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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,	)	Case No. 6-15-cv-01517-AA
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT OPINION TESTIMONY OF PROFESSOR CATHERINE SMITH AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendants bring this motion pursuant to Federal Rules of Evidence 401, 402, 403, and 702 for an order *in limine* excluding the expert opinion testimony of Professor Catherine Smith because her testimony consists exclusively of legal opinions that are not relevant to any issues in dispute in this case. This motion is based upon the memorandum below and its attached exhibits. Defendants have conferred with Plaintiffs' counsel regarding this motion and Plaintiffs have indicated they oppose it.

I. INTRODUCTION

Professor Smith's Report, attached as Exhibit A ("Smith Rep."), cites the Constitution, international jurisprudence, several United States Supreme Court cases, and instances of executive, judicial, and societal discrimination against children throughout history to support her legal conclusion that children are a protected class warranting intermediate scrutiny by the nation's courts. The Ninth Circuit, however, prohibits opinion testimony on ultimate issues of law, *see Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004), and recognizes that resolving questions of law is the exclusive province of the trial judge. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1290 (9th Cir. 1993). While Professor Smith posits that her opinions are historically and sociologically informed and thus not legal conclusions, the "history" she considers in her expert report consists of case law. The Smith Report should be excluded because it consists of legal advocacy with the pretense of sociological and historical analysis and improperly infringes on the judge's function by interpreting the law.

II. FACTUAL BACKGROUND

Professor Catherine Smith has a Juris Doctor degree and teaches at the University of Denver Sturm College of Law. Smith Rep. 1. She co-authored an amicus brief on the rights of children of same-sex parents in *Obergefell v. Hodges*, *id.*, and she has had articles about equal

protection and children's rights published by Law and Contemporary Problems, the Washington University Law Review, and the Denver University Law Review, among other legal journals. *Id.* ex. B 1-2. But Professor Smith claims no expertise in climate change, climate science, meteorology, biology, fossil fuel development, renewable energies, U.S. energy policy, or medicine. Smith Dep. Tr. 16:23-17:2, 36:21-37:21 ("Smith Dep.") (excerpts attached as Ex. B). She has no training in sociology or history, *id.* 37:22-25, and has spent her entire career as a lawyer, *id.* at 34:8-17. Nor does she claim expertise in how climate change may cause harms to Plaintiffs. *Id.* at 122:3-8.

Professor Smith offers two principal legal opinions about children's rights. First, she opines that "the special characteristics of children and their differential treatment under the law bears on their status as a protected class for purpose [sic] of equal protection principles." Smith Rep. 1. Second, Professor Smith posits that government action "that creates devastating and disproportionate consequences to children requires at least intermediate scrutiny." *Id.* at 4.

Professor Smith explains the function of her report's historical and sociological legal analysis in the first sentences of her Executive Summary. She writes that the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), explained that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Id.* at 3 (quoting *Obergefell*, 135 S. Ct. at 2603-04). And she notes that the Court considers these "advanced understandings" and incorporates "the lessons learned into the fabric of constitutional law." *Id.* 3. She then advocates for the recognition of children as a protected class and the application of intermediate scrutiny by making the same historical and sociological considerations she admits judges make in reaching their own conclusions.

Professor Smith roots her protected class analysis in interpretive readings of the Constitution and Bill of Rights. Smith Rep. 7 (contending that "[t]he Founders held claim to the concept that certain unalienable rights could never be lost to later generations through the action or inaction of earlier generations."); *id.* at 11 (arguing that "[t]he founding documents, including the Bill of Rights, have special sensitivities towards children and future generations that are reflected throughout our nation's continuing history since the late 1800s."). She then identifies presidential initiatives and pieces of legislation designed to protect children before highlighting similar international efforts. *Id.* at 16 (contending that "the United States throughout the twentieth century repeatedly recognized that children are deserving of special protection under the law").

After establishing that "America's founding documents, the Bill of Rights, and international law have laid the ground work for a more robust recognition of the rights and interests of children," Professor Smith turns to a series of "cases about children's Fourteenth Amendment equal protection rights" that she believes "are critical to analyzing one of the most menacing threats to the health and well-being of children today – climate change." *Id.* at 3-4; *see also id.* 18-35. She first relies on a series of cases—including *Brown v. Board of Education of Topeka, Shawnee County*, 347 U.S. 483 (1954); *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. 460 (2012); among many others—to establish that "Children are children. They are a class entitled to special consideration and protection as a result." *Id.* at 24.

Professor Smith then hones in on a specific set of "child-centered cases" to argue that heightened scrutiny should apply "when government action imposes a lifetime of hardship on children for matters beyond their control." *Id.* at 24. These cases include *Levy v. Louisiana*, 391

U.S. 68, 68 (1968); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); and *Plyler v. Doe*, 457 U.S. 202, 226 (1982). *Id.* at 24-31. She uses the legal framework established in these cases to highlight certain historical and societal harms judges have considered in those child-centered cases, including economic deprivation, stigmatic and psychological harm, and barriers to family formation. *Id.* at 31-35; *see also* Smith Dep. 120:12-121:17 (confirming that the categories of harms identified by Professor Smith in her report are derived from the "child-centered cases"). Professor Smith contends that "[t]hese cases offer valuable guideposts for when heightened review is warranted" and concludes that "the history and traditions of the nation, in combination with Supreme Court jurisprudence protecting the equal rights of children, require at least intermediate scrutiny[.]" Smith Rep. 35.

Professor Smith frames the rest of her report by arguing that "[e]ach of the child-centered cases presents circumstances where children are uniquely harmed and the Court has to intervene to protect children from injuries caused by the management of large-scale systems over which government wields control." *Id.* at 39. She argues that the government's "climate and energy systems" fall into this category of government-controlled large-scale systems that will "deprive children of the benefits that are foundational for their lives" and for that reason warrant intermediate scrutiny. *Id.* at 36. In reaching this conclusion, Professor Smith relies on factors identified from case law regarding children's "lack of control over their plight," *id.* at 36; weighs the same categories of harm considered in the child-centered cases, *id.* at 42-45; and cites *Obergefell* and *United States v. Windsor*, 570 U.S. 744 (2013), for the proposition that certain groups of children are more vulnerable to those harms. *Id.* at 40-45. She concludes by arguing that the Constitution and Supreme Court precedent require heightened scrutiny "when government actions impose a lifetime of hardship on children for matters beyond their control,

even where no fundamental right is at issue." *Id.* at 46.

Because it offers only inadmissible legal opinion, Professor Smith's report and testimony should be excluded in its entirety.

III. LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. District courts serve as gatekeepers in assessing the admissibility of expert evidence under this rule. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *see also Murray v. S. Route Mar. SA*, 870 F.3d 915, 923 (9th Cir. 2017) ("District judges play an active and important role as gatekeepers examining the full picture of the experts' methodology and preventing shoddy expert testimony and junk science from reaching the jury."). As gatekeepers, trial judges consider whether: (1) "the opinion is based on scientific, technical, or other specialized knowledge"; (2) "the expert's opinion would assist the trier of fact in understanding the evidence or determining a fact in issue"; (3) "the expert has appropriate qualifications"; (4) "the testimony is relevant and reliable"; (5) "the methodology or technique the expert uses 'fits' the conclusions"; and (6) "its probative value is substantially outweighed by the risk of unfair prejudice, confusion of issues, or undue consumption of time." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) (internal citations omitted).

The Ninth Circuit limits expert opinions to ultimate issues of fact—"expert witnesses may not opine as to legal conclusions, *i.e.*, an opinion on an ultimate issue of law." *Siring v. Or. State Bd. of Higher Educ. ex. rel. E. Or. Univ.*, 927 F. Supp. 2d 1069, 1076 (D. Or. 2013) (citing *Hangarter*, 373 F.3d at 1016). "[A]lthough experts may use legal terms in expressing their opinions, expert testimony that consists of legal conclusions is unhelpful and inadmissible." *Arjangrad v. JPMorgan Chase Bank, N.A.*, No. 3:10-cv-01157-PK, 2012 WL 1890372, at *7 (D.

Or. May 23, 2012) (citing *United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009)). "Any 'judicially defined terms,' 'terms that derived their definition from judicial interpretations,' or 'legally specialized terms' constitute expression of opinion as to the ultimate legal conclusion." *Halsted v. City of Portland*, No. 3:10-cv-00619-AC, 2012 WL 13054271, at *2 (D. Or. Mar. 7, 2012) (citing *United States v. Duncan*, 42 F.3d 97, 101-02 (2d Cir. 1994)).

The proponent of the expert opinion testimony bears the burden of establishing its admissibility. *Daubert*, 509 U.S. at 592 n.10; *Lust By and Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). "Admissibility of the expert's proposed testimony must be established by a preponderance of the evidence." *Chong v. STL Int'l, Inc.*, No. 3:14-cv-244-SI, 2016 WL 4253959, at *3 (D. Or. Aug. 10, 2016).

IV. ARGUMENT

A. PROFESSOR SMITH'S REPORT IS LEGAL ADVOCACY WITH THE PRETENSE OF SOCIOLOGICAL AND HISTORICAL ANALYSIS

Professor Smith's report is inadmissible because it addresses the ultimate legal issues in the case, *viz.*, the standard of review to apply to children when considering an equal protection claim. *See* Smith Rep. 1 ("I, Catherine Smith, have been retained by Plaintiffs in the above-captioned matter to provide my expert opinions regarding a historical and sociological legal analysis of whether government actions that discriminate against and harm children should be reviewed under heightened judicial scrutiny."). The report accomplishes this in two ways. First, Professor Smith offers interpretive readings of Supreme Court cases and the presidential initiatives, legislation, and social shifts courts may consider in reaching their own decisions on the same legal issues Professor Smith addresses—all under the guise of a historical and sociological analysis she admits courts routinely undertake themselves. She then identifies those factors courts have looked to in child-centered equal protection cases and applies them to the

facts of this case.

Experts and attorneys offer the court differing but potentially useful functions. Experts interpret and analyze factual evidence. Attorneys advocate for certain outcomes based on legal arguments and the facts of their case. But attorneys cannot offer the court the expert's special knowledge. So the expert functions as a vehicle with which the court can arrive at the truth, as opposed to a legal advocate persuading the court to arrive at a particular conclusion. Yet the Smith Report advocates for two legal conclusions: (1) children are a protected class (2) warranting at least intermediate scrutiny.

The Ninth Circuit has defined the permissible scope of expert testimony. "[E]xpert testimony concerning an ultimate issue is not per se improper." *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065 n.10 (9th Cir. 2002), *amended* 319 F.3d 1073 (9th Cir. 2003). Nor does expert testimony that is otherwise admissible become objectionable because "it embraces an ultimate issue" to be decided by the trier of fact. Fed. R. Evid. 704(a). But "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law." *Mukhtar*, 299 F.3d at 1065 n.10. This limitation is consistent with the principle that expert testimony should aid the trier of fact. "Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact." *United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002) (citing *Daubert*, 509 U.S. at 591).

Professor Smith's expert report is not—and her proposed testimony would not be—helpful. Whether children are a protected class and whether that protected class warrants intermediate scrutiny are legal issues the court can decide using the same tools Professor Smith uses in her report. The Smith Report includes references to the Constitution, the Bill of Rights, presidential and international initiatives designed to protect children, and Supreme Court cases.

Professor Smith admits that the Court could look to the same founding documents when interpreting the Constitution:

> Q. But would you agree that a Court could look to the Constitution and could interpret the Constitution in a case?
>
> A. Yes.
>
> Q. Okay. And a Court could look to the Bill of Rights [and] the Fourteenth Amendment in a case?
>
> A. A Court could.

Smith Dep. 51:18-24.

Professor Smith also admits that the Court could look to the same presidential initiatives and social shifts:

> Q. But in your position as a law professor, you wouldn't think it inappropriate for a court to look at these presidential statements in reaching its conclusion that there's been this evolution over time of children's rights and in reaching a conclusion about the level of scrutiny to be applied?
>
> A. I think it goes back to looking at social shifts and changes in society, and I think the Court does that often, and it can reference lots of different provisions, statements, speakers in doing so, whether it's a presidential statement or a statement from civil rights activists or -- or anyone else. But I -- I would say that I think it's important for the Court to be thinking about these issues because, unlike what Kennedy said, the difference from *Obergefell* in this case with respect to children is that children don't have the same power that adults have to plea and protest, to educate the Court and society about the harms that they experience.

Id. at 58:12-59:6.

And Professor Smith admits that case law would inform her testimony as it does her report:

> Q. And would you yourself testify that certain groups of children are more vulnerable than others to climate change based on other things in the case?
>
> A. If there's some sort of document from the parties, a statement from the federal government, from the defendants, I might rely on that, but I won't be relying on my own expertise to reach that conclusion, but I will rely on the case

> law to say that it's an important consideration for the court and that we look at children as a class or classification, including subsets of kids.
>
> Q. And, again, when you say you'd rely on the case law to show it's an important consideration for the Court, you're referring to the child-centered cases?
>
> A. Yes.

Id. at 133:4-19.

The Constitution. Presidential initiatives. Court cases. Professor Smith admits these are all within the Court's purview. Yet she applies all three herself in concluding that children are a protected class warranting at least intermediate scrutiny. "Expert testimony is not helpful to a jury, and thus not relevant, when it addresses an issue that is within 'the common knowledge of the average layman.'" *Arjangrad*, 2012 WL 1890372, at *7 (quoting *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001)). And while there is no jury here, the Constitution, presidential initiatives, societal shifts, and court cases are well within the purview of the trial judge, as Professor Smith herself acknowledges. *See* Smith Dep. 50:16-21, 58:12-24.

Professor Smith not only considers the same texts, initiatives, and shifts in societal thinking that courts do in child-centered cases but also applies legal rules from those cases throughout her report. First, she notes "the abiding principle that '[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.'" Smith Rep. 24 (alteration in original) (quoting *Plyer*, 457 U.S. at 220). She then applies that principle to climate change, writing that "children impacted by climate change face a different kind of lack of control over their plight because they do not have economic power and cannot vote." *Id.* at 36. Second, she notes "[t]he child-centered cases establish that the government may

not use large-scale government systems to pose serious risks to the wellbeing of children." *Id.* at 39. She then applies that rule to climate change, writing that "the national energy system is one of the largest systems under government control and direction" and that it "has significant consequences for the rights, benefits, and wellbeing of children." *Id.* Professor Smith concludes by noting that "[t]he federal defendants set policy for both [the climate and energy] systems" and "those policies should be reviewed under heightened scrutiny." *Id.* Third, she highlights specific harms from large-scale government systems that she argues the child-centered cases prohibit, including economic and psychological harms and barriers to family formation. *Id.* at 31. She then analogizes those harms to climate change, which she contends flows from the United States' energy policy. *Id.* at 42-45.

Plaintiffs may claim that Professor Smith is offering purely historical or sociological analysis, but every aspect of her analysis is permeated by legal advocacy based on the same factors traditionally addressed by legal counsel. Courts typically reject expert testimony that purports to apply, interpret, or advocate a legal position. The plaintiffs in *Democratic National Committee v. Reagan* sought to include testimony from an expert historian who concluded that the law in question had the effect of depriving minority voters of the opportunity to participate in the political process and was passed with the intent of suppressing minority voters. No. CV-16-01065-PHX-DLR, 2018 WL 2191664, at *2 (D. Ariz. May 10, 2018), *aff'd*, No. 18-15845, 2018 WL 4344291 (9th Cir. Sept. 12, 2018). While the court admitted the underlying data, it found that the historian's "ultimate opinions" were not useful. *Id.*, 2018 WL 2191664, at *3. The court stated that he "applied the law as he interpreted it to the data he assembled" and so "his opinions presented more like an attorney's closing argument than an objective analysis of data." *Id.*

Other courts have excluded historical analyses that speak directly to the governing law.

In excluding an expert's opinion on the history of the Fair Credit Reporting Act, the U.S. District Court for the Northern District of Illinois found that "expert testimony on the history or purpose of the law is impermissible." *In re Ocean Bank*, 481 F. Supp. 2d 892, 903 (N.D. Ill. 2007). The U.S. District Court for the Eastern District of Virginia excluded an expert's testimony detailing the history of Virginia's trust law because the purpose of the testimony was to "assist the Court in determining what law to apply to the issues raised." *SunTrust Banks, Inc. v. Robertson*, No. 2:09-cv-197, 2010 WL 11566593, at *6 (E.D. Va. Aug. 12, 2010). And the U.S. Court of Federal Claims excluded expert testimony where the expert testified about the history of the underlying legal doctrine because the plaintiff's counsel could "make each of the arguments proffered by [the expert] during the trial." *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 9 (2007).

Professor Smith's opinions constitute legal analysis. Her expert report is essentially a legal argument that counsel could make in briefing and at trial. She admits that she could have presented the same opinions to this Court in an amicus brief—and has done so in other cases, such as *Obergefell* where she made similar arguments based on the same child-centered cases. *See* Smith Dep. 140:2-145:20, 145:18-20 ("I certainly could submit an amicus brief at the trial-level stage, like the law professor's brief, but I'm being asked to be an expert in this case."). She bases her opinion not on data from a technical field in which she has expertise but on legal materials that all legal professionals would consider in arguing and deciding a case. *See* Smith Dep. 77:7-81:5 (conceding that the materials she used and the conclusions she reached are identical to what a court would consider in rendering an opinion).

To the extent that Professor Smith offers an "often overlooked" interpretation of the child-centered cases, Smith. Dep. 42:20, her report and testimony should be excluded because

they concern "both what the law is and how it should be applied to the facts of a case." *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005).

B. PROFESSOR SMITH'S REPORT USURPS THE JUDGE'S FUNCTION BY INTERPRETING THE LAW

The Smith Report supplants more than just the role of trial counsel. By resolving disputed questions of law, Professor Smith's expert report occupies the "exclusive province of the trial judge." *See Hornish v. King Cty.*, 899 F.3d 680, 701 (9th Cir. 2018) (quoting *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008)). "[E]vidence that merely tells the jury what result to reach is not sufficiently helpful to the trier of fact to be admissible." *Nationwide*, 523 F.3d at 1060 (quoting *Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 830 (8th Cir. 1988)).

Although "[t]he concerns about admitting expert legal opinion may be lessened where, as here, a court sits as trier of fact," *CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005), none of the limited circumstances justifying deviance from the general rule that legal testimony is improper exist here. "[T]he Ninth Circuit has recognized that there may be 'instances in rare, highly complex and technical matters where a trial judge utilizing limited and controlled mechanisms, under the matter of trial management, permits some testimony seemingly at variance with the general rule.'" *Shops at Grand Canyon 14, LLC v. Rack Room Shoes, Inc.*, No. 2:09-cv-01234-RLH-PAL, 2010 WL 4181361, at *2 (D. Nev. Oct. 20, 2010) (quoting *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008), *rev'd sub nom Horne v. Flores,* 557 U.S. 433 (2009)). Yet the trial judge has "broad discretion" to exclude expert testimony that is not helpful to her decision. *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (per curiam) (internal citation omitted).

This is not a case warranting deviation from the general rule that legal matters are

inappropriate subjects for expert testimony. Where courts have found deviation appropriate, they have recognized that specialized knowledge within a particular industry makes expert testimony uniquely helpful. For example, in *Shops at Grand Canyon*, the expert had specialized knowledge of the real estate industry in Las Vegas. 2010 WL 4181361, at *3. Conversely, the Ninth Circuit has held experts could not be used to provide legal meaning or interpret insurance policies as written. *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999). The U.S. District Court for the Central District of California precluded expert testimony from a law professor about "the standard of review, the standard of patentability, the applicability of the presumption of validity, and the issues of claim scope and construction." *GTY Indus. v. Genlyte Grp., Inc.*, No. CV 94-1280 KN, 1995 WL 862319, at *1 (C.D. Cal. Dec. 19, 1995) (internal citation omitted). While the proposed expert was a patent law professor, he had "no demonstrated qualifications to testify as to technical matters." *Id.* The U.S. District Court for the District of Arizona also excluded testimony from law professors about piercing the corporate veil in a case involving cleanup of a hazardous waste site. *Pinal Creek Grp.*, 352 F. Supp. 2d at 1044. In precluding the testimony, which included summaries of state law and discussions of Supreme Court precedent, the court stated that "federal courts typically prohibit lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case." *Id.* at 1042.

Like the patent law professor in *GTY Industries*, Professor Smith has no demonstrated qualifications to testify to technical matters. She is not an expert in climate change, climate science, meteorology, biology, fossil fuel development, renewable energies, U.S. energy policy, economics, medicine, or mental health, Smith Dep. 16:22-17:2, 36:21-37:21, and would not testify to the facts of what harms are caused by climate change. *Id.* at 122:14-22, 124:24-125:11,

126:7-15, 132:22-133:3. And, as is clear from Professor Smith's report, children-centered equal protection cases are neither rare nor highly technical because courts have Supreme Court and lower court precedent at their disposal. *See* Smith Rep. 18-35 (discussing long line of child-centered Supreme Court cases); Smith Dep. 40:19-41:19 ("And my expertise is to push those [child-centered] cases out and say we can look at them from a different way."); Smith Dep. 43:1-11 (noting that her report pulls "guiding principles" from the child-centered cases to be used in deciding the appropriate level of scrutiny). Professor Smith cited and applied that precedent herself to conclude that children are a protected class warranting intermediate scrutiny. Admitting Professor Smith's testimony "would give the appearance that the court was shifting to witnesses the responsibility to decide the case," and Professor Smith is in no better position to resolve these legal issues than the court. *United States v. Scop*, 846 F.2d 135, 150 (2d Cir. 1988).

C. EVEN IF PROFESSOR SMITH'S REPORT DID NOT CONSTITUTE IMPROPER LEGAL TESTIMONY, IT IS INADMISSIBLE BECAUSE IT DOES NOT PROVIDE RELEVANT EVIDENCE

Aside from the fact that Professor Smith's testimony offers improper legal conclusions, it is also inadmissible because it is irrelevant to the issues in dispute in this case. Under Federal Rule of Evidence 402, evidence is admissible only if it is relevant. Evidence is relevant only if it has a tendency to make a fact "of consequence in determining the action" more or less probable. Fed. R. Evid. 401; *see also Clark v. Thomas*, 706 F. App'x 358, 359 (9th Cir. 2017) (upholding district court order holding evidence inadmissible when it was not "relevant to the disputed issues at trial").

Professor Smith's report argues that "government actions that discriminate against and harm children should be reviewed under heightened judicial scrutiny" because children are a

"protected class for purpose of equal protection principles." Smith Rep. 1. This opinion is not relevant to this action because the question of whether children are a protected class owed heightened scrutiny has already been decided by this Court. In its Opinion and Order on Defendants' motion for judgment on the pleadings and motion for summary judgment, the Court found that children are not a suspect class to which heightened scrutiny applies under the Equal Protection Clause. ECF No. 369 at 57-58. Although the Court left open the possibility that strict scrutiny could still apply to Plaintiffs' equal protection claim based on the "alleged infringement of a fundamental right"—here, the alleged "right to a climate system capable of sustaining human life," *id.* at 58—Professor Smith does not opine on the existence or infringement of that alleged fundamental right. Her testimony is limited to the conclusion that "climate change's consequences for children raises [] an 'area of constitutional sensitivity' that warrants heightened scrutiny, *even when no fundamental right is at issue*," because children are a protected class. Smith Rep. 4 (emphasis added); *see also id.* at 35 ("In my expert opinion, the history and traditions of the nation, in combination with Supreme Court jurisprudence protecting the equal rights of children, require at least intermediate scrutiny when government actions impose a lifetime of hardship on children for matters beyond their control, even where no fundamental right is at issue.").

In her deposition, Professor Smith confirmed that she does not directly analyze fundamental rights in her report. Smith Dep. 113:9-115:15. She also confirmed that she does not intend to testify about the existence of any particular fundamental rights at trial. *Id.* at 115:16-18. And, as discussed above, Professor Smith has acknowledged she is not an expert in how climate change might infringe a fundamental right to a climate system capable of sustaining human life, thereby causing harm to Plaintiffs or others. *Id.* at 122:5-8.

Because the Court has already determined that children are not a suspect class under the Equal Protection Clause, Professor Smith's report and testimony are not relevant and therefore should be found inadmissible under Federal Rules of Evidence 401 and 402.

V. CONCLUSION

For the reasons discussed above, Defendants respectfully request that the Court exclude the Smith Report and related testimony.

Dated: October 15, 2018

Respectfully submitted,

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Exhibit A

EXPERT REPORT
OF
Catherine Smith, J.D.

Kelsey Cascadia Rose Juliana; Xiuhtezcatl Tonatiuh M.,
through his Guardian Tamara Roske-Martinez; et al.,
Plaintiffs,

v.

The United States of America; Donald Trump,
in his official capacity as President of the United States; et al.,
Defendants.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

(Case No.: 6:15-cv-01517-TC)

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TABLE OF ACRONYMS AND ABBREVIATIONS

APA:	American Psychological Association
CRC:	United Nations Convention on the Rights of the Child
DOMA:	Defense of Marriage Act
NOAA:	National Oceanic and Atmospheric Administration
UNICEF:	United Nations Children's Fund

INTRODUCTION

I, Catherine Smith, have been retained by Plaintiffs in the above-captioned matter to provide my expert opinions regarding a historical and sociological legal analysis of whether government actions that discriminate against and harm children should be reviewed under heightened judicial scrutiny. My expert report sets forth that children are situated differently from other classes of people and as such, children gain differential treatment in the American legal system, and under international law. In my expert opinion, the special characteristics of children and their differential treatment under the law bears on their status as a protected class for purpose of equal protection principles. I also provide my expert opinion that, from a historical and sociological legal perspective, children in America require extraordinary legal protection from the harm of climate change and the government actions causing the harm. I conclude that based on a historical and sociological legal analysis, at least intermediate scrutiny is warranted when government action imposes a lifetime of hardship on children for matters beyond their control, as in the case of the national energy system causing dangerous climate change.

I am a legal scholar teaching law at the University of Denver Sturm College of Law. After graduating from the University of South Carolina School of Law, I clerked for the late Chief Judge Henry A. Politz of the U.S. Court of Appeals for the Fifth Circuit and for U.S. Magistrate Judge William M. Catoe Jr. I served as a legal fellow at the Southern Poverty Law Center and entered teaching as an Assistant Professor at the Thurgood Marshall School of Law (TMSL). After four years at TMSL, I joined the faculty at the Sturm College of Law where in 2013, I was promoted to full professor. My scholarship focuses on the equal protection law and I specifically study the American legal system's historic, sociologic, and present treatment of children and the meaning of equality with respect to children's rights. Within this area, I consider legal structures (i.e., the legal system), legal processes (how law is made) and the interaction of the law, societal change and social control. My scholarship and expertise is also informed by the importance of critically analyzing the impact, positive and negative, of law on age, race, class, gender, and other socially constructed differences. My theoretical approach in historical and sociological aspects of law is to regard law as a set of institutional practices that have evolved over time and developed in relation to, and through interaction with, cultural, economic and socio-political structures and institutions. My legal scholarship on the rights of children has gained important recognition. In 2010, my short essay, *The Rights of the Child*, was selected as a winning essay in the American Association of Law Schools writing competition "On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship." In 2011, my article *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion – Legitimacy, Dual-Gender Parenting, and Biology*, won the Williams Institute's Dukeminier Award as one of 2010's best sexual orientation law review articles. Further, my expert scholarly opinion on the constitutional rights of children has been recognized by the U.S. Supreme Court through an *amicus curiae* brief on the rights of children of same-sex parents that I co-authored in support of same-sex plaintiffs in *Obergefell v. Hodges*. Through my research on the long history of discrimination against children of unmarried parents, I have been studying the ways in which some children as a class are treated differently than other groups of children, as well as how children are treated differently than adults in numerous contexts. I have developed an expert opinion on why children already have gained protected status in numerous contexts and why the

harm to children from climate change should be treated as an area of "special constitutional sensitivity."[1]

The opinions expressed in this expert report are my own and are based on the data and facts available to me at the time of writing. All opinions expressed herein are to a reasonable degree of certainty, unless otherwise specifically stated. Should additional relevant or pertinent information become available, I reserve the right to supplement the discussion and findings in this expert report in this action.

This expert report contains my opinions, conclusions, and the reasons therefore. My curriculum vitae is contained in **Exhibit A** to this expert report. A list of publications I authored within the last ten years is shown in **Exhibit B** to this expert report. My expert report contains citations to all documents that I have used or considered in forming my opinions, listed in **Exhibit C**.

I have not given expert testimony within the preceding four years at trial or by deposition.

In preparing my expert report and testifying at trial, I am deferring my expert witness fees charged to the Plaintiffs given the financial circumstances of these young Plaintiffs. If a party seeks discovery under Federal Rule 26(b), I will charge my reasonable fee of $375 per hour for the time spent in addressing that party's discovery

[1] *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

EXECUTIVE SUMMARY

In *Obergefell v. Hodges*, the landmark decision on the fundamental right to same-sex marriage, the Supreme Court explained that, when interpreting the Due Process and the Equal Protection Clauses, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[2] New insights and society's evolved understanding over time about the individual and societal harms of racial, gender, and sexual orientation discrimination led to the eradication of anti-miscegenation and male coverture laws, as well as same-sex marriage bans.[3] This iterative process of gaining advanced understanding and then incorporating the lessons learned into the fabric of constitutional law is not reserved solely for adults; it also pertains to the unequal treatment of children.[4]

According to leading children's rights scholar Professor Barbara Bennett Woodhouse, children historically have been treated as "objects, and not subjects of the law, functioning more in the role of parental property than as persons."[5] America's founding documents, the Bill of Rights, and international law have laid the ground work for a more robust recognition of the rights and interests of children. So, too, have courts. In the last sixty years, the classic view of children-as-property has shifted to children-as-bearers of constitutional rights.[6]

The most popularly recognized children's constitutional rights cases come from the areas of criminal law and procedure and First Amendment law.[7] Yet, a series of cases about children's Fourteenth Amendment equal protection rights are critical to analyzing one of the most menacing threats to the health and well-being of children today – climate change. These cases,

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[2] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2603–04 (2015).
[3] *Id.* at 2595–98, 2603–04.
[4] *Id.* at 2590 (discussing how protecting children from laws that "harm and humiliate the children of same sex couples" is, in part, the basis for the Court's decision to recognize same-sex marriage) (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (finding, with respect to an Oregon state law that mandated public education of children: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *United States v. Windsor*, 570 U.S. 744, 772 (2013) (finding that the Defense of Marriage Act "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").
[5] Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. Ill. L. Rev. 1567, 1578 (2009).
[6] *Id.*
[7] *See id.* (discussing the Court's protection of children's due process and First Amendment rights) (citing *In re Gault*, 387 U.S. 1, 13 (1967) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969)).

in a mix of civil rights law and our democratic commitment to the basic economic and social protections of children, bring much to bear on the looming threat of climate change and its unfair impact on children. In my expert opinion, climate change's consequences for children raises a an "area of consitutional sensitivity" that warrants heightened scrutiny, even when no fundamental right is at issue.[8]

The constitutional principle of equal protection is that "no State shall deny to any person within its jurisdiction the equal protection of the laws."[9] In my expert opinion, these "child-centered" cases raise special concerns about children as a class and prohibit government action that imposes a lifetime of hardship upon them for matters beyond their control. There are times when courts step in to protect children from state action when the injury to children is too significant to leave to the political process. In my expert opinion, from a historical and sociological legal perspective, and based on the new insights and understandings of climate change's impact on children, this is one of those pivotal moments for the rights of children. Climate change threatens to impose lifelong hardships on children, which will hinder their access to basic necessities and freedoms.

Courts have yet to address climate change's impact on children applying from an equality lens. In my expert opinion, on the basis of existing historical, sociological, and legal precedent, it is open to a court to find that state action that creates devastating and disproportionate consequences to children requires at least intermediate scrutiny to protect children from the government's unequal treatment and blatant disregard for their futures. Also in my expert opinion, based on a historical and sociological legal analysis, the United States government's role in creating and knowingly permitting the devastating consequences of climate change with full knowledge of its disproportionate impact on children [and future generations] directly contravenes children's equal protection guarantee and our democratic values.

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[8] *Plyler*, 457 U.S. at 226.

[9] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985). The Equal Protection Clause of the Fourteenth Amendment is of course binding on the federal government through the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Barbara Bennett Woodhouse, *Children's Rights*, *in* Handbook of Youth and Justice 377, 382 (2001) (Susan O. White, ed.) ("[The Fourteenth] amendment, designed to protect former slaves from white tyranny and racial discrimination, has become a rich source of children's rights through the process of judicial interpretation.").

EXPERT OPINION

I. Children, Alongside Other Classes of People Battling Historic and Ongoing Discrimination, Are Slowly Being Recognized As a Class

Applying a historical and sociological legal perspective, children were historically often conceptualized as akin to property of the father.[10] Indeed, English common law recognized children as property under the exclusive control of the father.[11] Under English common law the father had a right to the custody, labor, and services of his child under the so-called "empire of the father."[12] However, the father's rights over children came with the attendant legal obligation to protect, support, and educate his children.[13] The absolute power of the father was also the dominant model of early American colonial families.[14] Often the relationship between father and child was one of master and servant.

In addition to cruelly enslaving Africans, the colonialists also brought the harsh practice of treating children as indentured servants, a source of labor or economic producers carried across the ocean to America. Because labor was scarce in the colonies, the services and income from children were valuable assets. Children made up half of the indentured servants who were shipped across the ocean to the colonies south of New England. While most children who came to America did not come as indentured servants, separating children from their parents and placing them in forced labor was common throughout the colonies. Children of slaves, who made up one-fifth of all children in America by the end of the eighteenth century, could be taken from their families and sold away at any time. This harsh manner of treating children carried over from the English tradition.

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[10] Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child As Property*, 33 Wm. & Mary L. Rev. 995, 1042 (1992). Woodhouse notes that the notion of the child as property goes back to ancient Greek, Roman, and Judeo Christian traditions. *Id.* at 1043.

[11] *See* William Blackstone, 1 Commentaries on the Law of England at 453 (1753), available at http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1; Kevin Noble Maillard, *Rethinking Children As Property: The Transitive Family*, 32 Cardozo L. Rev. 225, 237, 237 n.85 (2010).

[12] *See* Blackstone, Commentaries at 453. A Blackstone noted, "[a] father has no other power over his son's estate than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants. The legal power of a father, - for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children." *Id.*

[13] *See* Blackstone, Commentaries at 452–53; Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & Fam. Stud. 337, 345 (2008).

[14] Woodhouse, *"Who Owns the Child?"* at 1037.

While the slavery of African Americans and their children continued unabated, and many other children continued to be treated as indentured servants in the 19th century,[15] by the time of the founding of our democracy, the constitutional groundwork was laid for children to bear rights.

A. The Founding Documents Laid the Groundwork for Recognizing the Interests of Children and Future Generations

1. The Whole Constitutional Construct Protects Our Posterity and Our Children Across Generations

It has remained a central tenet of our democracy that the Union was about ensuring each child had equal opportunity to invent him/herself and that the blessings of that liberty would be passed down from generation to generation. The Founders opened the Constitution with their intergenerational concern:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty *to ourselves and our Posterity, do ordain and establish this Constitution* for the United States of America.[16]

While the Posterity Clause does not confer powers on the federal government, it does state who the beneficiaries of the powers and rights enumerated in the Constitution are: "ourselves and our Posterity." As Jim Gardner wrote:

> The statement in the Preamble that the Constitution was established to secure the blessings of liberty for 'posterity' bears [a] relationship to certain remaining provisions in the Constitution: it articulates a constitutional policy which subsequent provisions translate into specific guarantees and safeguards. . . . [P]olicies such as the principle of intergenerational fairness may in certain circumstances limit the power of state and federal governments to impose disadvantages on future generations.[17]

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[15] By 1906, forty-two states had some form of child labor law. Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became A Con Game*, 10 Whittier J. Child & Fam. Advoc. 89, 111 (2010). Nevertheless, these laws had little impact on the practice of child labor because of exceptions with parental consent, and lack of enforcement. By 1906, the first federal child labor bill was introduced in Congress with the Fair Labor Standards Act finally enacted in 1938.

[16] *U.S. Const.*, Preamble (emphasis added).

[17] Jim Gardner, *Discrimination Against Future Generations: The Possibility of Constitutional Limitation*, 9 Envtl. L. 29, 35, 33 (1978).

Further support for the original intent of the Founders to protect children and their descendants resides in the generational sovereignty principles of the Declaration of Independence and the Virginia Declaration of Rights. The Declaration of Independence states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator *with certain unalienable Rights*, that among these are Life, Liberty, and the pursuit of Happiness. . . . That whenever any form of Government becomes destructive of these ends, it is the right of the People to alter or to abolish it, and to institute new Government . . . .[18]

That clause in the Declaration of Independence was based on the Virginia Declaration of Rights, Article I:

> [A]ll men are by nature equally free and independent, and have *certain inherent rights*, of which, when they enter into a state of society, they cannot, by any compact, *deprive or divest their posterity;* namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[19]

The Founders held claim to the concept that certain unalienable rights could never be lost to later generations through the action or inaction of earlier generations.[20]

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[18] United States *Declaration of Independence* (1776), par. 2 (emphasis added).

[19] *Virginia Declaration of Rights* (1776), Art. 1 (emphasis added); *see also id.*, Preamble ("A Declaration of Rights made by the good people of Virginia in the exercise of their sovereign powers, *which rights do pertain to them and their posterity*, as the basis and foundation of government") (emphasis added).

[20] *See Declaration of Rights and Grievances* (1765) (Stamp Act Congress) *in* Bernard Schwartz, *The Roots of the Bill of Rights* at I: 196, 197 (1981). ("His Majesty's liege subjects in these colonies are intitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain."); *Journals of the House of Burgesses of Virginia, 1761-1765,* ed. by Kennedy (Richmond, 1907) 302–04 (declaring in response to the Stamp Act that "As our Ancestors brought with them every Right and Privilege they could with Justice claim . . . their Descendants may conclude, they cannot be deprived of those Rights without Injustice"); *First Charter of Virginia* (1606), *in* B. P. Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* (1878), Vol. 2, pp. 1888–93 (the king declares "for Us, our Heirs, and Successors . . . that all [colonists] . . . and every of their children . . . shall have and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, as if they had been . . . within this our Realm of England"); *see also* similar or identical guarantees in the charters of New England, Massachusetts Bay, Maryland, Connecticut, Rhode Island, Carolina, and Georgia; *Declarations and Resolves of the First Continental Congress* (1774), *in* Bernard Schwartz, *The Roots of the Bill of Rights* 215, 216 (1981) ("That the inhabitants of the English Colonies in North America . . . have the following Rights: *Resolved* . . . That they are entitled to life, liberty, & property."); *The Rights of the Colonists and a List of Infringements and Violations of Rights* (1772), *in* H. A. Cushing, *The Writings of Samuel Adams* (1906), ed., II: 350–69 ("1. *Natural Rights of the Colonists as Men* – "In short it is the greatest

2. The Corruption of Blood

While children are not explicitly mentioned in the Consitution, there are two clauses that directly pertain to protecting children, the Corruption of Blood Clause and the Bill of Attainder Clause.[21]

In English law, treason was considered such a terrible act that the traitor's property would not pass to their children and children retained any debts owed by the traitor. Attainder literally meant "civil death" and applied to the children of the attained.[22] The Constitution enshrined the principle that the punishment of the traitor ends at death, and goes no further. Article III, Section 3, Clause 2 of the Constitution says "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained." It stands for the proposition that children should not be punished for the actions of their parents, or colloquially, the "sins of the fathers" shall not be passed to future generations. The Founders were intent on not imposing burdens on children and all posterity by allowing government to take property from the child.

In separating the new nation from this unjust law of England, Alexander Hamilton, James Madison and others, during the time of the founding, made clear that they did not want children to be victims of the actions of their forebears. Madison wrote in the Federalist Papers that the Corruption of Blood Clause was designed to prevent government "from extending the consequences of guilt beyond the person of its author."[23] Hamilton wrote in the Federalist Papers that the Corruption of Blood Clause and the Bill of Attainder Clause were two constitutional provisions that secured important individual liberties.[24] In addressing why the Corruption of Blood Clause was added to the Constitution, Joseph Story wrote that the corruption of blood penalty made the "victims of a guilt, in which they did not, and perhaps could not, participate; and the sin is visited upon remote generations."[25]

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absurdity to suppose it in the power of one or any number of men at the entering into society, to renounce their essential natural rights, or the means of preserving those rights.).

[21] Homer H. Clark, Jr. Children and the Constitution, 1992 U. Ill. L. Rev. 1, 1 (1992) ("there is nothing in the Constitution about children, minors, or infants, or parents for that matter."); Article III, § 3; Article I, § 9; *see* Max Stier, *Note, Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, Stan. L. Rev. 44 (1992).

[22] "[A]ll the property of one attainted, real and personal, is forfeited; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him; . . . and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches." Joel Prentiss Bishop, Bishop on Criminal Law § 967, at 716 (1923) (John M. Zane & Carl Zollman eds., 9th ed.) (footnote omitted) (explaining the corruption of blood penalty in English Law); 2 William Blackstone, Commentaries 251–54.

[23] James Madison, The Federalist No. 43, at 269 (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

[24] Alexander Hamilton, The Federalist No. 84, at 534 (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

[25] 2 Joseph Story, Story on the Constitution 177–78 (4th ed. 1873).

The Supreme Court has confirmed that the Corruption of Blood Clause was introduced in the Constitution to protect children and their heirs so "that the children should not bear the iniquity of the fathers."[26] At the time of the Constitutional Convention, of course, these clauses benefited only certain children (white children whose parents would have owned property and wealth); however, those liberty rights secured for children and future generations were among the few provisions establishing specific individual rights in the original Constitution (as opposed to structure and procedure), indicating their importance to the Founders.[27]

In my expert opinion, the founding documents made clear that children and later generations were entitled to special considerations in terms of how the state exercised its power. The Founders took efforts to ensure that the state would not wield its power to punish or discriminate against children or future generations, groups without power to protect themselves. The Constitution set the course for our nation's evolving understanding of the just treatment of children.

3. The Bill of Rights

On June 8, 1789, James Madison introduced the Bill of Rights to the Constitution, which included the first ten amendments, in response to states calling for greater constitutional safeguards for individual liberties. By 1791, they became the law of the land. The Bill of Rights created specific prohibitions on governmental power and was strongly influenced by the Virginia Declaration of Rights. Other antecedents to Madison's Bill of Rights included the Magna Carta, the Petition of Right, the English Bill of Rights, and the Massachusetts Body of Liberties.[28] Pertinent here, the Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[29] The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[30]

In 1789, Madison described our constitutional democracy in these terms:

> [A]ll power is originally vested in, and consequently derived from, the people. That Government is instituted and ought to be exercised for the benefit of the

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[26] *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1875); *Illinois Cent. R.R. v. Bosworth*, 133 U.S. 92, 102 (1890).

[27] Max Stier, *Note, Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 Standofrd Law Review 727, 730-731 (1992); *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1875) ("No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers.").

[28] A. E. Dick Howard, *Rights in Passage: English Liberties in America*, *in* The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties 3 (Patrick T. Conley and John P. Kaminski eds., 1992); Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (1992); Leonard W. Levy, *Origins of the Bill of Rights* (1999).

[29] U.S. Const. amend. V.

[30] U.S. Const. amend. IX.

> people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.[31]

Madison's Bill of Rights expressed the need to protect the sacred fire of liberty from encroachment by government abuses of power that infringe on people's rights.[32] Liberty in a constitutional democracy, in Madison's view, meant individuals have rights that no majority should be able to take away.

The rights that the Founders sought to safeguard from government abuses were referred to in the Declaration of Independence as "unalienable rights," but they were also called "natural rights."[33] To Madison, they were the "great rights of mankind." Madison was clear that the Bill of Rights did not create people's entitlement to their rights, but protection from the deprivation of the rights they naturally held as human beings, like freedom of religion and speech, privacy, due process and equality, and the basic foundations of life itself. Both Jefferson and Madison agreed that an independent federal judiciary would be "an impenetrable bulwark" of liberty.[34] In 1824, in his final *Advice to My Country*, James Madison said, "[t]he advice nearest to my heart and deepest in my convictions is that the Union of the States be cherished & perpetuated."[35]

After the Civil War, the 14th Amendment (overturning, in part, *Dred Scott v. Sandford*, which said that no black person could be a U.S. citizen) clarified the conditions of citizenship:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

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[31] George Washington, *First Inaugural Address*, April 30, 1789, *available at* http://www.archives.gov/exhibits/american_originals/inaugtxt.html.
[32] *Id.*
[33] *See* Edward J. Melvin, C.M., *The Constitution and the Declaration of Independence: Natural Law in American History*, 31 The Catholic Lawyer 1 (2017).
[34] James Madison, *Speech to the House of Representatives (June 8, 1789)*, reprinted in 12 The Papers of James Madison 198, 207 (Robert A. Rutland et al. eds., 1977); *see also* Colleen Sheehan, *James Madison: Father of the Constitution*, 8 First Principles: Foundational Concepts to Guide Politics and Policy (April 8, 2013), available at https://www.heritage.org/political-process/report/james-madison-father-the-constitution ("Madison believed that he and his generation of American Founders had discovered the way to rescue popular government from its past failures, but that its ultimate success depended on the great experiment in self-government entrusted to the hands of future generations. The destiny of republican government, Madison believed, is staked on the vigilance of the American people to tend 'the sacred fire of liberty.'")
[35] 4 *The Virginia Historical Register, and Literary Note Book* 118 (William Maxwell ed., 1854).

> of life, liberty, or property, without due process of law; nor deny to any person within its jursidction the equal protection of the laws[36]

Members of the Republican Party introduced the Fourteenth Amendment after the conclusion of the Civil War to ensure that the admission of Confederate States back into the Union would be accompanied by a guarantee of equal rights for African Americans, especially freed slaves and their children, in the South. By specifically granting citizenship to all persons born or naturalized, the Fourteenth Amendment not only guaranteed citizenship to former slaves but to most children born within the United States, even if the child's parents are not and cannot become citizens.[37]

The Citizenship Clause was initially introduced by Senator Jacob Howard to read: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[38] Senator Howard stated:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

Senator Cowen objected and inquired, "Is the child of the Chinese immigrant in California a citizen? … [I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration…?"[39] Senator John Conness of California responded: "The proposition before us … relates simply to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens…. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States…."[40]

The founding documents, including the Bill of Rights, have special sensitivities towards children and future generations that are reflected throughout our nation's continuing history since the late 1800s.

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[36] U.S. Const. amend. XIV, § 1.
[37] See generally, Catherine E. Smith and Susannah W. Pollvogt, Children as Proto-Citizens, 48 U.C. Davis L. Rev. 655, 661 (2014)
[38] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).
[39] *Id*. at 2890–91.
[40] *Id.*

B. Children's Rights Have Been Recognized By U.S. Presidents and the Global Community

Every sitting President since Theodore Roosevelt has recognized children's rights and that same recognition in international law has also become universal.

1. Presidential Conferences on Protection of Children

A pivotal moment for children as rights-bearers came at the turn of the twentieth century. On December 8, 1908, President Theodore Roosevelt addressed the Congress about children:

> If there is any one duty which more than another we owe it to our children and our children's children to perform at once, it is to save the forests of this country, for they constitute the first and most important element in the conservation of the natural resources of the country. . . . Any really civilized nation will so use all of these three great national assets that the nation will have their benefit in the future. Just as a farmer, after all his life making his living from his farm, will, if he is an expert farmer, leave it as an asset of increased value to his son, so we should leave our national domain to our children, increased in value and not worn out.[41]

In the President's special message to Congress on January 22, 1909, Theodore Roosevelt set the stage for an initiative he would launch to protect children. Building on the foundational principles of the Union and the Posterity Clause, the President told the House and the Senate of the United States:

> The great basic facts are already well known. We know that our population is now adding about one-fifth to its numbers in ten years, and that by the middle of the present century perhaps one hundred and fifty million Americans, and by its end very many millions more, must be fed and clothed from the products of our soil. With the steady growth in population and the still more rapid increase in consumption our people will hereafter make greater and not less demands per capita upon all the natural resources for their livelihood, comfort and convenience. It is high time to realize that our responsibility to the coming millions is like that of parents to their children, and that in wasting our resources we are wronging our descendants. . . .
>
> The policy of conservation is perhaps the most typical example of the general policies which this Government has made peculiarly its own during the opening years of the present century. The function of our Government is to insure to all its citizens, now and hereafter, their rights to life, liberty and the pursuit of happiness. ***If we of this generation destroy the resources from which***

[41] Theodore Roosevelt, *Eighth Annual Message to the Senate and House of Representative*, Dec. 8, 1908, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29549&st=Children&st1

> ***our children would otherwise derive their livelihood, we reduce the capacity of our land to support a population, and so either degrade the standard of living or deprive the coming generations of their right to life on this continent.*** If we allow great industrial organizations to exercise unregulated control of the means of production and the necessaries of life, we deprive the Americans of today and of the future of industrial liberty, a right no less precious and vital than political freedom. Industrial liberty was a fruit of political liberty, and in turn has become one of its chief supports, and exactly as we stand for political democracy so we must stand for industrial democracy.[42] (emphasis added)

That same year, President Theodore Roosevelt initiated the White House Conference on Children and Youth, which was held every ten years from 1909 to 1970,[43] with some White House conferences occurring after 1970 focusing on children's health and welfare under different names. In 1909, President Theodore Roosevelt asked Congress to pass legislation protecting the welfare of children, in part from unfair labor practices and protecting children with disabilities, to set "an example of a high standard of child protection by the National Government to the several States of the Union, which should be able to look to the nation for leadership in such matters." The President said:

> There can be no more important subject from the standpoint of the nation than that with which you are to deal; because, when you take care of the children you are taking care of the nation of to-morrow. . .
>
> I deem such legislation as is herein recommended not only important for the welfare of the children immediately concerned, but important as setting an example of a high standard of child protection by the National Government to the several States of the Union, which should be able to look to the nation for leadership in such matters.[44]

In approving of a national campaign called "The Children's Year," which ran from April 6, 1918 through April 6, 1919 and focused on health, recreation, education, and labor of children, President Wilson stated that other than taking care of soldiers at war, there is "no more patriotic duty than that of protecting children."[45] The Children's Bureau of the U.S. Department of Labor held eight conferences with domestic and foreign experts on minimum standards for child welfare. The Chair of the Child Welfare Committee said of the campaign:

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[42] Theodore Roosevelt, *Special Message to the Senate and House of Representatives*, Jan. 22, 1909, available at http://www.presidency.ucsb.edu/ws/index.php?pid=69658&st=Children&st1=

[43] Dwight D. Eisenhower Library, White House Conference on Children and Youth: Records 1930–70 (1992), https://eisenhower.archives.gov/Research/Finding_Aids/pdf/White_House_Conference_on_Children_and_Youth.pdf.

[44] Proceedings of the Conference on the Care of Dependent Children, *Address of President Roosevelt*, Jan. 25, 1909, *available at* https://archive.org/details/proceedingsconf01statgoog.

[45] U.S. Department of Labor, Children's Bureau, Sixth Annual Report of the Chief, Children's Bureau to the Secretary of Labor, June 30, 1918, pp. 24.

> When children bear burdens, the nation suffers; when children lack schooling that prepares them for life, the nation suffers; when they lack mothers' care and home life, they and the nation suffer most of all. The Children's Year means constructive conservation. If its program can be realized the nation's children will walk more freely to be the strength of the next generation.[46]

In advance of the decadal White House Conference on Child Health and Protection in 1929, President Herbert Hoover announced: "We as a nation are fundamentally concerned with reinforcement of the equality of opportunity to every child, and the first necessity for equal opportunity is health and protection."[47] He urged the committee to consider the utmost importance of their work, explaining:

> The greatest asset of a race is its children, that their bodily strength and development should prepare them to receive the heritage which each generation must bequeath to the next. These questions have the widest of social importance, that reaches to the roots of democracy itself. By the safeguard of health and protection of childhood we further contribute to that equality of opportunity which is the unique basis of American civilization.[48]

Ten years later at the next conference, President Franklin Delano Roosevelt took the rights of children one step further to consider the child as integral to national life and democracy itself.

> Definitely we are here with a principal objective of considering the relationship between a successful democracy and the children who form an integral part of that democracy. We no longer set them apart from democracy as if they were a segregated group. They are at one with democracy because they are dependent upon democracy and democracy is dependent upon them. . . .
>
> Yet, after all has been said, only a beginning has been made in affording security to children. In many parts of the country we have not provided enough to meet the minimum needs of dependent children for food, shelter and clothing, and the

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[46] Jessica B. Peixotto, Executive Chairman, Child Welfare Department, Woman's Committee, Council of National Defense, The Children's Year and the Woman's Committee, *The Annals of the American Academy of Political and Social Science*, Vol. 79, War Relief Work (Sept., 1918), pp. 262.

[47] Herbert Hoover, *Statement on Plans for a White House Conference on Child Health and Protection*, July 2, 1929, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=21852&st=conference&st1=child

[48] Herbert Hoover, *Remarks at the First Meeting of the White House Child Conference Planning Committee*, July 29, 1929, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=21876&st=conference&st1=child; *see also* Herbert Hoover, *Address to the White House Conference on Child Health and Protection*, Nov. 19, 1930, *available at* http://www.presidency.ucsb.edu/ws/?pid=22442.

> Federal Government's contribution toward their care is less generous than its contribution to the care of the aged. . . .
>
> We are concerned about the future of our democracy when children cannot make the assumptions that mean security and happiness.[49]

In a radio address on January 19, 1949 from the White House Conference on Children in a Democracy, President Franklin D. Roosevelt said:

> Last April when this Conference first met in this room I asked you to consider two things: first, how a democracy can best serve its children; and, the corollary, how children can best be helped to grow into the kind of citizens who will know how to preserve and perfect our democracy.
>
> I believe with you that if anywhere in the country any child lacks opportunity for home life, for health protection, for education, for moral or spiritual development, the strength of the Nation and its ability to cherish and advance the principles of democracy are thereby weakened.[50]

Again in 1950, President Harry S. Truman gave an address before the Midcentury White House Conference on Children and Youth, stating:

> [W]e must preserve the elements of our American way of life that are the basic source of our strength. This is the purpose of this Midcentury White House Conference on Children and Youth. We are seeking ways to help our children and young people become mentally and morally stronger, and to make them better citizens. I think you should go right ahead with this work, because it is more important now than it has ever been. . . .
>
> We must remember, in all that we do at this conference and afterward, that we cannot insulate our children from the uncertainties of the world in which we live or from the impact of the problems which confront us all. What we can do--and what we must do--is to equip them to meet these problems, to do their part in the total effort, and to build up those inner resources of character which are the main strength of the American people.[51]

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[49] Franklin D. Roosevelt, *Address at the White House Conference on Children in a Democracy*, Apr. 23, 1939, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15747&st=conference&st1=child

[50] Franklin D. Roosevelt, *Radio Address at the White House Conference on Children in a Democracy*, Jan. 19, 1940, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15999&st=conference&st1=child

[51] Harry S. Truman, *Address Before the Midcentury White House Conference on Children and Youth*, Dec. 5, 1950, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=13677&st=conference&st1=child

Presidents Eisenhower and Nixon continued the tradition of their predecessors in reaffirming the importance of protecting the rights and welfare of children as central to democracy during the decadal White House Conferences on Protection of Children, which ended in their original form in 1970.[52]

Federal legislation during the 1960s also reaffirmed the central policy of the United States to protect children. For instance, the Child Nutrition Act of 1966 recognized the relationship between food nutrition "and the capacity of children to develop and learn" and therefore declared the policy of Congress to strengthen federal authority "to safeguard the health and well-being of the Nation's children."[53]

It is my expert opinion that the United States throughout the twentieth century repeatedly recognized that children are deserving of special protection under the law, and that protecting children and their foundations for life, was essential to preserving democracy and the intergenerational ethics embodied in the founding documents of the nation.

2. The Convention on the Rights of the Child and the Growing International Jurisprudence on Children's Rights in the Context of Climate Change

During the 1980s, the United States led the international effort in drafting the United Nations Convention on the Rights of the Child ("CRC"), which entered into force on September 2, 1990.

The CRC was the first international treaty to incorporate the complete range of internationally-recognized human rights into its text, including civil, cultural, economic, political and social rights as well as certain aspects of humanitarian law.[54] It protects three categories of children's rights, including survival and development rights, protection rights, and participation rights. Survival and development rights include rights to the resources, skills and assistance necessary for survival and development, such as adequate food, shelter, clean water, formal education, primary health care, leisure and recreation, cultural activities, and information about rights and entitlements. Protection rights include protection from all forms of child abuse, neglect, exploitation and cruelty, especially in times of war and when interacting with the criminal justice

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[52] Dwight D. Eisenhower, *Remarks to the National Committee for the 1960 White House Conference on Children and Youth*, Dec. 16, 1958, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=11297&st=conference&st1=child; Richard Nixon, *Statement Announcing the White House Conference on Children and Youth*, Oct. 26, 1969, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2284; Richard Nixon, *Statement Announcing the Appointment of Stephen Hess as National Chairmen of the White House Conference on Children and Youth*, Dec. 5, 1969, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2356&st=conference&st1=child; Richard Nixon, *Remarks at the Opening Session of the White House Conference on Children*, Dec. 13, 1970, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2845&st=conference&st1=child

[53] 42 U.S.C. § 1771.

[54] UNICEF, *Rights Under the Convention on the Rights of the Child*, *available at* https://www.unicef.org/crc/index_30177.html (last visited March 27, 2018).

system. Participation rights include the rights and freedoms to speak and express opinions about social, economic, religious, cultural and political life; the right to information; and freedom of association. The guiding principles of the CRC include non-discrimination; adherence to the best interests of the child; the right to life, survival and development; and the right to participate. These guiding principles represent the underlying requirements for the realization of all rights in the CRC.[55]

Cynthia Price Cohen, who participated in drafting the CRC, wrote that the United States "played a pivotal role in the drafting of the convention and, thus, in changing the world for children," though their leadership in children's rights ended in 1989.[56] Even though the United States worked extensively to advocate for an expansion of the treaty from the original Polish model convention, the United States eventually adopted a negative attitude toward the treaty and today is the *only nation on Earth* (other than Somalia and the newly-recognized South Sudan) that has not ratified the treaty. Nonetheless, the CRC reflects the United States' involvement in developing an international commitment to children that was adopted by world leaders.

Additionally, Article 24 of the CRC explicitly recognizes that environmental harm interferes with the full enjoyment of the rights of children. In recent years the Committee on the Rights of the Child has increasingly paid attention to the relationship between environmental protection and children's rights, including during an official "day of general discussion" on September 23, 2016.[57]

Just this month, April 2018, the Supreme Court of Colombia issued an important ruling in favor of 25 young people, including children, who sued their government for the destruction of the amazon rainforest, which results in increased "emission of carbon dioxide (CO_2) into the atmosphere, producing the warming effect that transforms and fragments ecosystems, altering water resources, the water supply of populated centers, and soil degradation."[58] The decision is the latest ruling from legal bodies around the world that children have fundamental legal rights that should be safeguarded by the State, including their rights related to their environment and the climate, waters, and soils essential for life. Specifically, the Court acknowledged:

> Without a healthy environment we subjects of rights and human beings in general cannot survive, much less safeguard those rights for our children nor for the generations to come. Neither could the existence of the family, of society, or the

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[55] *Id.*

[56] Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 Emory Int'l L. Rev. 185, 185 (2006).

[57] Rep. of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ¶¶ 7, 12, U.N. Doc. A/HRC/37/58 (2018).

[58] STC-4360-2018, Radicación n.° 11001-22-03-000-2018-00319-01, Corte Suprema de Justicia de Colombia, 34-35 (2018) (unofficial English translation. Original text: "… la emission de dióxido de carbono (CO_2) hacia la atmósfera, produciendo el efecto invernadero, el cual transforma y fragmenta ecosistemas, altera el recurso hídrico y con ello, el abastecimiento de agua de los centros poblando y degradación del suelo.").

> State itself be guaranteed. The growing deterioration of the environment is a grave attack against present life and life to come and all the fundamental rights; furthermore, it gradually depletes life and all of the rights connected to it.[59]

Notwithstanding the early recognition of children and future generations as beneficiaries of the blessings of liberty bestowed by the Constitution, and Presidential and global commitments to the rights and interests of children, children have nonetheless been historically subjected to state and societal discrimination and unequal treatment. Consistent with the notion that law evolves with our greater appreciation and understanding of the harms of discrimination, there are times when courts play an important role in stepping in to protect children when state action goes too far, burdening children's right to equality, self-determination, and the full realization of their liberties.

C. The U.S. Supreme Court Has Also Evolved in Its Recognition of Children as Rights-Bearers

In addition to the increasing recognition of children's rights by U.S. Presidents and the global community in the twentieth century, the Supreme Court's jurisprudence similarly evolved. As society gained new insights and understanding about the meaning of liberty and equality, and the unique position of children in our society and as compared to adults, governmental practices that subjected children to unequal treatment were revealed and could not stand as a constitutional matter. [60]

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[59] *Id.* at 13 (unofficial English translation. Original text: "Sin ambiente sano los sujetos de derecho y los seres sintientes en general no podremos sobrevivir, ni mucho enos resguardar esos derechos, para nuestros hijos ni para las generaciones venideras. Tampaco podrá garantizarse la existencia de la familia, de la socieded o del propio Estado. El deterioro creciente del medio ambiente es atentado grace para la vida actual y venidera y de todos los otros derechos fundamentales; además, agota paulatinamente la vida y todos los derechos connexos con ella."). The Court went on to say that "In keeping with the criteria of intergenerational equity, the transgression is obvious, in keeping with the prognosis that an increase in temperature for the year 2041 will be 1.6 degrees and in 2071 up to 2.14 degrees, being that future generations, amongst them, the children who lodge this safeguard, will be directly affected, unless the present [generations], reduce to zero the level of deforestation." *Id.* at 37 (unofficial English translation. Original text; "En cuanto al criterip de equidad intergeneracional, es obvia su transgresión, en tant que el pronóstico de incremento de la temperatura para el año 2014, será de 1,6°, y en 2071 hasta de 2,14°, siendo las futuras generaciones, entre ellos, los infantes que interponen esta salvaguarda, las que serán directamente afectadas, a menos que las presentes, reduzcan a cero la tasa de deforestación.").

[60] *See generally* Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. Ill. L. Rev. 1, 3–36 (1992) (surveying judicial opinions on children's rights post *Brown*).

1. *Brown v. Board of Education* as a Catalyst for the Expansion of Children's Rights

In 1954, *Brown v. Board of Education* overturned the separate but equal doctrine, "usher[ing] in the modern era of equal protection jurisprudence."[61]

In overturning *Plessy v. Ferguson*, the *Brown* Court focused on the long-lasting impact that racial segregation would have on African Americans, especially African-American children:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . .
>
> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating races is usually interpreted as denoting the inferiority of the negro group.

Brown is heralded as one of the most important civil rights decisions for the advancement of equality in the United States. While not a Supreme Court case, *Mendez v. Westminster School District of Orange County*, decided seven years before *Brown*, ended 100 years of racial segregation of Mexican-American and Mexican students.[62] These cases had common equality themes for children. In *Mendez*, the U.S. District Court held:

> 'The equal protection of the laws' pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, textbooks and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.[63]

The Ninth Circuit affirmed the U.S. District Court's decision that relegating children to "Mexican Schools" was unconstitutional under the equal protection clause of the Fourteenth Amendment.[64]

Brown and *Mendez* also held a common connection to an iconic civil rights pioneer - Thurgood Marshall who represented both nine-year-old Sylvia Mendez and twelve-year-old Linda Brown (She died on March 25, 2018).

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[61] Erwin Chemerinsky, Constitutional Law: Principles and Policies 668 (3d ed. 2006).
[62] *Mendez v. Westminster Sch. Dist. of Orange Cnty.*, 64 F.Supp. 544 (S.D. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947) (en banc).
[63] *Mendez*, 64 F.Supp. at 549.
[64] *Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (en banc).

The Supreme Court's ruling in *Brown* sparked an increasing willingness to recognize the constitutional rights of children. Ten years after *Brown*, in *In re Gault*, the Court explicitly held that children were "persons" within the ambit of the equal protection guarantee. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[65]

From 1967 to present,[66] the United States Supreme Court has recognized children's unique constitutional protections in a number of contexts, including substantive due process in juvenile proceedings,[67] reproductive rights,[68] freedom of expression,[69] and equal protection.[70] With

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[65] *In re Gault*, 387 U.S. 1, 13 (1967). However, despite these strong words, the Court has yet to fully realize children's rights. *See* Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. Ill. L. Rev. 1567, 1578 (2009) ("This promising bit of dicta has never fully matured. To date, most of the constitutional rights have been rights of protection against state action as opposed to rights of active participation.").

[66] After the Court's decision in *Brown*, the Court's first big decision involving children's constitutional rights was *In re Gault*. 387 U.S. at 4–6 (discussing the Court's recognition that the "Due Process Clause and Bill of Rights applied to children"). Most recently, the Court has continued to expand constitutional protections for children by holding that capital punishment and mandatory life-without-parole violate the Eighth Amendment's ban on cruel and unusual punishment. *Montgomery v. Louisiana*, 136 S.Ct. 718, 732 (2016) (extending the Court's decision in *Miller* to apply retroactively to children sentenced to mandatory life-without-parole); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding mandatory life-without-parole sentences for children is cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that capital punishment of a child who committed the crime under the age of eighteen is a violation of the Eighth Amendment).

[67] *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376–77 (2009) (holding that a strip search of a middle school student violated the student's constitutional right of privacy); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (holding that Fourth Amendment protects minors from unreasonable searches and seizures by public school officials); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (holding that school officials could not impose a multiple day suspension on students without Due Process); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding that "the prosecution of respondent [a minor] in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth Amendment"); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that "as a matter of due process * * * the case against [a minor] must be proved beyond a reasonable doubt" in juvenile adjudications) (ellipsis in original); *In re Gault*, 387 U.S. 1, 33–34, 41, 55 (1967) (holding that the Due Process Clause and Bill of Rights apply to minors in juvenile adjudication proceedings).

[68] *Hodgson v. Minnesota*, 497 U.S. 417 (1990) ("Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court.") (holding that Minnesota abortion statute requirement that both parents be notified of minor's intent to obtain an abortion is unconstitutional because it did not further a legitimate state purpose); *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977) (holding that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults" so statutes barring the distribution of nonmedical contraceptives to persons over sixteen was unconstitutional); *Planned Parenthood of*

children "[r]arely seen as bearers of due process and equal protection rights,"[71] *Brown v. Board of Education* served as a catalyst for the expansion of children's rights.[72] Several of these cases discussed below provide important principles for a court's consideration of the special position and equal protection rights of children in the context of climate change.

2. With the Expansion of Children's Rights, the U.S. Supreme Court Also Embraced the Understanding that Children Must be Treated Differently Than Adults

In our society, we assume that children "lack the capacity to act rationally" and that they must be "under some responsible adult's control and care."[73] At the same time, courts are beginning to recognize that "children are persons, equally entitled with all others to be treated justly by the law, even if they are treated differently."[74] The Supreme Court has extended important consitutional rights to children and at the same time acknowledged that "children are different." In my expert opinion, based on a historical, sociological, and legal analysis, the Court plays an

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Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.") (holding that a statute requiring written consent from a parent for an abortion of an unmarried woman under eighteen was violated the minor's constitutional right to privacy).

[69] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") (holding that the First Amendment protects high school student's right to wear black armbands to protest the Vietnam War).

[70] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2603-04 (2015) (discussing how laws prohibiting same-sex marriage violate the equal protection of laws because they "harm and humiliate the children of same sex couples") (holding that the constitution grants all a right to marry); *Plyler*, 457 U.S. at 230 ("If a State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that *it furthers some substantial state interest."*) (emphasis added) (holding that a State law that denied education to undocumented children violated the Equal Protection Clause); *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding that a probate law that distinguished between legitimate and illegitimate children violated the Equal Protection Clause); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (concluding that classifying a child based on non-marital status is "illogical and unjust") (holding that law that precluded children from collecting workers' compensation benefits because their mother was unmarried violated the Equal Protection Clause); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that classifying children based on parents' non-marital status is an Equal Protection violation).

[71] Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. Ill. L. Rev. 1567, 1577 (2009).

[72] Richard Kluger, Simple Justice 314 (1977) (discussing the strategic choice to challenge segregation laws through challenges to education because of the exponential effect on children).

[73] Barbara Bennett Woodhouse, Handbook of Youth and Justice at 377. It is important to note that for older children, these assumptions may be rooted in stereotypes of children. *Id.* at 377-378.

[74] *Id.* at 377.

important role in protecting children from state action that fails to take into consideration their position in society as children. As Professor Woodhouse explains, "No right is absolute and children's rights must be weighed in the balance with other competing claims of rights and authority. However, the power adults exercise over children – as parents, legislators, and judges – should not be taken for granted, but must be justified as furthering children's interests and meeting their special needs."[75] That courts play this mediating role of balancing concerns between the government and the rights of children has been reflected in both the civil and criminal context.

In 1969, the Supreme Court held in *Tinker v. Des Moines Independent Community School District* that the First Amendment applies to high school students and protects their right to wear black armbands to protest the Vietnam War.[76] The Court stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[77] The Court, however, did articulate in a subsequent opinion that the "constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings" because the regulation of vulgar or offensive language is part of the role of schools in instilling fundamental values in students.[78] And, a student's freedom of expression must be balanced against the sensibilities of the other students and the school's responsibility in teaching students the boundaries of socially appropriate conduct.[79] The Court recognized the children's consitutional rights mattered while at the same time took into consideration their stage in life and status as children in arriving at its conclusion. In contrast to constitutional sensitivities aimed at protecting children, when state actors deprive children of due process rights, the Court has stepped in to ensure that children are not deprived fundamental rights because of their minor status.

In the criminal context, the Supreme Court has issued a number of important decisions establishing that children are entitled to enhanced protections under the law and cannot be treated the same way as adults, in part due to the development of brain science and our growing understanding that children are physiologically different than adults.

In 1948, the Supreme Court first recognized in *Haley v. Ohio* that children "cannot be judged by the more exacting standards of maturity" expected of adults, and required special care during interrogations.[80] In his concurrence, Justice Frankfurter lamented the lack of "available experts on such matters to guide the judicial judgment" regarding child development.[81] In *Gallegos v. Colorado*, Justice Douglas reaffirmed that children could easily be deprived their constitutional rights if they were treated the same as adults, noting that children needed special protection from adults.[82] *In re Gault*, discussed above, also reaffirmed that the greatest of care is required to

[75] *Id.* at 378.
[76] 393 U.S. 503 (1969).
[77] *Tinker*, 393 U.S. at 506.
[78] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986).
[79] *Id.* at 681.
[80] 332 U.S. 596, 599-601 (1947).
[81] *Haley v. Ohio*, 332 U.S. 596, 605 (1947).
[82] 370 U.S. 49, 52 (1962).

protect a child's constitutional right against self-incrimination under the Fifth Amendment.[83] In *J.D.B. v. North Carolina*, the Court recognized age as a factor in the custody inquiry for a Miranda warning.[84]

In a line of child-centered Eighth Amendment cases, the Supreme Court treated children as a class who are similarly situated to adults in terms of the crime they have committed but "constitutionally different from adults in their level of culpability."[85] The foundational principle in these cases is "that imposition of a State's most severe penalties" on children offenders "cannot proceed as though they were not children"[86] The distinctive attributes and status of children diminished the penological justifications for imposing the harshest sentences on juvenile offenders (even though an adult could receive such sentences for a similar crime), rendering such harsh sentences disproportionate. The Court found that the differences between children and adult offenders "are too marked and well understood to risk allowing a youthful person to receive" the death penalty or a sentence of life without parole for a nonhomicide crime "despite insufficient culpability."[87]

In analyzing these constitutional differences between children and adults, the Court relied "not only on common sense—on what 'any parent knows'—but on science and social science as well."[88] In *Graham*, the Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[89] In *Miller*, the Court stressed the need to consider the unique qualities of children and youth and their "stage of life" in sentencing.[90] The Court observed, "'youth is more than a chronological fact' . . . . It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'"[91] The Court also emphasized that children "'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves" from the external circumstances they find themselves in.[92] During oral argument in the Supreme Court in *Graham*, Justice Ginsburg said "every State – recognize[s] the difference between an adult

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[83] *In re Gault*, 387 U.S. 1, 55 (1967).
[84] 131 S. Ct. 2394 (2011),
[85] *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016) (citing *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits capital punishment for children under the age of 18 at the time of their crimes); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment bars life without parole for children nonhomicide offenders); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for children, including those convicted of homicide, violate the Eight Amendment)) (holding that *Miller*'s prohibition on mandatory life without parole sentences for children offenders was a substantive rule that must be applied retroactively).
[86] *Miller*, 567 U.S. at 474.
[87] *Roper*, 543 U.S. at 572–73; *Graham*, 560 U.S. at 78.
[88] *Miller*, 567 U.S. at 471.
[89] *Graham*, 560 U.S. at 68.
[90] *Miller*, 567 U.S. at 476.
[91] *Miller*, 567 U.S. at 476 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).
[92] *Miller*, 567 U.S. at 471 (citing and quoting *Roper*, 543 U.S. at 569).

and a minor."[93] Children are children. They are a class entitled to special consideration and protection as a result.

3. A Special Area of Consitutional Sensitivity: When Government Action Imposes a Lifetime of Hardship on Children for Matters Beyond Their Control it Invokes Heightened Review

Despite the advancement of children's rights post-*Brown*, recognition of children's Fourteenth Amendment protections outside the context of criminal law continues to be an area that is afforded minimal attention from litigants and scholars. That said, in my expert opinion, the precedent that does exist supports the application of heightened scrutiny when government action poses significant risks to children's well-being for matters over which they have no control.

In what I will refer to as the "child-centered" cases, the Supreme Court has opted for a different route to heightened review than the classic test rooted in the *Carolene Factors* that sorts and places groups into their respective tiers. It does so, because of the unique positioning of children in our society and their unique vulnerability.

At the heart of these cases is the abiding principle that "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[94] In my expert opinion, we readily understand this foundational principle in the context of race and gender discrimination, however, a series of cases about state discrimination against children – the children of unmarried parents and the children of undocumented parents – offer important overlooked insights into our understanding of the equal protection guarantee as it applies to children. The child-centered cases offer an important foundation for the Equal Protection rights of children.

a. The Court's Recognition of Children's Rights When Government Action Hinders Children's Family Formation Because of Matters Beyond Their Control.

The United States has a history of discrimination against children of unmarried parents. They were considered the "child of no one" and as such, they were denied the social status and legal benefits enjoyed by children of marital parents.[95] From 1968 to 1988, the Supreme Court heard more than a dozen cases about the equal protection rights of these children. In 1988, in *Clark v. Jeter*, the Court, in a unanimous decision authored by Justice O'Connor, explicitly held that discrimination against non-marital children warranted intermediate scrutiny.

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[93] Transcript of Oral Argument at 43, in *Graham v. Florida*, 560 U.S. 48 (2010), No. 08-7412 (Nov. 9, 2009).
[94] *Plyer*, 457 U.S. at 220.
[95] Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U.L. Rev. 1589, 1608 (2013).

Deemed "nonpersons," children of unmarried parents could not inherit, obtain parental support, seek wrongful death recovery or social security, or other benefits. They were also socially ostracized.[96] Children bore the brunt of society's moral condemnation of their parents' conduct despite their inability to control neither their parents' conduct, nor society's moral judgments against adults who have children outside of marriage.[97]

Levy v. Louisiana and *Weber v. Aetna Casualty & Surety Co*. are foundational Supreme Court cases in the evolving protection of children as rights-bearers. In 1968, in *Levy v. Louisiana* the United States Supreme Court, for the first time, addressed the plight of children of unmarried parents as a violation of children's equal protection rights. Louise Levy, an unmarried, African American mother, died as the result of medical malpractice by a Louisiana doctor.[98] Louisiana denied Levy's five children a "right to recover" for their mother's death because they were born outside the bonds of marriage. The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim because they were not "legitimate" and "morals and general welfare [] discourage[d] bringing children into the world out of wedlock."[99] The U.S. Supreme Court reversed.[100]

The *Levy* Court first held that children of unmarried parents were persons. "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[101] The Court then went on to conclude that excluding children from a wrongful death recovery based on the mother's conduct was invidious discrimination. The Levy Court was mindful that wide latitude must be given to legislative classifications in social and economic legislation; however, citing *Brown v. Board of Education*, the Court reiterated that it would not "hesitate to strike down an invidious classification even though it had history and tradition on its side." The Court then struck down the law as unconstitutional.[102] The children's "illegitimacy" was unrelated to the medical malpractice performed on the mother and the children were dependent on her and entitled to recover like any other child in their position.

A few years later, in *Weber v. Aetna Casualty & Surety Co*., the Court overturned another Louisiana law that denied workers' compensation benefits to children of Henry Clyde Stokes

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[96] *Id*. at 1608
[97] *Id.*
[98] *Levy v. Louisiana*, 391 U.S. 68, 68 (1968); *see also* John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1, 2–3 (1969) (discussing the background of the *Levy* decision).
[99] John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1, 3 (1969).
[100] *Levy*, 391 U.S. at 68.
[101] *Id.* at 70.
[102] *Id.* at 71 (citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954)).

because they were born outside of marriage.[103] Stokes, who died from work-related injuries, lived in the same household with his marital and non-marital children. Under Louisiana workers' compensation law, however, the non-marital children could not recover if the surviving dependents with first priority to the benefits exhausted the proceeds.[104] The four marital children were awarded the maximum allowable amount, denying the two non-marital children any recovery. The Supreme Court found the law treating non-marital children differently than marital children was "impermissible discrimination."[105] The Court reasoned, "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[106] To penalize the child would place the child at an economic disadvantage for acts over which the child has no control.

In a combination of developing civil rights doctrine and the basic economic and social protections of children, *Levy* and *Weber* laid the groundwork for an important forward step for the rights of children.[107]

After establishing non-marital children as a group of children warranting special protection, the next line of cases established what procedural safeguards were required for states to treat children of unmarried parents fairly. Although the Court has not fully addressed the state's unequal treatment of non-marital children, subsequent cases established minimal procedural safeguards necessary to ensure that the government satisfied its obligation to place non-marital children on equal footing with marital children.[108]

In 1982, in *Mills v. Habluetzel*, the Supreme Court addressed the Texas Legislature's adoption of paternity procedures for children of unmarried parents to establish a parent-child relationship within one year of the child's birth. The failure to bring suit on behalf of the child within the first year of its life resulted in the child being barred for life from child support from the father.[109]

In *Mills*, the child of a mother born out of wedlock was one year and seven months old. The trial court dismissed the suit and the Texas Court of Civil Appeals affirmed. The appellant argued that the statute placed a burden on illegitimate children that is not shared by legitimate children and is not justified by the state's interest in avoiding stale and fraudulent claims.

The Supreme Court reversed, finding that the opportunity for a child to obtain support must be more than illusory. "The period for asserting the right to support must be sufficiently long to permit those who do not normally have an interest in such children to bring an action on their

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[103] *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).
[104] *Id.* at 168.
[105] *Id.* at 169.
[106] *Id.*
[107] Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U.L. Rev. 1589, 1614 (2013).
[108] Despite the progress made on behalf of non-marital children, they continue to face disparate treatment. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (2011)
[109] *Mills v. Habluetzel*, 456 U.S. 91, 94–95 (1982).

behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock."[110] The opportunity in this case was so limited that few could use it effectively. The Court focused on two related requirements. First, the period for obtaining support must be long enough to present a reasonable opportunity for a child to assert a claim or to have a claim asserted on his or her behalf. Second, any time limitation placed on the opportunity must be substantially related to the state's interest in avoiding stale or fraudulent claims. The Court found that granting only one year to establish paternity was inadequate; it was too short for the mother to bring the claim and was not substantially related to the state's interest in avoiding prosecution of stale or fraudulent claims.[111]

In 1988, in *Clark v. Jeter*, the Supreme Court in a unanimous decision authored by Justice O'Connor, explicitly held that discrimination against non-marital children warranted intermediate scrutiny and reiterated the procedural safeguards in a case striking down Pennsylvania's six-year statute of limitations to establish paternity imposed on children of unmarried parents.[112]

Today, as a result of the Supreme Court's jurisprudence on the equal protection rights of children of unmarried parents, every state has a process for a father to establish paternity and a process for a child (or third party) to do so, in order to facilitate a child's access to the legal benefits enjoyed by children of married parents.[113] In addition, classifications based on non-marital children are subject to heightened review. States are required to place children of unmarried parents on equal footing with children of married parents unless the distinction is substantially related to a sufficiently important governmental interest.[114]

The non-marital status cases, as Professor Lawrence Nolan explains, led to the "transformation of law and policy regarding legitimacy and illegitimacy as to economic rights, nationally. That is, the cases set a floor, which all states are constitutionally bound to follow in regard to these children."[115]

In my expert opinion, from a historical and sociological viewpoint, the Court stepped in to protect children born out of wedlock during the 1970s and 1980s because of the increasing numbers of children facing unequal treatment by states and discrimination for matters outside

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[110] *Id.* at 97.
[111] *Id.* at 101.
[112] *Clark v. Jeter*, 486 U.S. 456, 465 (2008).
[113] *Id.* at 347; Unif. Parentage Act § 202 (2002) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.")
[114] *Mathews v. Lucas*, 427 U.S. 495, 513 (1976) ("… we cannot say that the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).
[115] Lawrence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 25 (1999).

their control. As I have explained previously, we "view the availability [] paternity procedures as necessary in modern times; however, they did not materialize out of thin air."[116] Through the process of developing new insights and understanding of the harms from state action denying non-marital children equal treatment, the Court shifted its view and recognized the unconstitutional injury.

The non-marital status cases are often viewed as limited and unique to their circumstances. Perhaps this is so because they are often bracketed as family law cases. This is not the end of the constitutional story, however, when we look at equal protection law from the perspective of children. There is more. In the early 1980's, in *Plyler v. Doe*, the Supreme Court intervened again on behalf of children and offered additional insights into the meaning of their equal protection guarantee.[117]

b. The Recognition of Children's Rights When Government Action Hinders Children's Access to Education for Matters Beyond Their Control

In 1975, the State of Texas enacted a law that withheld state funding from local school districts that enrolled children not "legally admitted" into the United States. The plaintiffs, two Mexican children, challenged the law as a violation of the equal protection clause. [118]

In striking the law down in *Plyler v. Doe*, the Court focused on two critical aspects of the case – the special needs of immigrant children and the importance of education to citizenship in our democracy. Once again, the Court did not resort to the traditional justifications for heightened constitutional scrutiny.[119] In fact, the Court was clear that immigrants did not fall into a "suspect class" and that the Court had recently held that an education was not a "fundamental right." Nevertheless, the *Plyler* majority characterized the education of immigrant children as an "area of special constitutional sensitivity," and worthy of something more than rational basis.[120]

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[116] Catherine Smith, Equal Protection for Children of Same-Sex Couples, 90 Wash. U. L. Rev. 1589 (2013)

[117] *Plyer*, 457 U.S. at 230.

[118] *Id.* at 202. It is important to note that *Plyler* extended heighted scrutiny to children of undocumented children denied a secondary education was decide after *San Antonio Independent School Disrict v. Rodriguez*, 411 U.S. 1 (1973), which refused to find that education was a fundamental right.

[119] Plyler, 457 U.S. 202 (1982) (The opinion does not analyze the classic Carolene Product factors to arrive at is decision to apply heightened scrutiny.). See generally, Erwin Chemerinsky, Constitutional Law: Principles and Policies 566 (5th ed. 2015) (As discussed in succeeding chapters, intermediate scrutiny is used in evaluating laws involving gender discrimination, discrimination against nonmarital children, discrimination against undocumented children with regard to education, and regulation of commercial speech and of speech in public forums. It appears clear that the government has the burden of proof under intermediate scrutiny.")

[120] *Plyler*, 457 U.S. at 226 ("We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some

First, the Court focused on the unique concerns raised when children are targeted because of their undocumented parents' conduct of entering the United States unlawfully, explaining that migration into the United States has created a "shadow population" and the "existence of such an underclass presents most difficult problems for a nation that prides itself on adherence to principles of equality under the law."[121] The Court made a clear distinction between adults and children, explaining that the state may "withhold its beneficence" from those who are in the country unlawfully because of their own conduct, but children, whom the Court recognized as being "present in this country through no fault of their own," are a different matter.[122] The *Plyler* Court, relying on the non-marital status cases, stated that children "can affect neither their parents' conduct nor their own status."[123] The state practices imposed a discriminatory burden on children "on the basis of a legal characteristic over which children have little control."[124] The Court found that the state offered no rational justification for treating children in this way.

Second, the *Plyler* majority focused on the denial of an education as a significant reason the Texas Law violated equal protection law principles. The Court, despite recognizing that there was no fundamental right to public education, explained that education is different than other forms of social welfare. "[B]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of a child, mark the distinction." Education transmits fundamental values needed to maintain our democratic political system. It also provides the basic tools by which individuals secure "economically productive lives" to the benefit of everyone. The Court explained, "[w]e cannot ignore the significant costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests." The *Plyler* Court applied more than rational basis and required the state of Texas to advance some "substantial" justification for denying immigrant children an education, which it failed to do.[125]

A central concern in the child-centered cases, that originates from the *Carolene Products* factors, is the danger of targeting a group because of a characteristic over which the group has no control, like birth status.[126] In these cases, the Supreme Court repeatedly flagged that discrimination against children for matters beyond their control was impermissible because, as it explained in

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articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. *But in the area of special constitutional sensitivity presented by these cases*, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education.")

[121] *Plyler*, 457 U.S. at 218–19.

[122] *Plyler*, 457 U.S. at 219–20, 226.

[123] *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Weber v. Aetna Cas. & Sur.*, 406 U.S. 164 (1972)).

[124] *Id.* at 220.

[125] *Id.* at 221, 230.

[126] *Plyler*, 457 U.S. at 216 n.14 ("[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind fo "class or caste" treatment that the Fourteenth Amendment was designed to abolish.)

Weber, "like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."[127]

Importantly, *Weber* did not simply make the comparison to race, it explained the dangers birth status discrimination posed to equal protection law values:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as unjust way – of deterring the parent.[128]

Weber's reasoning was so compelling that a year later, the Supreme Court quoted it in its decision to extend heightened scrutiny to gender classifications.[129]

Plyler relied on this same reasoning from the non-marital status cases to reject the denial of education to children of undocumented parents finding that "directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[130]

For the state to deny children access to government structures or deny children protection within those structures for matters beyond their control hampers a child's advancement on the basis of individual merit and it exacts group-based harms.

Levy (and the non-marital status cases) and *Plyler* have been "viewed as 'unique,' limited to their factual circumstances, or unrelated to each other in equal protection lore, but they need not be."[131] They do not stand alone. In my expert opinion, *Brown*, *Levy* and *Plyler* carve out a unique path to heightened scrutiny for state actions that unjustly burden children. This path, though not well-trodden, draws on a combination of civil rights doctrine and our democratic commitment to the basic economic and social protections of children.[132] In my expert opinion,

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[127] *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972).
[128] *Id.* at 175.
[129] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ([S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . .") (quoting Weber, 406 U.S. at 173).
[130] *Plyler*, 457 U.S. at 220.
[131] Catherine Smith, Obergefell*'s Missed Opportunity*, 79 L. & Contemporary Problems 223, 231 (2016).
[132] *Mathews*, 427 U.S. at 505 ("the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic to be determined by causes not within the control of the

these cases, yet to be fully developed, because of a failure to view as children's cases, lay important equal protection groundwork to protect children from overreaching state action. These cases also inform us of the kinds of lifetime harships that are of concern. Further, the most recent same-sex marriage cases, *United States v. Windsor* and *Obergefell v. Hodges* contribute additional support that the Superme Court is concerned for the well-being of children.

c. Impermissible Government Action that Impose a Lifetime of Hardship on Children

The child-centered cases establish that the government may not use large-scale government systems to pose serious risks to the well-being of children. As explained in Plyer, in describing the threat to children from depriving them of an education:

> The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[133]

The government's exclusion of children from access to large-scale government systems leads to economic deprivations, stigmatic and psychological harm, and family formation barriers that place significant obstacles in the path of children, imposing a lifetime of hardship for matters beyond their control.

i. Economic Deprivation

The child-centered cases establish that the government may not use large-scale government systems to deny children access to basic economic resources – such as access to benefits through paternity or access to education – because of their status of birth. The *Levy* Court explained that when dealing with social and economic legislation, latitude to government decisions was

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illigetimate individual, and it bears no relation to the individual's ability to participate in and contribute to society') (referencing two of the factors stemming from *Carolene Products*); Erwin Chemerinsky, Constitutional Law: Principles and Policies 811 (5th ed. 2015) (In discussing the distinction between non-marital children and other suspect classifications: "As with other classifications that receive heightened scrutiny, there is a long history of discrimination, and it is immutable in the sense that thre is nothing the individual can do to change his or her status. . . But the Court also has distinguished discrimination against nonmarital children from the types of classifications that receive strict scrutiny. Illegitimacy is different from race, which receives strict scrutiny, or gender, which receives intermediate scrutiny, in that "illegitimacy does not carry an obvious badge." Additionally, 'the discrimination against illegitimates has never approached the severity or pervasivness of the historic legal and political discrimination against women and Negroes.'") (quoting *Mathews*, 427 U.S. at 505. Despite these distinctions, the Supreme Court ultimately applied intermediate scrutiny to discrimination against non-marital children.).

[133] *Plyer*, 457 U.S. at 222.

necessary, yet the Court struck the law withholding financial resources down because the non-marital children "were dependent on [the mother]. . . in her death they suffered a wrong that any dependent would." Similarly, in *New Jersey Welfare Rights Organization v. Cahill*, the Supreme Court struck down New Jersey's Assistance to Families and Working Poor program because it limited benefits to households comprised of opposite-sex married couples with "legitimate" children.[134] In *Plyler* the Court raised the economic impact of the denial of an education to children of undocumented parents, explaining that education provides the "basic tools by which individuals might lead economically productive lives to benefit us all."[135] Further, the Plyler Court found that the law would "permanently lock[]" the children of undocumented immigrants "into the lowest socio-economic class."[136]

In addition to the child-centered cases, recent decisions on same-sex marriage also speak to the harmful impact of marriage bans on children of same-sex parents and their economic prospects. In *Windsor*, the Court explained the financial injury that federal marriage bans inflicted on children:

> DOMA . . . brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse or parent, benefits that are an integral part of family security.

Interestingly, the *Obergefell* Court voiced special concern for the economic impact that marriage bans had on children through "no fault of their own."[137]

ii. Stigmatic and Psychological Harm

In addition to protecting children from economic harm, the child-centered cases also sought to guard against government action using large-scale systems to inflict psychological harm. Stigma and psychological injury is certainly relevant when considering its impact on children. One cannot forget the powerful language from *Brown v. Board of Education* on the psychological harm of race discrimination:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.[138]

The *Plyler* Court also recognized the dangers of psychological harm to children of denying them an education, exacting an "inestimable toll" on their "psychological well-being."[139] The Court explained the relevance of the law's harmful impact, stating:

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[134] *New Jersey Welfare Rights Organiz., v. Cahill*, 411 U.S. 619 (1973) (per curiam).
[135] *Plyler*, 457 U.S. at 221.
[136] *Id.* at 208.
[137] *Obergefell*, 135 S.Ct. at 2600
[138] 347 U.S. 483, 494 (internal quotation marks omitted).

> [The law] imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. . . In determining the rationaility of [the law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

Further, *Windsor* recognized DOMA's psychic and stigmatic harm to children of same-sex couples. The Court explained:

> [DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in questions makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives. . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.[140]

Finally, *Obergefell* reinforced this notion by viewing the psychological benefits of marriage as even more profound than its material ones.[141]

iii. Barriers to Family Formation

A third dominant theme in the child-centered cases is that the state cannot deny similarly situated children access to family formation and the corresponding legal and social benefits that stem from it because of the moral disagreement with their parents' status or conduct. When viewed from the perspective of children, this theme is particularly prevalent in the non-marital status cases and the more recent same-sex marriage cases.

Until *Levy*, children of unmarried parents were viewed as "illegitimate."[142] They were viewed as inferior in the eyes of society and the law.[143] Non-marital children were socially ostracized, could not inherit, nor obtain financial parental support, wrongful death recovery, social security, and other benefits.[144] They were deemed *filius nullius* or the "child of nobody."[145]

In *Levy*, for the first time, the Supreme Court recognized that non-marital children were "'persons within the meaning of the Equal Protection Clause" and that the "rights asserted" in

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[139] 457 U.S. at 222.
[140] *Windsor*, 133 S.Ct. at 2694-96.
[141] Marriage is fundamental because it "safeguards children and families." *Obergefell*, 135 S.Ct. at 2600.
[142] Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U.L. Rev. 1589, 1608–10 (2013).
[143] *Id.*
[144] *Id.*
[145] *Id.*

the case "involve the intimate, familial relationship between a child and his own mother."[146] *Levy* and the subsequent non-marital status cases established that children of unmarried parents must be placed on par with children of married parents absent a substantial state justification. They also established basic procedural requirements to allow non-marital children to establish a legal relationship with their fathers (and vice-versa) through paternity actions.

Levy, *Weber* and the non-marital cases recognize the importance of family formation and the "government-provided rights and benefits that attend the family relationship as 'basic civil rights'"[147] that warrant protection when their deprivation has significant consequences.

In addition, in my opinion, the more recent same-sex marriage cases, although not equal protection claims brought by children, bolster the arguments that government cannot erect barriers to children's access to family formation. "Although many states allowed second-parent adoptions, in many marriage ban states, it was impossible for a child of same-sex parents to establish a legal relationship with her non-biological parent: they were permanent legal strangers." In addition, marriage bans coupled with non-recognition laws voided existing legal parent-child relationships, creating uncertainty for children of same-sex parents when their families moved from one state to another. In a marriage equality state, the child's relationship to both her parents would be recognized; in a non-recognition state, the relationship to the non-biological (non-adoptive parent) would be void.

The impact on children from marriage bans was not lost on the Supreme Court. In both *United States v. Windsor* and *Obergefell v. Hodges*, the Court struck down DOMA and state marriage bans, respectively. Both decisions relied, in part, on the impact these marriage bans imposed on children of same-sex parents, including harm to family formation. As the *Windsor* Court explained:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . And it humiliates. . children now being raised by same-sex couples. The law in question makes it even more difficult for children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[148]

Similarly, in *Obergefell v. Hodges*, although the decision did not speak directly about the "rights" of children of same-sex parents, it did acknowledge the importance of a child's legal relationship to a same-sex parent. The majority also raised concerns about the impact marriage bans had on family formation. For example, Michigan co-plaintiffs, April DeBoer and Jayne Rowse were raising three adopted children, however, because Michigan limited adoption to opposite-sex married couples and single people, each child had only one legal parent. The Obergefell Court explained the legal conundrum for the children and their same-sex parents. "[I]f an emergency were to arise, schools and hospitals may treat the children as if they had only

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[146] *Levy*, 391 U.S. at 71.
[147] Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. Davis L. Rev. 655, 671 (2014).
[148] *Windsor*, 570 U.S. at 772.

one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the child she had not been permitted to adopt."[149]

In my expert opinion, based on a historical and sociological analysis, the child-centered cases tell us that when large-scale government systems leads to economic deprivations, stigmatic and psychological harm, and family formation barriers that place significant obstacles in the path of children, imposing a lifetime of hardship for matters beyond their control, the Court takes a closer and more in-depth look at the government's actions.

The child-centered cases demonstrate that there are times when government action goes too far and mandates closer scrutiny. These cases offer valuable guideposts for when heightened review is warranted to prevent large-scale injuries to children, including when the government: 1) denies children a right or benefit based on matters beyond their control; and 2) the right or benefits stem from a) large-scale government systems that, if denied, b) imposes a lifetime of hardship on children. Climate change is one of those times that warrants Court intervention to protect children from the lifelong impacts.

II. Discrimination Against Children In Making Climate and Energy Policy Warrants Heightened Scrutiny

In my expert opinion, the history and traditions of the nation, in combination with Supreme Court jurisprudence protecting the equal rights of children, require at least intermediate scrutiny when government actions impose a lifetime of hardship on children for matters beyond their control, even where no fundamental right is at issue.

The child-centered cases demonstrate that there are times when government action goes too far and mandates closer scrutiny. While government can act to specially protect children and provide for them, like in the context of education or health care, it cannot deprive them of the exercise of their full panoply of rights upon the age of majority. Our national history described above combined with Supreme Court jurisprudence stands for the equal protection principle that government must not deny children the benefits of large-scale systems that it controls, like marriage and education, for matters beyond their control, posing serious risks to their well-being by cutting off economic resources, inflicting psychological harm, or preventing the formation of familial bonds or depriving them of the foundations necessary for life.[150] Such treatment of children invokes "a special area of constitutional sensitivity" that warrants heighted scrutiny.[151]

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[149] *Obergefell*, 135 S. Ct. at 2595; Catherine Smith, Obergefell*'s Missed Opportunity*, 79 L. & Contemporary Problems 223, 227 (2016) ("The *Obergefell* Court's recognition of the harms and interests of children is noteworthy; however, it did fall short of a transformative or pivotal paradigm shift on behalf of children and their rights to equal protection.")

[150] This is not an exhaustive list.

[151] *Plyler*, 457 U.S. at 226 ("But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education."); *Pickett v. Brown*, 462 U.S. 1, 7 (1983) (noting "a special concern for discrimination against non-marital children").

The child-centered cases offer valuable guideposts for when heightened review is warranted to prevent large-scale injuries to children.

In my expert opinion, based on a historical and sociological analysis, as an overlay to the Supreme Court's *Carolene Products* factors, heightened review is warranted for children as a class when the government: 1) denies children a right or benefit based on matters beyond their control; and 2) the right or benefits stem from a) government-controlled large-scale systems that b) impose a lifetime of hardship by cutting off economic resources, inflicting psychological harm, preventing the formation of familial bonds, or depriving them of the foundations necessary for life.

The climate and energy systems controlled by government are precisely the type of systems that deprive children of the benefits that are foundational for their lives and should invoke this special area of constitutional sensitivity.

A. Children Are Now Born Into Climate Danger and Bear the Policies of their Forebears and the Political Majority, Which are Matters Beyond Their Control

1. Matters Beyond Their Control

As explained earlier, a core tenet of equal protection law is that it is unfair to discriminate against an group of people because of a trait or characteristic derived at birth. This notion that comes from race-based equal protection law is also central to the Supreme Court's decision to strike down the unlawful practices in the child-centered cases. The *Weber* Court, citing a series of cases, including *Brown v. Board of Education* explained that while it could not prevent the social judgment of children born outside of marriage; it could "strike down discriminatory laws relating to status of birth."[152] Few lawyers and scholars realize that the immutability arguments in *Weber* were relied upon to extend intermediate scrutiny to gender classifications.[153] And while the child-centered cases focused on controlling parents as matters beyond their control, children impacted by climate change face a different kind of lack of control over their plight because they do not have economic power and cannot vote.

2. Children Lack Economic Power

Government policies regarding energy and climate have resulted in a dangerous climate situation, according to experts within the federal government and other renowned climate experts. The nation's fossil fuel energy system and degrading land management practices have

[152] 406 U.S. at 176.

[153] *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) ("Since sex, like race and national origin is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to invidual responsibility.") (citing *Weber*, 406 U.S. at 175)

been the primary cause of increased atmospheric greenhouse gases, particularly carbon dioxide, which is heating the planet and causing dangerous conditions for children.

Even though children are considerably harmed by climate change, the energy and climate policies and related actions of the federal defendants are outside of the control of children as a class. Children as a class do not have economic power to influence climate and energy policy, due in part to legal limits on their ability to own property or earn wages and legal requirements to attend school. Any familial accrued wealth held by children is most often held in trust for them until they reach the age of majority. The lack of economic power of this minority group prevents children from competing with well-resourced lobbying groups who sway public policy in their favor, such as the fossil fuel industry and related trade associations, like the former intervenor defendants in this case: National Association of Manufacturers, American Petroleum Institute, and American Fuels and Petrochemical Manufacturers. Children's lack of economic power also precludes children from voting with their dollars and choosing renewable clean energy where available, choosing alternative forms of transportation over fossil fuel-powered vehicles, or even choosing to purchase goods and services with a low-carbon footprint. Most economic decisions are made by adults and most property is owned by adults, leaving children economically powerless.

Perhaps as a consequence of children's lack of economic power, children's lives have long been economically discounted or devalued in government decision-making regarding climate and energy policy. Economists have described the practice of discounting as placing a lesser value on benefits to people in the future, i.e. children who will reach the age of majority years from now, than the value of costs borne by people today, i.e. adults who make the policies. In the context of climate and energy policy, this means that discount rates have been applied to disfavor spending money today to address climate change under the assumption that later generations of adults (children of today who will reach the age of majority tomorrow) will be better positioned to address the problem. The result has been government policies that place an untenable climate burden on children and future generations, without any input from the class of children today who will step into the shoes of the future adult generations.

Even apart from economic discounting, the climate and energy policies of the political majority will affect children born into those policies for their entire lives. The reason for the long-lasting effect of those policies is the longevity of CO_2 in the atmosphere and the oceans and the longevity of heat in the oceans, which is accelerating the melting of the planet's ice sheets. Climate and energy policies that lead to climate change deprive children, a politically powerless minority of their rights to self-determination.

Simply, youth are unable to protect themselves through political process because they are denied the right to vote until and if they live to be 18 years of age. Historically and today, their interests have been subjugated to the interests of those who can and do vote, and otherwise lobby and influence decision-makers.

Ultimately, the deprivation of a climate system that sustains basic liberties and life in the way it did at the founding of the nation, also deprives children of fundamental rights implicit in ordered liberty and rooted in our nation's traditions and history, including the right to personal security.

However, even rights not deemed fundamental under the 5th Amendment, but important for the well-being of children, are implicated by these large-scale systems and how government manages them.

3. Children Cannot Vote

Perhaps the most significant of the legal disabilities of children in exercising their rights is their inability to vote until the age of 18. While the 15th and 19th Amendments established the right of all adults to vote, the 26th Amendment established the voting age at 18 years. As a result, children under 18 are the only class of people in the nation constitutionally prohibited from exercising their democratic right of suffrage until they come of age and are thought to be capable of considered decision-making and full participation in democracy. Until such time, children are at the just mercy of the adult majority and their three branches of government to protect their rights, including rights they will exercise upon the age of majority.[154]

Children are arguably the most economically powerless class in the nation who do not have rights to earn an income until a certain age and are dependent on their parents or guardians for their basic necessities. Children are also fully dependent on the majority to protect their rights in trust until they become the age of majority and can fully exercise their rights. In my expert opinion, when the majority acts in ways that threaten the full realization of children's rights at the age of majority, courts become the only effective recourse in a democratic system that poses a threat to their current and future well-being.

The *Plyer* Court intervened to block Texas from denying children an education and this is why:

> [M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.

In my expert opinion, as evidenced by this powerful language from Plyler, the child-centered cases embodied a special concern for the lifelong and devastating consequences to children and stepped in when the government disregarded those consequences in pursuit of other purposes.

[154] The "age of majority" is the threshold into adulthood as recognized by law. At the age of majority a person can manage her own affairs apart from her parents, assuming legal responsibility for her actions. The very language used to legally define the transition from the class of children to the class of adulthood illustrates that children are a minority class in our country.

B. The Rights and Benefits Being Deprived Children Stem From Large-Scale Systems Controlled by Government

The child-centered cases establish that the government may not use large-scale government systems to pose serious risks to the wellbeing of children. As explained in *Plyer*, regarding the threat to children from depriving them of an education:

> The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[155]

Each of the child-centered cases presents circumstances where children are uniquely harmed and the Court has to intervene to protect children from injuries caused by the management of large-scale systems over which government wields control. Courts have to date addressed the special circumstances of children vis-à-vis the large-scale government-controlled systems of education, social welfare, the legal benefits of marriage and familial relationships, and the criminal justice system.

In the context of climate and energy policy, the government similarly exercises its control over the national energy system and sets climate policies impacting the long-term status of the climate system. The federal defendants' control over the composition of the U.S. energy system through actions such as leasing public lands for fossil fuel development, and mismanagement of the consequent impacts on earth's climate system, is a large-scale system that has significant consequences for the rights, benefits, and wellbeing of children.

In my expert opinion, where government controls a large-scale system, and its control over that large-scale system specially deprives children of the foundations necessary to their wellbeing, or creates an obstacle to their self-determination and their ultimate exercise of their fundamental rights, courts should review those systems with heightened scrutiny. Earth's climate system is undoubtedly foundational to life and the national energy system is one of the largest systems under government control and direction. The federal defendants set policy for both systems, and given the discussion below, those policies should be reviewed under heightened scrutiny for the deprivations they cause the wellbeing of children, even if there were no fundamental right at stake.

[155] *Plyer*, 457 U.S. at 222.

C. The Discrimination Will Result in a Lifetime of Hardships and Deprivations of Rights

Children experience unique and substantial harms from federal defendants' climate and energy systems and policies that are disproportionate to the effects adults will experience. Those government systems and policies will result in a lifetime of hardship and deprivations.

The American Academy of Pediatrics has formally acknowledged that "[c]limate change poses threats to human health, safety, and security," and that "[c]hildren are uniquely vulnerable to these threats."[156] The threats to children's health include both physical and psychological harms from heat stress, storms and disasters, increasing air pollution, altered disease patterns and the increasing insecurity of access to food, water and nutrients in certain regions. Because of the life span of children across the century, they will also experience the worsening impacts of climate change in the adult phase of their lives. In a special issue by The Future of Children on Children and Climate Change, two top findings emerged from leading experts:

> 1. Climate change will fundamentally alter Earth's climate system in many ways that threaten children's physical and mental wellbeing.
>
> 2. Today's children and future generations will bear a disproportionate share of the burden of climate change, which will affect child wellbeing through many direct, indirect, and societal pathways.[157]

Figure 1 depicts the various rights of children that are harmed by climate change.

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[156] Samantha Ahdoot & Susan E. Pacheco, American Academy of Pediatrics, Global Climate Change and Children's Health, 138 Pediatrics e1, e1 (2018), *available at* http://pediatrics.aappublications.org/content/pediatrics/early/2015/10/21/peds.2015-3233.full.pdf.

[157] The Future of Children, Children and Climate Change (2016), *available at* https://futureofchildren.princeton.edu/file/656/download?token=tor4EJc3.

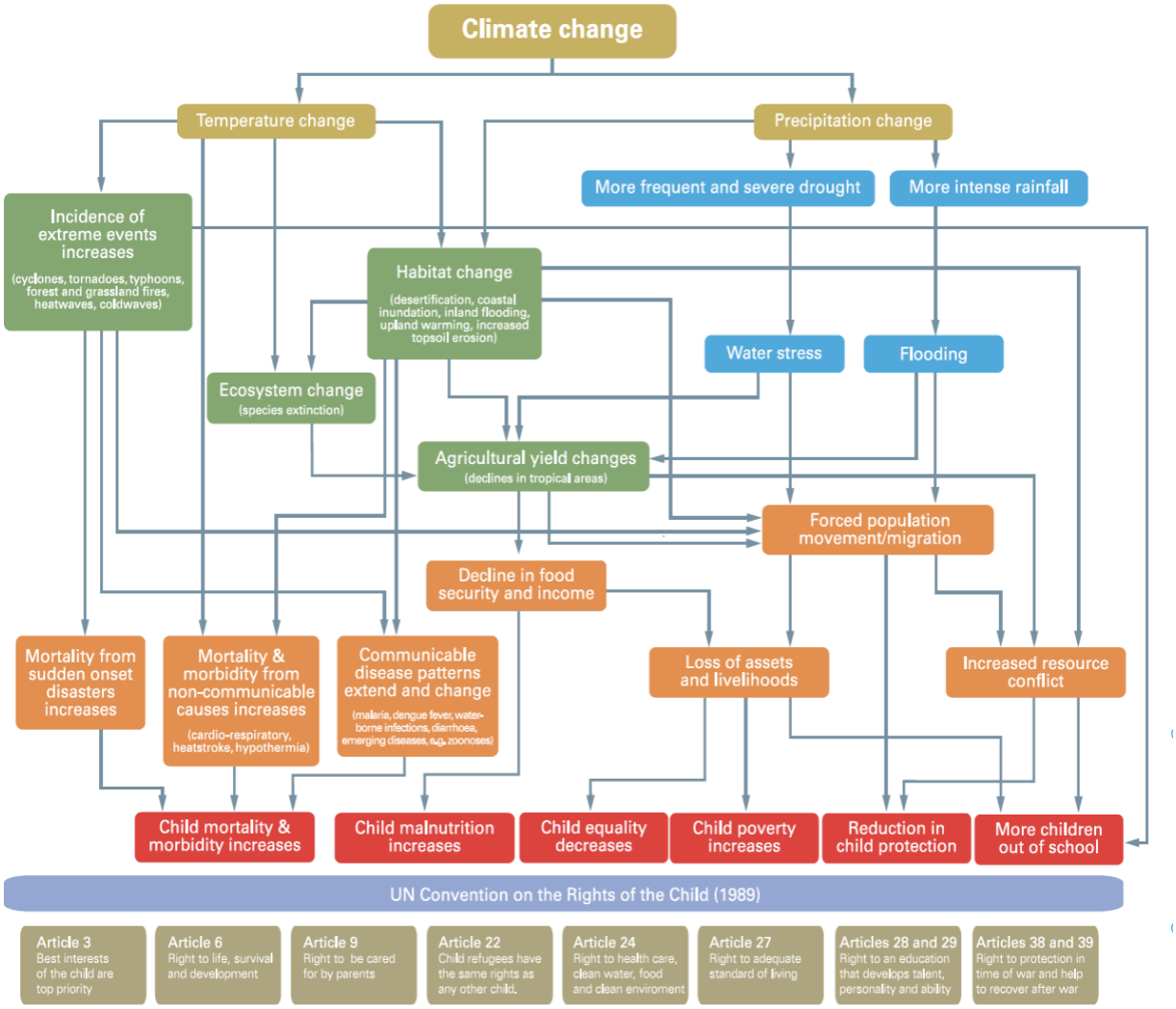

Figure 1: Climate change impacts and harm to children's rights[158]

Below, I apply a historical and sociological legal analysis and evaluate climate harms to children in the context of harms recognized in the child-centric Supreme Court decisions protecting children under heightened scrutiny of government systems that discriminate against them. In my expert opinion of studying the special status of children and the ways in which the law treats them, I easily conclude that climate and energy policies of the federal defendants here should be reviewed under at least intermediate scrutiny with respect to the systemic impacts on the foundational aspects of children's lives, including deprivations of their economic, psychological and familial wellbeing, and much more. The profundity of the deprivations waged on children by these government policies and systems is at least as significant, as the circumstances considered in cases like *Levy*, *Weber* and *Plyler*.

[158] UNICEF, *A brighter tomorrow: Climate change, child rights and intergenerational justice*, 5 (2010), *available at* https://downloads.unicef.org.uk/wp-content/uploads/2010/09/intergenerationaljustice.pdf.

1. Economic Deprivation

The large-scale economic harm from climate change, compounded by the escalating costs of stopping climate change with each year of delay, lays a profound economic burden on children, and future generations of children, through no fault of their own. The costs alone of increasingly severe storm and wildfire disasters, along with sea level rise, are already significant and will grow increasingly burdensome. Adaptation costs of relocation or otherwise adapting to water shortage, food insecurity, disease, disasters, and heat will threaten the economic productivity of children. A recent study has demonstrated how impacts in children's early-life environment affect long-term human capital. The study found that an individual's economic wellbeing can be directly impacted by in utero and early life exposure to temperatures over 32°C (89.6°F), which is only mitigated by air conditioning.[159] That is but one economic impact of government climate and energy policy that is unique to children.

2. Stigmatic and Psychological Harm

In addition to the American Academy of Pediatrics, the American Psychological Association (APA) has made findings on the mental health impacts to children from climate change. The APA has found that children experience fear around climate change and also post-traumatic stress disorders, including panic attacks, nightmares and phobic behavior from directly experiencing climate disasters.[160] The APA finds that children become emotionally dysregulated and somatize their feelings about climate change, which they are not always able to verbalize. Indigenous youth have been found to have higher rates of suicidal ideation and depression from the loss of nature and cultural activities. And children who have suffered climate impacts, but live in a society where climate change is denied or unaddressed suffer depression and alienation. Thus, the climate and energy policies of the federal defendants uniquely deprive children of their emotional and psychological wellbeing.

3. Barriers to Family Formation

The sanctity of family has long been recognized as fundamental. Protecting children's rights to the benefits of family was a central premise in the child-centered cases. Children's familial and cultural ties are already being harmed and are increasingly threatened by climate change. Family homes around the country are threatened with disasters, from storms to seawater inundation to wildfires and drought. As one example, NOAA has projected that even 3 feet of sea level rise would permanently inundate 2 million homes in the U.S. with water and 5.9 feet of sea level rise

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[159] Adam Isen et al., *Relationship Between Season of Birth, Temperature Exposure, and Later Life Wellbeing*, PNAS (2017), *available at* http://www.pnas.org/content/early/2017/11/28/1702436114?sid=6a3506fb-ab3a-4ad1-a26e-1e4a0b0220c3. The study found every day of a child's life between conception and age one when temperatures rose above 32 ˚C (roughly 90 ˚F) is associated with a 0.1 percent decrease in average income at age 30.

[160] Susan Clayton Whitmore-Williams et al., American Psychological Assoc. et al., *Mental Health and Our Changing Climate: Impacts, Implications, and Guidance* (2017), *available at* https://www.apa.org/news/press/releases/2017/03/mental-health-climate.pdf.

would put 6 million homes underwater.[161] When homes are lost, families are often torn apart and familial wealth and prosperity cannot be passed down to the benefit of children and the next generation. Lost homes also lead to personal insecurity and harm to physical and mental wellbeing.

Already, Native and Indigenous children are losing their familial and cultural ties to land and place by forced relocation from climate damage. And some researchers argue that children today should make different choices about having family and limit their procreation to one child in order to lessen their carbon footprint and mitigate climate change, in other words, repair the damage committed by preceding generations of adults.[162]

The ability of children to inherit a nation where they will have the freedom to form families, maintain homes, and keep familial traditions, wealth and property intact is being threatened by the climate and energy policies of the federal defendants. In my expert opinion, those large-scale government systems should be reviewed under heightened scrutiny in light of the special circumstances of children.

4. Health Impacts

Children are uniquely vulnerable to the health impacts associated with climate change.[163] Children are different from adults because their bodies and brains are still developing. These differences leave them more vulnerable to the range of negative health impacts driven by climate change.

Apart from increasing mortality due to climate change, health impacts cause children to miss school, spend less time outside and suffer increased anxiety and mental illness. Poor health negatively impacts a child's community connections and their future physical and emotional well-being.

Children are more vulnerable to physical illness, due to their developing bodies and their desire to spend time outdoors.[164] These illnesses, ranging from asthma to gastrointestinal disease, are

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[161] William V. Sweet et al., NOAA, Technical Report NOS CO-OPS 083, *Global and Regional Sea-Level Rise Scenarios for the United States* (2017), *available at* https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf; *see also* Hauer et al., *Millions Projected to Be at Risk from Sea-Level Rise in the Continental United States*, 6 Nature Climate Change 691 (2016), *available at* https://www.nature.com/articles/nclimate2961.

[162] Seth Wynes & Kimberly A. Nicholas, *The Climate Mitigation Gap: Education and Government Recommendations Miss the Most Effective Individual Actions*, 12 Envtl. Research Letters 1 (2017), *available at* http://iopscience.iop.org/article/10.1088/1748-9326/aa7541.

[163] A.J. Crimins, et al., *Executive Summary. The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*. U.S. Global Change Research Program, Washington, DC 20 (2016).

[164] EPA, *America's Children and the Environment*, Third Edition. U.S. Environmental Protection Agency (2013).

exacerbated by climate change.[165] For example, there are more than six million children in the U.S. affected by asthma.[166] They will experience higher rates of attack as climate change worsens air quality.[167] Similarly, children playing outside face lyme disease, West Nile Virus and other illnesses as the range of vectors carrying these diseases expands.[168] Finally, children increasingly risk gastrointestinal illness, for which they are more vulnerable to death, from consuming water, as rates of contamination rise through flooding, drought, algal blooms and salinization.[169]

In addition to disease impacts of climate change on children's health, the increased frequency and intensity of climate-related extreme weather events, such as heat waves and flooding, pose a greater risk of injury and death for children than for adults.[170] And children suffer emotional distress and mental health problems from these events.[171]

These health impacts interrupt a child's relationship to school and community and hinder physical activity. It is therefore no surprise that medical experts call global climate change the "leading public health threat to all current and future children."[172] This vulnerability of children to deterioriating health due to climate change impacts shapes their relationship to all other aspects of their lives.

5. Certain Groups of Children are More Vulnerable

It cannot be overlooked that *Brown*, the child-centered cases and even *Windsor* and *Obergefell*, dealt with classes of children, including black children, children of unmarried parents, children of undocumented parents who were mostly Mexican or Mexican American and children of LGBTQ parents. While all children are disproportionately vulnerable to the impacts of climate change, the reality is that climate change will, at least initially, have a more devastating impact on certain groups of children. In particular, the immediate impacts of climate change will disproportionately impact children who fall within other vulnerable parts of the population—those with low income, communities of color, immigrant groups, Indigenous peoples, and persons with preexisting or chronic medical conditions—especially in terms of health impacts.[173]

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[165] Crimins, *The Impacts of Climate Change on Human Health in the United States*, at 9; Ying Zhang, et al. *Climate change and disability-adjusted life years*. 70 J. Envtl. Health 32 (2007).
[166] Crimens, *The Impacts of Climate Change on Human Health in the United States*, at 9.
[167] *Id.*, at 9.
[168] *Id.*, at 12.
[169] EPA 2008, 2009
[170] Crimins, at 7.
[171] Crimins, at 19; Zhiwei Yu, et al, *The impact of heat waves on children's health: a systematic review.* 58 Intl. J. of Biometeorology 239 (2014).
[172] Ahdoot & Pacheco, at e1.
[173] *See* A.J. Crimins, et al., *Executive Summary. The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*. U.S. Global Change Research Program, 2 (2016).

For example, due to systemic discrimination and disparities in our society that exist along racial and economic lines, communities of color and low income are more likely to live closer to fossil fuel infrastructure and other sources of industrial pollution, thus the children from those communities are more vulnerable.[174] Over the long term, climate change will compound and exacerbate existing disparities and inequities in these communities, who have little or no ability to adapt.

As discussed above, Native and Indigenous chilren across the United States, including Alaska and the Pacific Rim, are suffering disproportionate consequences of climate change on their lands, resources and people. Sovereignty, culture, economy and the ways of life developed by Native communities over thousands of years are under assault through the "loss of traditional knowledge in the face of rapidly changing ecological conditions, increased food insecurity due to reduced availability of traditional foods, changing water availability, Arctic sea ice loss, permafrost thaw, . . . relocation from historic homelands" and changes in "culturally important plant and animal species." [175]

Children in coastal areas also experience increased vulnerability. Coastal areas in the U.S. are unique, since "no other region concentrates so many people and so much economic activity on so little land, while also being so relentlessly affected by the sometimes violent interactions of land, sea, and air."[176] Unlike their counterparts in noncoastal regions, children living along the coast experience directly climate change impacts such as sea level rise, ocean acidification , increasing storm surges, erosion, and inland flooding.[177] Coastal communities face ongoing economical and physical disrupton resulting in a fundamental change to their ways of life.[178] Moreover, the vulnerability is dangerously compounded and amplified, when children in coastal areas are also from communities of color or any of the other vulnerable parts of the population discussed above.

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[174] I. L. Rubin et al., *Environmental and Social Impact of Industrial Pollution in a Community*, 6 Int'l J. of Child Health & Human Development 553 (2013).
[175] U.S. Global Change Research Program, 2014 National Climate Assessment: Indigenous Peoples (2014), http://nca2014.globalchange.gov/report/sectors/indigenous-peoples.
[176] U.S. Global Change Research Program, 2014 National Climate Assessment: Coastal Zone Development and Ecosystems 581 (2014), https://nca2014.globalchange.gov/report/regions/coasts.
[177] *Id.*
[178] *Id.*

CONCLUSION AND RECOMMENDATIONS

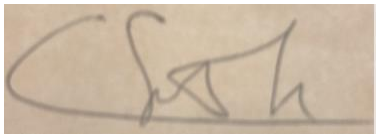
The Founders created the architecture for the rights of children to self-determination and protection from the sins of their forebears. A central tenet of our democracy is that government, including these federal defendants, should not deprive children (the next generation) of the foundational elements of their lives, liberties or property and should not impose hardships on them for matters of which they have no control. This historical tradition and intent of the Founders of our nation has not always been realized, but has evolved over time as our society gains new insights and understandings of children and our notions of equality.

Children have come from a place of being treated as objects and property, to having their rights more fully recognized. Though the intent of government has been clear throughout the presidential administrations throughout the twentieth century, much of that legal recognition has come from the courts.

Since the middle of the last century, the Supreme Court has slowly recognized the rights of children. In my expert opinion, the history and traditions of the nation, in combination with Supreme Court jurisprudence protecting the equal rights of children, require heightened scrutiny when government actions impose a lifetime of hardship on children for matters beyond their control, even where no fundamental right is at issue.

The federal defendants have operated and continue to operate and manage a large scale-government energy system that is damaging the Earth's climate system in ways that endanger young people and burden them for the remainder of their lives. Children cannot vote. They are unequivocally a special class of people and based upon our nation's history, our societal norms, and the law, these children deserve the courts' heightened review of government systems which discriminate against them. Without such review, we threaten children as a class, the core of our democratic principles and future generations.

Signed this 13th day of April, 2018 in Denver, Colorado.



Catherine Smith

EXHIBIT A: CURRICULUM VITAE

CATHERINE E. SMITH

Professor of Law & Associate Dean
for Institutional Diversity & Inclusiveness
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ACADEMIC WORK EXPERIENCE

University of Denver, Sturm College of Law, Denver, CO
Associate Dean for Institutional Diversity and Inclusiveness *2010-Present*

- Coordinate, design and implement programs to build a diverse and inclusive law school environment.
- Design and implement student pipeline programs to increase access to law school for underrepresented groups.
- Design and implement programs to attract and retain diverse law faculty.
- Work collaboratively with professional staff in admissions, career services, student affairs, communications, development and alumni relations.
- Manage budget dedicated to diversity priorities.
- Build donor and alumni relations as they relate to diversity priorities.

Full Professor *2013 - Present*
Associate Professor with Tenure *2007 - 2013*
Assistant Professor *2004 - 2007*

Courses: Torts, Advanced Torts, Children and the Law (2018), Family Law, Employment Discrimination, Sexuality, Gender and the Law, Comparative Sexuality and the Law (University of Barcelona, Summer 2014)

Research: Civil Rights, Children's Rights, Equal Protection, Torts, Discriminatory Intent and Implicit Bias

UCLA School of Law, Los Angeles, CA *Spring 2009*
Visiting Scholar, Williams Institute on Sexual Orientation Law and Public Policy

Thurgood Marshall School of Law, Houston, TX
Assistant Professor *2000-2004*

Courses: Torts, Employment Discrimination, Criminal Law
Children and the Law, Fall 2018

HONORS AND AWARDS

2017 Denver Urban Debate League Hall of Fame Inductee.

2016 Recipient of the Clyde Ferguson Award, American Association of Law Schools Minority Groups Section Award, national award given to an outstanding law teacher, who in the course of his or her career has achieved excellence in the areas of public service, teaching and scholarship and aimed at law teachers who have provided support, encouragement and mentoring to colleagues, students, and aspiring legal educator.

2015 Recipient of the University of Denver's Sabbatical Enhancement Award for excellent research proposal.

2014 Recipient of the Colorado Women's Bar Association Foundation's "Raising the Bar" Award (awarded to six women legal educators from the University of Denver Sturm College of Law and the University of Colorado School of Law who have "made a difference in our communities and have 'raised the bar'").

2013 Recipient of the Haywood Burns/Shanara Gilbert Award from the Northeast People of Color Legal Scholarship Conference (NEPOC) (awarded to a person who has demonstrated, through his or her work within the legal academy and in the community, "a sustained commitment to the advancement of the legal, social, and economic position of People of Color in our society.").

2012 DU Law Student Bar Association Award, Most Engaging Professor.

2012 DU Law Student Bar Association Award, Most Outstanding Professor.

2011 winner of writing competition "*On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship*," sponsored by the AALS Section on Gender and Sexual Orientation Identity.

2010 Dukeminier Award Recipient (Williams Institute selected *Three Pillars* as one of the best sexual orientation law review articles of the year).

UNIVERSITY SERVICE

University of Denver

Ex-officio member, Admissions Committee (2014-2015)
Ex-officio member, Faculty Appointments Committee (2010 – 2013; 2014-2015).
Member, Hiring Committee for Assistant Dean of Development (2012).
Member, Hiring Committee for Associate Director of Admissions (2011).
Member, Hiring Committee for Director of Development (2011).
Member, University Search Committee for Associate Provost for Inclusive Excellence (2011).
Member, Inclusive Excellence Incubator (2011 – 2012).

Member, University Hiring Committee for Access to Pipeline Director (2012).
Chair, Faculty Appointments Committee (July 2009 – June 2010) (a ten-member committee seeking to hire three lawyering process faculty and nine tenure-track faculty).
Member, Dean Search Committee (May 2009 – Feb. 2010).
Member, three-person Advisory Committee for tenure candidate (Aug. 2009 – Feb. 2010).
Member, three-person Advisory Committee for full-professor candidate (Aug. 2009 – Feb. 2010).
Member, Faculty Appointments Committee (Aug. 2006 – May 2008).
Alternate, Policy Committee (five-member, faculty-elected committee that makes all promotion and tenure decisions (Aug. 2008 – May 2009)) (served as committee member for one tenure case).
Member, Policy Committee (five-member, faculty-elected committee that makes all promotion and tenure decisions) (Aug. 2007 – May 2008) (two tenure reviews, two full-professor reviews, two fourth-year reviews, and one second-year review).
Member, Spanish For Lawyers Program Committee (Aug. 2007 – May 2008).
Member, Faculty Development Committee (Aug. 2006 – May 2007).
Chair, Inaugural Faculty Executive Committee (five-member, faculty-elected governance committee) (Aug. 2005 – May 2006).
Budget Committee (Aug. 2005 – May 2006) (in conjunction with role as Chair of Faculty Executive Committee).
Member, Judicial Clerkship Committee (2005 – 2010).
Member, Multicultural Committee (Aug. 2004 – May 2005).
Faculty Advisor, Outlaws (2006 – 2010).
Member, Colorado Employment Law Faculty Scholarship Group (CELF) (Aug. 2004 – present).

Thurgood Marshall, Texas Southern University

Member, Curriculum Committee (Aug. 2000 – May 2002).
Member, Clinic Committee (Aug. 2000 – May 2002).
Member, Appointments Committee (Aug. 2002 – May 2003).
Member, Rank and Tenure Committee (Aug. 2002 – May 2003).
Implemented "Lessons Learned" Mentor/Mentee Project (Aug. 2001 – May 2004).
Founder and participant, TMSL Running Club (Aug. 2001 – May 2004).

JUDICIAL CLERKSHIPS

The Honorable Henry Politz, Chief Judge, Fifth Circuit Court of Appeals, Shreveport, LA *1997-1998.*

The Honorable William M. Catoe, Jr., U. S. Magistrate Judge, Greenville, SC, *1996-1997.*

OTHER LEGAL WORK EXPERIENCE

Southern Poverty Law Center, Montgomery, AL
Legal Fellow *1998-2000*

- Developed, researched and litigated civil rights cases with a focus on race, national origin, poverty, homelessness, education, incarceration and disability.
- Researched and drafted legal memoranda on cases primarily based in tort law, against hate groups.
- Researched and drafted legal documents and memoranda for appellate cases, including Title VI case, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Sinkler and Boyd, P.A., Columbia, SC
Law Clerk *Summer 1994, Summer 1995*

EDUCATION

University of South Carolina Law School, Columbia, SC
Juris Doctor, May 1996
Honors and Activities:
Moot Court Bar, Member of the National Moot Court Team
American Jurisprudence Award (highest grade), Torts I
Academic Assistance Peer for Torts, 1994-1996
Black Law Students' Association, Outstanding Senior Award
Founding member of the Lesbian and Gay Legal Society (LEGALS)
Research Assistant for Professor Jane Aiken, 1994-1996

University of South Carolina, Columbia, SC
Masters in Public Administration, May 1993

Wofford College, Spartanburg, SC
B.A. Government & French, May 1991

College International de Cannes, France
Foreign Language Semester Abroad, 1989

CONFERENCES/PRESENTATIONS

Participant, Early Childhood Workshop: Critical Legal Issues and Strategies, University of Florida College of Law, April 5-6, 2018. (interdisciplinary workshop of pediatricians, psychologists, lawyers, and educators with a focus on children ages 0-5)

Presentation, *State Action that Penalizes Children as Evidence of Animus Against Their Politically Unpopular Parents*, Southern Methodist University School of Law, April 4, 2018.

Panelist, *Association Discrimination in the Workplace,* Relationships In Employment Discrimination Law Panel, American Association of Law Schools, January 5, 2018.

Presentation, *From Levy to Obergefell: Tearing Down Silos to Root Out Birth Status Discrimination*, Case Western Faculty Development Workshop, April 19, 2017.

Keynote Address, *State Action Punishing Children as "Evidence of Discrimination of an Unusual Character" Against Their Parents*, John Donahue Lecture, Suffolk University Law Review, Suffolk Law School, Boston, MA, April 5, 2017.

Co-Presenter, *350 Years and Counting*: *A Collection of Works Inspired by James Baldwin*, "A Language to Dwell In": James Baldwin, Paris, and International Visions, The American University of Paris, Paris, France, May 28, 2016 (with Zoe Smith-Holladay).

Panelist, *Race, Gender and Intersectionality*, Race (In)Action: The 2016 Critical Race Theory Conference, Yale Law School, New Haven, CT, April 9, 2016.

Organizer, DU Law Pipeline Conference, University of Denver Sturm College of Law, Denver, CO April 1, 2016 (with Randy Wagner).

Presentation, *Obergefell and the Rights of Children*, The Critical Theories of Law and Politics of Intimate Association, The Center for the Study of Law and Culture, Columbia Law School, NY, NY, March 22, 2016. (in conversation with Professor Peggy Davis, NYU Law School)

Visiting Scholar, Texas Southern University, Thurgood Marshall School of Law, Houston, TX, March 1-March 4, 2016.

Panelist, *From Oyama to Obergefell*: Centering the Rights of Children, MAPOC, American University, Washington, DC, January 28-February 1, 2016.

Panelist, *From Oyama to Obergefell: Developing a Child-Centered Civil Rights Jurisprudence*, The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America, Duke Law School, Durham, NC, November 21, 2015.

Panelist, The Latcrit-SALT Faculty Development Workshop, Orange, CA, October 1, 2015.

Speaker, *Obergefell Amicus Brief on Children*, University of Baltimore Law School, Baltimore, MD, Sept. 9, 2015.

Panelist: *The Rights of Children After Obergefell*, AALS Midyear Conference on Next Generation Issues of Gender, Sex, and Equality, Association of American Law Schools, Orlando, Florida, June 24, 2015.

Keynote Speaker: *Deconstructing the Law Professor*, 2015 National Diversity Pre-Law Conference and Law Fair, Washington, DC, April 11, 2015.

Organizer, DU Law Pipeline Conference, University of Denver Sturm College of Law, Denver, CO. March 28, 2015 (with Randy Wagner).

Organizer, SALT/DU Law Pipeline Conference, University of Denver Sturm College of Law, Denver, CO, March 28, 2014 (with Randy Wagner).

Co-panelist, *Children as Proto-Citizens*, Not Equal Yet: Building Upon Foundations of Relationship Equality, U.C. Davis Law Review, U.C. Davis Law School, Davis, CA, Feb. 7, 2014.

Panelist, *The Rights of Children of Same-Sex Parents Post-Windsor*, LGBT Law Advances in the 21st Century, Association of American Law Schools 2014 Annual Meeting, New York, NY, January 5, 2014.

Panelist, *Looking to Torts in Employment Discrimination Law*, Torts and Civil Rights Law: Migration and Conflict, Ohio State Law Review, Ohio State Law School, Columbus, OH, November 15, 2013.

Speaker, *The Equal Protection Rights of Kids of Gay Parents, Modern Families: Changing Families, Challenging Law*, Journal of Gender, Race and Justice, Iowa Law School, Iowa City, IA, March 7-8, 2013.

Panelist, Beyond "Diversity": Negotiating Racial and Gender Identities on the Path to Tenure, American Association of American Law Schools 2012 Annual Meeting, New Orleans, LA, January 5, 2013.

Panelist, Plenary Session: Pipelining Programs and Their Relationship to the Statement of Good Practices, Association of American Law Schools 2012 Annual Meeting, New Orleans, LA, January 5, 2013.

Panelist, A Comparative View of the Rights of Same-Sex Parents and their Children in South Africa and the United States, Conference on Clinical Legal Education, Access to Justice and Constitutionalism, Durban, South Africa, December 12, 2012.

Organizer, Opening Doors to Academia: A One-day Workshop for Practicing Lawyers Interested in Law Teaching, University of Denver Sturm College of Law, Denver, CO, August 25, 2012.

Panelist, Author Meets Reader, Mignon Moore, Invisible Families: Gay Identities, Relationships and Motherhood Among Black Women. Law and Society International Conference, Honolulu, HI, June 5, 2012.

Panelist, *Countering the Crisis in Law School Admissions: Our Capability and Responsibility to Increase the Success of African Americans and Latinos Pursuing Legal Careers*, SE/SW People of Color Scholarship Conference, Transformative Advocacy, Scholarship, Praxis: Taking Our Pulse, Cumberland School of Law, Samford University, Birmingham, AL, March 30, 2012.

Panelist, *Marriage Equality for Minority Families*, CAPALF/NEPOC Joint Conference, Hofstra Law School, Hempstead, NY, November 4, 2011.

Panelist, *The Challenge of Diversity in Difficult Times, A Panel Discussion*, University of Miami School of Law, Miami, FL, October 20, 2011.

Speaker, *Using Associate Deans Effectively*, 2011 Promoting Diversity in Law School Leadership Workshop, Seattle University School of Law, Seattle, WA, September 23, 2011.

Panelist, AALS Mid-year Meeting, Women Rethinking Equality, Closing Plenary: Reshaping Institutions, Washington DC, June 22, 2011.

Keynote Speaker, 2011 Lutie A. Lytle Black Women Law Faculty Writing Workshop: "Freedom Writers," Thurgood Marshall School of Law, Houston, TX, June 16-19, 2011.

Presenter, Work-in-Progress, *The Rights of the Child of Same-Sex Parents*, 2011 Lutie A. Lytle Black
Women Law Faculty Writing Workshop: "Freedom Writers," Thurgood Marshall School of Law, Houston, TX, June 16-19, 2011.

Speaker, *The Psychology of Heterosexism and Racism*, 2011 Think-Tank Conference and Symposium for Law and Psychology, University of Nebraska – Lincoln, Lincoln, NE, April 20-22, 2011.

Panelist, *Re-Shaping Heterosexual Masculine Identity*, Access to Equal Justice Symposium, "Race to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens," Washington University School of Law, St. Louis, MO, March 28, 2011 (response to Angel Harris's Keynote Address).

Panelist, *The Rights of the Child of Same-Sex Parents*, The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage, American University, Washington College of Law, Washington, DC, March 24-25, 2011.

Speaker, *The Rights of the Child of Same-Sex Parents*, Chapman University Law School Faculty Development Workshop Series, Orange, CA, March 14, 2011.

Panelist, *Seven Principles: Increasing Access to the Legal Academy Among Students of Color*, The Future of Legal Education, Iowa Law Review, University of Iowa College of Law, Iowa City, IA, February 25 – 26, 2011.

Panelist, R.I.S.E. Symposium, "Equity in Education: Examining the Rhetoric of Race & Achievement Gaps," University of Colorado, Boulder, CO, Feb. 18, 2011.

Speaker, *The Rights of the Child of Same-Sex Parents*, University of Denver, Political Science Undergraduate Course taught by Professor Tiffani Lennon, Denver, CO, Oct. 20, 2010.

Panelist, *Equal Protection for Children of Gay Parents: Challenging the Three Pillars of Exclusion – Biology, Legitimacy, and Gender Stereotypes*, Third National People of Color Conference: Our Country, Our World in a Post-Racial Era, Seton Hall Law School, Newark, NJ, Sept. 9-12, 2010.

Presenter, Work-in-Progress, *Equal Protection for Children of Gay Parents: Challenging the Three Pillars of Exclusion – Biology, Legitimacy, and Gender Stereotypes*, 2010 Lutie A. Lytle Black Women Law Faculty Writing Workshop: Harnessing the Written Word, University of Kentucky College of Law, Lexington, KY, June 24-28, 2010.

Speaker, *The Rights of the Child*, Family Values: Law and the Modern American Family, *Journal of Law and Inequality*, University of Minnesota School of Law, Minneapolis, MN, April 9, 2010.

Panelist, *Straight Scrutiny*, Evaluating the Critical Race Theory Movement on its Twentieth Anniversary, South Eastern Association of American Law Schools, Palm Beach, FL, August 2-6, 2009.

Presenter, *Straight Scrutiny*, Lutie A. Lytle Black Women Law Faculty Writing Workshop, Seattle School of Law, Seattle, WA, June 2009.

Speaker, *Straight Scrutiny*, Hofstra Colloquium on Law and Sexuality, Hofstra Law School, April 15, 2009.

Presenter, Work-in-Progress, *Straight Scrutiny*, Critical Race Theory 20: Honoring Our Past, Charting Our Future, University of Iowa College of Law, Iowa City, IA, April 3, 2009.

Speaker, *Straight Scrutiny*, Ski CLE – University of Denver Sturm College of Law, Keystone Resort, Keystone, CO, February 29, 2009.

Speaker, *Straight Scrutiny*, Laverne Law School, Los Angeles, CA, February 26, 2009.

Speaker, *Straight Scrutiny*, Williams Institute's Work-in-Progress Series, UCLA School of Law, Los Angeles, CA, February 25, 2009.

Speaker, *Straight Scrutiny*, Same-Sex Marriage and Beyond: Charting a Progressive Course, University of North Carolina School of Law, Raleigh, NC, February 21, 2009.

Panelist, *Civil Rights, Gay Rights and the Evolution of Equality*, Seventh Annual Day of Equality, Birmingham, AL, September 20, 2008.

Speaker and Panelist, *A Cautionary Tale: Obama's Coalition, Anti-Subordination Principles and Proposition 8*, Obama Phenomena: Facets of a Historic Campaign, University of Denver Sturm College of Law, Denver, CO, August 29, 2008 (symposium the day after Democratic National Convention).

Member, National Planning Committee, Twentieth Anniversary Critical Race Theory Conference, Iowa City, Iowa (December 2008-April 2009).

Co-Organizer, Obama Phenomena: Facets of a Historic Campaign, University of Denver Sturm College of Law, Denver, CO, August 29, 2008 (symposium the day after Democratic National Convention).

Organizer, Black Female Law Faculty Writing Workshop, University of Denver Sturm College of Law, Denver, CO, June 26-29, 2008. (hosted 45 law professors from across the country).

Speaker, *Civil Rights, Gay Rights and the Axis of (In)equality*, Emory University, Presentation sponsored by the Women's Studies Department and African American Studies Department, Atlanta, GA, April 17, 2008.

Panelist, Queer in the Academy: Review, Tenure, and Promotion. University of Denver, Denver, CO, March 4, 2008.

Selected Participant, UCLA's Williams Institute's Primer on Empirical Research on Sexual Orientation, UCLA School of Law, Los Angeles, CA, February 21-22, 2008.

Invited Panelist, Hate Speech v. Free Speech: A Dialogue about the Limits and Interests, Colorado College, Colorado Springs, CO, February 6, 2008.

Invited Panelist, *MLK and Gay Rights, What Does King Mean Now?*: Essays on the 40th Anniversary of the Assassination of Martin Luther King, Jr., Association of American Law Schools 2008 Annual Meeting, New York, NY, January 5, 2008.

Invited Panelist, *Outsider Interest Convergence, Coalitions and the Legal Construction of "Family,* The 20th Anniversary of Charles Lawrence's *The Id, the Ego, and Equal Protection: Reckoning Unconscious Racism*, *Connecticut Law Review*, University of Connecticut School of Law, Hartford, CT, November 1-2, 2007.

Participant, *One People, One Nation? Housing and Social Justice: The Intersection of Race, Place, and Opportunity*, University of North Carolina School of Law, Chapel Hill, NC, October 11-12, 2007.

Moderator, Examining the Subconscious Bias within Us (panelists: Professors Robert Chang, Charles Lawrence and Mari Matsuda), The Rocky Mountain Legal Diversity Summit, Invesco Field, Denver, CO, September 20, 2007.

Speaker, *Why You, Too, Should Pursue a Judicial Clerkship*, Presentation to minority law student groups APALSA, BLSA, LLSA, NLSA and the Outlaws, University of Denver Sturm College of Law, Denver, CO, August 2007, August 2006 and August 2005.

Panelist, *Biology as a License to Family*, Panel on Race, Law and Performance Identity, 2007 Joint Meeting of the Law and Society Association and the Research Committee on Sociology and Law (ISA), Berlin, Germany, July 27, 2007.

Presenter, *Queer as Black Folk?*, The South-North Exchange on Theory, Culture and Law, Race & Color Across the Americas: Comparative Constructions of Racial and Ethnic Subjugation, Rio De Janeiro, Brazil, May 10, 2007.

Panelist, *How Same-Sex Couples Protect Themselves and Their Children*, Reproductive Rights Week, University of Denver Sturm College of Law, Denver, CO, January 24, 2007.

Panelist, *"Care-ing" the Dream from a Legal & Social Justice Perspective*, Law School Forum, University of Denver Sturm College of Law, Denver, CO, January 9, 2007.

Presenter, *Queer as Black Folk?*, Loving by Law: Forty Years After *Loving v. Virginia*, The Thelton E. Henderson Center for Social Justice, UC Berkeley – Boalt Hall School of Law, Berkeley, CA, November 17-18, 2006.

Presenter, *Queer as Black Folk?*, Intimacy, Marriage, Race, and the Meaning of Equality: Perspectives on the 40th Anniversary of *Loving v. Virginia*, Wisconsin Law Review, Wisconsin Law School, Madison, WI, November 10 – 11, 2006.

Presenter, *The Group Dangers of Race-Based Conspiracies*, Employment Law Panel, First Annual Colloquium on Current Scholarship in Labor and Employment Law, Marquette University Law School, Milwaukee, WI, October 27 – 28, 2006.

Participant and Co-organizer, *Roundtable: Critical Relations: Identity Matters*, Part 2. Eleventh Annual LatCrit Conference, Working and Living in the Global Playground: Frontstage and Backstage, Las Vegas, NV, October 7, 2006.

Invited Responding Panelist to Keynote Speaker, *Castle Rock v. Gonzales* Conference: *Some Are Guilty – All are Accountable, Accountability in the Age of Denial*, University of Denver Sturm College of Law, Denver, CO, March 16-17, 2006.

Panelist and Co-organizer, *The Professional and the Personal: Navigating Intimate Space Across (and Within) Perceived Racial and Gender Boundaries*, Panel on Critical Relationships: The Political and Academic Consequences of Choosing Different-Race Partners – Is the Politically Personal Professional?, Tenth Annual LatCrit Conference, Critical Approaches to Economic In/justice, San Juan, Puerto Rico, October 8, 2005.

Presenter and Co-organizer, *On Balance: Work, Family and Professionalism*, Junior Faculty Development Workshop, Tenth Annual LatCrit Conference, Critical Approaches to Economic In/justice, San Juan, Puerto Rico, October 6, 2005.

Presenter, *Race-Based Civil Conspiracy Theory*, The Southeast/Southwest People of Color Scholarship Conference, New Orleans, LA, May 5-May 8, 2005.

Speaker, Careers in Law that Raise Social Awareness, 37th Annual National Black Law Student Association (NBLSA) Convention, Denver, CO, April 1, 2005.

Panelist, *Issues Faced by Women in Law: Relating to Clients and Colleagues, Navigating the System, and Balancing it All*, Panel for Diversity Week, University of Denver, Sturm College of Law, March 23, 2005.

Presenter, *Race-Based Civil Conspiracy Theory*, The Oxford Roundtable on Employment Rights and Responsibilities, Pembroke College, University of Oxford, Oxford, England, March 13 – March 18, 2005.

Moderator, *Developments in International Reproductive Rights*, Panel for Reproductive Rights Week, University of Denver, Sturm College of Law, January 27, 2005.

Panelist, The Black Pride Survey, The Policy Institute of the National Gay and Lesbian Task Force, Houston, TX, July 9, 2002.

Panelist, "Staying Connected During and After Classroom Crises," American Association of Law Schools 2002 Annual Meeting, New Orleans, LA, January 3, 2002.

Panelist, *The Pros and Cons of Mandatory Pro Bono in Law Schools*, Houston Bar Association's 2nd Annual Joint Law School Faculty Meeting. Moderated by Texas Supreme Court Justice Deborah Hankinson, Houston, TX, September 28, 2001.

Co-presenter, *All Civil Rights Movements Are Not the Same*, The Racist Rainbow Forum, Houston Lesbian and Gay Community Center, Houston, TX, September 29, 2000 (with Jennifer Holladay).

Speaker, *A Multifaceted Attack on Intolerance: The Work of the Southern Poverty Law Center*, Beyond the Box II: Redefining Multiculturalism on College Campuses, Wellesley College, Wellesley, MA, April 24, 1999.

Speaker, *Reflections on My First Year*, Orientation for First Year Students, University of South Carolina School of Law, Columbia, SC, August 1994.

BAR AND PROFESSIONAL MEMBERSHIPS

South Carolina Bar
United States Court of Appeals for the Fifth Circuit
United States Supreme Court
Latina/o Critical Theory, Board Member, 2007 – 2009; Junior Faculty Development Workshop Planning Committee, 2005 – 2010; Works-in-Progress Committee, 2006 – 2007
Board member, ACLU of Colorado**,** 2005-2007
Chair, Legal Panel, ACLU of Colorado, 2005-2007
Board Member, Fund for Southern Communities, 2005-2006

POINTS OF INTEREST

Four years of collegiate volleyball (selected as most valuable player and team captain)
Military Brat (lived in Belgium from ages eleven to eighteen)
Enjoy running, swimming and biking (completed a number of marathons and sprint/olympic triathlons)

Professional References

Jane Aiken
Associate Dean for Experiential Education
& Professor of Law
Georgetown Law
jha33@law.georgetown.edu
202-662-9580

Rachel Arnow-Richman
Director, Workplace Law Program
& Professor of Law
University of Denver
Sturm College of Law
rarnow@law.du.edu
303-871-6264

Roberto Corrada
Mulligan Burleson Chair in Modern Learning
& Professor of Law
University of Denver
Sturm College of Law
rcorrada@law.du.edu
303-871-6273

Camille Nelson
Dean & Professor of Law
Suffolk University Law School
cnelson@suffolk.edu
617-573-8155

Angela Onwuachi-Willig
Charles M. and Marion J. Kierscht Professor of Law
University of Iowa College of Law
angela-onwuachi@uiowa.edu
319-335-9043

EXHIBIT B: PUBLICATIONS

Articles:

State Action that Penalizes Children as Evidence of a Desire to Harm Their Politically Unpopular Parents, 51 SUFFOLK L. REV. – (*forthcoming* 2018)

Obergefell's Missed Opportunity, *79* LAW & CONTEMPORARY PROBS. 223 (2016)

Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases, 48 U.C. DAVIS L. REV. 655 (2014) (with Susannah W. Pollvogt)

Looking to Torts: Exploring the Risks of Workplace Discrimination, 75 OHIO STATE L. J. 1207 (2014).

Equal Protection for Children of Same-Sex Parents, 90 WASH. U. L. REV. 1589 (2013).

Seven Principles: Increasing Access to Law School Among Students of Color, 96 IOWA L. REV. 1677 (2011).

Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion – Legitimacy, Dual-Gender Parenting, and Biology, 28 LAW & INEQ. 307 (2010).

- Selected as one of the best sexual orientation law review articles of 2010 by the Williams Institute, UCLA Law School.

- Reprinted in 10 DUKEMINIER L.J. 97 (2011).

A Cautionary Tale: Obama's Coalition, Anti-Subordination Principles and Proposition 8, 86 DENV. UNIV. L. REV. 819 (2009) (co-authored with Jennifer Holladay).

Unconscious Bias and "Outsider" Interest Convergence, 40 CONN. L. REV. 1077 (2008).

Queer as Black Folk? 2007 WIS. L. REV. 379 (2007).

The Group Dangers of Race-Based Conspiracies, 59 RUTGERS L. REV. 55 (2006).

(Un)masking Race-Based Intra-Corporate Conspiracies Under the Ku Klux Klan Act, 11 VA J. SOC. POL & L. 129 (2004).

Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra, 80 DENV. U. L. REV. 1 (2002).

Short Essays:

Children's Rights in the Midst of Marriage Equality: Amicus Brief in Obergefell v. Hodges By Scholars of the Constitutional Rights of Children, 14 WHITTIER J. CHILD & FAM. ADVOC. 1 (2015)

Amicus Brief in United States v. Windsor by Scholars for the Recognition of Children's Constitutional Rights, 17 J. GENDER, RACE & JUST. 467 (2014).

Foreword: Social Class, Race and Legal Education, 88 DENV. U. L. R. i (2012) (with Joyce Sterling).

The Rights of the Child, 88 DENV. U. L. REV. ONLINE (2011) (essay selected as winner in writing competition "*On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship*," sponsored by the AALS Section on Gender and Sexual Orientation Identity).

John Calmore's America, 86 N.C. L. REV. 739 (2008) (with Robert Chang).

Amicus Briefs:

Amicus Brief of Scholars of the Constitutional Rights and Interests of Children in Support of Respondents, filed in Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission, No. 16-111 (October 26, 2017) (with Lauren Fontana, Angela Onwuachi-Willig, Tanya Washington and Barbara Bennett Woodhouse)

Amicus Brief of Scholars of the Constitutional Rights of Children, filed in *Obergefell v. Hodges*, U.S. Supreme Court, Nos. 14-556, 14-562, 14-571, 14-574 (2015) (with Lauren Fontana, Susannah Pollvogt, and Tanya Washington) (2015 WL 1088972)

- Cited in the Majority opinion in *Obergefell v. Hodges*
- Reprinted in 14 WHITTIER J. CHILD & FAM. ADVOC. 1 (2015)

Amicus Brief of Scholars of the Constitutional Rights of Children, filed in *Robicheaux v. Caldwell*, United States Court of Appeals for the Fifth Circuit, No. 14-31037, (October 24, 2014) (with Susannah Pollvogt and Tanya Washington).

Amicus Brief of Scholars of the Constitutional Rights of Children, filed in *United States v. Windsor*, U.S. Supreme Court, No. 12-307, (2013) (with J. Robert Brown, Kyle Velte, Susannah Pollvogt and Tanya Washington)

- Reprinted in 17 J. GENDER, RACE & JUST. 467 (2014).

Other Publications:

Judge in Same Sex Case Rebuffs High Court: Ban on Gay Marriage Based on Benefits to Children is Discriminatory, Precedent Strongly Suggests, THE NATIONAL LAW JOURNAL, September 29, 2014 (with Susannah Pollvogt).

First Openly Gay NFL Pick is Helping Expand Views on Legal Equality, NATIONAL LAW JOURNAL, May 26, 2014 (with Frank Rudy Cooper).

Peace and Protest: Can City Officials Force Protesters to Identify Themselves by Name? INTELLIGENCE REPORT, No. 121, Spring 2006.

Citizens' Unrest: In Arizona, a County Prosecutor Opens the Door for Vigilante Justice, INTELLIGENCE REPORT, No. 120, Winter 2005.

Threats.com: Radical Animal Rights Activists Set the Stage for a First Amendment Showdown, INTELLIGENCE REPORT, No. 118, Summer 2005.

What First Amendment? Alabama State Rep. Gerald Allen is No Lawyer. But He Must Know that His Proposed Ban on Pro-Gay Books is Unconstitutional, INTELLIGENCE REPORT, No. 117, Spring 2005.

Hate on Trial: The First Amendment protects hatemongers' racist beliefs. So how can prosecutors introduce evidence of racism at trial? INTELLIGENCE REPORT, No. 116, Winter 2004.

Refuge for Hate? After his conviction in Germany for Holocaust denial activities, a revisionist requests political asylum in the United States, INTELLIGENCE REPORT, No. 115, Fall 2004.

Taxing the First Amendment: A recent injunction prohibiting the sale of a tax protester's book raises thorny questions about the First Amendment, INTELLIGENCE REPORT, No. 114, Summer 2004.

Stop the Hate. Educate: An Interview with James Byrd Jr.'s Sister, OUTSMART, September 2000. (with Jennifer Holladay).

Online Blog Posts and Op-Eds

Guest Blogger, *Kid Power!,* Prawfsblawg, August 4, 2015.

Guest Blogger, How Marriage Bans Harmed Children of Same-Sex Parents, Prawfsblawg, July 22, 2015

Guest Blogger, *Marriage Ban Proponents Slept Through a Revolution: But Not the One You Think,* Prawfsblawg, July 18, 2015.

Guest Blogger, *Obergefell and the Interests of Children*, Prawfsblawg, July 9, 2015.

The Smartest Constitutional Argument for Marriage Equality That No One Is Making, *Slate*, September 29, 2014 (with Susannah Pollvogt).

EXHIBIT C: REFERENCES

Constitutions

U.S. Const., Preamble.

U.S. Const., Article III, § 3; Article I, § 9

U.S. Const. amend. V.

U.S. Const. amend. IX.

First Charter of Virginia (1606) in B. P. Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* (1878) (vol. 2).

Virginia Declaration of Rights (1776).

Statutes, Declarations, and Congressional Documents

Declaration of Rights and Grievances (1765) (Stamp Act Congress), *in* Bernard Schwartz, *The Roots of the Bill of Rights*.

4 *The Virginia Historical Register, and Literary Note Book* 118 (William Maxwell ed., 1854).

CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

Alexander Hamilton, The Federalist No. 84 (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

James Madison, The Federalist No. 43 (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

The Rights of the Colonists and a List of Infringements and Violations of Rights (1772), *in* H. A. Cushing, *The Writings of Samuel Adams* (1906), ed., II: 350-69.

Declarations and Resolves of the First Continental Congress (1774), *in* Bernard Schwartz, *The Roots of the Bill of Rights.*

United States *Declaration of Independence* (1776).

Journals of the House of Burgesses of Virginia, 1761-1765, ed. by Kennedy (Richmond, 1907).

Unif. Parentage Act § 202 (2002)

42 U.S.C. § 1771 (2012).

Presidential Addresses

George Washington, "First Inaugural Address," April 30, 1789, http://www.archives.gov/exhibits/american_originals/inaugtxt.html.

James Madison, *Speech to the House of Representatives (June 8, 1789)*, reprinted in 12 The Papers of James Madison 198, 207 (Robert A. Rutland et al. eds., 1977).

Theodore Roosevelt, Eighth Annual Message to the Senate and House of Representative, Dec. 8, 1908, available at http://www.presidency.ucsb.edu/ws/index.php?pid=29549&st=Children&st1

Theodore Roosevelt, Special Message to the Senate and House of Representatives, Jan. 22, 1909, available at http://www.presidency.ucsb.edu/ws/index.php?pid=69658&st=Children&st1=

Proceedings of the Conference on the Care of Dependent Children, *Address of President Roosevelt*, Jan. 25, 1909, available at https://archive.org/details/proceedingsconf01statgoog.

Herbert Hoover, Statement on Plans for a White House Conference on Child Health and Protection, Jul. 2, 1929, available at http://www.presidency.ucsb.edu/ws/index.php?pid=21852&st=conference&st1=child.

Herbert Hoover, Remarks at the First Meeting of the White House Child Conference Planning Committee, Jul. 29, 1929, available at http://www.presidency.ucsb.edu/ws/index.php?pid=21876&st=conference&st1=child.

Herbert Hoover, Address to the White House Conference on Child Health and Protection, Nov. 19, 1930, available at http://www.presidency.ucsb.edu/ws/?pid=22442.

Franklin D. Roosevelt, Address at the White House Conference on Children in a Democracy, Apr. 23, 1939, available at http://www.presidency.ucsb.edu/ws/index.php?pid=15747&st=conference&st1=child

Franklin D. Roosevelt, Radio Address at the White House Conference on Children in a Democracy, Jan. 19, 1940, available at http://www.presidency.ucsb.edu/ws/index.php?pid=15999&st=conference&st1=child

Harry S. Truman: Address Before the Midcentury White House Conference on Children and Youth, Dec. 5, 1950, available at http://www.presidency.ucsb.edu/ws/index.php?pid=13677&st=conference&st1=child

Dwight D. Eisenhower, Remarks to the National Committee for the 1960 White House Conference on Children and Youth, Dec. 16, 1958, available at http://www.presidency.ucsb.edu/ws/index.php?pid=11297&st=conference&st1=child

Richard Nixon, Statement Announcing the White House Conference on Children and Youth, Oct. 26, 1969, available at http://www.presidency.ucsb.edu/ws/index.php?pid=2284

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Exhibit B

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

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

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

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

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

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ALSO PRESENT:

Dan Schmitz, videographer

I N D E X

E X H I B I T S

(exhibit index concluded)

P R O C E E D I N G S

(Exhibits Number 1-2 marked.)

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

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

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

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

MR. GREGORY: Phillip Gregory, counsel for Plaintiffs.

MS. OLSON: Julia Olson, counsel for Plaintiffs.

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

///

CATHERINE SMITH,

having been first duly sworn, testified as follows, to wit:

EXAMINATION

BY MS. BORONOW:

Q. Good morning.

A. Good morning.

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

So have you been deposed before?

A. Yes.

Q. Okay. So you know the drill.

A. (Nods head.)

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

A. Yes.

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

A. No.

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

A. Okay.

Obergefell, is that, you know, not only is the law changing, so is our understanding of concepts and ideas. And so I very much believe in that, and so that -- as things present themselves, we think about ideas differently.

Q. Okay. When you -- when you said you would consider having done your research for this report, are there any particular sources that you looked at that were new?

A. On top of my -- just my research agenda, or like what I've been studying for --

Q. Right, exactly. I'm talking about what you would do for your living.

A. I -- well, let me put it this way. I think I've included the sources that I will rely on in the expert report, so...

Q. So is it fair to say it's hard to disentangle what is in the report from what research you do in your work as a law professor?

A. Yes.

Q. Okay.

A. I think it's hard to disentangle the two. I'm not a -- someone who is -- studies or is an expert in climate, but I am someone who studies and researches the protection clause in the Fourteenth Amendment, and

in the last eight to ten years, in particular, with respect to children.

Q. Okay.

A. And so it's hard to disentangle that from my sort of 18 years of writing on the Fourteenth Amendment and my interest in kids and teaching and writing about children.

Q. Sure. That makes sense.

Would you consider yourself an expert in the Fourteenth Amendment?

A. I would consider myself an expert on the things that I've talked about in this report.

Q. Okay.

A. This -- with respect to the equal protection rights of children and how our views of that have changed and evolved and how children are different with respect to that, our understanding in comparison to adults, and that children -- I think I would definitely -- I would say are overlooked as a class. And I think the set of cases I'm talking about are raising the importance of us thinking about those cases in the context of climate change.

Q. Okay. Did anyone work with you to prepare this report?

A. I may have asked research assistants or

because, you know, I hear that you've done -- after law school you did clerkships.

A. Uh-huh.

Q. You did the legal fellowship with the Southern Poverty Law Center, and then you've been a law professor.

A. Uh-huh.

Q. Is there anything non-legal that you've done as part of your career?

A. Well, I think in the public administration program I worked at the -- did kind of public administration. I worked, at that time, in the governor's office --

Q. Okay.

A. -- and -- but in terms of professional career, I think, yeah, I've been a lawyer for the most part.

Other things I'd add to that list that inform my -- my research and writing and experience is including being a mom, but if you're going to think strictly career, yes, I've primarily been a lawyer --

Q. Okay.

A. -- reading lots of cases, doing lots of legal analysis.

Q. Sure.

And we've discussed this a bit already, but as I understand it, your legal area of expertise is the equal protection clause as applied to children. Are there other things that you would consider yourself to be an expert in in the legal field?

A. I write and research about the history of legal protection clause, race, and the study of race, and how race is social construction, and critical race theory, and also LGBT kind of issues under the protection clause, discriminatory intent, and equal protection clause.

And so I mean I think in terms of -- but I wouldn't say I'm a -- I wouldn't necessarily say I'm a -- I'm just trying to get at this notion of expert and what exactly you're getting at. But I think -- I certainly would say I'm an expert on the things that are in this report, the main point in this report, about children and the historical and sociolegal study of the equal protection rights of children and how children are often overlooked, and the set of cases that I reference in the report should, and can, inform how a court and society might think about climate change impact on kids to protect children.

Q. Do you teach classes on children and the law?

A. I'm teaching a class on children and the law

this semester.

Q. And in those classes, do you cover this historical and sociological background that underpins your legal analysis?

A. Yes. I also taught a class a few years ago in family law, which obviously has a significant intersection with children as well, just to add that.

Q. Would you consider yourself an expert in environmental law?

A. I would not consider myself an expert in environmental law, though I did write a paper in my public administration class on climate change in the mid 1990s, early 1990s, I guess it was, yeah.

Q. Okay. But you haven't taught classes in environmental law?

A. No.

Q. And you haven't published law review or journal articles in environmental law since that paper you referenced?

A. Yeah, which was not published, not yet.

Q. Okay. And you said earlier you're not an expert in climatology or climate science.

A. No.

Q. And you're not a meteorologist?

A. No.

Q. Okay. And you're not a biologist?
A. No.
Q. Are you an expert in fossil fuel development?
A. No.
Q. Are you an expert in renewable energies?
A. No.
Q. Are you an expert in U.S. energy policy?
A. No.
Q. And you're not a doctor?
A. No.
Q. And you don't have any training in medicine or human health?
A. No.
Q. Okay. And you're not a psychologist or a psychiatrist?
A. No.
Q. And you don't have any special training in mental health?
A. No.
Q. Are you an economist?
A. No.
Q. And are you sociologist?
A. Not trained as a sociologist, no.
Q. And are you trained as a historian?
A. No.

are different than -- than adults.

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

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

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

Q. Okay.

A. -- under the equal protection clause.

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

A. Right. Yes.
Q. Okay.
A. And it's relying on the series of cases that -- that I'm drawing on to say that that's -- that that -- that history is present, and in the cases what happens is they get overlooked often.
Q. Okay.
A. And my expertise is to push those cases out and say we can look at them from a different way.
Q. Okay. And is it fair to say that the second half of your report essentially applies that test that you formulated in the first half to government policies related to climate change?
A. I think that the -- that it's laying out -- hold on. Let me see if I can pull this for us.
If you look on page 24, when I'm talking about the cases that I'm thinking about as children's cases, in the -- after the -- right after footnote 94, I say, In my expert opinion, we readily understand this foundational principle from the -- from the -- the -- that legislation imposing special disability groups -- it's referencing the sentence before it -- that this foundational principle in the context of race and gender, we understand that --
MR. GREGORY: Slow down so Lisa can --

THE WITNESS: Oh, sorry. I apologize.

A. So I'm going to start from the beginning of the paragraph and I'll go slowly.

"At the heart of these cases is the abiding principle that "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggest the kind of class or class treatment that the Fourteenth Amendment was designed to abolish. In my opinion, we readily understand this foundational principle in the context of race and gender discrimination. However, a series of cases about state discrimination against children - the children of unmarried parents, and the children of undocumented parents - offer important overlooked insights into our understanding of the equal protection guarantee as it applies to children. These child-centered cases offer an important foundation for the equal protection rights of children."

And so these -- these cases are telling us something that I think is often overlooked and is important for the Court and lawyers and others to understand that there are principles from these cases that speak to the equal protection rights of children when the state goes too far, when the state engages in -- in -- in conduct.

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

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

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

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

Q. Okay. And are you referring to any other founding documents aside from the Constitution, the Declaration Of Independence, and the Virginia Declaration Of Rights?

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

A. There are a series of footnotes that reference -- or may reference other documents. I don't recall what those other documents are at this time.

Q. (BY MS. BORONOW) Okay. What steps did you take in reviewing these documents to determine that the documents lay the groundwork for recognizing the interest of children?

A. In terms of just research and reading and relying on the article cited.

Q. Okay. Would you agree that Courts look to these same documents when they're interpreting the Constitution?

A. I would think the Courts look to these documents in interpreting the Constitution, and sometimes they don't.

Q. So to be clear, your answer is sometimes they do and sometimes they don't?

A. Yes.

Q. Okay. What exactly do you mean by that?

A. I think it depends on what constitutional provision or what's at issue in the -- in the opinion or in the case.

Q. Okay. And for interpretation or trying to understand Fourteenth Amendment rights in particular, since that's what we're talking about here, would you agree that Courts would look to the Constitution and the Declaration Of Independence and maybe the Virginia Of Declaration Rights?

A. Well, I think that I'll just back up and say that the idea here is that this is a historical representation or a history of where children are referenced, or at least implicitly referenced in the Constitution -- in the Constitution, in the Bill Of Rights. With respect to the Fourteenth Amendment that was subsequent to, that would not be until after reconstruction, so...

Q. Okay. I understand. But would you agree that a Court could look to the Constitution and could interpret the Constitution in a case?

A. Yes.

Q. Okay. And a Court could look to the Bill Of Rights in the Fourteenth Amendment in a case?

A. A Court could.

Q. Okay. Okay. So after developing the

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

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

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

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

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

important for the Court to be thinking about these issues because, unlike what Kennedy said, the difference from Obergefell in this case with respect to children is that children don't have the same power that adults have to plea and protest, to educate the Court and society about the harms that they experience.

And I think that's really important -- an important role and a part of the discussion that I've had in this opinion for the Court to -- to undertake, because people who have the ability to plea and protest in our -- in a real -- in a forceful way tend to be adults and children's voices and interests get lost.

Q. Okay. And do you think it would be appropriate for the Court in this case to look to the Obergefell case as a precedent?

A. What do you mean?

Q. Well, let's step back.

Do you think the Obergefell case is at all relevant to this case and to this Court's consideration of the claims before it?

MR. GREGORY: Objection. You mean in the context of her expert opinion, or in the context of the briefing?

Q. (BY MS. BORONOW) In the context of your expert opinion.

children's case.

And it can be both. I'm not trying to strip that from the race cases. That's true for Levy and Louisiana and the subsequent cases, and it's true for Plyler, and I think it's true and happening with Windsor and Obergefell.

Q. Okay. So, again, just to make sure I understand, the historical and sociological aspects that you're considering here are how the legal community as a whole has viewed these cases over time and perhaps misinterpreted them, in your view, or missed out on an aspect of them in terms of how they relate to children.

A. I think society -- the legal system, lawyers, society, legislators -- no, I wouldn't say misinterpret. I would say there's another way to look at them when you think about this evolution of the rights of children and this history of that evolution and the emergence of children as having their own rights and interests when it comes to things that harm them, like climate change.

Q. Okay. I want to turn to page 36. And on page 36, at the top here, in the paragraph that starts with "In my expert opinion," you lay out the text or factors --

A. Uh-huh.

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

A. Uh-huh.

Q. -- heightened reviews. Is that right?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Uh-huh.

Q. Do you use those interchangeably?

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

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

A. Yes.

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

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

Q. Right. I understand. But you also said you could potentially see a similar right or right to be cared for by parents in U.S. law, and if you were to try and find that right in U.S. law, where would you look for it?

A. Well, it would be those cases interpreting substantive due process provision of the Fourteenth Amendment.

Q. Okay. On page 37, at the very bottom, you say, "Ultimately the deprivation of a climate system that sustains basic liberties and life in the way it did at the founding of the nation also deprives children of fundamental rights implicit in order liberty and rooted in our nation's traditions and history, including the right to personal security." Do you see that?

A. Yes.

Q. When you refer to fundamental rights here, do you mean rights protected by substantive due process?

A. Yes, in that provision, certainly, and perhaps also the equal protection clause.

Q. And you say "the right to personal security." Are there other fundamental rights that you're thinking of here?

A. I don't recall.

Q. And how would you go about determining whether a right qualifies as a fundamental right?

A. Well, looking at the substantive due process, the equal protection provisions, and the case law.

Q. And to be clear, your report doesn't provide any analysis about the existence of fundamental rights; is that right?

A. The report focuses mostly on, for the most part, on the equal protection clause, provision of the Fourteenth Amendment.

Q. So, again, is it fair to say that your report doesn't provide analysis to support a conclusion that the deprivation of a climate system that sustains basic liberties and life in the way it did at the founding of the nation also deprives children of fundamental rights?

A. Can you ask it again, the question?

Q. Sure.

Yes or no, does your report provide any analysis that supports your conclusion here that the deprivation of a climate system that sustains basic liberties and life in the way it did at the founding of the nation also deprives children of fundamental rights?

MR. GREGORY: Objection. The document speaks

for itself.

A. The report focuses, for the most part, on the equal protection clause.

Q. (BY MS. BORONOW) Okay. You would agree that your report doesn't analyze substantive due process?

A. Not directly.

Q. Okay. Does it analyze it indirectly anywhere?

A. I think that -- it doesn't directly address the fundamental rights under substantive due process, but I think the arguments could be used in a -- in terms of the evolution of rights. Those arguments could be used in the fundamental rights context as well, but that's -- my report is focused on the equal protection clause.

Q. Okay. And would you testify at trial about the existence of certain fundamental rights?

A. Not at this time, that I'm aware of.

Q. Okay. I want to turn to the end of your report, not the very end, but section C, I think, where you go through the types of hardships and deprivations of rights that children may suffer.

A. Yes.

Q. So is it your expert opinion that the United States' control over the energy system will deny equal

Q. So maybe I'm packing this up a little bit. You're depending on expert assumptions of others regarding the U.S. government's control over the energy system; is that right?

A. Yes.

Q. Okay. But assuming you make those assumptions, is it your opinion and are you prepared to testify that that control over the energy system will deny rights and benefits to children and thereby result in a lifetime of hardship?

A. I think that that's also dependent on other expert reports and testimony.

Q. Which expert reports and testimony?

A. I think we talked about them earlier and the Frumkin and Pacheco and the other reports that talk about the harms of climate change. We also -- I think that the reports mentioned earlier in that -- this section offer some of that testimony, page -- you know, footnote 158 -- pages basically 41 through 45 -- 40 through 45.

Q. Okay. So when you talk about the harms of climate change that could result in a lifetime of hardship, is it fair to say you're not an expert in those specific harms?

A. Yes, that's fair to say.

Q. Okay. And you would be relying on other experts for testimony regarding the harms of climate change.

A. Yes.

Q. Okay. Okay. So, again, I'm trying to unpack this a little bit. You would be relying on other experts for the U.S. government's control over the energy system, right?

A. Well, let's back up. The one thing I want to add is that the report is relying on other experts, but the -- for the harms to children of climate change.

But the cases and our history of thinking about children, and harms to children historically and social kind of legal perspective on this, is that those harms matter. The psychological harm to children, Brown says that is impermissible. Plyler and Levy are saying economic harms and psychological harms, and Obergefell, and those cases, are saying harm to family formation matter in our -- in this equation. And in this arena, it extends to these other areas, health impacts included.

And -- and so I just want to make sure that that's really clear about the role that my report is playing and what I'm saying.

Q. Okay. So to make sure I understand, you're

relying on -- or you're utilizing case law to inform the particular harms that you think are relevant here, harms to children --

A. I'm utilizing --

Q. -- or categories of harms.

A. Categories of harm.

Q. Okay.

A. But I'm -- I'm looking at -- and remember that's situated in our historical and social context of the harms that we have -- the courts have recognized or that we're using as guideposts or guidelines for when the courts say we're going to apply heightened level review, because this is so important because it is children and because children are different and children don't have the ability to protest or vote or impact the majoritarian political process, and those harms matter.

Q. Okay. So would you say that you are an expert on these categories of harms that matter based on everything else we've talked about in your report?

A. The harms that matter and that the -- and it's not saying it's unlimited -- limited number of harms. These are just what we can flush out from looking at these cases from a different lens and that history and evolution of the rights of kids and the

interest of kids and the things that we are learning that are harmful to kids.

Q. Okay. But you are not an expert on how climate change may cause those specific harms.

A. Yes. I would not say I'm an expert on the climate change and the, you know, science -- scientific harms. I can give my personal view on that, but I'm not an expert on it.

Q. Okay. So on -- so when you talk about these lifetime of hardships and harms, I think you have five specific examples, starting on page 42, and the first one is economic deprivation.

A. Uh-huh.

Q. Do you intend to testify at trial that climate change will cause economic deprivation to children?

A. I think -- once again, I will rely on other experts in terms of the economic harms of climate change to children, but it doesn't take much as an individual or person to know that if someone loses their home because of climate change, it causes economic harm.

Q. Okay. But you'd rely on other experts to testify about economic harms to children?

A. And the other evidence in the case, testimony

from the plaintiffs, the statements from the government itself on climate change.

Q. Okay. And economic deprivation, is one of the reasons you have this as a category of harm because it is one of the types of harm that's relevant to the child-centered cases?

A. It's certainly one of the reasons why it's a part of the -- as one of the considerations, is because of the cases, but those are also referencing history and context from our values, our values within the equal protection clause.

Q. Okay.

A. The cases themselves talk about the importance of not relegating a group of children to second-class citizenship and they're drawing on that history and social context.

Q. Okay. So I'm looking at page 31 of your report where you talk about impermissible government action that imposes a lifetime of hardship on children, and the first thing listed is economic deprivation. And you say there that the child-centered cases establish that the government may not use large-scale government systems to deny children access to basic economic resources because of our status of birth. So is it fair to say that the child-centered cases

established economic deprivation as a factor relevant in considering equal protection issues for children?

A. Yes, I think that's fair to say.

Q. Okay.

A. And so did Windsor and Obergefell. You'll also note that they talk about it through no fault of their own as well.

Q. Right. And, again, I think you had Windsor and Obergefell, you considered those child-centered cases, or you were including them in that category of cases?

A. Yes.

Q. Okay. And on page 42 in your discussion of economic deprivation in regards to climate change, you do not discuss any specific plaintiff in this case; is that right?

A. I don't name a specific plaintiff in this case in that section.

Q. Okay.

A. But I'm focused on the class of children, as we've referenced earlier, and so...

Q. And, again, you aren't an economist, right?

A. No. I think I answered that earlier.

Q. Right. Okay. So in number two we discuss stigmatic and psychological harm. Are you also relying

on other experts for your discussion here about stigmatic and psychological harms to children in climate change?

A. Yes. I think I'd be relying on other experts and other testimony at trial and in the case discovery leading up to this point. But also, once again, it doesn't take a lot of connections to make that if you lose your home or can't participate in recreational activities that you used to do or animals are losing their climate or their life cycle, that a kid might have psychological harm.

Q. Sure. But, again, you're not an expert in mental health.

A. I am not.

Q. And you have no training in mental health.

A. That is true.

Q. Okay. And for this category, stigmatic and psychological harms, are you also relying on the child-centered cases for that specific category of harm? And I'm looking at page 32 here where you discuss stigmatic and psychological harm.

A. Uh-huh. I am relying on the child-centered cases, but as I would also reference that, there are references to psychological or freedoms and mental throughout the report from different sources.

Q. Okay.

A. And they're in the report.

Q. Okay. And number two or page 42, stigmatic and psychological harms, in that paragraph you don't refer to any specific plaintiffs, do you?

A. No.

Q. Okay. In number three, barriers to family formation, are you again relying on experts and other research and reports to establish harms to family formation caused by climate change?

A. Yes. But, once again, I'd say that it doesn't take a lot to understand that if family members are separated as a result of climate change, whether it's storms or flooding, that it could have a barrier to family formation and family relationships.

Q. Would you testify at trial that climate change harms family formation and family relationships, or would you leave that to other experts?

A. I'm likely to leave the actual demonstration of that to other experts but -- but -- but recognizing that it's an important consideration drawing on our understanding of children and the evolution of the rights of children and the factors that the courts have found to be important based off kind of that social and historical context.

Q. Okay. And when you say it's an important consideration, you're referring to family formation?

A. Yes. And that's coming from the discussions about family formation from the non-marital status cases and Obergefell v. Hodges and those series of cases talk to us -- give us an understanding of how impacting children by denying them relationships with their parents is harmful, so...

Q. Okay. And turning to page 33 --

A. I did want to flag that on 43, and I think I mention it earlier, this -- there is a -- even though I don't necessarily name them, there is a specific reference to native and indigenous children losing their familial and cultural ties, which does include or at least are specific to some of the plaintiffs in this case.

Q. Do you know which plaintiffs those are?

A. I don't recall, but I -- I'd have to go back and take a look, but I remember seeing that as a piece of some of their experiences.

Q. And when you make this statement about native and indigenous children, are you referring specifically and only to those plaintiffs, or are you referring to native and indigenous children --

A. Yeah, as a class, as a classification. But I

also wanted to point out that there is also specific plaintiffs that I'm aware of who are losing their -- having been moved off the reservation because of climate change and being impacted by familial and cultural ties.

Q. Okay. But, again, to confirm, your statement in this report is not about any specific plaintiff, it's about the class of native and indigenous children.

A. Yes.

Q. Okay. And on page 33, you list barriers to family formation as a third dominant theme in the child-centered cases.

A. Uh-huh.

Q. So, again, is it fair to say your discussion of barriers to family formation in the context of climate change is derived from these child-centered cases?

A. I would say -- I'd add that it's true that I'm referencing the child-centered cases, but there are also other references throughout the materials that I'd point you to in terms of the importance of family, page 14, that the chair of the Child Welfare Committee said of the campaign, they're talking about the campaign on behalf of children. "When children bear burdens, the nation suffers. When children lack

schooling that prepares them for life, the nation suffers. When they lack mother's care and home life, they and the nation suffer most of all. The Children's Year means constructive conservation. If its program can be realized the nation's children will walk more freely to be the strength of the next generation."

So it is drawing on the child-centered cases, but also those cases are drawing on our history and context, and so is the report of the things that are critical and important when we talk about climate change impact on family formation for kids.

Q. Okay.

MS. BORONOW: I think we need to take a quick break.

THE VIDEOGRAPHER: The time is 1:26, we're off the record, end of disc number two.

(Recess taken 1:26 to 1:34)

THE VIDEOGRAPHER: The time is 1:34, we're back on the record, beginning of disc number three.

Q. (BY MS. BORONOW) Okay. So just a little bit left now. I wanted to turn next to number four on page 43, health impacts. Will you testify at trial that climate change is harming children's health, or will you rely on experts for that opinion?

A. I will rely on experts for that -- for the impacts. Although, similar to what I said before, I will -- my research and historical analysis certainly views this sort of impact, health impacts, as significant for the Court's consideration.

Q. And, again, when you say your research and historical analysis, are you referring back to the child-centered cases and the other history and tradition we've discussed so far in your report?

A. Yes.

Q. Okay. In the last paragraph of this section on page 44, you say, "It's no surprise the medical experts call real world climate change the leading public health threat to all current and future children." Who are you referring to when you say medical experts here?

A. Well, the cite is to Ahdoot and Pacheco.

Q. So are those the experts you're referring to?

A. Yes.

Q. Okay.

A. And whatever experts they're referring to if it's incorporated into that.

Q. If it's incorporated into their --

A. In other words -- oh, sorry, go ahead.

Q. -- into their report that you cite here in

footnote 172?

A. Yes.

Q. And --

A. I'm sorry. I'd add whatever might be in the testimony at -- the complaint and other sources of -- of information to that respect.

Q. And you're not an expert in health and medicine, right?

A. No.

Q. Okay. And so how did you determine that Ahdoot and Pacheco, for example, are medical experts?

A. Well, I relied on their -- the report. I don't recall. I can't call their credentials out at this point, but I do think they qualify as medical experts.

Q. And when you say they qualify as medical experts, in a legal sense, like they would qualify as expert witnesses, or in a non-legal sense?

A. At least in the terms of -- that -- that they're medical professionals, or at least Pacheco.

Q. Okay.

A. I don't recall with Ahdoot, but Pacheco I -- as I recall, she's a medical professional.

Q. Okay. So by medical experts, you mean they have -- they are medical professionals with medical

credentials.

A. Yes.

Q. Okay. And in section 4, where you talk about health impacts, you don't reference any specific plaintiff; is that right?

A. I don't recall referencing any specific plaintiff.

Q. Okay. In section 5 you talk about how certain groups of children are more vulnerable.

A. Uh-huh.

Q. And I assume you mean more vulnerable than other sets of children.

A. Yes.

Q. And, again, will you testify at trial that climate change --

A. I'd add also as adults, not only a group of children but also adults.

Q. Okay. Certain groups of children are more vulnerable than adults.

A. Than -- more vulnerable than other groups of children and adults.

Q. Okay. Will you testify at trial that climate change is disproportionately impacting certain groups of children, or will you rely on other experts to make that testimony?

A. I will rely on other experts and, as I've said before, other testimony or information in the trial, in the case, really, proceedings.

Q. And would you yourself testify that certain groups of children are more vulnerable than others to climate change based on other things in the case?

A. If there's some sort of document from the parties, a statement from the federal government, from the defendants, I might rely on that, but I won't be relying on my own expertise to reach that conclusion, but I will rely on the case law to say that it's an important consideration for the court and that we look at children as a class or classification, including subsets of kids.

Q. And, again, when you say you'd rely on the case law to show it's an important consideration for the Court, you're referring to the child-centered cases?

A. Yes.

Q. Okay. And do you reference any specific plaintiff in section 5?

A. I don't recall referencing a specific plaintiff.

Q. And would you say that these five factors that we just discussed, economic deprivations,

MR. GREGORY: Thank you.

Q. (BY MS. BORONOW) And I believe this is the amicus brief you wrote in Obergefell, is that accurate, as published in the Whittier Journal Of Child And Family Advocacy?

A. Yeah. The brief starts on page 7.

Q. Okay. In this amicus brief I believe you argue that the Court's equal protection jurisprudence has expressed a consistent special concern for discrimination against children, right?

A. Uh-huh.

Q. Okay.

A. I mean, I think -- I think that's one way to characterize it. I mean, this says a lot, so I just -- but, yes, the Court does express a special concern under the Fourteenth Amendment for children, in particular, in areas -- special kind of areas of constitutional sensitivity.

Q. And on page -- starting on page 18 you have a heading that says "This Court's Precedent Unequivocally Establishes That States May Not Punish Children Based On Matters Beyond Their Control."

A. Uh-huh.

Q. And in this section you cite many of the same cases you cite in this case, right?

A. Uh-huh.
Q. Plyler, Weber, Levy; is that right?
A. And you said -- what page are you on?
Q. I'm starting on page 18 --
A. Uh-huh.
Q. -- under Roman Numeral I, and then through that section, which continues on the following pages --
A. Uh-huh.
Q. -- you discuss many of the same cases that you've discussed in your expert report.
A. Uh-huh.
Q. Is that correct?
A. And that's just on page 18 or --
Q. No, page 18 and the following pages within Roman Numeral one, so I think it's 18 through 29. But, for example, on page 25, there's a paragraph that starts with, "Levy, Weber, and Plyler establish that discrimination against children cannot be justified based on moral disapproval of parents' marital or immigration status."
A. Uh-huh, yes, I see that those are some similar -- many of the same cases.
Q. And you're making a similar point here, correct, that these cases stand for the fact that discrimination cannot be justified based on moral

disapproval of parents' marital or immigration status?

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

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

now.

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

A. Uh-huh.

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

A. Uh-huh.

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

A. Uh-huh.

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

A. Uh-huh.

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

A. Uh-huh.

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

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

comes to children being harmed, and I -- and that evolution includes adding Windsor and Obergefell as well.

They make those statements that the Court is concerned about government action that marginalizes or impacts children, and I think this case, in the context of climate change, a Court could find -- this maybe a rare example, but an example of that as well, as we think about the evolution of our understanding of rights and the social science that educates us about harms and what harms us.

Q. Okay. And just to be clear, you also talk about familial formation harms, psychological harms, and economic harms, in your expert report, right, just in the context of climate change?

A. Yes.

Q. Okay. So given that you've written this amicus opinion in Obergefell, would you state your opinion that heightened scrutiny is warranted for judicial review of government action that deprives children of rights in an amicus brief?

MR. GREGORY: Objection, vague and ambiguous, incomplete hypothetical.

A. Yes, I could state it in an amicus brief.

Q. (BY MS. BORONOW) And then in that brief

could you apply the factors that you've developed in your expert report regarding when heightened scrutiny should apply to the specific examples of government climate change policies?

A. Say that again. Sorry.

Q. Sure.

So in an amicus brief, you just said that you could state your opinion that heightened scrutiny is warranted for children in certain circumstances.

A. Uh-huh.

Q. Could you then go on in that same brief to apply the various factors you've developed regarding when heightened scrutiny applies to children to government climate change policies or actions?

A. Are you talking about a brief -- at what procedural stage are you talking about an amicus brief?

Q. The trial-level stage.

A. I certainly could submit an amicus brief at the trial-level stage, like the law professor's brief, but I'm being asked to be an expert in this case.

Q. Okay.

A. I mean, I think you could do that in any context with anything, essentially. But I do think that this expert report provides a way for the Court to be able to directly engage and interrogate and ask in a

way that procedurally might not be the case in the basic classic amicus brief format. But at the end of the day I think your question is more of a question for the lawyers than for me someplace --

Q. You are --

A. -- as a strategy.

Q. You are a lawyer, though, correct?

A. This is not my case. I'm an expert in the case.

Q. Okay.

A. Yeah.

Q. So when you say a question for the lawyer, you're referring to plaintiffs' counsel?

A. Yeah, plaintiffs' counsel.

Q. Got it. Okay. And your expert report does not offer or propose a remedy in this case, does it?

A. I think the report provides a pathway or a vehicle or a way for the Court to think about these issues. The cases that are cited could be instructive in what that remedy might look like, if you think about Brown v. Board of Education or Levy v. Louisiana and the -- the cases -- the series of cases subsequent to Levy v. Louisiana and how the Court ultimately -- as a result of those decisions, we ended up with a paternity framework for children.