No. 19-35708

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, a nonprofit organization; et al.,
Plaintiffs–Appellants,

v.

UNITED STATES OF AMERICA; et al.,
Defendants–Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
D.C. Case No. 6:18-cv-01860-MC
Hon. Michael J. McShane

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Animal Legal Defense Fund, a 501(c)(3) non-profit corporation, and Plaintiff-Appellant Seeding Sovereignty, a project of Earth Island Institute, Inc., do not have parent corporations. No publicly held corporation holds 10 percent or more of their stock.

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I. Introduction

The right to be let alone has long been recognized as a fundamental right of privacy and autonomy under the Fifth Amendment of the United States Constitution. Protection of wilderness is a necessary precondition to the meaningful expression of the right to be let alone because it is the only appropriate baseline against which infringement of the right can be measured. Through intentional decisions to subsidize, develop, and promote carbon-intensive industries on federal public lands throughout the United States, defendants have caused and exacerbated the climate crisis. Defendants' actions have had and will continue to have cascading catastrophic adverse impacts to federal lands. Indeed, there can be no doubt that the extraction of fossil fuels, logging of old-growth forests, and conversion of native grasslands to pastures for animal agriculture have not only caused the intentional degradation of these lands, but also contributed significantly to the climate crisis by removing Earth's most effective means to draw down excessive carbon from the atmosphere. As intact ecosystems disappear, as species of plant and animal go extinct, as severe wildfire and flood eviscerate the ability of wildlands to recover, defendants continue with business as usual. This court is the last venue available to plaintiffs to protect their right to wilderness, and without court intervention, defendants will not stop destroying America's Wilderness Heritage.

The United States was founded on the concept of freedom as political separation from others, as withdrawal from the crowds of Europe into a relative wilderness, and independence from unwanted and unconsented intrusions that generally follow such withdrawal. The concept of nature as freedom, the idea of a place free from humans, and the notion of a pre-Anthropocene world, or what the Declaration of Independence in its foundational paragraph called "the powers of the earth, the separate and equal station" among "the Laws of Nature and of Nature's God," flows throughout documentation of this Nation's founding. Declaration of Independence, para. 1 (1776). For the founders, the environment was not just aesthetic; it was and remains a check, or buffer, on human power.

The Constitution's conception of "We the people," as juxtaposed against the perception of wilderness at the time of the founding, is a sufficient textual hook for the claims made herein given everything we know about the founders' unique place-based view of liberty, nature's role in their view of liberty, the environment at the time of the founding, and most importantly their political philosophy of a special form of consensual governance and personal sovereignty, which logically requires a neutral or original baseline from which consent to human power and influence becomes possible. Carter Dillard, *The Primary Right*, 29 PACE ENVTL. L. REV. 860 (2012). This framing around autonomy has always been the proper framing for a substantive due process right, *e.g.*, the right to be let alone.

America's intergenerational commitment to protection of wilderness is not only evidenced by the founders' placement of nature at the center of its scheme of ordered liberty but also by the Nation's history and tradition of protecting public lands for the use and enjoyment of its people. In fact, over the many years since designating Yellowstone National Park as the first national park in 1872, the United States has set aside more than 640 million acres of federally managed public land (about 28 percent of the United States), more than 109 million acres of which is specially designated as wilderness (about 5 percent of the United States). ER 230. Specially designated wilderness is explicitly protected from human influence to preserve valued landscapes and their biological and physical attributes in a state that is free from human development, disturbance, and manipulation. These federally managed public lands provide a critical resource to plaintiffs, who seek solitude in wilderness, without which the right to be let alone cannot be meaningfully exercised. Taken as a whole, so long as these federally managed lands are retained by defendants, they provide one of the last reminders of the human connection to the natural world, with inspirational, therapeutic, spiritual, cultural, and psychological values that grow increasingly important in a world dominated by urbanization and anthropogenic climate change. The degradation of wilderness and the values therein is a degradation of human freedom, as well as a violation of the social contract on which this Nation was founded. No one has the

right to impose the human power necessary to form a social contract—any amount of it—upon others or upon future generations against their will.

The concept of freedom from others was passed into our jurisprudence as the right to be let alone, that which "one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 530 U.S. 703, 716–717 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting)). The fundamental human right to autonomy, along with its many variations as privacy or liberty or bodily integrity, is made coherent in wilderness, which is the quintessence of being let alone. It is the beginning of the continuum or spectrum of liberties upon which all other articulations of the right to be let alone fall, and ignoring it changes the meaning of liberty as the founders understood it. It is absurd to think the Constitution protects Americans from unlimited state surveillance but not the incomparable threat to human well-being posed by the climate crisis, which defendants have knowingly caused and continue to exacerbate.

As a remedial measure for defendants' destruction of wilderness, plaintiffs ask the court to prohibit resource extraction from federal lands, a measure that serves the dual purpose of wilderness restoration for plaintiffs' future use and climate change mitigation. ER 225. While recognizing the right to wilderness may raise new questions for future courts to consider, the district court erred by

declining 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. Rev. 1026, 1030 (2003) (quoting Roy Schotland). Plaintiffs respectfully request that this court reverse the district court's dismissal of plaintiffs' case and remand the case for further litigation.

II. Statement of Jurisdiction

(A) The district court had jurisdiction under 28 U.S.C. § 1331 and Article III, Section 2 and the Fifth Amendment to the United States Constitution because plaintiffs assert claims under the United States Constitution.

(B) This court has jurisdiction under 28 U.S.C. § 1291 because this appeal is taken from a final decision granting defendants' motion to dismiss without leave to amend. ER 5–14.

(C) The appeal is timely because the district court entered its final judgment dismissing plaintiffs' claims with prejudice on July 31, 2019, ER 4, and plaintiffs noticed their appeal on August 20, 2019, ER 1-3.

III. Statutes Involved

Pursuant to Ninth Circuit Rule 28-2.7, pertinent constitutional provisions are included in an addendum attached to the end of this brief.

IV. Statement of the Case

Plaintiffs brought this action against the United States of America and the four federal agencies with the largest share of federal public land holdings in this country. ER 177–78. Plaintiffs allege that defendants have caused or contributed to the climate crisis through the promotion, subsidization, and extraction of three carbon-intensive industries on federal lands: fossil fuel development, animal agriculture, and the commercial logging of old growth forests. *See* ER 181, 202–03, 215–31. The climate crisis is destroying federal lands, as increasing temperatures and unpredictable weather patterns permanently alter the wilderness landscape, cause dangerous extreme weather events, and accelerate the mass extinction of plants and wildlife. *See* ER 180–81, 203–211. Plaintiffs allege that they use these federal lands to exercise their constitutional right to be let alone, free from government interference, and are unable to do so safely because of defendants' actions. *See* ER 198, 232–43.

The district court granted defendants' motion to dismiss with prejudice on three grounds: lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. ER 4, 8–14, 122–23. Plaintiffs appealed, but the appeal was stayed for a while pending the outcome of this court's decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), a case involving the same theory of standing.

V. Statement of the Issues

1. Did the district court err in dismissing plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) without leave to amend on the ground that plaintiffs could not allege a particularized injury caused by the effects of climate change because "the effects of climate change would be an abstract injury that all citizens share," ER 10?

2. Did the district court err in dismissing plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) on the ground that plaintiffs failed to present a justiciable controversy, ER 11?

3. Did the district court err in dismissing plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) on the ground that "no clearly established 'right to wilderness'" exists under the United States Constitution, ER 14?

VI. Summary of Arguments

The district court erred when it dismissed plaintiffs' complaint for lack of subject matter jurisdiction because plaintiffs alleged sufficient facts to establish standing under Article III of the United States Constitution and stated a claim for infringement of their substantive due process right to be let alone in wilderness.

1. Plaintiffs' complaint sufficiently alleges that plaintiffs (1) have suffered or are suffering injuries in fact that are concrete, particularized, and actual or imminent; (2) fairly traceable to defendants' conduct; (3) that can be at least

partially redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); ER 72–84. Plaintiffs supported each element of standing "with the manner and degree of evidence required" at the pleading stage of the litigation. *Lujan*, 504 U.S. at 561. The district court erred when it declared, as a matter of law, that no plaintiff can suffer a particularized injury due to climate change. *Id.*

2. The district court erred by dismissing plaintiffs' claims based on an inaccurate characterization of their remedial requests. Plaintiffs do not seek an "overhaul" of any government policies, as the district court concluded. ER 11, 243–49. Rather, they seek very specific relief in the form of a moratorium on the extraction of resources from federal lands to restore public lands for plaintiffs' future expressive use and to protect public lands from further adverse impacts from climate change. ER 243–49. Plaintiffs' complaint contained specific allegations supporting their requested remedies and directly tied their injuries to defendants' intentional destruction of wilderness through the prioritization of these extractive industries over plaintiffs' constitutional right to be let alone in wilderness. *Id.*

3. Finally, the district court erred by dismissing plaintiffs' claims on the merits, even though plaintiffs pled sufficient facts to establish a substantive due process right to be let alone. According to plaintiffs' well-pled allegations, the right to be let alone, expressed through solitude in wilderness, is deeply rooted in

American history and tradition and fundamental to the Nation's scheme of ordered liberty. ER 234–43. Exercising this right requires access to the public lands identified in plaintiffs' complaint. ER 183–95 (describing plaintiffs' need for public lands access); 240–42 (discussion of various acts establishing public lands). Through their actions to exacerbate the climate crisis, defendants have infringed on plaintiffs' constitutional rights by degrading public wild lands across the United States. ER 243–49.

VII. Standard of Review

Failure to State a Claim. Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed de novo. *See Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (citing *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002)). The facts alleged in a complaint must be taken as true and must "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mere legal conclusions "are not entitled to the assumption of truth," *Id.* at 679, and the complaint must contain more than "a formulaic recitation of the elements of a cause of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

Subject Matter Jurisdiction. The court reviews dismissals based on lack of subject matter jurisdiction based on Fed. R. Civ. P. 12(b)(1) de novo. *See Prather*

v. AT&T, Inc., 847 F.3d 1097, 1102 (9th Cir. 2017); *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1039 (9th Cir. 2011); *BNSF Ry. Co. v. O'Dea*, 572 F.3d 785, 787 (9th Cir. 2009).

Dismissal without leave to amend is improper unless it is clear upon de novo review that the complaint could not be saved by any amendment. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655–56 (9th Cir. 2017); *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 n.3 (9th Cir. 2011); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

VIII. Argument

A. The district court erred in ruling that plaintiffs lack standing because they "failed to allege a particularized injury."

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*, 504 U.S. at 560. Plaintiffs must support each element of 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 because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Id.*

Contrary to this well-established test, after acknowledging the "serious" and "well-recognized" harms associated with climate change, the district court declared that plaintiffs' allegations of "aesthetic and recreational harm" are "by their very nature, generalized grievances." ER 10 (citing *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007)). Without discussing the concrete and personal injuries plaintiffs identified in the complaint, the district court dismissed plaintiffs' case as a matter of law because "the effects of climate change" are an "abstract injury that all citizens share." *Id.*[1] The district court got it wrong.

Injuries resulting from climate change, like injuries resulting from any force, can be concrete and particularized. *See Juliana v. United States*, 947 F.3d at 1168; *see also Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). In *Juliana v. United States*, this court recently held that, when evaluating whether a plaintiff satisfies the injury-in-fact prong of standing with respect to injuries suffered because of the climate crisis, "[i]t does not matter how many persons have been injured if the plaintiffs' injuries are concrete and personal.

[1] Given its disposition, the district court did not have occasion to reach the second and third prongs of Article III standing. ER 10. If this court determines that the district court erred in dismissing the complaint for the reasons given, plaintiffs ask this court remand to the district court to decide those issues in the first instance.

The fact that a harm is widely shared does not necessarily render it a generalized grievance." 947 F.3d at 1168 (citing *Massachusetts v. EPA*, 549 U.S. at 517); *cf. Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future"). Fortunately, this court need not create new law on this issue, as the Supreme Court has provided 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.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998) (emphasis added; 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. According to the Supreme Court, "[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 concrete, though widely shared, the Court has found 'injury in fact.'" *Akins*, 524 U.S. at 24. As examples of widely shared but concrete injuries, the Supreme Court listed "a widespread mass tort" or "where large numbers of voters suffer interference with voting rights conferred by law." *Id.*

In their complaint, plaintiffs do not allege a widely shared concern for the overall effects of climate change. They allege instead that they suffer and will

continue to suffer concrete, personal injuries because of climate change and its effects on federal lands. For example:

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. ER 190, 191. 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. ER 191. "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" because she cannot retreat to wilderness for fear of climate-induced wildfire. ER 192.

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. ER 193–94. 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." ER 194. 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. ER 194.

Plaintiff Cody Shotola-Schiewe is a mountaineering guide. ER 194–95. 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. ER 195. The remaining safe routes have become increasingly popular and crowded, which not only prevents 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.

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. ER 189. 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. ER 190.

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.

Like the plaintiffs in *Juliana,* these injuries are not "conjectural" or "hypothetical." They are specific and real. Plaintiffs have alleged that climate change is affecting them now in concrete ways and will continue to do so unless checked. *Juliana,* 946 F.3d at 1169 (citing *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990))); *cf. Ctr. for Biological Diversity,* 563 F.3d at 478 (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future"). The district court erred in concluding otherwise.

B. The district court erred in ruling that it lacked subject matter jurisdiction because plaintiffs failed to raise a justiciable controversy.

The district court was wrong to hold that plaintiffs' action is not a "case or controversy" under Article III of the Constitution. This action is justiciable because plaintiffs' claims present essential legal questions "in an adversary context" and "in a form historically viewed as capable of resolution through the judicial process." *E.g., Flast v. Cohen,* 392 U.S. 83, 95 (1968). Moreover, the district court

should not have employed broad, rarely used, separation-of-powers principals to shield itself from a genuine, adversarial dispute about constitutional rights. *Marbury v. Madison*, 5 U.S. 137, 141 (1803) (Article III courts have a responsibility "to say what the law is."). To reach its conclusion, moreover, the district court impermissibly intertwined the requirements for redressability with the political question doctrine. As explained in this section, plaintiffs pled a case or controversy, and their claims should not have been dismissed for lack of standing for raising a political question at this early stage of litigation.

1. Plaintiffs seek resolution of a "case or controversy" under Article III.

Under Article III of the Constitution, the jurisdiction of federal courts is limited to cases and controversies arising under the laws of the United States. U.S. Const. art. III, § 2. While there is no practical distinction between the terms "case" and "controversy," *see, e.g., Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239 (1937), both ideas capture the "dual limitation" of justiciability that cases be adversarial and not intrude into areas reserved for the political branches. *See, e.g.*, *Flast*, 392 U.S. at 95. Beyond that basic limitation, no "precise test" for whether plaintiffs' claims are a case-or-controversy exists. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979) (noting, "the difference between an abstract question and a 'case or controversy' is one of

degree"). Defendants' mischaracterization of plaintiffs' claims as "sprawling," "open-ended," and "abstract" should not distract from the constitutionally concrete, adversarial, and judicially redressable nature of plaintiffs' claims. As explained above, plaintiffs' injuries are concrete and particularized, but just as important, plaintiffs' requested remedies are specific in nature and would at least partially, if not wholly, redress their injuries.

As set forth in the complaint, plaintiffs asked the district court to declare that defendants are violating their constitutional rights by contributing to the degradation of public wilderness areas. ER 247–48. In addition to declaratory relief, plaintiffs sought an injunction prohibiting defendants from extracting resources from federal lands as remedy for their constitutional injuries, which is within the power of the district court. ER 248. *See generally Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (finding the underlying property dispute justiciable, despite a "tinge" of political overtones). Ending extractive practices would both restore public lands for plaintiffs' future use and mitigate the impacts of climate change, as intact ecosystems are best equipped to draw down carbon from the atmosphere naturally. ER 224.

Plaintiffs have presented "a real, substantial controversy between parties having adverse legal interests [and have raised] a dispute definite and concrete, not hypothetical or abstract." *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945). The

district court had authority to enter the specific declaratory and injunctive relief plaintiffs' request, and the district court erred in concluding otherwise.

2. Plaintiffs' case does not present a "political question."

The district court also erred in suggesting, albeit indirectly, that plaintiffs' case presents a "political question." Though the district court did not explicitly conclude that plaintiffs' complaint called for an answer to a "political question," its rhetoric closely mirrors federal political question analyses and impermissibly intertwined the political question analysis with the question of standing. ER 11. Binding Supreme Court and Circuit precedent establish separate and distinct tests for whether a claim is barred by the political question doctrine under the factors in *Baker v. Carr*, 369 U.S. 186, 217 (1962), and standing, which examines "whether the person . . . is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable," *Flast*, 392 U.S. at 99–100. As explained above, plaintiffs are proper parties to request adjudication of their injuries. As explained next, plaintiffs' claim is not barred by the political question doctrine either.

The "political question" doctrine of nonjusticiability is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. at 210, which exists "to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394

(1990). First announced by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."), the doctrine was later split into six independent factors by the *Baker* Court, 369 U.S. at 217.

Three of *Baker*'s factors are implicated in this case: (1) whether the case involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) whether there is "a lack of judicially discoverable and manageable standards for resolving it"; and (3) whether there is an "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* These "constitutional" factors "reflect three distinct justifications for withholding judgment on the merits of a dispute." *Zivotofsky v. Clinton*, 566 U.S. 189, 203–04 (Sotomayor, J. & Breyer, J., concurring). Under the first *Baker* factor, courts lack the authority to decide an "issue whose resolution is textually committed to a coordinate political department." *Id.* Under factors two and three, courts should abstain in "circumstances in which a dispute calls for decision making beyond courts' competence." *Id.*

Three further considerations should guide courts in applying *Baker*'s factors. First, "[t]hese tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). "[This]

is borne out by the disproportionate emphasis on [*Baker*'s constitutional factors] in both Supreme Court and lower court cases." *Alperin v. Vatican Bank*, 410 F.3d at 545–46 (9th Cir. 2005) (citing cases that emphasized the first two *Baker* factors over the others). Second, courts must "undertake a discriminating case-by-case analysis" to determine whether one of *Baker*'s factors is "so inextricabl[y] tied to the case as to divest the court of jurisdiction." *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014) (citing *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007), and *Baker*, 369 U.S. at 217) (internal quotation marks omitted). Third, and relatedly, the political question doctrine is seldom invoked and even more rarely applied; where plaintiffs present an actual case or controversy, courts should dismiss "only if one of *Baker*'s formulations is 'inextricable' from the case"—and never "lightly"—because "courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Alperin*, 410 F.3d at 539 (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990) (internal quotation marks omitted)). That obligation persists even in cases where plaintiffs "raise[] an issue of great importance to the political branches." *U.S. Dep't of Commerce v. Mont.*, 503 U.S. 442, 458 (1992). Thus, federal courts must adjudicate each case or controversy—*even the political ones*—brought properly before them, unless one of *Baker*'s factors unavoidably presents a "narrow

exception" to that responsibility. *Sierra Club v. Trump*, 929 F.3d 670, 686 (9th Cir. 2019) (quoting *Zivotofsky*, 566 U.S. at 195).

i. Plaintiffs' claims do not require the court to exercise powers or adjudicate issues textually committed to Congress or the Executive.

Because "there are few, if any, explicit and unequivocal instances in the Constitution of [the] sort of textual commitment [described in *Baker*'s first factor]," federal courts "are usually left to infer the presence of a political question from the text and structure of the Constitution." *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring). Thus, courts have traditionally avoided matters related to foreign policy, national security, and legislative procedure, which (while not explicitly reserved) are functionally committed to the political branches. *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002–04 (1979) (challenge to the President's unilateral termination of a treaty is nonjusticiable) (plurality opinion); *Nixon*, 506 U.S. at 237–38 (Impeachment Trial Clause vests the Senate with exclusive power to try impeachment cases). Yet, even within these often-textually committed, highly political arenas, courts have declined to apply the doctrine where constitutional rights are at stake. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 942–943 (1983) ("[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine."). Indeed, courts should not use *Baker*'s first factor to avoid their responsibility to

protect judicially enforceable, constitutional rights "merely because the issues have political implications." *Sierra Club*, 929 F.3d at 687 (internal quotation marks omitted); *see also Vieth*, 541 U.S. at 277.

Plaintiffs' claims are not inextricably tied to *Baker*'s first factor because the Constitution does not commit federal lands management to either Congress or the Executive. *E.g.*, *Saldana*, 774 F.3d at 552. But even if the court concludes that plaintiffs' claims challenge political action, the district court is still empowered to decide the *constitutionality* of that action, whether traditionally (or textually) committed to the political branches. *See, e.g.*, *Baker*, 369 U.S. at 217 ("Courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."). Multiple Supreme Court and Circuit cases have made this point "abundantly clear." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004). In *I.N.S. v. Chadha*, for example, the Supreme Court held that the Constitution provides a legal basis for the judicial resolution of issues related to aliens despite Congress's plenary authority over undocumented immigrants. *See* 462 U.S. at 940–43. This Court was similarly compelled by the "presence of constitutional issues" to "examine whether the political branches [were using] a foreign policy crisis as an excuse for treating aliens arbitrarily" despite the issue of "alienage classifications [being] closely connected to matters of foreign policy and national security." *Am.-Arab Anti-*

Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995) (internal quotation marks omitted) ("We can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake."). And in *Kahawaiolaa*, this Court held that plaintiffs' Fifth Amendment equal-protection claim was justiciable, even though it involved Congress's plenary authority to recognize Native American tribes. *See* 386 F.3d at 1276 ("[T]he political question doctrine does not bar adjudication of a facial constitutional challenge even though Congress has plenary authority, and the executive has broad delegation, over Indian affairs."). But unlike the foreign policy issues raised in *Chadha*, *Reno*, and *Kahawaiolaa*, the climate-change and federal land-use issues raised by plaintiffs' constitutional claims are not textually or even constructively committed to the political branches.

Nor is the broader issue of climate change itself (much less its deleterious effects on public wilderness) constitutionally excluded from judicial cognizance. The Constitution's text neither mentions nor commits either topic to the political branches. Recently, in *Juliana*, this Court addressed the point directly: "We do not find [plaintiff's constitutional claims challenging the government's failure to adequately address climate change] to be a political question." 947 F.3d at 1174 n.9. And it was obvious to at least one member of the *Juliana* court that "the Constitution does not explicitly address climate change," and, importantly, that

climate change does not "*implicitly* fall within a recognized" *Baker*-factor-one area, like foreign policy. *Id.* at 1187 (Staton, Dist. J., dissenting) (emphasis in original); *see also Juliana v. United States*, 217 F. Supp. 3d 1224, 1238 (D. Or. 2016) ("Unlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision." (Emphasis in original). Like the claims at issue in *Juliana*, plaintiffs' claims do not involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department."

ii. Judicially manageable standards exist to resolve plaintiffs' claims and do not require the court to make discretionary, nonjudicial policy determinations.

Standing "in no way depends on the merits of a plaintiff's contention that particular conduct is illegal," but "it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Maya v. Centex Corp.*, 658 F.3d 1060,1068 (9th Cir. 2011) ("[T]he threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim."). Though the district court expressly declined to address the redressability prong of standing, the lower court plainly considered the nature of the relief requested in rejecting plaintiffs' claims on justiciability grounds, concluding, in language sounding much like the second and third *Baker* factors,

that "it is not in the province of the judiciary to make the policy decisions required to grant plaintiffs the relief they seek." ER 11.

The second *Baker* factor demands that plaintiffs' case provide the court with "some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case." *Zivotofsky*, 566 U.S. at 204. "One of the most obvious limitations imposed by [the political question doctrine] is that judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (emphasis in original). Similarly, *Baker*'s third factor permits courts to dismiss claims that would defy judicial resolution "in the absence of a yet-unmade policy determination charged to a political branch." *Zivotofsky*, 566 U.S. at 204. The "crux" of this combined 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 whether the court has "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 552 (quoting *Vieth*, 541 U.S. at 278).

This action survives *Baker's* second and third factors because established constitutional standards exist for resolving plaintiffs' claims and because their resolution would not require "initial policy determinations" that exceed judicial competence. *Baker*, 369 U.S. at 217. If the court agrees that plaintiffs' "right to wilderness" exists, the only issue before this Court is whether the district court

could at least partially remedy plaintiffs' constitutional injuries, *Ashcroft*, 556 U.S. at 678, without becoming inextricably tied to Baker's second and third factors, *Saldana*, 774 F.3d at 552 (quoting *Baker*) (internal quotation marks omitted). Judicial resolution is clearly plausible here. *Baker*, 369 U.S. at 217.

Indeed, resolving plaintiffs' constitutional claims is well within the district court's competence regardless of the scope or number of federal policies ultimately affected by its order. Federal courts are "no stranger[s] to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution." *Juliana*, 947 F.3d at 1188 (Staton, Dist. J., dissenting). Cases like *Brown v. Plata*, 563 U.S. 493 (2011), which required the government to reduce overcrowding in California prisons, *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955), which appointed a special master to oversee the integration of public schools in Kansas, and *Planned Parenthood of Southeastern. Pennsylvania. v. Casey*, 505 U.S. 833, 877 (1992), which created a new test to evaluate the constitutionality of local restrictions on a woman's right to bodily autonomy, demonstrate this point overwhelmingly. *Baker*, 369 U.S. at 217. If federal courts can depopulate prison systems, desegregate public schools, and limit abortion restrictions, they can certainly protect public wilderness from ruin.

In this case, however, plaintiffs did not demand that the district court oversee a structural injunction, pinpoint the precise "best emissions" level to mitigate climate change, choose which agencies should promulgate regulations or alter their operations, or decide the exact level of funding required for such efforts. They sought a specific declaration and particularized relief. More specifically, plaintiffs asked the court to phase out fossil fuel extraction on federally owned lands, prohibit the use of federal lands for animal agriculture, and end the logging of old-growth forests—remedies[2] that are clearly *within* the powers of the district court. ER 226–27.

There can be no doubt that plaintiffs do not ask the court to insert itself into federal policy making or oversee a long-term yet-to-be-defined structural injunction. Plaintiffs seek declaratory and injunctive relief in the form of moratoriums on the extraction of resources from federal lands, the cessation of which serves the dual remedial purpose of restoring federal lands for future use and alleviating the impacts of climate change. For these reasons, the court should

[2] Plaintiffs also asked the court to compel the government to consider family planning in its decision-making and to appoint a magistrate judge to administer The Wilderness Act, 16 U.S.C. §§ 1131–1136 (1964). To the extent these remedies are less specific and more structural in nature, Plaintiffs remind the court that declaratory relief alone is sufficient to redress Plaintiffs' constitutional injuries. *See Evers v. Dwyer*, 358 U.S. 202, 203 (1958). The district court's sweeping dismissal of Plaintiffs' claims was wrong under existing precedent for justiciability.

reverse the district court's "case-or-controversy" holding and reject the notion that plaintiffs' case is otherwise nonjusticiable under the political question doctrine.

C. Plaintiffs have a Fifth Amendment right to be let alone in wilderness, the protection of which is necessary to ensure they can meaningfully express of their long-recognized rights to liberty and autonomy.

The Fifth Amendment declares that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause protects substantive rights to unspecified forms of liberty and property that cannot be deprived without adequate justification. U.S. Const. amend. V. Access to federal public lands as America's Wilderness Heritage, is a necessary and fundamental precondition for the protection of the long-recognized substantive due process right to be let alone. Accordingly, recognition of the right to wilderness, as alleged in plaintiffs' complaint, satisfies the Supreme Court's test for a substantive due process[3] because it is "implicit in the concept of ordered

[3] Like most constitutional rights, the problem the right to wilderness protects is more complex and nuanced than the label itself suggests. *See, e.g.*, Thomas Emerson, *The System of Freedom of Expression* 15, 6–7 (1970) ("The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.").

liberty" and also "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997).[4]

The very first step in evaluating a substantive due process right is to define the liberty interest at stake "in a most circumscribed manner, with central reference to specific historical practices." *Obergefell*, 576 U.S. at 671 (2015). The Supreme Court has acknowledged, however, that requiring precision in defining the scope of a fundamental right "is inconsistent with the approach" the Court has used in discussing other fundamental rights, including marriage and intimacy, for which a more comprehensive formulation of the right is appropriate. *Id.* In other words, the Supreme Court allows for future refinement in the scope of a fundamental right as it is applied to specific situations. Plaintiffs encourage the court to recognize such possibility here where the right to wilderness a precondition to or part of a comprehensive formulation of the already-established right to be let alone.

[4] The majority in *McDonald v. City of Chicago* indicates that the test is disjunctive. 561 U.S. 742, 767 (2010) ("The Court must decide whether [that right] is fundamental to the Nation's scheme of ordered liberty. . . or, as the court has said in a related context, whether it is deeply rooted in this Nation's history and tradition."). Defendants, in briefs below, ECF 75, p.20, fn. 11, pointed to the formulation in dissenting opinions in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 576 U.S. 644 (2015) and Justice Thomas' concurring opinion in *Obergefell*, in which he criticizes the majority's application of the Due Process Clause, to argue that a right must satisfy both conditions. In the face of these minority positions, the plain language of *McDonald* suggests that one prong is sufficient. The right to wilderness rests on both prongs.

Fundamentally, though, the right to wilderness is, at its core, a right of each American to have reasonable access to publicly owned wild lands maintained at a minimum baseline of natural, self-sustaining vitality. While the textual formulations may differ, defendants have always reserved great swaths of this country for preservation in a natural state for the enjoyment and the benefit of present and future generations.[5] Anthropomorphic climate change poses an existential threat to the vitality of America's public lands, such that the space plaintiffs require to exercise their rights has been and will continue to be substantially impaired. ER 70–71, 199–201. To be sure, plaintiffs' ability to experience wilderness safely has already been severely limited if not restricted due to defendants' contribution to the climate crisis. ER 183–95.

1. Access to wilderness is implicit in our scheme of ordered liberty.

Wilderness as a means of liberty has been recognized as implicit in our scheme of ordered liberty since this Nation's founding, long before other recognized due process rights, such as abortion, contraception, and same-sex marriage were legally protected, and at least 120 years ago, when robust protections of wild lands were undergoing widespread codification. As such, the

[5] For instance, National Parks are to be maintained so as to leave them "unimpaired for the enjoyment of future generations." National Parks Service Organic Act, 39 Stat. 535, § 1 (1916).

right to wilderness is not a broad, untethered philosophical concept, but rather a right that exists on a continuum of the existing right to be let alone. *See* Carter Dillard, Fundamental Illegitimacy, 56 Willamette L. Rev. 157, 163 (2020), ("To be comprehensive, evaluations of political autonomy must first orient from a baseline of the absence of any form of human influence or affect (point zero)."). That the right is not like currently recognized expressions of the right to be let alone is not fatal to plaintiffs' request for recognition now, as the right to be alone in wilderness must be protected for plaintiffs to meaningfully express their fundamental rights of liberty and autonomy.

As discussed in detail in the complaint, colonists forming communities across the Eastern Seaboard were deeply influenced by the philosophy of John Locke and believed recourse to the "state of nature" was necessary for people to freely provide, or revoke, consent to subjugate some personal liberty in favor of the benefits of social organization. ER 93, 237 (citing John Locke, *The Second Treatise on Government* 35–36 (1690); Joshua Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. of Pol., No. 4, 985, 993–94 (1996); M.B. Arneil, *All the World Was America*: *John Locke and the American Indian* (1992)). Existence and proximity to wilderness was critical to developing individual rights, such as the rights to autonomy and privacy that explicitly embodied Lockean principals in the Declaration of Independence. *See*

John Locke, *The Second Treatise on Government* 35-36 (1690); Declaration of Independence, para. 2 (U.S. 1776). "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 and the American Mind* xi (4th ed. 2001). Essentially, wilderness was a precondition for ordered liberty.

In keeping with this concept of liberty, many early colonial charters included the right to exit and form a new community. ER 94, 237. Initially, European colonists considered the existence of vast western wild lands, open for their settlement, as explicit implementation of their Fifth Amendment right to freedom to travel to enjoy public wild lands. *See id.* Indeed, "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). The right to travel was recognized long before the bodily integrity rights more often associated with substantive due process.

For much of the Nineteenth Century, the western frontier allowed European Americans to withdraw, to a meaningful extent, from then-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. Public lands increasingly took on a less-literal Lockean meaning; yet they continued to provide opportunities to express and experience liberty and privacy values. The district court's order suggests we should ignore this original conception of liberty because the threat to wilderness is too great, but 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." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (finding the notion that only Eighteenth-Century arms are protected by the Second Amendment as "bordering on the frivolous"). *See* ER 158–58.

Like other rights— such as political speech, procreation, abortion, travel, teaching or learning a foreign language, accessing a loaded pistol, same-sex-marriage, interracial marriage—the right to wilderness is not exercised, desired, or utilized equally by all people. But this does not detract from its fundamental character. Still today, as detailed in the complaint, wilderness provides plaintiffs access to an essential type of liberty, which is as close as an approximation to Lockean liberty that modern society allows. ER 183–95.

Throughout history, then, public wild lands have been 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. As recently as 1950, Justice Douglas accepted that in wilderness, one "is free of the restraints of society and free of its safeguards, too." William O. Douglas, *Of Men and Mountains* (1950) (autobiography of Justice Douglas). Wilderness is also a recognized venue for "freedom of individual development" and "aspirations toward honor, nobility, integrity and courage" that "satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention." Joseph Sax, *Freedom: Voices from the Wilderness*, 7 Envtl. L. 565, 569, 573 (1977) (quoting John Rawls, *A Theory of Justice* 426–27 (1971)).

This court has acknowledged, in recognizing a right to protection against warrantless searches in national parks, that "one of the primary purposes of our national parks" is to allow expression of "visitors' fundamental right to be left alone." *United States v. Munoz*, 701 F.2d 1293, 1298 (9th Cir. 1983). An original and ongoing central purpose of the federal wild lands are specifically to afford the public physical places to commune with nature. *Id.* This inherently furthers a certain type of bodily liberty, autonomy and privacy, all attributes traditionally at the core of due process rights. *Obergefell*, 576 U.S. at 663 (2015) ("[L]iberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."); *Olmstead v.*

United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.").

That a "right to wilderness" has yet to be recognized by the United States Supreme Court should not have been fatal to plaintiffs' case at this early stage in the litigation. The Supreme Court does not have occasion to address constitutional rights 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 its 2008 decision in *Heller*, 554 U.S. at 625. In doing so, the Court acknowledged that the right to bear arms was a "significant matter" that had "been for so long judicially unresolved." Similarly, almost 150 years passed before the Court struck down a statute on First Amendment grounds. *See id.* at 625–26 (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. . ..").

During the COVID-19 pandemic, millions of Americans sought out nature, gaining an increasing appreciation for this natural heritage. *See, e.g.*, Sadie Dingfelder, *Nurtured by Nature: How the Pandemic Has Intensified Our Connection to the Outdoors*, Wash. Post: Magazine, Dec. 28, 2020 (reporting increasing public appreciation of nature during the pandemic). Wilderness was and continues to be an essential source of artistic and creative inspiration. The

termination of the ability to seek solitude in a flourishing wilderness is a significant imposition on the liberty expected as a heritage of the American people. ER 180, 233–34. The freedom to access wilderness is of no less importance to many Americans than "the freedom to loiter for innocent purposes," which is recognized as "part of the 'liberty' protected by the Due Process Clause." *City of Chi. v. Morales*, 527 U.S. 41, 53 (1999).

2. A right to wilderness is objectively, deeply rooted in this Nation's history and tradition.

Due to the importance and vulnerability of wilderness, defendants now administer a network of protective regimes; yet, for most of the 1800s, natural "superabundance," coupled with the limited reach of the federal government, meant there was little perceived need for federal intervention to protect wilderness rights. Craig W. Allin, *The Politics of Wilderness Preservation* 12 (1982). With the increasing urbanization and industrialization, and the extolling of American nature in numerous art forms, *see* ER 98–99, a national patriotic appreciation for the majesty and power of the America's distinctive natural diversity rapidly developed. Nash, *supra* p. 32, at 69, 78-79. Nature was recognized to carry intrinsic experiential, religious, and esthetic value. Donald Worster, *The Wilderness of History*, 7 Wild Earth no. 3, 221, 225 (1997). Mass westward migration, industrialization, and expanded rail travel suddenly placed vast western land

reserves at risk of cultivation and extraction. *See*, ER 98. As expected, Americans developed a growing source of environmental interest in "the wilderness passing away, and the necessity of saving and perpetuating its features." Hans Huth, *The American and Nature*, 13 J. of Warburg & Courtauld Inst. 101, 120 (1950) (quoting Louis Noble, *The Course of Empire: Voyage of Life, and Other Pictures of Thomas Cole, N.A.* 398 (1853)). By the 1860s, 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).

Since first establishing Yosemite National Park and Mariposa Grove in 1864, the federal government has become increasingly active in setting aside wild lands for recreation and future appreciation, as well as other purposes. *See* National Parks Service Organic Act, 13 Stat. 325 (1864). Since 1891, the United States has established numerous other natural, recreational, and multiple-use units, including 150 National Forests and Grasslands. ER 100.

In 1916, the National Parks Service was established 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). Under an amendment to that Act, all national parks are part of "one National Park

System" that is a "cumulative expression of a single national heritage" to be "preserved and managed for the benefit and inspiration of all the people of the United States." 54 U.S.C. § 100101(b)(1)(B), (C) (2014). Currently, there are 417 areas within the National Park System. ER 100, 201. The states have also actively established parks and preserves, but the federal government is the primary steward of wild lands. *See generally* John Henneberger, *State Park Beginnings*, 17 George Wright Forum no. 3, 2000, at 9.

Largely mirroring Frederick Law Olmstead's first report on Yosemite National park,[6] in 1903, President Roosevelt declared: "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 of President Roosevelt at Santa Cruz, Cal. (May 11, 1903).

In hundreds of subsequent declarations, the president and principal officers have committed to preserving the national natural heritage for future generations: "Americans are united in the belief that we must preserve this treasured heritage." Proclamation No. 7665, 68 Fed. Reg. 19929 (Apr. 23, 2003). Last year, President

[6] Frederick Law Olmsted, *Yosemite and the Mariposa Grove: A Preliminary Report* (1865) ("It is the main duty of government, if it is not the sole duty of government, to provide means of protection [for] all citizens in the pursuit of happiness against the obstacles, otherwise insurmountable, which the selfishness of individuals or combinations of individuals is liable to interpose to that pursuit.").

Trump proclaimed that "these exquisite resources [are] 'the most glorious heritage a people ever received.' . . . America's natural landscapes belong to the American people. . .We will preserve the stunning beauty of the American and the Americas and this nation." Remarks by President Trump at Signing of H.R. 1957, *The Great American Outdoors Act* (Aug. 4, 2020) (quoting Theodore Roosevelt). Moreover, in hundreds, if not thousands, of enactments, Congress has enshrined the principle that the natural character of the land be preserved for future generations.[7]

[7] *See, e.g.*, National Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542 (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.C. § 1701(a)(8)); 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)).

Here is a small but representative sample of the preservation language in some national park legislation:

- Jean Lafitte National Historical Park and Preserve is established "[i]n order to preserve for the education, inspiration, and benefit of present

Recognizing the importance of solitude as a value in and of itself, and the necessity of access to wilderness as a means of achieving that value, Congress, via the 1987 Overflights Act, ordered the Federal Aviation Administration to reduce aircraft noise in Grand Canyon National Park and established the goal of "substantial restoration of natural quiet and experience of the park." *See* Overflights Act (PL 100–91 (HR 921), PL 100–91, August 18, 1987, 101 Stat 674); *see also* Proposed Change in Noise Evaluation Methodology, 64 Fed.Reg. at 3971 (accounting for the interests of those visitor "sitting quietly but actively seeking to experience the natural quiet and solitude of the park.") Similarly, the National Park Service regulates the number of visitors and visitor uses in parks to ensure adequate "opportunities for solitude." *See, e.g.,* National Park Service, U.S. Department of Interior, *Visitor Experience and Resource Protection Framework*, p. 59, 77 (1997).

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and future generations significant examples of natural and historical resources of the Mississippi Delta region," and for other reasons. 16 U.S.C. §230 (2009).

- "In order to preserve for the benefit, use, and inspiration of present and future generations certain majestic mountain scenery, snow fields, glaciers, alpine meadows, and other unique natural features in the North Cascade Mountains of the State of Washington, there is hereby established, subject to valid existing rights, the North Cascades National Park." 16 U.S.C. § 90.
- Mount Rainier National Park is "dedicated and set apart as a public park . . . for the benefit and enjoyment of the people." 16 U.S.C. § 91.

Not surprisingly, then, the United States was the first country to officially designate land as "wilderness," and the preamble of the Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (1964), declares its purpose to preserve wilderness "for the permanent good of the whole people." 16 U.S.C. § 1131(a). The first subsection further provides 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." *Id.* The Wilderness Act's obligation to preserve areas in a natural state is most clearly expressed in its rigorous preservation standards for unique, isolated natural areas that:

> (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition.

16 U.S.C. §1131(c). The Wilderness Act was overwhelmingly approved by Congress, passing in the Senate 73-to-12 and in the House 373-to-1 and remains extraordinarily popular. James Turner, *The Promise of Wilderness: American Environmental Politics Since 1964*, p. 18 (2012).

Just as the "state of nature" in Locke's social contract theory refers to both political and literal wilderness, the "wilderness" of the Wilderness Act refers to both the physical characteristics of wilderness and wilderness as a "state of being" akin to the purest form of solitude. *See Montana Wilderness Ass'n v. McAllister,*

666 F.3d 549, 556 (9th Cir.), aff'd, 460 F. App'x 667 (9th Cir. 2011) ("The Wilderness Act does not define 'wilderness' solely according to 'physical, inherent characteristics.' Instead, it states that, in *addition* to having physical characteristics such as large acreage, a wilderness 'has outstanding opportunities for solitude.' 16 U.S.C. § 1131(c). An area's ability to provide solitude depends on a current user's perception of *other* users around him—not just on the physical characteristics of the land.")

The courts have shown special solicitude to protect Wilderness Act-designated areas, suggesting judges implicitly recognize the fundamental rights implicated by the destruction of certain natural properties. Peter Appel, *Wilderness and the Courts*, 29 Stan. Envtl. L. J. 62, 98 (2010); *See also* ER 103–04 (discussing indicia of fundamental rights status). This longstanding history of setting aside federal lands and the repeated legislative and executive commitments to preserve them for perpetuity establishes a deep history and tradition of wilderness protection that is only explained by an antecedent right to wilderness.

3. Americans expect the court to act to protect their Wilderness Heritage, which faces unprecedented threats to its very existence.

Undoubtedly, after 150 years of expanding federal policy to protect public lands in a natural state from short-sided exploitation, it would shock the public, and judicial, conscience if today defendants were to declare that it is ceasing to protect

its wild lands holdings. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (official misconduct violates substantive due process only if it shocks the conscience or outrages a sense of decency). That is essentially the situation described in the complaint: Defendants, by causing and exacerbating the climate crisis, caused successive, multifront waves of attacks on federal publics lands. ER 217–18, 222–27. The threat posed by anthropomorphic climate change to wilderness is existential.

While there has always been obvious tension between the preservation ideal expressed in by the founders and the exploitative drive of capitalism, until recently, the public lands enterprise adapted to meet development threats, such as by establishment of the National Park System and enactment of the Wilderness Act. With climate change, defendants have demonstrated an inability to adapt to protect America's Wilderness Heritage. The only historical analogy to the current threat posed by climate change is the westward wave of unchecked development in the late-Nineteenth Century and early-Twentieth Century that itself was the impetus for the initial establishment of the federal wild lands management systems we have today.[8] *See* ER 99–100. Never since taking the mantle of preserver of wild lands,

[8] The Supreme Court similarly first considered a new and existential threat to an individual's right to own a handgun, rather than the collective right to keep and bear arms as part of a well-regulated militia, when it struck down a municipality's ban on gun ownership under the Second Amendment. *District of Columbia et al. v.*

has the government countenanced, abetted, or accepted irreversible destruction on this scale.[9] In fact, the reverse is true, as not even a single national park unit established for its ecological beauty has been removed from federal or state protection. *See* Bob Janiskee, *Gone and Mostly Forgotten: 26 Abolished National Parks*, NAT'L PARKS TRAVELER (Dec. 30, 2011) (parks established for historical or geological reasons have been delisted). Congress has never enacted any law

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Heller, 554 U.S. 570, 625 (2008). Plaintiffs asked the district court to recognize their individual right to wilderness access as part of their collective right to wilderness protection, evidenced by these ever-present federal public lands management policies.

[9] The legal development of the right to be left alone coincided with the loss of the frontier. *See* Robert F. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 Am. J. Juris. 87, 88-104 (1989) (finding that "the geographic spread of privacy actions and statutory enactments corresponds with the progression of the frontier line and its closing" and that the "threat to the frontier values of individualism and autonomy was an impetus for the creation and adoption of a legal means to protect personal privacy and to officially recognize the right to a certain degree of social distance").

And with "historical studies hav[ing] shown that the development of the right of privacy has closely tracked the receding line of the frontier," the social contract right of the return to the state of nature took on added importance. *See* James E. Fleming, *Securing Deliberative Autonomy* 48 Stan. L. Rev. 1 (1995), 54–56 ("[A]n increasingly important analogue to the "exit" option and the tradition of the frontier is the protection of basic liberties that are preconditions for deliberative autonomy. These basic liberties constitute a partial "exit" option from majoritarian oppression because they set aside a figurative "frontier" in which persons, individually and in association with others, may deliberate about and decide how to lead their own lives.") Climate change has only further amplified the importance of the right to be let alone in wilderness.

declaring, nor has any court has ever held, that the government has the right to collaterally destroy the Nation's Wilderness Heritage.

The Forest Service, too, has acknowledged that agency decision-making should reflect special care for the historical commitment to wilderness. *See* Appel, 29 STAN. ENVTRL L. J. at 72 (quoting the Forest Service regulatory enforcement instructions for its officers: "Each Forest Officer should fully recognize that these fragmentary remains of a once great virgin empire have, as such, a real value of great social significance, notwithstanding its intangibility; a value which, once lost, can never be replaced. To avoid irreparable loss, it will be well generally to resolve doubts in favor of primitive simplicity, to encourage or allow only the minimum of change required by proper protection and management of the National Forests and their resources, or by the forms of public use and enjoyment which, all factors considered, are most beneficial and to the public interest.")

With landscapes charred, ER 192, the forests gone, ER 210, meadows dead, *id.*, glaciers melted away, ER 205, and the seasonal window for access narrowed by ever-longer wildfire seasons and dangerous air quality, ER 191, barring a course correction, plaintiffs can prove that climate change has caused injury to and will result in irreversible elimination of the specific distinctive biological characteristics of numerous public lands set aside for government stewardship. Certainly, natural places are dynamic. But, unlike the isolated wildfires, droughts,

or floods that periodically affected parts of the public lands system, climate-change driven impacts irreparably eliminate telltale natural features across massive swaths of public wild lands.[10] The country had never experienced such an existential threat, and defendants' failure to act to protect plaintiffs' right to expression of liberty and autonomy in wilderness must be remedied by the Judicial Branch.

4. The district court ignored the facts asserted in the complaint and the arguments in plaintiffs' Response to the Motion to Dismiss.

i. Plaintiffs do not assert a right to be free from government.

In holding that there is no right to wilderness, the district court incorrectly construed plaintiffs' claim as a "a substantive due process right to be free from government." ER 13. Plaintiffs "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." ER 94.

[10] "It's really difficult to imagine Glacier National Park without glaciers, Joshua Tree National Park without these trees. Yet, the evidence is clear that we may be facing just that kind of future." *The Impacts of Climate Change on America's National Parks: Hearing Before the H. Subcomm. on Nat'l Parks, Forests, and Pub. Lands*, 111th Cong. 1 (2009) (statement of Rep. Raúl Grijalva) https://www.govinfo.gov/content/pkg/CHRG-111hhrg48662/html/CHRG-111hhrg48662.htm; *see also* ER 205.

ii. The right to wilderness is predicated on defendants having committed for over a decade to wilderness as an environmental standard.

In holding that there is no right to wilderness, the district court also ignored the plaintiffs' detailed discussion of the history supporting the right to wilderness, *see* ER 94–104, and incorrectly equated the right to wilderness with a constellation of cases labeled by the district court as a "right to a particular type of environment or environmental conditions," ER 13. However, unlike the cases cited by the district court, *see, e.g.*, *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 108 (D.C. Cir. 2018) (referring to rights to clean air and pure water), plaintiffs are not seeking an abstract type of environment or to impose their own pollution-free standards on nature or their own communities, but rather to give legal force to the repeated undertakings of the government itself to maintain an environmental standard on federal wild lands that will be suitable for expressions of solitude in a sustainable, natural condition for future generations. *See*, ER 99–103.

iii. The right to wilderness is narrower than the right to a stable climate system recognized in *Juliana*.

In holding that there is no right to wilderness, the district court also incorrectly distinguished the right claimed in Juliana because the Juliana "plaintiffs did not object to the government's role in just *any* pollution or climate change, but rather *catastrophic* levels of pollution or climate change." ER 14 (emphasis in original) (citing 217 F. Supp. 3d 1224, 1250 (D. Or. 2016)). But these plaintiffs do

not object to "just any pollution or any climate change." Rather, the complaint seeks only to prevent the catastrophic destruction of the natural character of federal wild lands, arguably a much more manageable undertaking than stabilizing the world climate. *See, e.g.*, ER 193, 203–04, 207, 208, 209, 210, 233–34. To be sure, the right plaintiffs seek to vindicate is access to federal wildlands in the natural and vital state anticipated and declared by Congress as the standard for such lands. "The numerous legislative enactments recognizing the fundamental importance of public land remaining wild and suitable for public enjoyment offer the court necessary 'guideposts for responsible decision making.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)." ER 106.

Paradoxically, the district court asserted that the right recognized in *Juliana* to a "stable climate system," contrary to the all-encompassing plain meaning of that phrase, is somehow "narrower" than an individual right to wilderness, placing plaintiffs' right beyond the scope of the right recognized in *Juliana*. ER 14. The district court supported this illogical determination by referring to the "sweeping relief [plaintiffs] request." *Id.* However, the relief requested is not an appropriate or recognized means of ascertaining the existence of a fundamental right and is often a result of tactical litigation considerations. Surely, protecting a "stable climate system" could justify the most extreme relief involving all aspects of human behavior. The right to wilderness only involves prohibiting defendants' conduct in

specific ways aimed at maintaining the natural character of a meaningful quantity of the existing federal land already set aside for that purpose.

iv. Substantive due process is not limited to a fixed domain.

Finally, in holding that there is no right to wilderness, the district court wrongly straightjacketed substantive due process to a narrow range of specific activities, ER 12 ("right to marry, have children, direct one's children's education and upbringing, marital privacy, use contraception, bodily integrity, and abortion"), and arbitrarily dismissed the potential for recognition of a right to wilderness because it is superficially "unlike other fundamental rights the Supreme Court has enumerated." *Id.* The Supreme Court has long cautioned precisely against this type of reasoning: "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); *Obergefell*, 576 U.S. at 664 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."). Notably, the district court neglected to mention the fundamental right recognized in *Juliana* and the right to travel, a right that shares many important attributes with the right to physically access wilderness.

In each of hundreds of enactments, Congress and the Executive have declared that the preservation of the essential character of wild public lands is a fundamental value. It is not a fleeting policy position but an enduring and growing commitment that began more than 150 years ago. That there should and must be spaces of natural vitality where the ability to be let alone is enhanced and fostered, is an important form of American liberty. To be sure, it is no longer the liberty to exit of Locke's theory and certainly the laws of the United States extend their protection to wilderness like all other territory. Yet, the existence of these natural physical spaces affords a type of essential liberty experienced regularly by plaintiffs and of which Americans cannot and must not be deprived.

IX. Conclusion

Based on the foregoing, plaintiffs respectfully request that the court reverse the district court's judgment dismissing plaintiffs' claims with prejudice and remand for further litigation.

Respectfully submitted this 21st day of June 2021,

/s/ Carter Dillard
Carter Dillard
Matthew Hamity
Animal Legal Defense Fund

/s/ Jessica L. Blome
Jessica L. Blome
Greenfire Law, PC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Article III, Section 2 of the United States Constitution

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states; between a state and citizens of another state; between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

16 U.S. Code § 230. Establishment of the Jean Lafitte National Park and Preserve

In order to preserve for the education, inspiration, and benefit of present and future generations significant examples of natural and historical resources of the Mississippi Delta region and to provide for their interpretation in such manner as to portray the development of cultural diversity in the region, there is authorized to be established in the State of Louisiana the Jean Lafitte National Historical Park and Preserve (hereinafter referred to as the "park"). The park shall consist of (1) the area generally depicted on the map entitled "Boundary Map, Barataria Preserve Unit, Jean Lafitte National Historical Park and Preserve", numbered 467/80100A, and dated December 2007, which shall be on file and available for public inspection in the office of the National Park Service, Department of the Interior; (2) the area known as Big Oak Island; (3) an area or areas within the French Quarter section of the city of New Orleans as may be designated by the Secretary of the Interior for an interpretive and administrative facility; (4) folk life centers to be established in the Acadian region; (5) the Chalmette Unit of the Jean Lafitte National Historical Park and Preserve; and (6) such additional natural, cultural, and historical resources in the French Quarter and Garden District of New Orleans, forts in the delta region, plantations, and Acadian towns and villages in the Saint Martinville area and such other areas and sites as are subject to cooperative agreements in accordance with the provisions of this part.

(Pub. L. 95–625, title IX, §§ 901, 909, Nov. 10, 1978, 92 Stat. 3534, 3538; Pub. L. 100–250, § 1(a), Feb. 16, 1988, 102 Stat. 16; Pub. L. 111–11, title VII, § 7105(a), (f)(1)(B), (2)(B), Mar. 30, 2009, 123 Stat. 1191, 1193.)

16 U.S. Code § 1131. The Wilderness Act

(a) ESTABLISHMENT; CONGRESSIONAL DECLARATION OF POLICY; WILDERNESS AREAS; ADMINISTRATION FOR PUBLIC USE AND ENJOYMENT, PROTECTION, PRESERVATION, AND GATHERING AND DISSEMINATION OF INFORMATION; PROVISIONS FOR DESIGNATION AS WILDERNESS AREAS

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, 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. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

(b) MANAGEMENT OF AREA INCLUDED IN SYSTEM; APPROPRIATIONS

The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness

Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

(c) "WILDERNESS" DEFINED

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

(Pub. L. 88–577, § 2, Sept. 3, 1964, 78 Stat. 890.)

16 U.S. Code § 1241 - National Trails Preservation Act

(a) CONSIDERATIONS FOR DETERMINING ESTABLISHMENT OF TRAILS

In order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation, trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation, which are often more remotely located.

(b) INITIAL COMPONENTS

The purpose of this chapter is to provide the means for attaining these objectives by instituting a national system of recreation, scenic and historic trails, by designating the Appalachian Trail and the Pacific Crest Trail as the initial components of that system, and by prescribing the methods by which, and standards according to which, additional components may be added to the system.

(c) VOLUNTEER CITIZEN INVOLVEMENT

The Congress recognizes the valuable contributions that volunteers and private, nonprofit trail groups have made to the development and maintenance of the Nation's trails. In recognition of these contributions, it is further the purpose of this chapter to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails.

16 U.S. Code § 668dd(a) - National Wildlife Refuge System

(a) DESIGNATION; ADMINISTRATION; CONTINUANCE OF RESOURCES-MANAGEMENT-PROGRAMS FOR REFUGE LANDS IN ALASKA; DISPOSAL OF ACQUIRED LANDS; PROCEEDS

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

(3) With respect to the System, it is the policy of the United States that—

(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established;

(B) compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife;

(C) compatible wildlife-dependent recreational uses are the priority general public uses of the System and shall receive priority consideration in refuge planning and management; and

(D) when the Secretary determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate.

(4) In administering the System, the Secretary shall—

(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System;

(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;

(C) plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public;

(D) ensure that the mission of the System described in paragraph

(2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;

(E) ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of

the States in which the units of the System are located;

(F) assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge;

(G) acquire, under State law, water rights that are needed for refuge purposes;

(H) recognize compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the American public can develop an appreciation for fish and wildlife;

(I) ensure that opportunities are provided within the System for compatible wildlife-dependent recreational uses;

(J) ensure that priority general public uses of the System receive enhanced consideration over other general public uses in planning and management within the System;

(K) provide increased opportunities for families to experience compatible wildlife-dependent recreation, particularly opportunities for parents and their children to safely engage in traditional outdoor activities, such as fishing and hunting;

(L) continue, consistent with existing laws and interagency agreements, authorized or permitted uses of units of the System by other Federal agencies, including those necessary to facilitate military preparedness;

(M) ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges; and

(N) monitor the status and trends of fish, wildlife, and plants in each refuge.

(5) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b)(3) of this section) unless—

(A) the Secretary determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than—

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(6) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is—

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of Congress, except that nothing in this paragraph shall be construed as precluding—

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (5) of this subsection;

(ii) the exchange of lands within any such area pursuant to subsection (b)(3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

the Federal Advisory Committee Act (5 U.S.C. App.).

(Pub. L. 89–669, § 4, Oct. 15, 1966, 80 Stat. 927; Pub. L. 90–404, § 1, July 18, 1968, 82 Stat. 359; Pub. L. 93–205, § 13(a), Dec. 28, 1973, 87 Stat. 902; Pub. L. 93–509, § 2, Dec. 3, 1974, 88 Stat. 1603; Pub. L. 94–215, § 5, Feb. 17, 1976, 90 Stat. 190; Pub. L. 94–223, Feb. 27, 1976, 90 Stat. 199; Pub. L. 95–616, §§ 3(f), 6, Nov. 8, 1978, 92 Stat. 3111, 3114; Pub. L. 100–226, § 4, Dec. 31, 1987, 101 Stat. 1551; Pub. L. 100–653, title IX, § 904, Nov. 14, 1988, 102 Stat. 3834; Pub. L. 105–57, §§ 3(b)–8, Oct. 9, 1997, 111 Stat. 1254–1259; Pub. L. 105–312, title II, § 206, Oct. 30, 1998, 112 Stat. 2958.)

16 U.S. Code § 7202 - Establishment of the National Landscape Conservation System

(a) ESTABLISHMENT

In order to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations, there is established in the Bureau of Land Management the National Landscape Conservation System.

(b) COMPONENTS

The system shall include each of the following areas administered by the Bureau of Land Management:

(1) Each area that is designated as—

(A) a national monument;

(B) a national conservation area;

(C) a wilderness study area;

(D) a national scenic trail or national historic trail designated as a component of the National Trails System;

(E) a component of the National Wild and Scenic Rivers System; or

(F) a component of the National Wilderness Preservation System.

(2) Any area designated by Congress to be administered for conservation purposes, including—

(A) the Steens Mountain Cooperative Management and Protection Area;

(B) the Headwaters Forest Reserve;

(C) the Yaquina Head Outstanding Natural Area;

(D) public land within the California Desert Conservation Area administered by the Bureau of Land Management for conservation purposes; and

(E) any additional area designated by Congress for inclusion in the system.

(c) MANAGEMENT

The Secretary shall manage the system—

(1) in accordance with any applicable law (including regulations) relating to any component of the system included under subsection (b); and

(2) in a manner that protects the values for which the components of the system were designated.

(d) EFFECT

(1) IN GENERAL

Nothing in this chapter enhances, diminishes, or modifies any law or proclamation (including regulations relating to the law or proclamation) under which the components of the system described in subsection (b) were established or are managed, including—

(A) the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.);

(B) the Wilderness Act (16 U.S.C. 1131 et seq.);

(C) the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.);

(D) the National Trails System Act (16 U.S.C. 1241 et seq.); and

(E) the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(2) FISH AND WILDLIFE

Nothing in this chapter shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations,

including the regulation of hunting, fishing, trapping and recreational shooting on public land managed by the Bureau of Land Management. Nothing in this chapter shall be construed as limiting access for hunting, fishing, trapping, or recreational shooting.

(Pub. L. 111–11, title II, § 2002, Mar. 30, 2009, 123 Stat. 1095.)

43 U.S. Code § 1701 - Federal Land Policy & Management Act

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

(Pub. L. 94–579, title I, § 102, Oct. 21, 1976, 90 Stat. 2744.)

54 U.S. Code § 100101 - National Parks Organic Act

(a) IN GENERAL.—
The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

(b) DECLARATIONS.—

(1) 1970 DECLARATIONS.—Congress declares that—

(A) the National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States and its territories and possessions;

(B) these areas, though distinct in character, are united through their interrelated purposes and resources into one National Park System as cumulative expressions of a single national heritage;

(C) individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one System preserved and managed for the benefit and inspiration of all the people of the United States; and

(D) it is the purpose of this division to include all these areas in the System and to clarify the authorities applicable to the System.

(2) 1978 REAFFIRMATION.—
Congress reaffirms, declares, and directs that the promotion and regulation of the various System units shall be consistent with and founded in the purpose established by subsection (a), to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3096.)