Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

BRIEF OF AMICUS CURIAE LAW PROFESSORS

IN SUPPORT OF PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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IDENTITY, INTERESTS, AND AUTHORITY OF THE AMICI CURIAE

Amicus curiae are law professors and scholars (listed on the signature page) who teach, research, and publish in the subject areas of constitutional, environmental, and climate law.[1] *Amici* law professors are of the view that Plaintiffs have pled legally cognizable causes of action under the Fifth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

Amici present three points in support of Plaintiffs-Appellees' Answering Brief. First, the lower court properly held that it has jurisdiction to hear Plaintiffs' constitutional claims under the Due Process Clause for three reasons: (1) Plaintiffs have alleged and provided evidence of sufficient injury in fact that is fairly traceable to Defendants' conduct and can be redressed by the court to satisfy standing requirements; (2) federal courts can exercise jurisdiction over Plaintiffs' claims because the reference in Article III to "Cases" and "Controversies" is not frozen in time to what it was in the "courts at Westminster"; and (3) the Administrative Procedure Act is not jurisdictional and there is no need for litigants to pursue constitutional claims under it. This Court should reject Defendants' arguments that the federal judiciary should shirk its constitutional responsibility in this case.

[1] *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. Plaintiffs and Defendants have consented to the filing of this brief. No person or party has made a monetary contribution towards the preparation or submission of this brief.

Second, the lower court properly held that, with respect to those claims it addressed, Plaintiffs have pled constitutionally cognizable claims under the Due Process Clause of the Fifth Amendment, again for three reasons: (1) The Fifth Amendment encompasses Plaintiffs' claim that government action has deprived them of a constitutionally-cognizable liberty interest in a stable climate system; (2) Plaintiffs' due process claim for government inaction falls within the "state-created danger" exception to government immunity; (3) Plaintiffs have also pled a constitutionally cognizable equal protection claim under the Due Process Clause of the Fifth Amendment.[2]

Last, the logical extension of the Defendants' arguments would virtually immunize government action from judicial review, and therefore should be rejected.

ARGUMENT

I. The lower court has jurisdiction

A. Plaintiffs have Article III standing

Defendants misapply the standing requirement under Article III. The Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), held that the very harms caused by climate change are constitutionally cognizable injury in fact traceable to U.S. policies that can be redressed by a federal court under

[2] *Amici* law professors support the district court's rulings on Plaintiffs' public trust claims, as argued in Plaintiffs' brief and the other *amici curiae* briefs submitted in support thereof, but do not separately address the issue for sake of brevity, except as to its relevance to Plaintiffs' independent constitutional claims, discussed below.

Article III. Defendants' attempts to distinguish *Massachusetts v. EPA* by arguing that that Plaintiffs are not entitled to the "special solicitude" reserved for states acting in a *parens patraie* capacity. Defendants' Opening Brief ("DOB") 16. But this ignores the essential holding of the case, which is to recognize the juridical cognizability of claims based on climate change. Even more strikingly, it defies logic to say that states have license to protect children when acting in a parental capacity recognized under common law but that children have no right to protect themselves. The greater rule in *Massachusetts v. EPA* that children's rights can be judicially protected must include the lesser premise that children can protect their own rights. *Washington Environmental Council v. Bellon,* 732 F.3d 1131 (9th Cir. 2013), is inapposite. There, a private, non-governmental group challenged the State of Washington's decision not to establish certain control technology standards for a small group of aging refineries in Washington. Here, Plaintiffs' injuries are much more clearly attributable to Defendants' alleged conduct. The emissions for which Defendants are alleged to be responsible, and their direct effects, far exceed those in *Bellon*, and even those in *Massachusetts v. EPA.*

Moreover, Plaintiffs have submitted sufficient evidence that their injury in fact is fairly traceable to Defendants' actions and inactions, and can be redressed by the court. Thus, Plaintiffs have met their burden at this stage of litigation of satisfying the standing requirements of Article III.

B. Plaintiffs have a case or controversy under Article III

Defendants' argument that federal jurisdiction is limited to what it was at the time of the court of Westminster is off the mark and would have the judiciary abdicate its core duty to interpret and enforce the Constitution and would turn back the clock more than 250 years, to a time of British Empire, before the American Revolution, before the adoption of the Constitution, during slave times, and before women's suffrage. DOB 24 ("[judicial] power can come into play only in matters that were the traditional concern of the courts at Westminster."); DOB 25 ("No federal court, nor the courts at Westminster, has ever purported to use the "judicial Power" to perform such a sweeping policy review …"); DOB 26 (arguing that the equitable power of federal courts "must be within the traditional scope of equity as historically evolved in the English Court of Chancery.").

There is no basis for freezing federal court jurisdiction to a time before the existence of federal courts, not to mention what was in the court at Westminster. Simply, it is hard to see how the judicial power of the courts at Westminster should hold any sway as a matter of American *constitutional* law, given that (1) it decided cases under *common* law, (2) that England lacked (and still lacks) a constitutional document, and (3) its decisions were not final insofar as they could be overturned by the Parliament, and none of the cases to which Defendants rely hold otherwise. DOB 24-27.

But if the judicial competence of the court of Westminster is truly the Rhumb line of modern due process analysis, then there is ancient support for Plaintiffs' claims that a stable climate is deeply rooted in American history. First, the *Magna Carta Libertatum* (Medieval Latin for "the Great Charter of the Liberties"), adopted at Runnymede in 1215 ("To no one will we sell, to no one deny or delay, rights or justice") drew a direct link between the environment and individual liberties. The Magna Carta produced the Carta de Foresta (Forest Charter) in 1217, which guaranteed the "liberties of the forest and free customs traditionally had, both within and without the royal forests," and obliged all "to observe the liberties and customs granted in the Forest Charter." The Magna Carta itself is deeply rooted in American history and tradition and has particular relevance to the Due Process Clause of the Fifth Amendment: "The American colonists . . . widely adopted Magna Carta's 'Law of the land' guarantee.'" *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., dissenting).[3]

Second, the Public Trust Doctrine, too, is deeply rooted in American history and traditions. By way of the common law, the public trust doctrine passed to law in the United States through England and the Romans from natural law: "the following things are by natural law common to all – the air,

[3] William Blackstone celebrated "these two sacred charters" in his *Commentaries*, upon which the courts at Westminster (and throughout England) relied heavily. Wm. Blackstone, "Commentaries on the Laws of England," Clarendon Press at Oxford, 1765-1769.

running water, the sea and consequently the seashore." Roman Code of Justinian, J. Inst. 2.1.1 (J.B. Moyle trans.).

Regardless, Defendants' invocation of the jurisdiction of the courts of Westminster so as to constrain judicial review here rests principally on a misattribution of a misreading of a misquoted opinion. Defendants purport to cite to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, for the proposition that "[t]he [judicial] power can 'come into play only in matters that were the traditional concern of the courts at Westminster' and only in 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." DOB 24 (citing 529 U.S. 765, 774 (2000). But Defendants omit an edifying portion of the quoted passage that changes its meaning. The full passage is provided here, with the omitted section in italics:

> [J]udicial power could 'come into play only in matters that were the traditional concern of the courts at Westminster *and only if they arose in ways that to the expert feel of lawyers constituted* 'Cases' or 'Controversies'."

Vermont Agency, 529 U.S. at 774 (*quoting Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)) (emphasis added).

The omitted portion alters the quotation's purported meaning from one about concerns *of courts* to one about concerns of *litigants*. This removes the absolute bar to jurisdiction that Defendants would impose on the federal judiciary.

Second, Defendants misattribute the quoted passage, which is neither

controlling nor even applicable, is not from the cited case, was made in dissent, and is nearly 80 years old. Defendants cite the quoted passage as a controlling attribute of *Vermont Agency*. DOB 24 ("internal quotation marks omitted"). Yet the (mis)quoted passage was made by Justice Frankfurter *in dissent* from the majority's finding that plaintiff-state legislators had standing in *Coleman*, 307 U.S. at 460 (Frankfurter, J., dissenting). Moreover, the quoted passage is not from a case from the modern era, but was instead decided *60 years* before *Vermont Agency*. *Id.* Furthermore, the majority view in *Coleman* supports the established principle that federal courts have a duty to resolve constitutional questions. Justice Frankfurter's sentiments have not withstood the test of time and are at odds with the text of the Constitution, which extends the "judicial Power" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority …" U.S. Const. Art. III, § 2. Also, *Vermont Agency* is inapposite because it does not even involve a constitutional claim. Defendants' efforts to restrict significantly the jurisdictional authority of the federal courts are thus unavailing.

Whereas Defendants seek to argue that the District Court's assertion of jurisdiction in this case was clear error, the Supreme Court has in fact held that jurisdiction in cases like this is mandatory. The Court said that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . *must* entertain the suit . . ." and that "the court *must* assume

jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy." *Bell v Hood,* 327 U.S. 678, 681-82 (1946) (emphasis added). To take jurisdiction in this case is not clearly erroneous. It is not a violation of separation of powers; it is not even discretionary. It is an obligation.

Rather than violating separation of powers, the district court's assertion of jurisdiction over Plaintiffs' Fifth Amendment claims implicates the core function of the federal courts in our system of separation of powers: to determine the meaning and scope of constitutionally protected fundamental rights. This is, essentially, the power to say what the law is, a power that has been allocated to the federal judicial department since *Marbury v. Madison* and repeated ever since. 5 U.S. 137 (1803). As the Court firmly asserted in *Cooper v. Aaron,* Chief Justice John Marshall's determination that it is "emphatically the province and duty of the judicial department to say what the law is," "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury*, 5 U.S. at 177).

Furthermore, to place the question before the federal courts is not to remove it from the political sphere. As the Court in *Obergefell v. Hodges* reminded us in the context of marriage, "changed understandings of marriage

are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process." 135 S. Ct. 2584, 2596 (2015). In our constitutional democracy, policies are shaped within the limits of the Constitution. The question before the district court concerns not the wisdom of the policies but their compliance with constitutional rights. That is fundamentally a judicial question.

Indeed, it would be an unprecedented abdication of the role of the Court to cede its role of interpreting the law to a coordinate branch. Such an abdication of the role of the court to say what the law is would undermine the separation of powers on which the rule of law depends and breach the duty of the court to fulfill its constitutional role. It would allow the executive to hold itself immune from judicial scrutiny despite violating due process rights of its citizens.

The Court recently rejected a similar claim of political branch authority "to govern without legal constraint" in a brief but firm paragraph in *Boumediene v. Bush*: "To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" 553 U.S. 723, 765 (2008).

Nor can Defendants switch off the Constitution because this case concerns a stable climate system. Denying the District Court the authority to

hold a trial on these claims would amass all the power in the executive branch by immunizing the government from judicial review, notwithstanding this nation's constitutional design that mandates a balance among the three branches.

C. Plaintiffs are not required to proceed under the APA

Defendants are also flatly incorrect to argue that federal courts lack jurisdiction over constitutional claims unless brought under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA"). DOB 27 ("Plaintiffs were required to proceed under the APA but did not do so.") This is an extraordinary and unprecedented argument with implications that would not only violate the letter and spirit of the APA but would violate the plain meaning of the Constitution. Simply put, the Government asserts that the U.S. Constitution is only enforceable if the claim is made under the Administrative Procedure Act. Such an outcome would rewrite the U.S. Constitution and settled assumptions involving judicial oversight of federal administrative action or inaction by executive fiat, and is flatly wrong under federal court precedent, the Federal Rules of Civil Procedure, and the APA.

First, the argument misconstrues the well-established relationship between the Constitution and statutes. Constitutional rights do not depend for their application on legislative imprimatur. Indeed, the very point of the Bill of Rights is to afford anti-majoritarian protection in the face of intransigence from the political branches. Second, the APA provides for judicial review of certain

statutory and constitutional claims, but does not and has never been viewed as preempting direct constitutional claims. The government cites no case that supports such a proposition, and it is belied by the APA's language extending judicial review. APA § 706.

Second, the APA is not jurisdictional. Federal question jurisdiction exists over claims based on constitutional *or* statutory *or* treaty claims. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). Thus, Section 1331 provides federal jurisdiction over constitutional questions independent of any statutory authority for such claims. The Government cites no precedent for the proposition that constitutional review is immunized from constitutional accountability unless a plaintiff mentions the APA in the pleading.

Defendants' argument misunderstands federal jurisdiction. Judicial authority extends to cases and controversies arising under the Constitution. U.S. Const. Art. III § 2. ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority …"). Subject matter jurisdiction based on a federal question extends to constitutional claims. 28 U.S.C § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

Third, the APA does not require that all federal constitutional claims involving government action or inaction be litigated under the APA simply because the APA permits judicial review of agency action "to the extent necessary to decision and when presented" that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C § 706(2)(B). What the Defendants misapprehend is that the APA is *not* itself a grant of subject matter jurisdiction. *See e.g.*, *Califano v. Sanders*, 430 U.S. 99, 107 (1977). This means that the "judicial review provisions of the APA are not jurisdictional." *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Defendants' reliance on *Webster v. Doe*, 486 U.S. 592, 603 (1988), is also incorrect. DOB 32. After holding plaintiff's statutory claim was committed to the discretion of the Central Intelligence Agency, the Court permitted plaintiff's constitutional claims to proceed, finding that the APA did not – because it could not – commit constitutional claims to the agency's discretion. *Webster*, 486 U.S. at 601, 603-05. Therefore, Plaintiffs did not need to pursue their constitutional claims under the APA.

Thus, for the reasons stated, the court has jurisdiction because Plaintiffs have alleged sufficient injury in fact that is fairly traceable to Defendants' conduct and can be redressed by the court, jurisdiction is not frozen in time to what it was in the "courts at Westminster," and the APA is not jurisdictional and there is no need for litigants to pursue constitutional claims under it.

II. The District Court Appropriately Held that Plaintiffs Properly Alleged and Provided Evidence Supporting Constitutionally Cognizable Claims under the Due Process Clause

The court below correctly concluded that Plaintiffs have demonstrated material issues of fact so as to preclude summary judgment. Fed. R. Civ. P. 56. As the court noted previously:

> In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation.

Defendants' Excerpts of Record ("ER") 95.

Since the inception of the Supreme Court's liberty jurisprudence through its most recent pronouncement, the Court has been clear about the correct judicial approach to interpreting and applying the liberty clause: "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.'" *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting from denial of certiorari).

Plaintiffs have pled and presented evidence of a constitutionally cognizable deprivation of a fundamental right under the Due Process Clause. For decades, Supreme Court jurisprudence has consistently recognized fundamental rights under the Due Process Clause as those that are (1) essential

to ordered liberty or (2) deeply rooted in American history and tradition, *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010)*; see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2598-99 (2015) (applying "reasoned judgment" to identify fundamental personal interests).

A. Plaintiffs' Due Process Claims Are Deeply Rooted in American History and Tradition

For nearly a century, the Supreme Court has recognized that the liberty interests protected by the Due Process Clause encompass unenumerated rights. Indeed, landmark decisions exist from almost every decade of the last one hundred years establishing and reaffirming that, in addition to incorporating most of the enumerated rights, the liberty clauses of the Fifth and Fourteenth amendments include interests of similar fundamental importance to the right to a stable climate system asserted here. Previously recognized unenumerated liberty interests include the rights to direct the education and upbringing of one's children (*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)), procreation (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)), bodily integrity (*Rochin v. California*, 342 U.S. 165, 172-73 (1952)), contraception (*Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)), abortion (*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973)), sexual intimacy (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)), family (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), and marriage (*Loving v. Virginia*, 388

U.S. 1, 12 (1967)). *See also McDonald v City of Chicago*, 561 U.S. 742 (2010) (finding the second amendment's protection of firearms for the purpose of protecting one's home and family to be deeply rooted in this Nation's history and traditions such that it is encompassed in the 14th Amendment's protection of liberty).

Many of the Court's due process cases have shown special concern for the interests of children, *see, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Troxel v. Granville*, 530 U.S. 57 (2000), which suggests special judicial concern for Plaintiffs in this case.

Balancing individual liberties against governmental interests, as due process analysis requires courts to do, is a task that is presumptively appropriate for the District Court.

B. The Court Correctly Held that Plaintiffs' Claims Are Essential to Ordered Liberty

The District Court was correct to find that a stable climate is essential to ordered liberty: "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." ER 94. Indeed, as the District Court found, "a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" ER 94 (quoting *Obergefell*, 135 S.Ct. at 2598).

As the Court wrote nearly 100 years ago:

While this Court has not attempted to define with exactness the liberty

> thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted). These are rights that have long stood at the heart of the Constitution's protection for liberty, which can not exist in an unstable climate, where increasingly severe storms, fires, and floods threaten every American's home, family, and community. As the *Meyer* Court continued, given the importance of the interests at issue: "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts." *Id.* at 400 (1923) (citation omitted). The importance of judicial review to protect fundamental interests relating to life and family and home has not diminished in the hundred years since *Meyer* was decided.

Interests essential to ordered liberty are undoubtedly at stake in this case. The District Court and Plaintiffs are correct that an unstable climate system can adversely affect many profound extensions of liberty, including occupation, education, family, food, shelter, travel, drinking water, residence, and relationships.

The District Court's "reasoned judgment" that "liberty" encompasses an implied right to a stable climate system is supported by ample Supreme Court precedent.

C. The District Court Appropriately Exercised Its Reasoned Judgment in Holding that Plaintiffs Had Pled a Constitutionally-Cognizable Cause of Action

Supreme Court jurisprudence insists that the right to liberty requires close examination of governmental justification of deprivation in a wide range of areas:

> This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 848–49, (1992) (Opinion of Justices O'Connor, Kennedy, and Souter) (quoting *Poe*, 367 U.S. at 543 (Harlan J., dissenting)). Nor are the outer boundaries of the Due Process Clauses forever fixed, any more than is any other aspect of the Constitution. As Justice Frankfurter explained: "To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Rochin v. California*, 342 U.S. at 171–172. Rather, it has always been

understood that the Constitution was adaptive; it was

> intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument . . . . It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

McCulloch v. Maryland, 17 U.S. 316, 415 (1824). Indeed, the Court has shown an unfailing capacity to adapt the Constitution to contemporary conditions. It has consistently coupled a willingness to protect modern day interests with the true meaning of the Constitution, even if the 18th century framers could not have foreseen the social, technological, or environmental conditions we now live in. See e.g. *Carpenter v. United States*, 585 U.S. ___, Slip op. at 6 (2018) ("We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools."); *Kyllo v. United States*, 533 U. S. 27, 34 (2001) (finding that the use of a thermal imager to detect heat radiating from the side of the defendant's home was a search because any other conclusion would leave homeowners "at the mercy of advancing technology"); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (applying the First Amendment to the internet); *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 360 (U.S. Oct. 12, 2018) (No. 17-1702) (applying the First Amendment to public access television channels); *Bucklew v. Precythe*, No. 17-8151 (2018) (applying the Eighth Amendment to lethal injection).

The Supreme Court followed this approach in its most recent major due process case. *See Obergefell*, 135 S.Ct. 2584. In elucidating "[t]he identification and protection of fundamental rights," *Obergefell* emphasized that this responsibility "has not been reduced to any formula." *Id*. at 2598. Courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)). In exercising such "reasoned judgment," courts should keep in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id*. This approach allows "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning." *Id.*

The District Court's interpretation of the Due Process Clause is fully consistent with the central lessons of these cases: the mere fact that the Framers of our Constitution did not contemplate and could not have foreseen the circumstances that give rise to a case does not preclude the application of the Constitution's protections. Just as a person can have a First Amendment interest in free speech on the internet, a person can have a Fifth Amendment interest in a stable climate.

Examples of the federal judiciary's willingness to apply constitutional norms to current conditions extend to its entire caseload. Courts have consistently adapted our 18th century charter to 19th, 20th, and 21st century life; it makes no difference whether the claim is under the liberty clause, directly or by

incorporation, or any other constitutionally protected right. To do otherwise would be to relegate the Constitution to the past, unsuited to the world in which we live.

Defendants' reliance on *Washington v. Glucksberg*, 521 U.S. 702 (1997), is of no avail. First, Chief Justice Roberts said in *Obergefell* that *Glucksberg* was "effectively overrule[d]." 135 S. Ct. at 2621 (Roberts, C.J., dissenting). Even if *Glucksberg*'s more formulaic and more archaic approach reflected the governing standard in due process cases, the District Court's decision here would not constitute clear error. For the reasons the district court and Plaintiffs explain at length, a stable climate system is both deeply rooted in the nation's history and traditions, and implicit in the concept of ordered liberty such that "neither liberty nor justice would exist if they were sacrificed."' *Glucksberg*, 521 U.S. at 721 (citations omitted); ER 94; Plaintiffs' Answering Brief ("PAB") 34-42.

D. Plaintiffs Assert a Valid Claim under the *DeShaney* State-Created Danger Exception

Defendants also argue that the state-created danger exception to the general rule – that there is no affirmative obligation on the part of the government to safeguard the life, liberty, or property of its citizens – does not apply. *See DeShaney v. Winnebago County*, 489 U.S. 189 (1989). Defendants have admitted that "they affirmatively 'permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation;' [and] that 'current

and projected atmospheric concentrations of CO2[] threaten the public health and welfare of current and future generations; and that this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change.'") ER 391, 431, ¶¶ 7, 230. Yet defendants argue that because this conduct does not resemble a rape or an assault, the government simply has no duty to avoid creating dangers. But there is nothing either in the logic or the language of the state-created danger exception that would limit it in the narrow way that Defendants propose.

In particular, if the government can be held liable for danger created to a single individual, it would defy logic and good governance to immunize it when it creates a danger for a few dozen individuals, or for millions – as long as each one is in fact in danger. A larger danger makes it more harmful, not less, and thus should impose a greater duty on government to avoid, not less. Moreover, there is no reason why the government may be held liable for bodily harm such as assault, but not for bodily harm such as respiratory illnesses or other "undisputed health risks to children," Doc. 21-9, Paulsen Decl. ISO Pl's Mtn. for Prelim. Inj., ¶41, 34, 27-30. Either way, the government's "deliberate indifference" (*Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016)) has placed Plaintiffs in a situation more dangerous than the one they would have faced, which is exactly what the exception in *DeShaney* seeks to avoid. Defendants' conduct creates, exposes, or increases a risk of harm Plaintiffs would not have faced to the same degree absent such conduct. *Hernandez v.*

City of San Jose, 897 F.3d 1125, 1134-35 (9th Cir. 2018); *DeShaney*, 489 U.S. at 196.

E. The District Court Properly Recognized a Constitutionally-Cognizable Claim to Equal Protection Under the Due Process Clause

The district court also properly recognized Plaintiffs' equal protection claim of discrimination with respect to the fundamental right to a stable climate system. ER 58. Further, with respect to Plaintiffs' alternate claim of discrimination as members of a suspect class, Defendants' suggestion that the Supreme Court has concluded that children are *not* a suspect class is incorrect. DOB 45.[4] In fact, the Supreme Court has never considered this question.

The logic of heightened judicial solicitude first articulated in *United States v. Carolene Products*, 304 U.S. 144, n. 4 (1938), is as relevant today as it was in 1938: the federal judiciary has an especially important role to play when the rights of those who can not protect themselves politically are at stake. Perhaps the paradigmatic example of such a group is children, who are barred by denial of the franchise under federal constitutional law and state law in all 50 states from participating in the political process.

Under the traditional approach to Equal Protection, the Court considers several factors to determine whether a group should be afforded suspect class

[4] As Plaintiffs note, the district court has yet to address their other equal protection claims of discrimination as members of a *quasi-suspect* class or with respect to previously recognized fundamental rights.

status. All of the factors that the Court has traditionally considered indicate a higher level of scrutiny for the children-plaintiffs in this case.

While the Supreme Court did hold that individuals who are more than 50 years old do not constitute a suspect class (and rather broadly wrote that "age" does not constitute a suspect class), *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the holding in that case does not and can not apply to children. Specifically, the Court observed: "a suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" 427 U. S. 314. That test supports the conclusion that people over 50 are not entitled to heightened scrutiny: people over 50 are entitled to vote, have never been the targets of purposeful and unequal treatment and, far from experiencing political powerlessness, in fact constitute the majority of members of Congress, the majority of United States Presidents, and the majority of people who have ever sat on the Supreme Court. This group is not entitled to strict scrutiny because this group has never been in need of special judicial solicitude because those are burdened by government conduct that targets people over 50 "can ordinarily be expected to" bring about its reversal if they so desire. See *United States v. Carolene Products*.

Whether "viewed from a social and cultural perspective" or a political one, *see Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), children are in

exactly the opposite situation. By virtue of the denial of their franchise, they have been "saddled with disabilities" and they have been subject to purposeful unequal treatment, as evidenced by countless federal and state laws that prohibit their participation in the electoral process as both voters and candidates, on juries, and in other positions of civic responsibility. The point is too obvious to require citation. Likewise, children have, since the founding moment of this nation, been "relegated to such a position of political powerlessness so as to command extraordinary protection from the majoritarian political process." *See Murgia*, 427 U.S. at 313. If strict scrutiny is useful to protect the rights of any "discrete and insular minority" it is surely children who have absolutely no other recourse in our political system, like Plaintiffs here.

Some cases consider additional factors, all of which weigh in favor of finding children to be a suspect class. While youth is not an immutable characteristic in the sense that children eventually grow out of it, it is immutable in the sense that they have no choice over their age and can do nothing to change their status. Burdening children with the effects of climate change while withholding any political recourse runs counter to the very foundation of our system of law: that burdens are expected to be imposed in relation to individual responsibility. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Several of the Supreme Court's more recent cases decline to follow this structured approach to judicial review but nonetheless find that laws that

discriminate against particular groups are unconstitutional if they are without justification. *See e.g. Obergefell v. Hodges,* 135 S. Ct. 2584.

Whether the Court abides by its decades-long tiered approach to equal protection claims, or to its more recent approach under *Lawrence* and *Obergefell*, the children's claims in this case deserve the special solicitude of the federal judiciary.

Plaintiffs' have properly pled, and the District Court properly found, the deprivation of constitutionally-protected interests under the Due Process Clause.

III. The Logical Extension of Defendants' Argument Would Virtually Eliminate Judicial Oversight of Government Action or Inaction and Should be Rejected

Defendants' position would have the effect of eliminating judicial oversight of government actions. For 229 years, federal courts in the United States have been deciding constitutional claims. Some of those were novel (*see, e.g., McCulloch v Maryland,* 17 U.S. (4 Wheat.) 316 (1819) (deciding whether Congress had the power to charter a bank); some asked the courts to extend the understanding of an established constitutional principle (*Rochin v California*, 342 U.S. 165 (1952) (whether entry into a home and pumping defendant's stomach violated defendant's liberty interest), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (deciding whether a prohibition on the distribution and use of contraceptives violated defendants' liberty interest); some asked the courts to apply constitutional rights to new situations (*Carpenter*, 138 S. Ct. 2206 (2018)

(whether defendant had a reasonable expectation of privacy in location data stored in cell phones), *Kyllo v. United States*, 533 U. S. 27, 34 (2001) (whether using thermal technology constituted a search) or to recognize for the first time values which, though not express, had always underlain our constitutional system (*Seminole Tribe of Florida v . Florida*, 517 U.S. 44 (1996) (whether state sovereignty limited federal power), *Moore v City of East Cleveland*, 431 U.S. 494 (1977) (whether liberty protections extended to non-nuclear family structures); and some asked the courts to harmonize US law with the law in peer democratic countries (*Washington v. Glucksberg*, 521 U.S. 702 (1997), *Roper v Simmons*, 543 U.S. 551 (2005) (holding the death penalty unconstitutional for youths). Courts have resolved even the most contentious and profound questions: slavery in *Pennsylvania v. Prigg*, 41 U.S. 539 (1842); Presidential authority in *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952); and discrimination and affirmative action in a series of cases spanning more than 50 years (*e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958), *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Some cases in which lower courts were asked to decide difficult questions of first impression were reversed when they reached the Supreme Court (*Brown v Board of Education*, 347 U.S. 483 (1954)) and some were not (*United States v. Nixon*, 418 U.S. 683 (1974)).

In all of these cases, regardless of the novelty of the claims, the complexity of the issues, or the importance of the case, or the social or political implications of the judicial determination, lower courts were allowed to make

their own independent judgment of the claims, and errors, if any, were corrected through the normal course of litigation in appellate courts and ultimately, where appropriate, in the Supreme Court of the United States. And, regardless of the final outcome, Plaintiffs were permitted to have their day in court.

This system has worked for more than two centuries because the federal courts are independent, adept and distinguishing meritorious from frivolous claims, charged with the constitutional responsibility to hear constitutional claims and, where appropriate, vindicate constitutional rights. Furthermore, the judicial department encompasses an effective method for correcting errors through one and sometimes two levels of appeal before a lower court decision becomes final. It takes time and effort, but that is the cost of governance in a constitutional democracy such as ours.

The District Court should be permitted to perform its constitutional functions to manage the case, develop a record, issue rulings, and reach a decision as it would in any other constitutional case.

The District Court should be allowed to determine after trial the scope of the constitutional protection of liberty particularly where the claim, as here, is based on rights that are "preservative of other rights." *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). To determine the constitutional merits of such claims through trial is the core function of the federal judiciary.

The climate context of this case makes it all the more amenable to judicial resolution. The constitution protects what is of fundamental importance

and what cannot be relegated to protection in the political branches alone. A stable climate system satisfies both of these, arguably more than anything else in history. Protection against the degradation of the environment is precisely the kind of thing that the political branches are *least* likely to be able to protect: it requires long-term thinking for the benefit of those who have no political voice.

This is a case of first impression because we now know what we failed to grasp before: that government action can and does impact the stability of the climate system and the ability of American citizens to own property along the shoreline for fishing and farming, to exercise all their other rights, and indeed to live full and free lives.

Federal courts have the duty to apply constitutional principles to determine the limits of governmental power to infringe on constitutionally protected interests.

Conclusion

For the reasons given herein, the Court should deny the Petition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,920 words (excluding the parts of the brief exempted based on the word processing system used to prepare the brief). I also certify that this amicus brief complies with the word limit of Fed. R. App. P. 29(a)(5).

DATED: March 1, 2019
/s/ Helen H. Kang
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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing Brief of Amicus Curiae Law Professors in Support of Plaintiffs-Appellees' Answering Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via-email to the following counsel:

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