fund preparation or submission of this brief.

governments have obligations to respect, protect, and fulfill those rights. Accordingly, *amici* respectfully request the Ninth Circuit deny this appeal and allow plaintiffs to litigate their claims.

ARGUMENT

The United States is obligated not to deprive Plaintiffs of their life, liberty, and property without due process. U.S. Const. amend. V. In the face of unrelenting evidence that global climate change will reshape humanity's future, the Plaintiffs ask this Court to recognize that their current and future enjoyment of life, liberty, and property is dependent on a stable climate system capable of sustaining life. Defendants argue that the right to a stable climate system is unlike any right previously recognized under our Constitution; but Defendants ignore that their ongoing and systemic actions to promote a fossil-fuel based energy system in the face of incontrovertible evidence of the impact on the future habitability of earth is unlike any breach of governmental responsibility that has come before. An international scientific and political consensus now agree that, left unaddressed, climate change threatens to destabilize our ecosystems and cause catastrophic harm that will among other things include increased deaths, millions of refugees, widespread destruction of property, and global food insecurity. *See* Intergovernmental Panel on Climate Change, Global Warming of 1.5° (2018), https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf [hereinafter

“IPCC, SR 1.5”]; U.S. Global Change Research Program, Fourth National Climate Assessment: Impacts, Risks, and Adoption in the United States, Volume II, (2018),

https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf

[hereinafter “Fourth NCA Summary”]. Yet in contravention of our international obligations, Defendants continue to promote a national fossil fuel-based energy system, with no plan to significantly reduce the U.S. contribution to climate change.

In the face of this reality, the District Court rightly recognized “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.” *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) [hereinafter “*Juliana I*”]. As the court held in 2016 and reaffirmed in 2018:

where a complaint alleges knowing governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

Id.; *Juliana v. United States*, 339 F. Supp. 3d 1062, 1098 (D. Or. 2018)

[hereinafter “*Juliana II*”].

As the District Court found below, Defendants do not dispute “that climate change is happening or that human activity is driving it” and that climate change poses a “monumental threat to Americans' health and welfare.” *Juliana I* at 1234, n.3. Rather, Defendants decry the purported novelty of the Plaintiffs’ claims and the Court’s finding of a right to a stable climate system.

But, as this brief demonstrates, Plaintiffs’ claims are not novel; international law and a growing number of decisions from foreign courts support Plaintiffs’ claims and the District Court’s opinion. International law and foreign jurisprudence recognize that life, liberty, and property intrinsically depend on the presence of a livable planet, including a climate system capable of sustaining human life. Recognizing this link between a stable climate system and human rights, courts in other jurisdictions have found that governments are obligated to address this deprivation of their citizens’ rights. Plaintiffs in this country should be allowed the same opportunity to prove that their government’s actions substantially cause, contribute to, and exacerbate climate change, thus depriving Plaintiffs of their individual rights to life, liberty, and property. Accordingly, *amici* respectfully urge the Court to uphold the District Court’s decisions and afford Plaintiffs the opportunity to present evidence and prove their claims at trial.

I. An international scientific and political consensus supports the District Court's recognition that fundamental rights are threatened by disruption to the climate system

A. Climate change is already causing and is projected to cause severe impacts on human life, liberty, and property

Climate change is here and its mark can be seen, *inter alia*, in the wildfires of California; the flooding from hurricanes in southern Louisiana, New York City, and Houston; sea level surges in southern Florida and the Chesapeake Bay; and record high temperatures throughout the United States. *See, e.g.*, Alejandra Bodura, *How a Warmer World Primed California for Large Fires*, Nat'l Geographic (Nov. 15, 2018), <https://www.nationalgeographic.com/environment/2018/11/climate-change-california-wildfire/>; Henry Fountain, *The Hurricanes, and Climate-Change Questions Keep Coming. Yes, They're Linked*, N.Y. Times (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/climate/hurricane-michael-climate-change.html>; NASA, *Global Temperatures*, Earth Observatory, <https://earthobservatory.nasa.gov/world-of-change/DecadalTemp>. The Fourth National Climate Assessment published in 2018 by the U.S. government confirmed the anticipated impacts of climate change on the United States:

The impacts of climate change are already being felt in communities across the country. More frequent and intense extreme weather and climate-related events, as well as changes in average climate conditions, are expected to continue to damage infrastructure, ecosystems, and social systems that provide essential benefits to

communities. Future climate change is expected to further disrupt many areas of life, exacerbating existing challenges to prosperity...

Fourth NCA Summary at 25. The Assessment paints a grim picture of Plaintiffs' future life in the United States. Absent significant and sustained mitigation efforts, climate change will:

- “[C]ause substantial net damage to the U.S. economy throughout this century” including annual losses in some economic sectors reaching hundreds of billions of dollars....” *Id.* at 26.
- Increase exposure to “waterborne and foodborne diseases,” temperature-related deaths, the “frequency and severity of allergic illnesses, including asthma and hay fever,” exposure to “ticks that carry Lyme disease and mosquitoes that transmit viruses such as Zika, West Nile, and dengue.” *Id.* at 27-28.
- Increase wildfires, intensify droughts, increase heavy downpours, reduce snowpack, and reduce surface water quality. *Id.* at 27, 29.
- Reduce agricultural productivity and crop yields. *Id.* at 29.
- Degrade infrastructure performance over the rest of the century, with the potential for cascading impacts that threaten our economy, national security, essential services, and health and well-being. *Id.* at 30.

The Fourth NCA Summary emphasized two other points particularly poignant for this lawsuit. First, children, like Plaintiffs, are “often disproportionately affected by, and less resilient to, the health impacts of climate change.” *Id.* at 28. Second, “[f]uture risks from climate change depend primarily on decisions made today.” *Id.* at 26.

The United States is not alone of course; the rest of the world will suffer similar or, in some cases, worse impacts. In its most recent full Assessment Report issued in 2013/2014, the Intergovernmental Panel on Climate Change (IPCC), the leading international organization for assessing climate change impacts, identified the following impacts from projected temperature increases: increased risks of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small islands; increased risk of severe ill-health and disrupted livelihoods for large urban populations; increased risks from the breakdown of critical services such as electricity, water supply, and health and emergency services; and food insecurity. IPCC 5th Assessment Report, Working Group II, Annex 7, at 13 (2014). As discussed, *infra*, these current and future climate impacts have increasingly been recognized as threats to fundamental human rights.

B. Projected climate change impacts threaten the enjoyment of the right to life and other rights

Since 2008, the United Nations Human Rights Council (HRC) has repeatedly affirmed that climate change has an adverse impact on the full and effective enjoyment of human rights, including the right to life. *See, e.g.*, Human Rights Council, Res. 38/4: Human rights and climate change, Preamble, U.N. Doc. A/HRC/RES/38/4 (July 16, 2018) (recognizing that “climate change has already had an adverse impact on the full and effective enjoyment of the human

rights enshrined in the Universal Declaration of Human Rights”); Human Rights Council, Res. 32/33: Human rights and climate change, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016) [hereinafter Human rights and climate change, A/HRC/RES/32/33]; *accord* Human Rights Council, Res. 31/8: Human rights and the environment Preamble, ¶ 4(a), U.N. Doc. A/HRC/Res/31/8 (Apr. 22, 2016).

Until it left the HRC in 2018, the United States endorsed the HRC resolutions linking climate change to human rights, including a 2017 resolution acknowledging that climate change contributes “to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights.” Human Rights Council, Human rights and climate change ¶ 1, U.N. Doc. A/HRC/35/L.32 (June 19, 2017). In joining the consensus, the United States expressly recognized that “the effects of climate change have a range of implications for the effective enjoyment of human rights.” U.S. Mission to International Organizations in Geneva, *U.S. Explanation of Position on HRC Climate Change Resolution* (June 22, 2017), <https://geneva.usmission.gov/2017/06/22/u-s-explanation-of-position-on-hrc-climate-change-resolution/>.

The HRC’s consistent recognition that climate change threatens human rights is supported by many other human rights institutions and Special Procedures mandate holders² charged with the interpretation and implementation of international human rights law. For example, the UN Human Rights Committee³ in its 2018 General Comment on the right to life under the International Covenant on Civil and Political Rights (ICCPR) found that “[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.” Human Rights Comm., General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life ¶ 62, CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter “General Comment No. 36”]. Similarly, the Committee on Economic, Social and Cultural Rights stated that

² Often referred to as UN Special Rapporteurs, the Special Procedures mandate holders are independent human rights experts who are appointed by the Human Rights Council and have specific mandates to report and advise on human rights from a thematic or country-specific perspective. This includes special procedures mandate holders on various topics that link to climate change and the environment, including among others, special rapporteurs on human rights and the environment, human rights and toxics, and the right to food, among others.

³ The UN Human Rights Committee is an international group of eighteen independent experts created under the ICCPR to monitor implementation of the Convention. It is different from the UN Human Rights Council cited above, which is an intergovernmental body made up of 47 Member States elected by the UN General Assembly to strengthen the promotion and protection of human rights around the world.

“climate change constitutes a massive threat to the enjoyment of economic, social and cultural rights” and noted that climate change is impacting these rights, including already affecting “the rights to health, food, water and sanitation; and it will do so at an increasing pace in the future.” Committee on Econ., Soc. & Cultural Rights, *Climate change and the International Covenant on Economic, Social and Cultural Rights* ¶¶ 1, 4 (Oct. 8, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>; see also Organization of American States General Assembly Preamble, ¶ 2, AG/RES. 2818 (XLIV-O/14) (Jun. 4, 2014) (climate change causes “deterioration of quality of life” for present and future generations).

The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment [hereinafter “Special Rapporteur”] has repeatedly emphasized the link between climate change and threats to human rights. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶¶ 23-39, 65, 68, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) (noting that the “. . . greater the increase in average temperature, the greater the effects on the right to life and health . . .”) [hereinafter “Report on the Issue of Human Rights Relating to the Environment”]; see also U.N. Office of High Commissioner for Human Rights, *Joint statement by UN Special*

Procedures on the occasion of World Environment Day (June 5, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> (noting, in a statement endorsed by twenty-seven UN Special Procedures, that increases in global temperature will adversely affect a wide range of human rights, including the right to life). The Special Rapporteur has called the further recognition of the right to a healthy environment an imperative given “the importance of ... a stable climate to the ability of both current and future generations to lead healthy and fulfilling lives.” Note by the Secretary-General, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶ 59, U.N. Doc. A/73/188 (July 19, 2018).

International human rights experts have also noted the potentially disproportionate impact of climate change on children. *See, e.g.,* Human rights and climate change, A/HRC/RES/32/33; Office of the U.N. High Commissioner for Human Rights (OHCHR), *Analytical Study on the relationship between climate change and rights of the child*, U.N. Doc. A/HRC/35/13 (May 4, 2017); *see also* *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶¶ 22-26, 69, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018) (noting that “climate change ... threaten[s] to cause long-term effects that will blight

children’s lives for years to come”). Accordingly, the OHCHR recommends taking “ambitious mitigation measures to minimize the future negative impacts of climate change on children to the greatest extent possible.” U.N. Doc. A/HRC/35/13 at ¶ 54(a). The Committee on the Rights of the Child in its review of the implementation of the Convention on the Rights of the Child has also explicitly recommended steps to reduce greenhouse gas emissions after noting the links between climate change and the rights of children. *See* Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth reports of Belgium* ¶ 35(b), U.N. Doc. CRC/C/BEL/CO/5-6 (Feb. 1, 2019) (recommending “that the State party ... [d]evelop a comprehensive national plan for reducing the level of greenhouse emissions to prevent dangerous climate impact”); Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic reports of Japan* ¶ 37(d), U.N. Doc. CRC/C/JPN/CO/4-5 (Feb. 1, 2019) (recommending “that the State party ... [e]nsure that climate mitigation policies are compatible with the Convention, including by reducing its emissions of greenhouse gases in line with its international commitments to avoid a level of climate change threatening the enjoyment of children’s rights”).

Climate change, therefore, is well understood as a threat to the full enjoyment of human rights. As the next section demonstrates, Defendants’

continued promotion of a fossil-fuel based energy system that exacerbates climate change is inconsistent with its international law obligations.⁴

II. Under international law, the U.S. obligation to protect the right to life extends to the protection of a climate system capable of sustaining life.

The District Court’s extension of due process rights to require protection of a “climate system capable of sustaining life” is consistent with recent international law interpretations of the right to life. Overturning that ruling would put the United States at risk of violating its international obligation to protect the Plaintiffs’ right to life.

⁴ This brief focuses on the U.S. obligations under human rights law, but the United States is also obligated to “adopt national policies and take corresponding measures” to stabilize greenhouse gases under the climate regime. *See* United Nations Framework Convention on Climate Change (UNFCCC), art. 4(2)(a) 1771 U.N.T.S. 107 (entered into force, March 21, 1994): “Article 2 – Objective: The ultimate objective of this Convention ... is to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.” The UNFCCC has been ratified by the United States Senate and is fully binding on the United States. *See also* Paris Agreement, Dec. 15, 2015, T.I.A.S. No. 16-1104.

A. The United States is obligated under international law to protect the right to life.

The United States is obligated under international law to respect, protect, and fulfill the right to life. Article 3 of the Universal Declaration of Human Rights, adopted in 1948 by the United Nations (with explicit affirmative support from the United States), provides “Everyone has the right to life, liberty and security of person”. G.A. Res. 217 A (III): Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948). In addition, the United States is a party to the ICCPR, which expresses the right to life in the following way: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Int’l Covenant on Civil and Political Rights art. 6, Dec. 16 1966, 999 U.N.T.S. 171. The United States has signed, but not ratified the American Convention on Human Rights and the Convention on the Rights of the Child, both of which affirm the right to life. *See* Am. Convention on Human Rights art 4, Nov. 22, 1969, 1144 U.N.T.S 123 (“No one shall be arbitrarily deprived of his life.”); *see also* the Convention on the Rights of the Child art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3 (“States Parties recognize that every child has the inherent right to life.... States Parties shall ensure to the maximum extent possible the survival and development of the child”). As a signatory, the United States has expressed its intent to be bound and is obligated to refrain from

acts that would defeat the object or purpose of these treaties. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S 331.

These human rights treaties are not self-executing and thus do not create an independent cause of action in U.S. courts, nor are Plaintiffs' claims based on their human right to life under international law. Nonetheless, "international law is part of our law..." *The Paquette Habana*, 175 U.S. 677, 700 (1900), and the courts should consider U.S. international obligations in deciding related cases under national law. At the least, national law should be interpreted in a way that does not conflict with international laws. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that ". . . an act of Congress ought never to be construed to violate the law of nations . . ."); *see also Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (relying on international law to interpret the meaning of "Republic of Vietnam" as used in a U.S. statute).

B. Under international law, the right to life encompasses environmental conditions, including a climate system, necessary to sustain life.

Under international law, the right to life is fundamental and interpreted broadly. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 36 ¶¶ 2-3 (reaffirming U.N. Human Rights Comm., General Comment No. 6: Article 6 (Right to Life) ¶ 1 (Apr. 30, 1982) (stating that the right to life is the "supreme right" and "should not be interpreted narrowly"); *Case of the Sawhoyamaya*

Indigenous Community v. Paraguay, ¶ 150, Judgement, merits, reparations and costs, IACHR Series C No 146 (Mar. 29, 2006) (finding that given the fundamental nature of the right to life “no restrictive approach ... is admissible”). Significantly, human rights courts have held that States must not only prevent harm, but must take steps to “protect and preserve the right to life.” *Id.* at ¶ 152; *see also Öneriyildiz v. Turkey*, ¶ 71, 2004 - Eur. Ct. H.R. (noting the right to life includes a State’s obligation to safeguard the lives of people in their jurisdiction).

As the potential scale and severity of environmental harms have increased, the vulnerability of the right to life to severe environmental degradation has become clearer, and this has led, in turn, to the recognition of obligations on the State to prevent severe environmental harm. For example the UN Human Rights Committee interpreted the right to life to create an environmental obligation: “Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors”. General Comment No. 36, ¶ 62.

Similarly, the Inter-American Court of Human Rights in an Advisory Opinion under the American Convention on Human Rights found that:

to respect and ensure the rights to life and personal integrity:

a. States are obligated to prevent significant environmental damages within and outside their territory.

b. To comply with this obligation of prevention, States must regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment; ... prepare contingency plans ... to minimize the possibility of major environmental disasters; and mitigate any significant environmental damage that has occurred

Official Summary Issued by the Inter-American Court: Environment and Human Rights, 4, IACHR Advisory Opinion OC-23-17 (Nov. 15, 2017); *see also Budayeva and Others v. Russia*, ¶ 128, 2008 - Eur. Ct. H.R. (noting that states should protect the lives of people within their jurisdiction from environmental harm including from a predictable or preventable environmental disaster).

Recognition that under international law the right to life is dependent on a stable environment and security from severe environmental degradation means that the United States is under an obligation not to cause or contribute to severe environmental degradation that threatens the earth's ability to sustain life. Although the federal government Defendants reject this interpretation of the right to life, the District Court's opinion is consistent with the emerging linkage under international law between the right to life and an obligation to maintain a climate system that can sustain life.

This was the approach taken in the 2018 opinion by the Hague Court of Appeal in *Urgenda Foundation v. The Netherlands*, which upheld a lower court

decision finding that the Netherlands had breached its duty of care by taking insufficient measures to prevent dangerous climate change. The Court of Appeal found that the government failed to meet its obligation to protect its citizens' rights to life and to family life under the European Convention of Human Rights by not planning to reduce emissions by at least 25% below 1990 levels by 2020. Ruling of Oct. 9, 2018, *The Netherlands v. Urgenda Foundation*. ¶ 73, Hague Ct. of App., Case No. 200.178.245/01 (Oct. 9, 2018) (unofficial translation published by the Court). The lower court had found “[d]ue to the severity of the consequences of climate change . . . the State has a duty of care to take mitigation measures” and further that the impacts of the government’s weak climate policies would fall disproportionately on youth and future generations. *Urgenda Foundation v. The Netherlands*, ¶ 4.83, C/09/456689/HA ZA 13-1396 (June 24, 2015). On appeal, the Hague Court of Appeal first reviewed the potential impacts from climate change and then held that there is:

a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life . . . [I]t follows from Articles 2 and 8 [of the] ECHR that the State has a duty to protect against this real threat.

Urgenda Foundation at ¶ 45.

The Court held that the State’s duty of care to protect the rights of its citizens required the State to reduce its emissions at least 25 percent from 1990

levels by the end of 2020. *Id.* at ¶ 76. In deference to the separation of powers, the Court required only a plan to attain the mitigation goals, leaving to the other governmental branches the details of which policies to use to achieve the goals.

While the Netherlands Court rooted the State's obligation under the international right to life found in the European Convention of Human Rights, as discussed *infra* courts from other foreign jurisdictions reached essentially the same result under their national constitution's right to life.

III. The constitutional jurisprudence of other countries supports the District Court's opinion that the right to life includes an obligation to maintain a climate system capable of sustaining human life.

A growing body of comparative law jurisprudence supports the District Court's conclusion that the Fifth Amendment's protection of life, liberty, and property should extend to maintaining an environment, including a climate system capable of sustaining life. These cases not only support the application of the right to life in the climate change context, but also demonstrate the justiciability of climate-related cases.

Defendants disparage the District Court's citation of a 1993 Philippines case, Def. Brief at 37, but U.S. courts can look to foreign jurisprudence to elucidate the law, including in identifying and applying fundamental rights. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 830, n.31, 34 (1988) (recognizing that laws, judicial practice, and statistics of other countries can be relevant

considerations in a court's decision-making); *Trop v. Dulles*, 356 U.S. 86, 101-04, n.35, 37-38 (1958) (noting "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); *Twining v. New Jersey*, 211 U.S. 78, 113 (1908) (citing "jurisprudence of civilized and free countries outside the domain of the common law" in reference to the Fifth Amendment's privilege against self-incrimination); *Latta v. Otter*, 779 F.3d 902, 906, n.7 (9th Cir. 2015) (citing the European Court of Human Rights in a case determining a state's right to define marriage).

Moreover, the Philippines is not alone. In recent years, the Philippines court has been joined by courts in Bangladesh, Colombia, Costa Rica, India, Ireland, Nigeria, and Pakistan in issuing opinions that support the link between a constitutional right to life and the obligation to maintain an environment, including in some cases a climate system, capable of sustaining human life.

In 2015, for example, the Lahore High Court in Pakistan invoked the protection of constitutional rights in ordering a stronger climate change policy. In *Asghar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.), a farmer alleged that the government's delay in addressing vulnerabilities associated with climate change violated fundamental constitutional rights to life and dignity. In a September 2015 order, the court declared: "Climate Change is a defining challenge of our time and has led to

dramatic alterations in our planet’s climate system. ... On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan.” *Id.* at ¶ 6. Recognizing the threat to food, water, and energy security, the Lahore High Court directed the government to identify and begin implementing climate change adaptation measures to protect Pakistani citizens and established a Climate Change Commission to monitor progress toward compliance with its guidelines. *See id.* at ¶ 8; *see also Shehla Zia v. WAPDA*, (1994) PLD (SC) 693 (Pak.) (finding that the rights to life and dignity under Pakistan’s constitution incorporate rights to a clean atmosphere and unpolluted environment).

In April 2018, the Colombian Supreme Court of Justice found that climate change impacts from the government’s failure to prevent accelerating rates of deforestation violated the youth plaintiffs’ constitutional rights to life, among others. *See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil*, abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018 (Colom.). The Colombian Supreme Court explained that:

the fundamental rights to life, health, the vital minimum, liberty and human dignity are substantially connected and determined by the environment and the ecosystem. Without a healthy environment the subjects of rights and sentient beings in general will not be able to survive, much less protect those rights, for our children nor for future generations. Nor will we be able to guarantee the existence of the family, the society or the State itself.

Id. at 13 (translated by amici). As in *Urgenda*, the Colombian court mandated that the government take action in the near future to meet its obligations to its citizens, but left it to the executive branch to determine exactly what measures it would take to comply with its obligations.

Climate change-specific cases are a part of a larger body of foreign jurisprudence that finds the rights to life or property, among other rights, give rise to an obligation to prevent severe environmental degradation more generally. In Ireland, for example, the High Court recognized an implied right to a stable environment as necessary for the enjoyment of several expressed Constitutional rights, including the rights to life and to work.

A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. ... Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed.

Merriman et al. v. Fingal County Council et al. [2017] IR 695, ¶ 264 (Ir.)

(dismissed on other grounds not relevant to this litigation⁵).

Courts in India have long recognized that the right to life encompasses the right to live in a sustaining environment. India’s Constitution, in language nearly identical to the due process clause of the U.S. Constitution, guarantees: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.” India Const. art. 21. In *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 AIR 171 (Andhra Pradesh HC), the High Court of Andhra Pradesh explained:

Examining the matter from the . . . constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to [a] violation....

Id. at ¶¶ 24-25; *see also Shantistar Builders v. Narayan Khimalal Totame* (1990)

1 SCC 520 (India) (Supreme Court of India recognized the right to life includes

⁵ The plaintiffs’ claims were dismissed because the decision the plaintiffs challenged – an extension by Fingal County Council of the duration of a planning permission originally granted many years earlier – was not a decision amenable to judicial review under the relevant planning statutes. *See Merriman & ors v Fingal County Council & ors; Friends of the Irish Env’t Clg v Fingal County Council & ors* [2017] IR 695, ¶¶ 16, 271 (Nov. 21, 2017).

the right to a decent environment); *M.C. Mehta v. Union of India*, Writ Petition No. 182 of 1996 (2000) (stating “Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for ‘life’, would be hazardous to ‘life’ within the meaning of Article 21 of the Constitution”).

Cases from other jurisdictions supporting this general proposition include those from Bangladesh, *Mohiuddin Farooque v. Bangladesh* [1997] 17 B.L.D. (A.D.) 1 (stating the right to life “encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed.”); Nigeria, *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] AHRLR 151 (Nigeria) (noting that the right to life includes the right to a healthy environment); and Costa Rica, *Sentencia 6240-93*, la Sala Constitucional de la Corte Suprema de Justicia (26 de noviembre de 1993) (finding that the right to life coupled with the state’s duty to protect natural beauty creates other enforceable rights including the right to a healthy environment).

As the District Court notes, the Philippines Supreme Court found “the right of future generations to a ‘balanced and healthful ecology’ is so basic that it ‘need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind.’” *Juliana I*, 217 F+. Supp. 3d at 1261 (citing *Minors Oposa v. Sec’y of the Dep’t of Env’tl. & Nat. Res.*, G.R. No. 101083, 33 I.L.M.

173, 187 (S.C., Jul. 30, 1993)). According to the Philippines Court, such a right “may even be said to predate all governments and constitutions.” *Minors Oposa*, 33 I.L.M. at 187.

These foreign cases do not only demonstrate support for judicial recognition of a right to life that encompasses a climate system capable of sustaining life, they also confirm more generally the appropriateness of judicial review over the government’s actions with respect to climate change and that judicially appropriate remedies are available. As noted above, the courts in the Netherlands and Colombia ordered the government to make a plan to meet their obligations. In Pakistan, the Court ordered creation of a Climate Change Commission to address the issue. These courts fashioned remedies in ways that did not abdicate the judiciary’s role, while respecting the roles of the legislative and executive branches.

In addition to judicial recognition of environmental rights, even more Nation-States include the right to a healthy environment explicitly in their constitutions or in legislation. As the Special Rapporteur found:

The right to a healthy environment enjoys constitutional protection in more than 100 States. It is incorporated into the environmental legislation of more than 100 States. This right is included in regional human rights treaties and environmental treaties ratified by more than 130 States. In total, 155 States have already established legal recognition of the right to a healthy environment.

Note by the Secretary-General, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶ 54, U.N. Doc. A/73/188, (July 19, 2018); *see generally* James R. May & Erin Daly, *Global Environmental Constitutionalism* (2015).

CONCLUSION

Both international law and foreign jurisprudence support the district court finding that a climate system capable of sustaining human life is a necessary condition for the right to life and other fundamental rights. As the district court found and reaffirmed: “To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.” *Juliana I* at 1250. The district court’s reasoning is also not completely foreign to this Circuit. Three decades ago this court recognized that:

it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources.

Stop H-3 Ass’n v. Dole, 870 F.2d 1419, 1430 (9th Cir. 1989).

The Ninth Circuit’s instinct that a livable environment is essential to the enjoyment of the right to life was correct and presaged this litigation. That court

was not then presented with imminent and severe threats to our rights of life, liberty, and property like those clearly and demonstrably posed by our destabilizing climate. That time is now, and this Court should find the U.S. Constitution protects plaintiffs against intentional government decisions that ignore such demonstrable and imminent threats to fundamental rights.

Accordingly, the District Court decision should be affirmed.

Respectfully submitted,

/s/ WJ Snape III
William John Snape, III (DC Bar No. 455266)
David Hunter (DC Bar No. 41306)
American University,
Washington College of Law
4300 Nebraska Ave. NW
Washington, DC 20016
(202) 274-4000
wsnape@wcl.american.edu
dhunter@wcl.american.edu

Dated: March 1, 2019

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of Times New Roman that is of 14 points or more, and contains 6192 words (not including FRAP 32 exclusions, and based on the word processing program used to prepare the brief).

Dated: 3/1/19

/s/ WJ Snape III

William John Snape, III
DC Bar No. 455266
American University,
Washington College of Law
4300 Nebraska Ave, NW
Washington, DC 20016
(202) 536-9351 (cell)
(202) 274-4443 (land)
wsnape@wcl.american.edu

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief in Support of Plaintiffs-Appellees with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 1, 2019. I certify my understanding that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 1, 2019

/s/ WJ Snape III

William John Snape, III
DC Bar No. 455266
American University,
Washington College of Law
4300 Nebraska Ave, NW
Washington, DC 20016
(202) 536-9351 (cell)
(202) 274-4443 (land)
wsnape@wcl.american.edu