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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 6:18-cv-01860-MC **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVE MOTION FOR STAY** *Request for Oral Argument*

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INTRODUCTION

Before the court is defendants' motion to dismiss this case for lack of jurisdiction and for failure to state a claim. For the purposes of this motion, the court must assume that climate change is happening, defendants' affirmative actions are exacerbating it, and climate change is ruining and will continue to ruin publicly owned wild lands throughout this country. The focus, then, should be on defining the scope of an individual right that is deeply rooted in American history and tradition—the individual right to be let alone in wilderness, which is fundamental to the meaningful exercise of the right to liberty and autonomy guaranteed by the Fifth, Ninth, and First Amendments of the Constitution. For simplicity sake, plaintiffs refer to this right as the "right to wilderness." Without wilderness, there is no baseline against which to determine whether the long-recognized substantive due process right to be let alone has been meaningfully infringed.

Like most constitutional rights, the problem the right to wilderness protects is more complex and nuanced than the label itself suggests. Exercising the right requires in-tact ecosystems throughout the National Parks, National Forests, publicly owned rangelands, Wilderness Study Areas, wildlife refuges and management areas, and National Historic Sites, National Recreation Areas, and other federally owned wild lands identified in plaintiffs' complaint.

For most of the Nation's history, sufficient wilderness existed that there was little recognized need to formally protect it. Once the specter of widespread despoliation was recognized, defendants initiated an ever-expanding protective regime to ensure that federal wild lands would remain an enduring place of natural solitude for the American people. Now, under

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threat of anthropogenic climate change and the defendants' current policies, that heritage faces widespread, irreversible impairment.

That the right to wilderness has yet to be recognized by the United States Supreme Court should not be fatal to plaintiffs' case at this early stage in the litigation. The Supreme Court does not have occasion to address constitutional rights unless and until a case presenting the issue comes before it. Take, for example, the right to bear arms, which the Court addressed for the first time in 2008. *See District of Columbia et al. v. Heller*, 554 U.S. 570, 625 (2008) (acknowledging that the right to bear arms was a "significant matter" that had "been for so long judicially unresolved"). Almost 150 years passed before the Court struck down a statute on First Amendment grounds. *See id.* at 626 (recognizing that the Court "first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified"). While recognizing the right to wilderness will most certainly raise a whole host of new questions, this court must not decline to "make a sound decision today, for fear of having to draw a sound distinction tomorrow." Eugene Volokh, *The Mechanism of Slippery Slope*, 116 Harv. L.R. 1026, 1030 (2002) (quoting Roy Schotland).

Nor should the systemic nature of the problem prevent this court from trying to remedy it. The scope and gravity of the growing threat is unprecedented. Sometimes, the only way to fix something is to see it from a new perspective—to think outside the box, so to speak. Sometimes, nothing short of revolutionary thinking will do.

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ARGUMENT

I. The court has jurisdiction.

Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an action if the court lacks subject matter jurisdiction. The party seeking to invoke jurisdiction bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Where, as here, defendants challenge jurisdiction, including Article III standing, at the pleading stage without disputing the facts alleged in the complaint, the court should accept as true all material allegations and draw all reasonable inferences from those allegations in plaintiffs' favor. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011).

The question at this early junction in the litigation is whether plaintiffs have *alleged* facts establishing jurisdiction. As explained next, they have done so here.

A. Plaintiffs have standing to enforce their own constitutional rights to wilderness.

To demonstrate standing to sue, plaintiffs must show (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to defendants' challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must support each element of the standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Accordingly, at the motion to dismiss stage "general allegations" suffice to establish standing because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Id*.

"Although standing in no way depends on the merits of [the] plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth*

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v. Seldin, 422 U.S. 490, 500 (1975) (citation omitted); *see also Maya*, 658 F.3d at 1068 ("the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim"). The claims asserted here are *constitutional claims*, and defendants' effort to conflate the merits of plaintiffs' cause of action with the required showing of injury in fact does not change that fact. In this case, then, the standing inquiry turns not on the merits of the alleged constitutional violations but on whether plaintiffs have alleged that their constitutional rights are actually being or imminently will be violated; that the violations are traceable to defendants; and that they are redressable by the court. As explained next, they are.

1. Plaintiffs' constitutional rights have actually been infringed by and continue to be infringed by defendants' conduct

Although an injury must be real or threatened, it does not need to be substantial—Supreme Court precedent instead places the injury bar low in order to ensure that "important interests are vindicated." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (where "a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax" were sufficient to establish standing to litigate plaintiffs' claims). Defendants' argument—that standing can never exist where a plaintiff *other than a state* alleges injuries resulting from climate change—is not supported by the Supreme Court's environmental precedent and would have broad implications for standing jurisprudence generally.

Relying on *Massachusetts v. EPA (Mass)*, defendants argue that plaintiffs' injuries are "quintessential generalized grievances" because "climate change is a diffuse, global phenomenon that affects every person in Plaintiffs' communities, the United States, and the world." ECF No. 66, p. 10. *Mass* does not support defendants' position. In that case, the Supreme Court made it clear that just because a harm is "widely shared does not necessarily render it a generalized

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grievance." *See Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). To the contrary, the Court explained, it makes no difference whether the injury is one that everyone suffers so long as "the party bringing suit shows that the action injures him in a concrete and personal way." *Id*. at 517.

Ctr. For Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466 (D.C. Cir. 2009), another case defendants rely on, does not support their position either. In that case, the D.C. Circuit denied standing to the Native Village of Point Hope, a federally recognized tribal government, because it "did not allege anywhere that it . . . suffered its own individual harm apart from the general harm caused by climate change and its derivative effects." *Ctr. For Biological Diversity*, 563 F.3d at 478. In this case, by contrast, plaintiffs allege that they suffer concrete, personal injuries as a result of climate change and its effects on federal lands.

For example:

- On a recent ice climbing trip, international outdoor adventurer plaintiff Will Gadd "feared for his safety because warming temperatures had made the ice unexpectedly soft." ECF No. 28 at ¶ 9-10. Mr. Gadd has cancelled trips due sudden storms and wildfire and will continue to cancel important trips because the defendants' affirmative actions to exacerbate the climate crisis are infringing on his individual constitutional right to wilderness. These actions have prevented and will continue to prevent him from reasonably and safely accessing the wilderness on which he relies for his physical and mental wellbeing as well as his economic status and global reputation as an outdoor adventurer and educator. *Id.*

- For eleven-year-old plaintiff Willow Phelps, storm surges and extreme weather events "have caused a significant increase in water in and around [her] home," which has combined with warmer temperatures to extend insect habitat in and around her home. *Id.* at ¶ 17. As a result, Ms. Phelps must spray herself with insect repellant, exposing herself to harmful chemicals, in order to commune with nature safely. *Id.* In addition, Ms. Phelps has been forced to refrain from surfing in United States waters due to her reasonable fear of unpredictable storm surges, which threaten her safety by causing dangerous undertows and big waves. *Id.* at 18. As climate change causes increasingly unpredictable weather patterns caused by warmer ocean temperatures, Ms. Phelps' fear is likely to continue, causing her to continually refrain from swimming and surfing in the Atlantic Ocean. *Id.* Defendants' actions to exacerbate climate change are infringing on and continue to infringe on Ms. Phelps' individual right to wilderness.

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- Plaintiff Christy Hawkins uses "solitary excursions" in nature to treat her depression, experiences that have become more dangerous due to "increased frequency and severity of wildfires due to climate change" in and around her Oregon home. *Id.* at ¶ 19, 23. Ms. Hawkins and her children have experienced "headaches and sore throats" after cycling in the vicinity of multiple unavoidable wildfires in Oregon wilderness areas, areas which she would return to if safe access were possible. *Id.* at 24. "Unable to unwind and unplug in the quite beauty of wilderness as often as necessary for her mental health," Ms. Hawkin's "stress levels have increased" as a result of defendants' affirmative actions that exacerbate and their failure to stem the severity of climate change and protect her individual right to wilderness. *Id.* at 25.

- Plaintiff Julia Tock has been caught in and will continue to be subject to unpredictable weather events with increasing frequency as she climbs rocks and hikes in wilderness. *Id.* at ¶ 33-34. Hotter summers and more frequent wildfires have "limited both the window of time and the number of locations suitable for mountaineering," forcing Ms. Tok "to congregate in the same elevated areas at the same early morning hours where and when the heat is not as oppressive." *Id.* at ¶ 35. Such crowded conditions degrade the public lands that Ms. Tok frequents and detract from the peace and solitude on which she relies for her mental well-being, infringing on her individual right to wilderness. *Id.*

- Plaintiff Cody Shotola-Schiewe is a mountaineering guide. *Id.* at ¶ 36. Climate change has caused a number of his ice-climbing routes to melt, which has significantly decreased the number of safe climbing routes to which he has access. *Id.* at ¶ 38. The remaining safe routes have become increasingly popular and crowded, which not only prevent Mr. Shotola-Schiewe from having the solitary, meditative experience he seeks when he is not working but also increases the danger of rock fall and avalanche, hindering his ability to make a living as a mountaineering guide. *Id.* Mr. Shotola-Schiewe's injuries will continue if defendants continue to actively exacerbate climate change and continue, as a result, to infringe on his individual right to wilderness.

In *Federal Election Commission v. Akins*, the Court gave context to the notion of a generalized grievance, explaining that petitioners lack standing "in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience of law.'" 524 U.S. 11, 23 (1988) (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)); *see also Lujan*, 504 U.S. at 573-74. The Court in *Akins* went on to explain that "[o]ften the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is

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concrete, though widely shared, the Court has found 'injury in fact.'" 524 U.S. at 24. As examples of widely shared but concrete injuries, the Court listed "a widespread mass tort" or "where large numbers of voters suffer interference with voting rights conferred by law." *Id*. If the court were to adopt defendants' argument, then it would follow that an individual taxpayer would not have standing to challenge an illegal tax on the entire population even though the individual is personally subject to a financial liability as a result of the illegal tax. Such result would have wide-ranging implications on standing jurisprudence in all cases, not only those involving environmental concerns.[1]

Plaintiffs allege continuing and ongoing injuries to their aesthetic, recreational, personal, and economic interests *and* to their individual constitutional rights. These injuries are concrete and particularized because they are personal to each plaintiff and not abstract or indefinite. *See also Juliana v. United States*, 217 F. Supp. 3d 1224, 1243 (D. Or. 2016) [hereinafter *Juliana 1*]; *cf. Virginia House of Delegates v. Bethune-Hill*, ___ S. Ct. ____ 2019 LEXIS 4174 (June 17, 2019) (finding that the Virginia House of Delegates lacked standing to challenge the State's redistricting map because it could only show an abstract constitutional violation, not a claim involving an *individual* constitutional right). Moreover, plaintiffs' constitutional injuries are likely to continue unabated, as climate change will only worsen impacts to wild lands absent

[1] Defendants also point to a copyright enforcement case to argue that the plaintiffs' request for remedies may require an international treaty, thus "representative branch powers are necessary to effectively address climate change." ECF No. 66, p. 11 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). Speculation about the appropriate remedy does not support dismissal of a complaint at this early stage. *Baker v. Carr,* 369 U.S. 185, 198 (1962). Appropriate remedy, moreover, is not relevant to injury-in-fact analysis and is therefore misplaced in this section of the defendants' brief.

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affirmative intervention by the United States Government. Plaintiffs have satisfied the actual-injury prong of the standing test.

2. The alleged constitutional injuries are fairly traceable to defendants' affirmative actions and inactions.

The second prong of the standing test requires a showing of causation in that a plaintiff must show her alleged injury is "fairly traceable" to the challenged conduct of the defendant and "not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. A causal chain does not fail simply because it has several links, provided they are "not hypothetical or tenuous and remain plausible." *Wash. Envtl. Council v. Bellon*, 732 F.3d. 1131, 1143 (9th Cir. 2013). In addition, under *Massachusetts v. EPA,* causation sufficient to support Article III standing requires more than a *de minimis* contribution to the climate crisis. 549 U.S. 497 (2007).

The complaint in this case alleges a direct causal connection between defendants' affirmative actions and inactions and the injuries plaintiffs have suffered. For example, the complaint alleges, and defendants do not dispute, that climate change is causing increased temperatures (¶ 49), changes in precipitation and snow pack (§ V(D)), flooding and storm damages (¶ 52), increased wildfires (§ V(E)), disruptions to ecosystems (¶ 60, 61, § V(F)), and decreases in forest productivity (§ V(H)(3)), among other things. *See* ECF No. 28.

In arguing to the contrary, defendants do not contest that greenhouse gas emissions are causally linked to global warming and detrimental climate change. *See generally* ECF No. 66; *see also Massachusetts*, 549 U.S. at 507-09; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011); 74 Fed. Reg. at 66524-66535. Indeed, they admit that "[e]ach additional ton of greenhouse gases emitted commits us to further change and greater risks." 77 Fed. Reg.

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72, pp. 22392, 22395 (Apr. 13, 2012); *see also* 72 Fed. Reg. 60, p. 14867 (March 29, 2007) (there is "a general consensus among the world's best scientists that climate change is occurring" and "the magnitude of warming in the northern Rocky Mountains has been particularly great"); U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, 1045 (2018), *available at* https://nca2018.globalchange.gov/downloads/NCA4_Ch24_Northwest_Full.pdf ("Forests in the interior Northwest are changing rapidly because of increasing wildfire and insect and disease damage, attributed largely to a changing climate."); Id. ("Increased wildfire occurrence is projected to degrade air quality and reduce the opportunity for and enjoyment of all outdoor recreation activities, such as camping, biking, hiking, youth sports, and hunting.")

Relying on *Bellon,* defendants argue instead that there is no support for the contention that they are a cause of the problem. In *Bellon*, the Ninth Circuit declined to compel Washington state agencies to regulate greenhouse gas emissions more stringently through the Clean Air Act. 732 F.3d at 1135. On the basis of a complete factual record after the parties cross-moved for summary judgment, the Ninth Circuit reversed the trial court's decision finding standing because, he court concluded, the plaintiffs had failed to prove that the federal agencies caused climate change simply by failing to regulate oil refineries. *Id.* at 1147. The summary judgment record reflected that Washington state oil refineries were only responsible for six percent of greenhouse gas emissions from Washington State. *Id.* The Ninth Circuit concluded that reducing Washington State emissions by six percent could not mitigate the plaintiffs' injuries because it could never be enough to mitigate the impacts of climate change globally.

This case is distinguishable from *Bellon* for two reasons. First, this case is before the court on a pleading motion, not a motion for summary judgment. At the pleading stage, the issue

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of causation is "best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed as a threshold question of constitutional standing." *Am. Elec. Power Co., Inc. v. Connecticut*, 563 U.S. 410, 429 (2011). Plaintiffs have alleged, over the course of their 73-page complaint, that defendants' affirmative actions to subsidize, promote, ensure price support, permit, lease, or otherwise encourage deforestation, animal agriculture, and fossil fuel development on federal lands have caused or contributed to the worst impacts of climate change on federal lands. *See* ECF No. 28. Climate change, in turn, destroys wilderness, and wilderness destruction has the snowball effect of further destroying wilderness, exacerbating the problem. *Id.* As a result of their *affirmative actions*—not just their failure to regulate—defendants have infringed on plaintiffs' right to wilderness. More than that, defendants have directly benefited from infringing on plaintiffs' right to wilderness because timber, leasing, and grazing rights raise revenue. *Id.*

Plaintiffs also allege that through their deliberate decisions to subsidize agricultural farming practices on public lands (§ V(H)(2)), lease federally owned lands for fossil fuel development and production (§ V(H)(1)), and permit the logging of old growth forests (§ V(H)(3)), defendants' affirmative actions have significantly contributed and will continue to exacerbate the climate crisis. Plaintiffs allege that, over the last decade, "the lifecycle emissions associated with publicly-owned fossil fuel resources amounted to 20 percent of all U.S. greenhouse gas emissions." ECF No. 28, ¶ 125. In 2016, nine percent of U.S. greenhouse gas emissions came from agriculture. *Id*. at ¶ 158. Converting old-growth forests into younger-growth forest plantations results in a forest capable of only 31 percent of its carbon sequestration potential. *Id*. at ¶ 186. Therefore, federally-permitted, subsidized, and promoted commercial logging reduces the carbon storage potential of U.S. forests by 42 percent. *Id.* at ¶ 191.

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Accordingly, at this early stage of the litigation, plaintiffs have alleged much more than the *di minimis* contribution to this global problem at issue in *Bellon*.

Plaintiffs have also alleged a sufficient causal connection between defendants' affirmative actions and plaintiffs' injuries, separate from the activities of third parties. To be sure, third parties may execute many of the federal policies plaintiffs identified in the complaint, but defendants alone have permitted these climate change-causing activities to occur on federally owned public lands. *Cf. Warth*, 422 U.S. at 504-05 (concluding that striking down a zoning ordinance would not necessarily result in construction of affordable housing because third party builders decide what houses to build). *Only defendants* have the means to end the federal permission, subsidization, encouragement, and promotion of animal agriculture, fossil fuel development, and deforestation on public lands. Therefore, plaintiffs allege that defendants' activities in three areas have caused and will continue to cause injury to plaintiffs' constitutional right to be let alone in the wilderness. Third parties do not violate constitutional rights. That is something only the government can do. Plaintiffs have adequately pled the causal link between defendants' affirmative actions and their constitutional injuries and are prepared to prove at trial that enjoining these actions will mitigate climate change and redress their injuries.

3. The constitutional injuries (like all constitutional injuries) must be redressed.

The judiciary must design remedies to redress, in whole or in part, systemic violations of constitutional rights, even when it's difficult to do so. *See Jenny L. Flores v. Jefferson B. Sessions, III, et al.* Order Appointing Special Master/Independent Monitor, Case No. 2:895-cv-04544-DMR-AGR, DKT No. 494 (C.D. Cal. Oct. 10, 2018) (appointing a special master to oversee the U.S. Customs and Border Patrol's implementation of remedies designed to protect

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immigrants' constitutional rights); *Brown v. Plata*, 563 U.S. 493 (2011) (requiring the State of California to decrease its prison population to a certain percentage); *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (enjoining local governments to desegregate schools and appointing a special master to ensure timely compliance). The redressability element can be satisfied by showing that the requested remedy would "slow or reduce" the harm. *Massachusetts*, 549 U.S. at 525 (citing *Larson v. Valente*, 456 U.S. 228, 243 (1982)). Thus, a plaintiff need only a *substantial likelihood* that the injury is redressable to *some* extent. *Bellon*, 732 F.3d at 1142.

Plaintiffs seek declaratory and injunctive relief designed to redress the systematic deprivation of their constitutional right to wilderness. ECF No. 66, p. 71, 72 (praying for an injunction to "phase out fossil fuel extraction, animal agriculture, and commercial logging of old-growth forests on federal lands;" compel the Government to "consider the impacts to wilderness areas in its decision-making related to family planning policies;" strike down Executive Order 13783; and "appoint a special master to facilitate the immediate review of potential Wilderness Areas for designation as a means to reduce the impacts of climate change on wilderness"). Plaintiffs allege that this relief will ensure the protection of constitutionally required wild spaces, the conservation of which will not only redress plaintiffs' injuries but also mitigate the impacts of climate change. The court must accept these allegations as true.

Defendants suggest that plaintiffs' grievances would fit better if they were made through multiple suits under various federal statutes that govern agency practice, none of which require evaluation of climate change impacts or wilderness degradation. ECF No. 66, p. 19. Their suggestion proves too much. For decades, defendants have recklessly disregarded the direct impacts of their actions, which have catapulted the United States into the climate crisis that has caused and will continue to cause plaintiffs' injuries. Statutes must yield to constitutional rights

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before being enforced in a way that infringes upon them, and only the court can remedy the systemic, ongoing violations of plaintiffs' constitutional rights.

4. Seeding Sovereignty has standing to sue on behalf of its members.

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth*, 422 U.S. at 511. Associational standing requires that (1) at least one member has standing, in his own right, to present a claim asserted by the association; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit. *Hunt v. Wash. State Adver. Comm'n*, 432 U.S. 333, 343 (1977). Without explicitly saying it, defendants suggest that Seeding Sovereignty fails to satisfy prongs one and three of the *Hunt* test.[2]

Defendants contend that Seeding Sovereignty does not have organizational standing because the complaint fails to specifically identify a member with individual standing. ECF No. 66, p. 9. There is no support for this argument. To the contrary, in *NAACP v. Ameriquest Mortg. CO.*, 635 F. Supp. 2d 1096 (C.D. Cal. 2009), the court declined to impose such a burden on the NAACP under prong one of the *Hunt* test when it challenged, on behalf of its members and in its own name, the government's discriminatory housing practices under various federal laws. *Id.* at 1102. In doing so, the court recognized that the *Hunt* test expressly permits the NAACP to stand in the shoes of its members and does not require the participation of a member as a plaintiff in the lawsuit itself.

[2] Defendants do not contend that Animal Legal Defense Fund lacks standing.

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Similarly, the *NAACP* court declined to require the participation of individual members under the third prong of the *Hunt* test. *Id.* at 1102-03; *see also Int'l Union v. Brock*, 477 U.S. 274, 287-88 (1986). According to the court, the third prong "is best seen as focusing [] on matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id.* (citing *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996)). Thus, "once an association has satisfied Hunt's first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more." *Id.*

Seeding Sovereignty has pled facts sufficient to meet each prong of the *Hunt* test at this early stage of the litigation.[3] First, Seeding Sovereignty's members would have standing, in their own right, to present a claim asserted by the association. Indeed, the complaint alleges that climate change threatens the indigenous way of life, because indigenous people, like Seeding Sovereignty's members, cannot live and carry out their cultural traditions if wild spaces disappear. This threatens tribal identity and sovereignty. ECF No. 28, ¶ 12. Second, protecting wilderness from climate change is germane to Seeding Sovereignty's purpose because, as part of its organizational mission, Seeding Sovereignty educates the public and engages in social and legislative activism about the need to "mitigate the impacts of climate change because loss of wilderness and wild places has historically "caused and will continue to cause direct and sustaining injury to Indigenous people's health, well-being, and ways of life." *Id.* at ¶ 12. Third, Seeding Sovereignty's individual members need not participate in this lawsuit to effect the

[3] Should the court disagree, plaintiffs respectfully request leave to amend to more specifically allege that the injuries to Indigenous peoples identified in the operative complaint have happened and continue to happen to Seeding Sovereignty members.

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remedies it seeks, as it does not seek damages of any sort. *See NAACP*, 635 F. Supp. at 1104. The court can grant declaratory and injunctive relief without the names of Seeding Sovereignty's members. *Id.* Because Seeding Sovereignty has pled facts sufficient to establish the factors required in *Hunt*, it has organizational standing to sue on behalf of its members.

B. The political-question doctrine does not bar this suit.

The United States Constitution commits to the courts the task of defining and enforcing constitutional rights. *Marbury v. Madison*, 5 U.S. 137, 170 (1803). That makes *this court*—not Congress or the various federal agencies—the proper forum for determining the scope and nature of rights protected by the Fifth, Ninth, and First Amendments to the Constitution. In their motion, defendants make a fallback jurisdictional argument urging the court to dismiss this case because of the difficult questions raised by plaintiffs' proposed remedies to the constitutional rights at issue. But, of course, the political-question doctrine was not designed to prevent courts from doing their quintessential job of construing and enforcing constitutional rights just because the remedy might implicate policy concerns. *See Juliana 1*, 217 F. Supp. 3d at 1235 (citing 1 Alexis de Tocqueville, Democracy in America 440 (Liberty Fund 2012) ("There is hardly any political question in the United States that sooner or later does not turn into a judicial question."). Indeed, defendants have not pointed the court to any instance, not a single one, in which a court has determined that the scope and nature of a *constitutional right* constitutes a political question. Nor can they. Federal courts quite regularly adjudicate constitutional claims "that arise in connection with politically charged issues." *Juliana 1*, 217 F. Supp. 3d at 1236 (internal citations omitted).

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In *Baker v. Carr*, the Supreme Court distilled decades of precedent on the political-question doctrine into six categories of questions that indicate the presence of a nonjusticiable political question, three of which are implicated by defendants' motion:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards for resolving it;
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

369 U.S. at 217.

If the questions presented in this case fall into any of these three categories of political questions, the court should decline to reach the question and should instead "permit policy makers in the identified branch" opportunity to address the issue. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). A case should not be dismissed, however, just because it "raises an issue of great importance to the political branches." *U.S. Dep't of Commerce v. Montana,* 503 U.S. 442, 458 (1992). It should be dismissed only if one of the categories of political questions is "inextricable from the case." *Baker*, 369 U.S. at 217. "The decision to deny access to judicial relief" is never made "lightly," because federal courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Alperin v. Vatican Bank*, 410 F.3d 532, 539 (9th Cir. 2005).

For these reasons, the Supreme Court rarely invokes the political-question doctrine. In the handful of cases where the Supreme Court has declined federal jurisdiction because it fell in the first category described above, the textually demonstrable decision to commit the issue to another branch has been clear and unambiguous. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (holding that the Constitution vests to the executive branch the exclusive power

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to receive ambassadors and negotiate treaties); *Nixon v. United States*, 506 U.S. 224 (1993) (declining to decide whether the Senate had properly conducted an evidentiary proceeding during the impeachment trial of a federal judge because the Constitution vested "the sole Power to try all impeachments" in the Senate); *Davis v. Passman*, 442 U.S. 228, 235, n.11 (1979) (finding that the Speech and Debate Clause immunizes statements made by Senators and Representatives from judicial review). Unlike *Zivotofsky, Nixon, and Davis*, in this case, there is no constitutional provision supporting a textual commitment to the legislative or executive to evaluate the merits of plaintiffs' constitutional claims There are, however, constitutional provisions committing to *individuals* certain rights under the First and Fifth Amendments, which is what this case is really about. It follows that this case does not fall within the first Baker category.

Under the second and third *Baker* categories listed above, the court must abstain when a dispute calls for "decision making beyond [the] court's competence." *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring). "When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a *political* branch, resolution of the suit is beyond the *judicial* role envisioned by Article III." *Id.* The defendants' arguments under the second and third *Baker* categories can be distilled into two main arguments, which plaintiffs address in turn.

First, defendants contend that the court cannot determine "how much the Nation's GHG should be reduced to address global climate change" without making policy determinations about how to weigh competing economic and environmental concerns. ECF No. 66, p. 23. But plaintiffs are not asking this court to pinpoint the best emissions level; they are asking the court to require defendants to take specific actions to reduce climate change impacts on wilderness, such as phasing out fossil fuel extraction on federally owned lands, preventing the use of federal

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lands for animal agriculture, and prohibiting the logging federally-managed forests. ECF No. 28, p. 72. Whether those prohibitions could mitigate the impacts of climate change on wilderness degradation – thus protecting the right to wilderness – is a question this court is equipped to answer.[4] The science may be complex, but "the political question inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate . . . claims in a reasoned manner." *Alperin*, 410 F.3d at 555.

Courts have tackled difficult factual questions and fashioned complex remedies in response to systemic substantive due process violations before, and this court is well-equipped to do so now. *See generally Brown v. Plata*, 563 U.S. 493 (2011) (upholding the structural injunction imposed by the lower court to require the governor of the State of California to reduce overcrowding in its prisons to remedy the resulting lack of care available for appellee prisoners with serious medical and psychological conditions); *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (appointing a special master to oversee the integration of public schools in Kansas); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (creating a new test to evaluate the constitutionality of local restrictions on a woman's right to bodily autonomy). If the federal judiciary can depopulate prison systems, desegregate public schools, and limit abortion restrictions, then it can protect public wilderness areas from ruin. There is a legal backdrop upon which the court can analyze and remedy the constitutional claims at issue here.

[4] In any case, the court cannot say on the face of the pleadings that the question is unanswerable as a matter of law, which is what the court would need to do to accept defendants' arguments at this stage in the proceedings.

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Second, defendants claim the court would have to choose "which federal agencies should promulgate regulations or alter their modes of operation" and "what is the appropriate level of funding for such efforts." ECF No. 66, p. 23. This argument ignores the relief plaintiffs ask for in their prayer.[5] ECF No. 28, p. 71-72. At its core, plaintiffs are simply asking the court to declare that defendants are violating their constitutional rights by contributing to the degradation of public wilderness areas, and if the court agrees, to require defendants to stop doing so and to prescribe practical remedies designed to redress the ongoing constitutional violations. Defendants rely on the City of Oakland's private nuisance action against BP Oil and other fossil fuel producers to justify its request for abstention under the political-question doctrine, but that case is materially distinguishable from this one. *See City of Oakland, et al. v. BP P.L.C., et al.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *appeal docketed,* No. 18-16663 (9th Cir. Sept. 4, 2018). In Oakland's nuisance action, the trial court concluded that, while the private sale of fossil fuels likely contributed to global warming, the court could not characterize state-sanctioned activity as a public nuisance, in part because the Clean Air Act expressly displaced federal nuisance actions stemming from emissions of covered air pollutants. *Id*. at 1024. Oakland's public nuisance action against private fossil fuel developers is distinguishable from plaintiffs' constitutional claims against the Government, as no federal statute displaces their right to redress of constitutionally protected injuries.

[5] Defendants spend some time arguing that plaintiffs' are not entitled to a "national remedial plan" to recover the climate, but plaintiffs do not pray for such relief. Although plaintiffs refer to a "national remedial plan" in the introduction to their complaint, they do not ask for that relief in their prayer. Its inclusion was a mistake, and plaintiffs withdraw any request for a national remedial plan implied by the introduction of the complaint.

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The court should reject defendants' political-question doctrine arguments and should deny their motion to dismiss on this ground.

II. Plaintiffs have stated constitutional claims.

When considering a motion to dismiss Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in favor of the plaintiff, and its factual allegations are taken as true. *Daniels-Hall v. Nat'l Educ. Ass'n.,* 629 F.3d 992, 998 (9th Cir. 2010). "[F]or a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 563 (2007). Because plaintiffs' complaint pleads facts supporting a facially plausible constitutional claim, defendants' motion should be denied.[6]

A. The right to wilderness is protected by the Fifth Amendment.

The Due Process Clause of the Fifth Amendment protects the substantive rights of individual Americans to life, liberty, and property. This case presents an issue of first

[6] Including materials outside the complaint does not convert a motion to dismiss to a summary judgement motion where such materials are items on which the complaint necessarily relied or are matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

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impression—whether the right to wilderness is incorporated in one or more of these due process concerns.[7] When determining whether a previously unrecognized right implicates due process concerns, the analysis turns on whether the right is "fundamental to *our* scheme or ordered liberty . . . **or** . . . deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (italics in original; bold emphasis added).[8] As explained below, the right to wilderness fits within both of these *alternative* theories. The preservation of wilderness for the use and enjoyment of present and future generations of Americans is fundamental to our scheme of ordered liberty *and* deeply rooted in this Nation's history and tradition.[9]

1. Wilderness is fundamental to our ordered scheme of liberty and formulates the baseline for substantive due process.

Defendants question the coherence of a concept (solitude) that is a given, enshrined by Congress in the Wilderness Act and enforced by defendants in courts every day. That concept is not a specific environment, but rather a range of wilderness or nature that was always assumed,

[7] The fact that this case presents an issue of first impression makes dismissal under Rule 12(b)(6) particularly inappropriate. As the Ninth Circuit has recognized, "dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development[.]" *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th. Cir. 2004) (internal citations omitted).

[8] Defendants misstate the applicable standard for discerning the existence of a Substantive Due Process right under the Fifth Amendment by suggesting that an asserted right must be *both* deeply rooted in history and tradition and implicit in ordered liberty. ECF No. 66, p. 29. As the use of "or" makes clear, these are *alternative* theories. It need not be both.

[9] Plaintiff opposing a 12(b)(6) motion may "submit materials outside the pleadings to illustrate the facts the party expects to be able to prove." *Geinosky v. City of Chicago*, 675 F.3d 743745 n.1 (7th Cir. 2012).

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and relied upon, especially by the framers of the Declaration of Independence and the Constitution. The language of that concept matches United States constitutional jurisprudence applying the authoritative test for liberty and autonomy, jurisprudence that establishes and relies upon a continuum or spectrum, and which orients from the Court's articulation of being "let alone." *See Roe v. Wade*, 410 U.S. 113, 169 (1973). Language that captures the idea of being actually "let alone," or free from others, or in solitude, or any number of ways of describing it, is capturing the logical endpoint and anchor of conceptual orientation that makes concepts like the continuum of liberty and autonomy coherent. How else would be know that we are more or less alone, or that one place is more wild than another, without that endpoint to orient our thinking? How else can we justify the fundamental right of privacy (or for some who see a change in the jurisprudence after *Lawrence v. Texas,* 539 U.S. 558 (2003), liberty) as it appears in modern substantive due process? Could the vague fundamental right to privacy or liberty the Court invokes on occasion as a right protecting interests inside the polity, be tacitly speaking to (and bundled together with) the value of relative autonomy outside of the polity?

All of this points to a core issue in the case: Defendants' argument removes the experience or state of affairs of actually being let alone, or the nexus between the solitude referred to in the Wilderness Act and the Court's test of "being let alone" as the anchoring point of orientation for the continuum of liberty and privacy. That move, pulling away the endpoint, creates a serious baseline problem. *See* Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987). If we don't anchor our continuum of being let alone from wilderness, what baseline do we use instead? Does the continuum become unhinged without it, and with no reference point in the world around us? That would flout everything the Court has implied about the continuum.

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In *Lawrence v. Texas*, Justice Kennedy used the oft-critiqued statement from *Planned Parenthood v. Casey* which described the heart of U.S. constitutional liberty as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," to question whether "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.?" 539 U.S. at 574. Are these claims meaningless as some have said? Consider that the Court's description of liberty in *Lawrence* ties back to *Griswold v. Connecticut and Olmstead v. United States* before it. Simplified, the Casey quote describes what the Court in *Griswold*, and Justice Brandeis in his dissent in *Olmstead*, described as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)). One cannot seriously argue that this is a meaningless statement, any more than one can argue that the statement "leave me alone" is meaningless. Defining one's self and one's concepts, or being autonomous and self-determining, is like defining anything else; it is the act of setting the thing apart from its surroundings to permit an identity. That said, there are degrees of being let alone.

> A woman permitted by the state to terminate her pregnancy without interference from that state and others is left alone more than if she were not permitted to do it. But she is not literally alone. She is still part of the system of rights and duties and is not alone in that sense. The state and others are ready to swoop down upon her if she acts in certain other ways. Being literally let alone, or autonomous and self-determining, would only be possible outside of the system of rights and duties, and indeed, beyond the control and influence of others. I am hardly "let alone" in my fenced backyard, relative to how I would be "let alone" to explore a wilderness free of human influence. Carter Dillard, *The Primary Right*, 29 Pace Envtl. L. Rev. 860, 891, n.31 (2012).

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Put simply: Without wilderness, there is no baseline against which to determine whether the right to be let alone has been meaningfully infringed.

Defendants fail to address these cases, and in fact, cannot say the right to be let alone does not already exist. What defendants are really saying is that the continuum exists, but wilderness cannot serve as the baseline. If that is true, it cannot be reconciled with what Congress, the courts, and defendants have said constitutes solitude in the myriad cases redressing substantive due process rights to privacy. In short, defendants are taking the unhinged position that the continuum of liberty and autonomy occurs in some abstract reality outside of our physical environment, when the result of that position exacerbates a threat to our national security. Indeed, defendants admit that unaddressed climate change eliminates wilderness and poses a national security risk equivalent to that of "[c]atastrophic attack on the U.S. homeland or critical infrastructure[,]" which undercuts the premise of Lockean social contract. ECF No. 28, ¶ 116. Pres. Barack Obama, *National Security Strategy* 3 (2015), *available at* http://nssarchive.us/wp-content/uploads/2015/02/2015.pdf.

Of course, the human brain is given to certain biases and cognitive distortions that make palpable and obvious to us certain and specific threats to being let alone, like the threat of state enforcement dealt with in many of the cases above. Perhaps those limitations are why we are faced with climate crises today. But we should not let those cognitive biases lead us to ignore more amorphous, slow-moving and ethereal threats like climate change, which those threats pose a *far greater* threat to human freedom and wellbeing than isolated actions by the state. This court is well positioned to account for those cognitive limitations, and to simply apply the objective logic of liberty – that being let alone means being let alone - in this case. The separation of powers and independent judiciary were designed for a case like this - where defendants are a

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threat to national security and ask this court to eliminate the institutional divide that cabins the subjectivity of the political branches with the objectivity and baseline-oriented conceptions of liberty, autonomy and law.

2. The Framers regarded the right to be let alone commensurate with the right to wilderness.

European colonists arrived in the "wilds" of the "New World" highly conscious of John Locke's conception of the state of nature and understood it literally as a state that "did exist at the time of his writing, amongst the Indians of America." Joshua Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. of Pol., No. 4, 985, 993-94 (Nov. 1996); Arneil, *All the World Was America* (1992). Under Locke's theory, as explained in more detail in the complaint (ECF No. 28, p. 60), retreat to the "state of nature" is necessary for people to freely provide, or revoke, consent to subjugate some personal liberty in favor of the benefits of social organization. John Locke, *The Second Treatise on Government* 35-36 (1690). Indeed, many colonial charters included the right to exit and form a new community or state. ECF No. 28, p. 61. Early Americans considered the freedom to travel guaranteed by the Fifth Amendment to be a subsidiary element of the fundamental right to wilderness. "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Kent v. Dulles*, 357 U.S. 116, 126 (1958).[10]

[10] In their motion (ECF No. 66, p. 29), defendants misunderstand what plaintiffs intend by "exit". They do not claim a right to secede from the U.S. or escape to an ungoverned sanctuary, but rather a right to access and experience wilderness, which is a modern, limited analogue, and the closest available approximation, to exit described in Locke's social contract theory.

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From both a practical and philosophical standpoint, open public wild lands were essential to early European settlers. *See, e.g.*, Gordon Wood, *The American Revolution* 22 (2002) (by closing the western frontier to unrestricted settlement, the British Royal Proclamation of 1763 resolving French and Indian War was a primary driver of the Revolutionary War). It was specifically and intentionally within this environmental setting that the colonists sought to form a representative democracy distinct from the European governing structures that existed on European lands that had already been denuded of wilderness for hundreds of years. The existence and proximity to wilderness was critical to developing as a polity protective of individual rights, autonomy and privacy that explicitly embodied Lockean principals in the Declaration of Independence. *See* ECF No. 28, ¶ 239-40.

The framers of the Declaration of Independence—the "We" who held "certain inalienable rights" "to be self-evident"—understood that these rights included the antecedent conditions necessary for "Consent of the governed" to be validly offered, which included the perpetual existence of wilderness to "secure the Blessings of Liberty to ourselves and our Posterity." THE DECLARATION OF INDEPENDENCE, para 2 (U.S. 1776). The right to wilderness continued to be "retained by the people" under the Ninth Amendment, which recognized unenumerated natural law rights. U.S. Const. amend. IX.

For much of the nineteenth century, the western frontier allowed European Americans to withdraw, to a meaningful extent, from the existing social and governmental intrusions. But, as governmental control necessarily expanded to cover all annexed lands, it became infeasible for individuals to fully withdraw to their own portion of wilderness. Federal wild lands increasingly took on a less-literal Lockean meaning. Yet, they continue to provide opportunities to express and experience core liberty and privacy values. As explained by Justice William Douglas, in

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wilderness one "is free of the restraints of society and free of its safeguards too." William Douglas, *Men and Mountains* (1950). "Shall we now exterminate this thing that made us American?" Aldo Leopold, *Wilderness as a Form of Land Use* 78 (1925).

The Constitution's protections are not limited to the forms or technologies available at the Nation's founding. Put simply: "We do not interpret constitutional rights that way." *Heller*, 554 U.S. at 582 (finding the notion that only eighteenth-century arms are protected by the Second Amendment as "bordering on the frivolous"). The function of the Fifth Amendment is to allow "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 578-79.

Protected public wild lands are the product of a history and tradition reflecting a recognition of the unique liberty and property interests that these lands offer the American people, which are unavailable elsewhere. Experiences in wild nature provide "freedom of individual development[.]" Joseph Sax, *Freedom: Voices from the Wilderness*, 7 Envtl. L. 565, 569 (1977). Such unstructured experiences offer opportunities for risk-taking and self-directedness that "satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention." *Id*. (quoting John Rawls, *A Theory of Justice* 426-27 (1971)). Such amenities are in decline in the wider, technologically-addicted society and such development engages "aspirations toward honor, nobility, integrity and courage." *Id.* at. 573.

As appropriate to individual notions of liberty, plaintiffs, like tens of millions of Americans each year, interact with wilderness in a variety of recreational and professional manners and in varying levels of intensity and duration. Like other rights— such as political

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speech, procreation, abortion, travel, teaching or learning a foreign language, accessing a loaded pistol, same-sex-marriage, interracial marriage— this right is not exercised, desired or utilized equally by all people. But this does not detract from its fundamental character. Public wild lands are appreciated as a place to be let alone, to experience solitude or an absence of coercive human control, to commune with nature, a spirituality greater than one's self and people of one's choosing, to observe beauty and appreciate other life forms, to recognize an order that contrasts with the society created by people, to function independently and self-sufficiently. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. Such a liberty is embodied in a right to enjoyment of federal wild lands.

3. The right to wilderness is deeply rooted in American history and tradition.

This individual right existed before the arrival of the first Europeans in North America and, since coming under recognized threat of extensive infringement, has been protected by the federal government as a heritage for the American people in the National Parks, National Forests, and other federally protected wildlands. "Wilderness was the basic ingredient of American culture. From the raw materials of the physical wilderness, Americans built a civilization. With the idea of wilderness they sought to give their civilization identity and meaning." Roderick Nash, *Wilderness in the American Mind* xi (4th ed. 2001).

In the Colonial period and early years of the Nation's founding, the availability of vast western lands to European settlers and the near doubling of the land area claimed by the United States through the Louisiana Purchase resulted in minimal practical concern that the continent's "superabundance" would soon be exhausted. Craig Allin, *The Politics of Wilderness*

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Preservation 12 (1982). Yet, amid explosive national expansion and the rapid levelling of wilderness to create farms and rangelands, cut timber and extract minerals and well before increased appreciation of the problem of wilderness loss in the latter half of the nineteenth century, there developed broad-based public appreciation of the intrinsic experiential, religious and esthetic value of wild nature. Donald Worster, *The Wilderness of History* 225 (1997). As would be expected, this was expressed across a wide range of cultural venues, and consciously connected to Lockean values of liberty in contrast with monarchy and lack of wilderness in the Old World. Nash, *supra*, at 69, 78-79.

As early as the 1830s some naturalists and explorers, such as George Perkins Marsh, a Congressman from Vermont, Minister to the Ottoman Empire and Ambassador to Italy, began to warn of the ecological dangers of degradation of nature. James Turner, *The Promise of Wilderness: American Environmental Politics Since 1964,* 20 (2012). While urban commons and parks were features of the first European settlements, Huth, *supra*, at 141, painter George Catlin in 1832 was the first person known to propose the creation of a "Nation's Park" to preserve grasslands "in their pristine beauty and wildness" for perpetuity. Allin, *supra*, at 14; *see also* Jurretta Hecksher, Lib. of Cong., *Documentary Chronology of Selected Events in the Development of the American Conservation Movement, 1847-1920* (1996), available at memory.loc.gov/ammem/amrvhtml/cnchron1.html.

During the population and economic growth that followed the Civil War, public recognition of the need to safeguard nature accompanied growing awareness of its obliteration. *See, e.g.,* Allin, *supra*, at 19. One source of growing nature appreciation was "the wilderness passing away, and the necessity of saving and perpetuating its features." Huth, *supra*, at 120 (quoting Thomas Cole, 1853).

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The Court in *Heller* recognized that some issues remain unresolved because"[f]or most of our history the question did not present itself[.]" 554 U. S. at 626. Just as there was no need to specify the type of small arms that could be borne when militia weapons and hunting weapons were alike, the public and legislature saw little need to set aside land for the first 100 years of the country's existence when wilderness was so abundant. However, as irreplaceable wild lands became scarce, a consensus arose on the need for affirmative conservation. *See* Joseph Sax, *The Search for Environmental Rights*, 6 J. Land Use & Envtl. L. 93, 103-04 (1990) (discussing ancient tradition of "of safeguarding and passing on cultural capital"); Mark Stoll, *"Sagacious" Bernard Palissy: Pinchot, Marsh, and the Connecticut Origins of American Conservation*, 16 Envtl. His. 4, 18 (2011) (discussing colonial tradition of stewardship).

The right to enjoy public wild lands is independent of any specific legislation. Yet, fundamental rights can be recognized in "the usual repositories of our freedom, such as federal and state constitutional provisions, constitutional doctrines, statutory provisions, common-law doctrines, and the like." *Williams v. Att'y Gen. of Ala*., 378 F.3d 1232, 1244 (11th Cir. 2004); *see generally Lawrence*, 539 U.S. at 570-71 (surveying state laws).

In 1864, in the midst of the Civil War, Congress declared the necessity of preserving Yosemite and Mariposa Grove by deeding it to the State of California for "public use, resort and recreation" because it was assumed that the state could more effectively protect it. An Act authorizing a Grant to the State of California of the Yo-Semite Valley, 13 Stat. 325 (1864); ECF No. 28, ¶ 252-54. Frederick Law Olmstead in 1865, one of the first Commissioners of the park, explained the justification for public protection of scenic nature as follows:

> It is the main duty of government, if it is not the sole duty of government, to provide means of protection all citizens in the pursuit of happiness against the obstacles, otherwise insurmountable, which the

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> selfishness of individuals or combinations of individuals is liable to interpose to that pursuit. Frederick Law Olmsted, Yosemite and the Mariposa Grove: A Preliminary Report (1865).

In 1872, Yellowstone was "reserved . . . and dedicated and set apart as a public park" with regulations to preserve natural elements within the park "in their natural condition." An Act to Set Apart a Certain Tract of Land Lying Near the Headwaters of The Yellowstone River as a Public Park, 17 Stat. 32 (1872). Additional National Parks were soon created. The pace of dedication of land for public access only increased in the twentieth century with the creation of the Forest Service and other land management agencies. ECF No. 28, ¶ 253.[11] Currently, there are 417 areas within the National Park System. *Id.* at ¶ 67. The protection of wild lands for the public occurred alongside the ongoing rapid divestment and development of federal lands under the Homestead Act of 1862, General Mining Law of 1872 and Desert Lands Act of 1877. This is no coincidence. The National Parks and National Forests were necessary specifically to ensure that some wilderness remained protected for the enjoyment of all Americans.

In 1891, the President was granted authority to "set apart and reserve" federal forest lands for the public. An Act to Repeal Timber-Culture Laws, and for Other Purposes, § 24, 26 Stat. 1095 (1891) (known as The Forest Reserve Act). Immediately upon passage of the Forest Reserve Act, the first National Forests, then known as Public Forest Reservations, were established by President Harrison. Presently, there are over 150 National Forests and National Grasslands. U.S.D.A., *Find a Forest by State*, available at http://www.fs.fed.us/recreation/map/state_list.shtml (last visited June 26, 2019).

[11] The long lag between creation of the first National Park and establishment of the Forest Service stemmed largely "from concerns about increasing the size and cost of the federal government." Richard Sellers, *Preserving Nature in the National Parks: A History* 35 (1997).

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In the last years of the Nineteenth Century and first years of the Twentieth, states created their own nature preserves at a furious pace to claw back land that had been lost and protect it from imminent encroachment. *See generally* John Henneberger, State Park Beginnings, George Wright Forum, Vol. 17, No. 3 (2000). President Theodore Roosevelt expressed the guiding principle underlying all earlier and subsequent legislation, that the enjoyment of wild lands should be a continual national heritage:

> Where the individuals and associations of individuals cannot preserve them, the State, and, if necessary, the nation, should step in and see to their preservation. . . . Our aim should be to preserve them for use, to preserve them for beauty, for the sake of the nation hereafter. Address at Santa Cruz, California (May 11, 1903).

Of course, the conservationist and public rights trend only continued to expand with the establishment of numerous state and federal recreation areas during the 1920s, under the New Deal and upon increased concern for nature in the later part of the twentieth century. Allin, *supra*, at 77, 94.

To date, the right to wilderness has been most clearly addressed in the Wilderness Act of 1964. 16 U.S.C. §§ 1131-1136 (Pub. L. No. 88-577). The title of the Act declares the purpose to preserve wilderness "for the permanent good of the whole people" and the first subsection states that "it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a). The Act was overwhelmingly approved by Congress, passing in the Senate 73-to-12 and in the House 373-to-1. Turner, *supra,* at 18. Passage "was rooted in long-standing concerns for conservation and preservation." *Id.*

> The campaign was not won with careful research briefs on the state of the nation's timber or petroleum supply or the diversity of wildlife in wilderness. Instead, it appealed to national values-patriotism, spirituality,

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> outdoor recreation, and a respect for nature— and the responsibility of the people and government to protect them. Turner at 18-19.

Congress continued to enact legislation enshrining, expanding and protecting public enjoyment of federal lands.[12] Since 1964, every president, including President Donald Trump, has approved legislation adding land to the National Wilderness Preservation System. Appel, *supra*, at 65.

Nearly all statutes governing and designating federal public lands declare that the lands are intended to remain available for public recreation and other types of personal enjoyment. This is a common denominator of federal public lands policy. The National Parks Service was created with the specific purpose "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *National Parks Service Organic Act*, 39 Stat. 535, § 1 (1916). The dynamics that drove the initial federal conservation legislation 150 years ago continue unabated. *See, e.g.*, Pres. George W. Bush,

[12] *See, e.g.* National Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-541(preserving free-flowing waterways for public enjoyment); National Trail Systems Act of 1968, Pub. L. No. 90-543 (establishing trails to "promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas") (16 U.S.C. § 1241(a)); National Forest Management Act of 1976, Pub. L. No. 94-588) (mandating forest planning include wildlife, wilderness and recreation use planning); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579 (purpose includes to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource. . . preserve and protect certain public lands in their natural condition . . . provide for outdoor recreation") (43 U.S U.S.C. § 1701 note); National Parks and Recreation Act of 1978 Pub. L. No. 95-625 (establishing new parks, wilderness area and scenic rivers); National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57 (mission to conserve, manage and restore habitats "for the benefit of present and future generations of Americans") (16 U.S.C. § 668dd(a)(2)); Omnibus Public Lands Management Act of 2009, Pub. L. No. 111–11 (to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations") (16 U.S.C. §7202(a)).

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Proclamation 7665, National Park Week, 2003 (April 18, 2003) ("Americans are united in the belief that we must preserve this treasured heritage"). With expanding urbanization, deeper ecological awareness and easier access to federal lands, public concern for wilderness and wildlife is commonplace and continually becoming an even higher priority.

4. Wilderness Act cases implicitly recognize the right to wilderness

Justice Harlan, in his concurrence to *Gideon v. Wainwright*, recognized that constitutional norms can be identified by the level of scrutiny applied, even when the formal judicial explanations do not yet speak in those terms. 372 U.S. 335, 352 (1963) "In truth," he said, prior "rule is no longer a reality. This evolution, however, appears not to have been fully recognized by many state courts." *Id.*; *see also Lawrence*, 539 U.S. at 571-72 (emphasizing importance of the more recent history in identifying an "emerging awareness" of a given liberty right). One indication that wild lands protection implicates fundamental values is that courts "employ a more exacting standard of judicial review" to such cases "than may be expected based on the stated standard of review." Peter Appel, *Wilderness and the Courts*, 29 Stan. Envtl. L. J. 62, 98 (2010). Despite the lip-service given to the deferential *Chevron* standard that normally applies to agency actions, between 1964 and 2010, agencies *lost* most cases brought by environmental organizations claiming insufficient wilderness protection under the Wilderness Act yet *won* the vast majority (88%) of cases where their restrictions were challenged as overly protective. *Id.* at 66-67. This pro-protection win rate is inconsistent with win rates documented in studies on other areas of environmental law, leading the author to conclude that other systemic factors must be at play. *Id*. at 114-15. The study's author surmises that judges are risk-averse to approving wilderness destruction and have a bipartisan pro-wilderness protection bias. *Id*. at 119, 124.

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Perhaps the most obvious explanation for this "bias" is that judges implicitly recognize wilderness is not simply another resource but implicates a fundamental right. *See, e.g., United States v. Munoz*, 701 F. 2d 1293, 1298 (9th Cir. 1983) ("[O]ne of the primary purposes of our national parks" are to allow expression of "visitors' fundamental right to be left alone.").

5. Defendants cannot permanently destroy wildland.

The discussion above clearly reflects that the right to wilderness is among those fundamental rights necessary to our system of ordered liberty and is also deeply rooted in American history and tradition. Yet, defendants insist that there is no due process right to wilderness. Even so, they have not pointed to a single case—not a single one—where a federal court has ever expressly said so. The cases on which defendants rely (ECF No. 66, pp. 30-31) are all inapposite and off point.[13] Defendants do not cite perhaps the most applicable case, *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, a district court opinion briefly discussing a claim that the "right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments." 325 F. Supp. 728 (E.D. Ark. 1971), aff'd by 470 F.2d

[13] For instance, *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, held that Pennsylvania state constitution "creates no federally protected liberty interest." 895 F.3d 102, 108 (D.C. Cir. 2018). Plaintiffs are not relying on any *state*-constitutional rights. Nor do they seek a "pollution-free environment." They argue instead that they are entitled to use and enjoyment of existing public wild lands. *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980), vacated sub nom. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). The cases actually on the topic of fundamental rights and wilderness do not involve well-pled allegations and are dissimilar from the present case in that they involved plaintiffs seeking to operate machinery in wilderness. *See Baker v. Dept. of Env. Conservation*, 634 F. Supp. 1460, 1466 (N.D.N.Y. 1986) ("The right to use motorized vehicles, vessels and aircraft in the wilderness is not a fundamental right."); *Nat'l Assoc. of Prop. Owners v. United States*, 499 F. Supp. 1223 (D. Minn. 1980) (accord).

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289 (8th Cir. 1972). In this 1971 case, the plaintiffs contended that an amorphous right prohibited the building of a dam on state land. *Id*. at 739. The judge explained that such claims "are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition" but declined to recognize a broad doctrine that "may be in the womb of time, but whose birth is distant." *Id*. (quoting *Spector Motor Service v. Walsh*, 139 F. 2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting)). The plaintiffs did not appeal denial of their substantive due process claims. 470 F.2d at 293. Much has changed since 1971, but the tradition of wild land preservation has only deepened, and due process now encompasses some environmental rights. *See Juliana 1*, 217 F. Supp. 3d at 1250. Based on the specter of near total impairment of the federal wild lands, the time for judicial recognition has arrived.

Defendants contend, in conclusory fashion, that plaintiffs' due process claim to wilderness fails because it "does not concern a private aspect of a person's body or relationship with another individual." ECF No. 66, p. 20. Defendants are mistaken for two reasons. First, as the complaint makes plain, access to federal wild lands implicates plaintiffs' personal relationship with wilderness, which is tied to the strength of the social contract and also, more intimately, provides a "critical resource" to individual "United States citizens seeking solitude in wilderness from human influence." ECF No. 28, p. 4; *see also* p. 70. Second, there is nothing in the language of the Fifth Amendment, nor in current jurisprudence, limiting unenumerated rights to marriage, sexual intimacy, procreation, abortion, child-rearing, bodily integrity, or any other fixed realm. "To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Rochin v. California*, 342 U.S. 165, 171-72 (1952). Moreover, the plaintiffs' asserted right is

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more rooted in the country's history and tradition than rights to abortion, contraception or same-sex marriage, activities which were not legally sanctioned, and in many cases criminalized, 130 years ago when robust manifestations of a right to wilderness was already well on its way to widespread codification.

Defendants also try to get around the issue by characterizing plaintiffs' claim as an assertion of "a right to a particular type of environment." ECF No. 66, p. 30. This argument ignores the consistent history of legislation specifically recognizing the need to maintain a certain environmental baseline on federal wild lands. *See* 16. U.S.C. §§ 230, 90, 410kkk-1(a). The argument is premised on contravention of well over 100 years of preservation legislation and federal practice. It assumes defendants may at will denude federal wild lands of their natural character, making these lands unsuitable for public enjoyment. The numerous legislative enactments recognizing the fundamental importance of public land remaining wild and suitable for public enjoyment offer the court necessary "guide posts for responsible decision making." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

The level of access plaintiffs seek is also no greater than what has been traditionally afforded to the citizens of this country. Plaintiffs are not seeking "wilderness on demand," as defendants contend. Nor do they object to access fees or reasonable limitations consistent with the often-remote locations and protected "primitive" character of wild lands. Limited destruction or impairment would not infringe fundamental rights so long as it "leave[s] open ample alternative channels for" wilderness access, *see, e.g., Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (regarding time, place and manner restrictions on First Amendment activities in public fora), and does not impose an "undue burden" on access (*see, e.g., Casey*, 505 U.S. at 874 (regarding regulation of a woman's right to abortion)).

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The complaint alleges that defendants have engaged in, and intend to continue, a pattern and practice that will inevitably lead to the destruction of the wild character of federal lands, substantially impairing the plaintiffs' enjoyment of such lands. ECF No. 28, p. 6, 48, 69-70. It is of no legal consequence that the destruction occurs incrementally through numerous aggregated actions. As with the First and Fifth Amendments "freedoms can no more validly be taken away by degrees than by one fell swoop." *N.L.R.B. v. Fruit & Veg. Packers & Warehousemen*, 377 U.S. 58, 80 (1964) (Black, J., concurring); *see also Massachusetts*, 549 U.S. at 524 (dismissing argument as resting "on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum").

6. This is not a mere failure-to-protect claim.

Defendants also rely on *DeShaney v. Winnebago County*, 489 U.S. 189, 195 (1989), for the proposition that substantive due process does not "impose an affirmative obligation on the State to ensure that [protected] interests do not come to harm through other means." ECF No. 66, p. 33. This reliance is misplaced. In *DeShaney*, the Court held that the Department of Social Services did not violate substantive due process rights by failing to protect a child in foster care from child abuse. The Court distinguished the case from those where an individual is harmed due to a "limitation which [the state] has imposed on his freedom to act on his own behalf." *Id*. at 200. This case falls in the second category of cases.

First, defendants are affirmative aiding and abetting climate change, through their subsidization, promotion, and encouragement of fossil fuel development, animal agriculture, and commercial logging on federal lands. These policies have caused climate change, which has caused and will continue to degrade federal public lands absent judicial intervention. Plaintiffs

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require wilderness for the meaningful expression of their rights to liberty and autonomy and have suffered injuries as a result of defendants' actions and inactions to mitigate the impacts of climate change on wilderness. *See, e.g.,* ECF No. 28, ¶ 130.

Second, the abuse in *DeShaney* occurred in a private home not inside a school or other government facility. In contrast, defendants assumed the duty to care for the public lands and must prevent the creation of unreasonable, anthropogenic dangers to invitees, such as plaintiffs. Moreover, plaintiffs, as private citizens, are unauthorized and unable to protect wilderness, either through direct interference with governmentally-approved activity on those lands or by regulating greenhouse gas emissions. The responsibility to protect public lands falls on defendants alone.

Beyond the protective duty discussed in *DeShaney*, in instances where individuals are unable to exercise their own private rights, defendants have a positive obligation to assist the individual. For instance, to give effect to individual First Amendment guarantees, despite the prohibition in the Establishment Clause, the government has an affirmative obligation to provide state-funded clergy to incarcerated persons, military personal, and hospitalized patients. *Hartmann v. Calif. Dept. of Corr*., 707 F.3d 1114, 1126 (9th Cir. 2013) (citing *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988)). Affirmative obligations are imposed in other contexts as well. *See Obergefell*, 135 S. Ct. at 2607-08 (rejecting the dissent's reliance on *DeShaney*, and holding affirmative provision of governmental sanction of same-sex marriages necessary to avoid denial of right to marriage); *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996) (obligation to waive filing and transcript fees for criminal defendants to allow right to petition even though indigency is not a suspect class); *Bounds v. Smith*, 430 U.S. 817 (1977) (duty to provide law libraries to prisoners to effectuate right to access courts); *Gideon v. Wainwright*, 372

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U.S. 335 (1963) and *Johnson v. Zerbst*, 304 U.S. 458 (1938) (affirmative duty to pay for defense counsel).

The liberty interest embodied in enjoyment of public wild lands, which conveys critical historical, cultural, political and human values, is tied to a form of limited public property right to the federal lands where wild nature exists. "[D]isruptions to settled expectations grounded in law" implicates questions of substantive due process property rights. Thomas Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 988 (2000). When practically the sole means of enjoying access to wilderness now runs through the federal lands, making it impossible for the plaintiffs to independently protect their interest without government assistance, defendants take on an affirmative, proprietary duty, as it has demonstrated over the past 140 years of legislative practice, to protect these lands on behalf of the American people. Defendants cannot now abandon this deeply imbedded history and tradition by allowing the destruction of the federal wild lands enjoyed by the plaintiffs.

7. In any case, defendants do have a duty to protect under the present circumstances.

The "state-created danger" doctrine is an exception to the general rule that Due Process imposes no duty on the government to protect persons from harm inflicted by third parties that would violate due process if inflicted by the government. *Patel v. Kent School Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2011). Defendants point to a dissenting opinion to argue in favor of the exception's "limited applicability," *Kennedy v. City of Ridgefield*, 440 F.3d 1091, 1095 (9th Cir. 2006) (Tallman, J., dissenting from denial of rehearing en banc), but the Ninth Circuit has held government officials liable, "*in a variety of circumstances*, for their roles in creating or exposing individuals to danger they otherwise would not have faced." *Id.* at 1062 (emphasis added).

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As a threshold matter, the "state-created danger" exception is substantially broader than defendants suggest. ECF No. 66, p. 36-39. The "variety of circumstances" identified in *Kennedy* includes instances in which the government is not the "but for" cause of the danger alleged. *Kennedy*, 440 F.3d at 1095. Rather, "[the Ninth Circuit] and a majority of other circuits have held that a state actor can be held liable when that state actor did '*play a part*' in the creation of a danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (emphasis added). Indeed, the "state-created danger" exception is itself a misnomer, because it applies in instances where the state's conduct did not "create" the danger, but merely "increased" or "enhanced" it, such that the state places a plaintiff "in a more dangerous position than the one in which they found him." *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997). Defendants even acknowledges *Penilla*'s recognition of "a due process violation where officers 'took affirmative actions that significantly increased the risk [of danger]," but did not themselves create the danger. ECF No. 66, p. 38.

Consider, for example, the plaintiffs in *Hernandez v. City of San Jose*, who alleged that the City's crowd control methods had "increased the danger" they faced at a political rally from violent protestors. 897 F.3d 1125 (9th Cir. 2018). The court found that plaintiffs had adequately alleged a state-created danger at the motion to dismiss stage, notwithstanding the City's argument that the "'danger [to the Attendees] was already present by virtue of the heated speech activity taking place throughout the entire area of the [R]ally venue.'" *Id.* at 1135. That the rally was "already dangerous" prior to the state's involvement did not preclude liability, since the officer's conduct further heightened that risk. *Id.*

Like the plaintiffs in *Hernandez*, plaintiffs here allege that defendants, through their affirmative actions and deliberative indifference to climate change, have caused dangerous

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conditions in wilderness. Their claimed injuries are not purely aesthetic, recreational, spiritual, cultural, and psychological; they are based on the increased physical danger they experience in wilderness due to defendants' affirmative conduct, including "wildfires [that] burn hotter and longer, threatening the physical safety of Plaintiffs" in the form of smoke exposure, proliferation of falling trees or "widowmakers," and increased risk of rockfall and avalanche. ECF No. 28, p. 18, 32. Plaintiffs and their members are especially vulnerable to these dangers, because they rely upon wilderness for their mental and physical health and wellbeing. Ms. Hawkins must cancel her backpacking trips in wilderness due to "unhealthy air quality and extreme fire danger." ECF No. 28, ¶ 23. Ms. Tok risks physical injury during her rock-climbing trips because the topography is changing more rapidly than before, "increasing the risk of avalanche and rockfall." ECF No. 28, ¶ 33. As a result of climate change, several of Mr. Shotola-Schiewe's ice climbing routes have substantially melted, leaving behind unsafe conditions due to the increased risk of rock fall and avalanche. ECF No. 28, ¶ 38.

As for defendants' contention that the "danger creation" exception lies only when that danger involves "a specific person known to that official," once again, their position finds support in a *dissenting* opinion. *Pauluk*, 836 F.3d at 1129-30 (Murguia, J., concurring in part and dissenting in part). The majority view is that whether "the danger-creation theory extend[s] to threats to the general public," remains an open question. *Huffman v. Cty. of Los Angeles,* 147 F.3d 1054, 1061 (9th Cir. 1998); *Doe v. Round Valley Unified Sch. Dist.*, 873 F. Supp. 2d 1124, 1135 (D. Ariz. 2012). Conveniently, defendants ignore the most analogous danger-creation case in its motion. In *Juliana v. United States*, Judge Aiken refused to dismiss the plaintiffs' state-created danger claim because they adequately alleged that the government played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the

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consequences of their actions, and that the defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change. *See Juliana I*, 217 F. Supp. at 1252. Like the plaintiffs in *Juliana*, plaintiffs here adequately allege that defendants *aggregate actions* in authorizing, subsidizing, permitting, promoting, fossil fuel development, animal agriculture, and commercial logging of old growth forests on federal land have exacerbated climate change impacts to such a degree as to increase the danger faced by plaintiffs when they exercise their right to be let alone on federally protected wild land.

B. The right to wilderness is also protected by the Ninth Amendment.

The right plaintiffs have to be let alone in wilderness is *also* rooted in the right to privacy. More specifically, this right has been explicitly recognized as relating to the right to be free from unreasonable search and seizure under the Fourth Amendment. In *United States v. Munoz*, the Ninth Circuit reversed the defendant's conviction because his "fundamental right to be let alone" in a National Forest conveyed a heightened expectation of privacy. *Munoz*, 701 F.2d at 1298.

Munoz involved law enforcement officials who were conducting a roving patrol of the Mount Hood National Forest to check for permit and game violations near a Wildlife Management Area. *Id.* at 1295. Without particularized suspicion, the officers stopped Munoz as part of their roving patrol and, in doing so, they found a dead Golden Eagle in his truck bed, hidden beneath cut wood. *Id.* The officers charged Munoz with a misdemeanor violation of the Eagle Protection Act. *Id.* At trial, the government argued that Munoz waived any privacy interest he might have had in his truck because park visitors engage in highly regulated conduct. *Id.* The court strongly disagreed: "In light of the fact that Congress established national parks in part *to preserve for people a setting for respite and reflection*, there is irony in the contention that

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federal regulations governing the use and management of the parks so pervasively control their use as to cause a diminished expectation of privacy. Such a rationale undercuts one of the primary purposes of our national parks by compromising the visitors' *fundamental right to be let alone*." *Munoz*, 701 F.2d at 1298 (emphasis added).

In recognizing Munoz's fundamental right to be let alone in wilderness—as well as the primary purpose of the federal lands system—the Ninth Circuit afforded Munoz relief through the unenumerated rights contemplated by the Ninth Amendment, despite his "despicable offense," which states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring.). Just as the Ninth Circuit recognized and honored Mr. Munoz's heightened expectation of privacy in a national park, plaintiffs will prove that defendants have an obligation to protect their right to be let alone in wilderness by ending federal lands programs that have caused and will continue to exacerbate the climate crisis.

C. The First Amendment's right to not associate encompasses the right to be free from associating, which is only possible in wilderness.

In *Roberts v. United States Jaycees*, the Supreme Court summarized the state of the jurisprudence regarding the First Amendment's right to associate:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human

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> relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty . . . 468 U.S. 609, 617 (1984).

Plaintiffs seek protection of their right to be let alone in wilderness, free from government interference, as a fundamental element of personal liberty. The nature and degree of constitutional protection afforded freedom of association in this context depends "on the extent to which . . . [the] aspect of the constitutionally protected liberty [interest] is at stake in a given case." *Id.* Though people live within society, among family, friends, co-workers, etc., "[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." *Jacobson v. Massachusetts,* 197 U.S. 11, 29 (1905) (nevertheless upholding the government's right to require vaccination to protect the safety of the general public). Thus, "a corollary of the right to associate is the right not to associate." *Cal. Democratic Party v. Jones,* 530 U.S. 567, 574 (2000).

Plaintiffs acknowledge that utmost protection from government interference in association has been afforded historically to close human relationships, but a "broad range of human relationships" are worthy of greater or lesser claims to constitutional protection. *Roberts,* 468 U.S. at 620. Determining the limits of government authority over an individual's freedom to enter into a particular association, therefore, "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. Plaintiffs have pled facts sufficient to demonstrate their intimate, personal relationships with the Nation's wild lands and wild spaces. With this lawsuit, plaintiffs ask the Court to build on the right to associate by acknowledging and

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protecting their constitutional right to formulate and foster these personal relationships with the Nation's public lands. It would be inappropriate for the Court to dismiss plaintiffs' claims at this early stage of litigation, where though novel, plaintiffs have pled facts sufficient to support a cause of action. *See McGary*, 386 F.3d at 1270 (recognizing that early-stage dismissals are disfavored when the complaint sets forth a novel theory).

D. Plaintiffs can proceed directly under the Constitution, notwithstanding the Administrative Procedure Act.

The Administrative Procedure Act (APA) provides a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review." *Id*. at § 704. A reviewing court has authority both to "compel agency action unlawfully withheld or unreasonably delayed" and to "set aside agency action" on several grounds, including that the action is "arbitrary, capricious, [or] an abuse of discretion"; is "contrary to constitutional right, power, privilege, or immunity"' or exceeds the agency's statutory authority. *Id*. § 706(1) & (2)(A)-(C). The APA's judicial review provisions apply only when agency action is final or "otherwise reviewable by statute." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

Plaintiffs assert several causes of action for equitable relief designed to prevent current and continuing violations of their constitutional right to wilderness, which is fundamental to the meaningful exercise of their rights to liberty and autonomy under the Fifth, Ninth, and First Amendments. Although plaintiffs do not assert an APA claim, defendants characterize their separate ability to challenge discrete agency actions under the APA as the "sole right of action

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for their claims." ECF No. 66, p. 24. Plaintiffs do not dispute the availability of a right of action under the APA to challenge individual, final agency action. However, the APA only displaces a constitutional claim for equitable relief if Congress intended such a result. *Navajo Nation*, 876 F.3d at 1171. It does eliminate private rights of action for constitutional violations.

The process for determining whether Congress intended to supplant constitutional claims for equitable relief requires a "heightened" showing of clear legislative intent "because courts should not take lightly the construction of a federal statute to deny a judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (rejecting the argument that the APA provides the exclusive vehicle for challenging discretionary agency action in an equal protection case). The APA contains no express language suggesting Congress intended that it eliminate the availability of constitutional claims for equitable relief. *See Juliana, et al. v. United States, et al.*, 339 F.Supp.3d 1062, 1087 (D. Or. 2018) [hereinafter *Juliana 2*]. To the contrary, claims not grounded in the APA, "like . . . constitutional claims," do not depend on the cause of action provided by Section 702 of the APA and thus Section 704's limitation does not apply to them. *Nation*, 876 F.3d at 1170.

Plaintiffs, as the master of their complaint, have chosen to assert constitutional claims rather than challenge discrete agency action under the APA. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (stating that "the plaintiff [is] the master of the claim"); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely on."). Plaintiffs request systemic review of the Government's actions and omissions under the Constitution because the APA's judicial review provisions do not permit review of "aggregate action by multiple agencies." *Juliana 2*, 339 F. Supp. 3d at 1084; *see also NRDC v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007) (agency

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failed to utilize the best available science to analyze the impacts of climate change to an endangered fish as a result of the coordinated operation of a single project); *see also Ctr. For Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (N.D. Cal. 2007) (declining to review allegations of noncompliance with a federal agency's "Climate Change Science Program's 2003 Research Plan" because it was a policy statement that did not bind the agency for the purposes of judicial review under the Administrative Procedure Act). Requiring Plaintiffs to funnel their constitutional claims through the APA on an action-by-action basis gives the Government unlimited opportunity to decline review of the aggregate and systemic harms detailed in the FAC because each court could consider the single federal agency action before it only, depriving Plaintiffs of any meaningful review of their claims. Because the APA does not govern Plaintiffs' claims—or supplant them—Plaintiffs' failure to state a claim under the APA is not grounds for dismissal of this lawsuit.

III. The Court should deny the Motion to Stay.

The power to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In determining whether to issue a stay, the "competing interests which will be affected by the granting or refusal to grant a stay must be weighed," including the possible "damage which may result from the granting of a stay," the hardship from which a party may suffer in being required to go forward, and the "orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions, of law which could be expected to result from the stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). This court should deny defendants' request to stay this

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litigation pending the outcome of *Juliana v. United States*, No. 6:15-cv-1517-AA, *appeal docketed* No. 18-36082 (9th Cir. Dec. 27, 2018), a separate case involving different parties and different issues. Defendants has failed to meet its burden to win a stay, and plaintiffs are suffering and will continue to suffer great hardship if the court stays their case.

Nor will judicial economy be served by a stay in light of how different the claims are in the two cases. The only similarity between the two cases is that plaintiffs in both cases allege that the Government has violated their constitutional rights by causing climate change. Beyond this broad question of causation, the cases are actually quite different. They involve separate parties (no plaintiff and only some defendants overlap); different sources of injury (plaintiffs allege that the Government has caused wilderness degradation through its promotion and subsidization of fossil fuel development, agriculture, *and* deforestation on public lands, while the *Juliana* plaintiffs focus on fossil fuel development); unrelated injuries (plaintiffs here allege they have already personally suffered as a result of defections actions; the youth plaintiffs request relief for their own injuries as well as injuries to "future generations"); and request distinct remedies (plaintiffs ask the court to compel specific federal action to protect wilderness, which will increase the carbon sequestration capability of federal wild lands and mitigate the impacts of climate change, whereas the *Juliana* plaintiffs ask the court to require the development of a national remedial plan to phase out fossil fuel use).

Moreover, plaintiffs here allege completely different deprivations of their constitutional rights: the right to be let alone in wilderness, the protection of which is necessary to the meaningful expression of their fundamental rights to liberty and autonomy. *Juliana's* youth plaintiffs seek enforcement of their due process and equal protection rights to a sustainable climate as well as a declaration that the atmosphere is part of the public trust. Both claims are

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worthy of this court's consideration, but they are separate, distinct causes of action predicated on different parties, injuries, and requests for relief.

Finally, to support its request for a stay, defendants cite cases in which the court exercised its jurisdiction to stay litigation pending the outcome of related litigation, involving the same parties and a common nucleus of facts, usually before administrative tribunals or state courts. In those cases, the court rightly concluded that helpful information could be gleaned from the lower tribunal's handling of the parties' dispute. Tellingly, defendants did not point to any cases where the judiciary declined to permit a matter to proceed simply because other litigation may have impacted the matter before it. *Cf. CMAX, Inc.*, 300 F.2d at 268 (upholding the trial court's stay of case pending outcome of related board action); *Shipley v. United States*, 608 F.2d 770 (9th Cir. 1979) (upholding stay pending outcome of proceedings between the parties in Tax Court). Defendants' reasons for seeking a stay do not satisfy the test for judicial economy, as nothing decided in a completely separate case could automatically affect the rights or positions of the parties in a current case, unless those parties are the same and the common nucleus of fact is substantial. The differences between the *Juliana* case and this one are sufficiently distinct to merit the continuation of this litigation.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss and alternative motion to stay should be denied.

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Respectfully submitted this 1st day of July 2019,

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 16,133 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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