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July 12, 2019

Ms. Molly C. Dwyer
Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

Re: No. 18-36082, *Juliana v. United States*
Response to Appellees' Rule 28(j) Letter of July 5, 2019

Dear Ms. Dwyer:

Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), is irrelevant.

The government cited *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), for the proposition that balancing economic benefits/burdens is a task for the representative branches. Oral.Arg. 1:01:30. Yet Plaintiffs demand that the Judiciary manage numerous federal decisions related to energy production, public lands, and air quality. But those policies are governed by numerous statutes, with the APA or other specialized regimes providing appropriate review channels. Op.Br. 27-35. Counsel also noted Plaintiffs seek to "constitutionalize doctrine that is for the representative branches to decide through the democratic process." Oral.Arg. 1:01:57. Under their theories, *any regulatory area* involving human health could be transformed into constitutional matters, e.g., regulation of automobiles/traffic, prescription and illegal drugs, food, alcohol/tobacco, etc. That is not the law.

Plaintiffs' reliance on *Barnette* assumes that they have identified a fundamental right. But they have identified no such right. Op.Br. 27-35; Rep.Br. 23-25. And even if they had, their suggestion that Congress would no longer be able to balance the benefits/burdens involved fails. Even where an *express* constitutional guarantee is involved, the Supreme Court teaches that Congress's choices in economic policy must be respected. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) ("Doubts concerning [Congress's] policy judgments … do not, however, justify reliance on the First Amendment as a basis for reviewing economic regulations."); Op.Br. 47.

Finally, the government referenced *Lochner*'s abandonment to reinforce that Plaintiffs' fallback theory errs by trying to reify public trust law (which is not applicable to the federal government in the first place) into an apex right, thereby eliminating legitimate spheres of legislative power. *Lochner v. New York*, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting) ("In

Allgeyer v. Louisiana, 165 U.S. 578, 589 … it was conceded that the right to contract in relation to persons and property, or to do business, within a state, may be 'regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes.'"). Public trust doctrines face similar displacement.

Sincerely,

s/ Jeffrey Bossert Clark
Jeffrey Bossert Clark

Counsel for Appellants

cc: All counsel via CM/ECF