Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants.

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

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellee Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock

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STATEMENT OF JURISDICTION

(a) The district court has jurisdiction under 28 U.S.C. § 1331 and Article III, Section 2 and the Fifth Amendment of the U.S. Constitution.

(b) This Court assumed jurisdiction pursuant to 28 U.S.C. § 1292(b) incorrectly even though both the district court and this Court failed to make the requisite findings for granting an interlocutory appeal. Defendants' Excerpts of Record ("ER") 120-123; ER 184-189.

(c) Plaintiffs agree with the dates of decision provided by Defendants.

ISSUES PRESENTED

1. Upon further consideration, does this Court have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291(b)?

2. Did the district court err in concluding there are genuine issues of material fact as to Plaintiffs' standing when Plaintiffs offered substantial evidence to establish standing and Defendants offered no evidence in support of summary judgment?

3. Does the district court have a duty to decide Plaintiffs' constitutional claims pursuant to its Article III authority and obligations?

4. Can a constitutional claim in equity be brought directly under the Fifth Amendment of the U.S. Constitution or must it be brought solely under the Administrative Procedure Act?

5. Is a climate system capable of sustaining human life a fundamental and unalienable right protected by the Fifth Amendment?

6. Have Plaintiffs produced sufficient evidence to present genuine issues of material fact as to whether Defendants affirmatively and with deliberate indifference to a known danger placed Plaintiffs in peril in violation of the Fifth Amendment?

7. Does the public trust doctrine apply to natural resources controlled by the federal government and is it actionable under the Fifth Amendment?

ADDENDUM

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

STATEMENT OF THE CASE

Plaintiffs do not restate the procedural history of this case, but herein correct Defendants' misstatements as follows:

Plaintiffs do not state a claim for "particular climate conditions," Defendants' Opening Brief ("DOB") 3, but rather not to be deprived of their rights to life, liberty, property, and public trust resources by federal government acts that knowingly destroy, endanger, and impair the unalienable climate system that nature endows, which are fundamental to Plaintiffs' lives. ER 521-525, 571-575, 586-588, 604-613.

In their Motion to Dismiss, Defendants did not argue that Plaintiffs failed to state *any* "cognizable constitutional claim." DOB 4. They argued only that there was

"no constitutional right to be free of CO_2 emissions," ER 502, that Plaintiffs are not a suspect class, ER 506-507, that the Ninth Amendment does not guarantee substantive rights, ER 508, and that the court has no jurisdiction over a public trust doctrine claim, ER 509-511.

At the Motion to Dismiss stage, the district court did not "rule[] that Plaintiffs had established Article III standing," but that Plaintiffs adequately alleged each element of standing. DOB 4; ER 80-90.

The district court did not "grant[ ] the motion for reconsideration in November 2018" on interlocutory appeal; it denied it. DOB 8; Plaintiffs' Supplemental Excerpts of Record ("SER") 1.

SUMMARY OF THE ARGUMENT

This is a constitutional case of great urgency about the physical and emotional security of American youth who properly invoked the district court's jurisdiction under the Fifth Amendment of the U.S. Constitution and 28 U.S.C. § 1331 to seek redress for Defendants' systemic deprivation of their fundamental rights to life, liberties, and property.

Defendants' plea to this Court to resolve this case prior to the presentation of evidence at trial should be rejected for several reasons. First, the prerequisites for this Court's jurisdiction under 28 U.S.C. § 1292(b) have not been met. Second, Defendants cite *no* evidence to support their plea. Third, Defendants rely entirely on

arguments regarding the limits of Article III powers, which are simply wrong. Importantly, the arguments will be the same after a trial as they are today. What will change, if this Court denies the interlocutory appeal and remands for trial, is that this Court's understanding of the context of the arguments will be based upon a fully developed factual record. The Court also will be able to base its decision on a concrete judgment from the district court granting (or denying) relief, rather than the hyperbolic speculation in Defendants' brief. Lastly, on the existing evidentiary record, to deny an actionable constitutional right is tantamount to denying these children their lives and their safety, upending the Framers' intent in the founding documents and the Bill of Rights.

The Constitutional role of Article III courts, and thus individual liberty, will be best protected by affording Plaintiffs the same opportunity as other citizens injured by the actions of the political branches: a courtroom in which to present their evidence and an appellate process to invoke after, not before or during, trial.

ARGUMENT

I. The Court lacks jurisdiction of this interlocutory appeal

Prior to consideration of this appeal, this Court should reconsider its certification order and dismiss this appeal as improvidently granted. *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). As Judge Friedland wrote in dissent, the district court's order certifying this case does not trigger jurisdiction under 28

U.S.C. § 1292(b). ER 120-23; ER 188; *see Couch v. Telescope*, 611 F.3d 629, 631-32 (9th Cir. 2010) (vacating jurisdiction where district court certified while expressing doubt that the requirements of § 1292(b) were satisfied).

This Court should vacate its order granting interlocutory appeal because: (1) most of Plaintiffs' claims were not addressed by the orders below; thus, apart from issues of standing and the APA, the case will go forward on the same factual basis irrespective of how this Court rules; (2) in light of that, no meaningful end is served by hearing some of the claims now; and (3) the standing and APA issues do not meet the section 1292(b) test.

Defendants' conclusory assertion that "all of Plaintiffs' claims and theories are before this Court now," DOB 45, is demonstrably false. Defendants continue to conflate the four counts enumerated in Plaintiffs' complaint with the eleven claims[1]

[1] In their complaint, based on a common nucleus of operative facts, Plaintiffs alleged infringement of: explicitly enumerated substantive due process rights to (1) life, ER 604-608 (¶¶ 278-280, 282, 286, 288-289), and (2) property, ER 604-608 (¶¶ 278-280, 286-289); previously recognized implicit liberty rights to (3) family autonomy, ER 606 (¶ 283), and (4) personal security, ER 606 (¶¶ 283, 285); (5) an unenumerated implicit liberty right to a stable climate system under the Fifth Amendment, ER 604-609 (¶¶ 279-284, 286, 289, 293); (6) a right to a stable climate alternatively grounded in the Ninth Amendment, ER 611-612 (¶¶ 302-306); (7) rights under the public trust doctrine, ER 612-613 (¶¶ 307-310); (8) equal protection rights to be free from discrimination as to each of their foregoing fundamental rights, ER 608-609, 611 (¶¶ 291-293, 301); and (9) as members of a suspect or quasi-suspect class, ER 608-610 (¶¶ 291, 294-298); and (10) rights under the state-created danger doctrine. ER 605-606 (¶¶ 281, 283-285). Plaintiffs also challenged (11) the constitutionality of Section 201 of the Energy Policy Act. ER 607-608, 610-611 (¶¶ 288, 299-300).

presented therein. *See, e.g.*, *Wilson v. City of Des Moines*, 338 F.Supp.2d 1008, 1015 n.2 (S.D. Iowa 2004) ("While Wilson's complaint only avers two counts, each of these counts alleges multiple claims."). Defendants addressed the merits of only five of those claims in their motions to dismiss[2] and for summary judgment.[3] Although under no obligation to address claims not challenged by Defendants, *see, e.g.*, *In re Salehi*, BAP No. EC-13-1171-TaKuJu, 2014 WL 2726149, at *5 (9th Cir. BAP, June 9, 2014), Plaintiffs have consistently noted Defendants' failure to address all of their claims. SER 614; ER 378-380.

In its orders, the district court addressed only those claims on which Defendants moved: (1) a right to a climate system capable of sustaining human life, ER 48-49; ER 94-95;[4] (2) state-created danger claim, ER 49-54; ER 95-98; (3) public

[2] At the motion to dismiss stage, Defendants argued: (1) there is no unenumerated right "to be free of CO_2 emissions" under the Fifth Amendment, ER 502-504; (2) the Ninth Amendment guarantees no substantive rights, ER 508-509; (3) youth are not a suspect class, ER 505-508; and (4) Plaintiffs' public trust claims lack merit. ER 509-511. Defendants first addressed: (5) Plaintiffs' state-created danger claim in their reply brief. SER 581-583. Although Defendants did not explicitly challenge Plaintiffs' claim of discrimination with respect to Plaintiffs' fundamental rights, their argument that the climate right is not fundamental relates to Plaintiffs' equal protection claim of discrimination. Defendants did not challenge Plaintiffs' claim of discrimination with respect to their other asserted fundamental rights.

[3] On summary judgment, Defendants argued the following claims lack merit: (1) no unenumerated right to a climate system capable of sustaining human life, SER 508-509; (2) state-created danger, SER 509-510; and (3) public trust. SER 510-513.

[4] Contrary to Defendants' assertion, the district court's focus in narrowly framing this newly recognized right to protect "against the constitutionalization of all environmental claims" was not to the exclusion of Plaintiffs' other substantive due process claims. ER 94-95. Rather, the court's focus was in direct response to

trust claims, ER 54-55; ER 98-113; and (4) equal protection claims of discrimination (a) as members of a suspect class, ER 56-58, and (b) with respect to their right to a stable climate. ER 58-59; ER 92. Because an appeal under section 1292(b) encompasses only those issues addressed, or "fairly included," in a certified order, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 203-05 (1996), Plaintiffs' remaining claims are not before this Court: infringement of explicitly enumerated substantive due process rights to: (1) life, and (2) property; previously recognized implicit liberty rights to (3) family autonomy, and (4) personal security; (5) equal protection rights to be free from discrimination with respect to each of the foregoing fundamental rights; (6) the right to be free from discrimination as members of a *quasi*-suspect class; and (7) the constitutionality of Section 201 of the Energy Policy Act.

Absent dismissal on standing or the APA, these seven remaining claims will proceed in the district court irrespective of this Court's disposition of the claims in this appeal. *See, e.g.*, *Spodek v. U.S.*, 52 F. App'x 497, 500 (Fed. Cir. 2002) (remanding claims not addressed in motion to dismiss); *Burke v. Warner & Swasey Co.*, 868 F.2d 1008, 1010 (8th Cir. 1989) (same on summary judgment). Standing presents a mixed question of law and fact, not a "controlling question of law"

Defendants' argument misconstruing the previously-unrecognized implied right asserted in this *particular* claim as a "right to be free from pollution . . . ." ER 94.

suitable for consideration on interlocutory appeal.[5] Additionally, under settled precedent of this Court and the Supreme Court, there are no "substantial grounds for differences of opinion" that Plaintiffs claims may proceed directly under the Constitution. *See* Section III, *infra*. Because Plaintiffs' remaining claims will proceed on the same body of evidence as the claims at issue here, ER 142, the merits of the claims before this Court neither present "controlling questions of law" nor would their dismissal "materially advance the ultimate termination" of this litigation. *U.S. Rubber Co. v. Wright*, 359 F.2d at 785.

The issues in this case are of tremendous importance and their final resolution upon a full factual record is a matter of immense urgency. "In short, this is precisely the kind of case in which the implications are so considerable and the issues so complex that in the proper exercise of judicial restraint, an abstract answer to an abstract question is the least desirable of judicial solutions." *Slade v. Shearson, Hammil & Co*., 517 F.2d 398, 400 (2d Cir. 1974) (vacating certification of order denying partial summary judgment and remanding for determination of facts).

[5] Standing only presents a controlling question of law for purposes of interlocutory appeal, if ever, where it involves a pure question of law, as opposed to the mixed questions of law and fact presented here. *See, e.g.*, *Edwards v. First Am. Corp.,* 610 F.3d 514 (9th Cir. 2010), *cert. dismissed*, 567 U.S. 756 (2012); *see also In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641 (9th Cir. 1992).

II. The district court has jurisdiction over this action

A. Plaintiffs have standing

To establish standing, a plaintiff must demonstrate he or she suffered a concrete and particularized injury that is either actual or imminent; the injury is fairly traceable to the defendant; and it is likely that a favorable decision will redress that injury. *Horne v. Flores*, 557 U.S. 433, 445 (2009); *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). In defending a standing challenge on summary judgment, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion *will be taken as true*." *Lujan*, 504 U.S. at 561 (emphasis added).

1. Further questions of material fact must be resolved at trial

The district court correctly concluded:

> Regarding standing, [Defendants] have offered similar legal arguments to those in their motion to dismiss. Plaintiffs, in contrast, have gone beyond the pleadings to submit sufficient evidence to show genuine issues of material facts on whether they satisfy the standing elements. The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that genuine issues of material fact exist as to each element.

ER 45; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). After presenting "more than a scintilla" of evidence, Plaintiffs are "entitled to a bench trial and specific findings of fact by the district court . . . ." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541–42 (9th Cir. 2004) (internal citations omitted).

"A district court's determination that the evidence presented by the parties raises genuine factual disputes is not reviewable on interlocutory appeal." *See Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1291 (9th Cir. 1999) (citing *Johnson v. Jones,* 515 U.S. 304, 307, 319–20 (1995)). In their opening brief, Defendants ignore *all* evidence Plaintiffs submitted in opposition to summary judgment and recited by the district court. *See* ER 315; ER 383. The district court clearly concluded Plaintiffs established genuine issues of material fact on standing that can only be resolved at trial. *See Martin v. City of Boise*, 902 F.3d 1031, 1040 (9th Cir. 2018) (quoting *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 947 (9th Cir. 2002) ("To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs 'need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements.'"); *Celotex Corp.*, 477 U.S. at 324; *see* ER 330 (setting forth allegations disputed by Defendants). Every issue of Plaintiffs' standing raised by Defendants requires an evidentiary analysis, which is outside the scope of this Court's review on interlocutory appeal. Below, Plaintiffs address the facts, which must be taken as true.

2. Plaintiffs are suffering, and are imminently threatened with, concrete, particularized, actual harms

Plaintiffs' injuries are *not* "generalized," but rather deeply personal and actualized: "Plaintiffs have filed sworn declarations attesting to a broad range of personal injuries caused by human induced climate change." ER 30.

On this evidentiary record, no objective fact-finder could find these young Plaintiffs have *not* been individually injured. Eleven-year-old Levi's house and school flooded; he has been forced to evacuate from his community multiple times; he has had nightmares and emotional trauma from climate change and his government's conduct in causing it; his ongoing injuries are worsening with climate change; and his island home is slowly disappearing to sea level rise—the irreversibility of which is being locked in *today*. SER 986-990, 993-996 (¶¶ 3, 5-6, 11, 14-16, 18-20); ER 286; SER 13-14, 18-19, 36, 40, 42; SER 174, 177; SER 45-51; SER 1120-1121. Jayden suffered physical and emotional trauma when her Louisiana home flooded during the extreme weather events in 2016 and 2017, extreme conditions that will continue to worsen with time. SER 1024-1028, 1030-1031 (¶¶ 2-16, 26, 28-32); SER 174, 177; ER 30.

"Journey attests that harm to his health, personal safety, cultural practices, economic stability, food security and recreation interests have occurred due to climate destabilization and ocean acidification." ER 30. In April 2018, Journey had storm water enter his home with an unprecedented 50 inches of rain in 24 hours, causing adjacent landslides and power outages. SER 1020 (¶ 21-22). Watching his island's coral reefs die and beaches disappear, Journey lost his source of personal pleasure and recreation. SER 1016-1020 (¶¶ 8-20); *see also* SER 1124-1125 (describing Journey's psychological injuries). Climate change-induced drought and

water scarcity forced Jaime to leave her home, separating her from her relatives on the Navajo Nation. SER 1046-1047 (¶ 4); *see Hawaii v. Trump*, 138 S.Ct. 2392, 2416 (2018) (separation from relatives established injury in fact).

Plaintiffs Isaac, Alex, Nicholas, Jacob, and Tia are injured by worsening asthma and/or allergies; each has been impacted by the annual onslaught of hazardous wildfire smoke in their towns, which is projected to worsen. *See, e.g.*, SER 957 (¶ 6); SER 1058-1059 (¶¶ 8-11); SER 1067-1069 (¶¶ 3-8); SER 1099 (¶ 48); SER 971 (¶ 5); ER 309; SER 69-71; SER 95-98; SER 175-176; SER 294-299. Defendants fail to contend with *any of this evidence*.

On summary judgment and in their pre-trial memo, Defendants *conceded* that Plaintiffs made a prima facie case of injury-in-fact. SER 6-7; SER 925 (conceding "physical, emotional, and property-related injuries" as "cognizable under Article III"). Notwithstanding their concessions below (of which they fail to inform this Court), Defendants resurrect their generalized grievance theory, which is unsupported by precedent. DOB 14.[6] "'[I]t does not matter how many persons have

[6] In *Center for Biological Diversity v. U.S. Dep't of Interior*, the plaintiffs failed to introduce evidence of actual, individual harms, instead relying on "the general harm caused by climate change." 563 F.3d 466, 477-78 (2009). *Lexmark Int'l Inc. v. Static Control Components*, involved prudential standing, no particularized injury, and simply described a generalized grievance as "'every citizen's interest in proper application of the Constitution and laws,'" which is vastly different than Plaintiffs' injuries here. 572 U.S. 118, 127 n.3 (2014) (quoting *Lujan*, 504 U.S. at 573-74). *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 220 (1974), involved only abstract injuries.

been injured by the challenged action'" so long as "'the party bringing suit . . . show[s] that the action injures him in a concrete and personal way.'" *Massachusetts*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring));[7] *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Catholic League for Religious & Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010); *Novak v. U.S.*, 795 F.3d 1012, 1018 (2015); *Jewell v. National Sec. Agency*, 673 F.3d 902, 910 (2011); *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010), *cert. denied*, 562 U.S. 1271 (2011). "That these climate change risks are 'widely shared' does not minimize [Plaintiffs'] interest in the outcome of this litigation."[8] *Massachusetts,* 549 U.S. at 517. Here, Plaintiffs' claims do not rest on "a global universal harm." *Contra* DOB 15. Rather, the evidence of global warming is contextual for Plaintiffs' concrete individual harms, which are well supported by uncontroverted evidence. ER 30-34; *see* DOB 9, 19 (ignoring evidence).

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[7] The past and ongoing harms evidenced by the summary judgment record are vastly different than those in *Massachusetts*, where Chief Justice Roberts, in dissent, referenced the lack of evidence supporting an actual loss of land to sea level rise and found harms that would arise in 2100 are not impending. 549 U.S. at 541-42 (Roberts, C.J., dissenting); *see, e.g.,* ER 45 (citing "voluminous" record).

[8] The Supreme Court's statement was not based on the fact that the case was brought by a sovereign state as opposed to an individual. *Massachusetts*, 549 U.S. at 517. Rather, the irrelevance of the widespread nature of harm for purposes of standing is reflected in many Supreme Court cases. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 n.7 (2016) ("The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm."); *Lujan*, 504 U.S. at 581; *Fed. Election Comm'n v. Atkins*, 524 U.S. 11, 24 (1998).

In addition, "[i]mpairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing." *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008) (quoting *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 292 (5th Cir. 2001); *see also Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Here, uncontradicted evidence shows Defendants' perpetuation of the fossil fuel energy system constitutes discrimination against Plaintiffs as young people, injuring their exercise of their fundamental rights to life, liberty, and property, and equal treatment under the law. SER 451-454, 458, 469-470; SER 273-278; SER 188-190, 194-208, 223-224 (Defendants' use of discounting in decision-making "systematically undermines the interests of Youth Plaintiffs in a way which cannot be justified."). *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 708 (9th Cir. 1997) (unequal treatment can constitute injury under the Equal Protection Clause).

3. Plaintiffs' injuries are fairly traceable to Defendants' conduct

As with injury, Defendants ignore the extensive evidence Plaintiffs proffered establishing genuine issues of material fact as to the traceability of Plaintiffs' injuries to Defendants' challenged conduct. ER 35-41; ER 337-349; *Lujan*, 504 U.S. at 560.

Plaintiffs' uncontested evidence demonstrates that their harms are a direct result of the federal government's affirmative conduct in effectuating and

perpetuating an unconstitutional fossil fuel-based energy system. The chain of causation is simple: (1) Defendants have substantially caused and contributed to climate change (ER 272-273, 284); and (2) climate change is not only capable of causing the types of injuries Plaintiffs are suffering, many of Plaintiffs' injuries are "signature" climate change injuries explainable only by increased atmospheric concentrations of greenhouse gas ("GHG") emissions. ER 279; SER 361, 364. It has been "well known for over ten decades that as CO_2 concentrations increase, the surface of the planet warms and the oceans warm," resulting in "many harmful effects on ecosystems and humans." SER 287; SER 534. "It is as if the Earth has a constant fever, and just as in the human body, even a slight rise in temperature weakens the organism, increases vulnerability of the organism, and can have dangerous long-term effects on the system." SER 287; SER 284-286. "[A]ny additional climate pollution and warming in the system, which will further increase temperatures from what they are today, is catastrophic." SER 348. Responsibility for the "excess heat caused by fossil fuel pollution and other human-caused greenhouse gas emissions" is a straightforward matter of proportional cumulative emissions and it is undisputed "[t]he U.S. is responsible for a large share of those global emissions." SER 364.

Regarding the first link in the chain, the district court found: (1) Plaintiffs "proffered uncontradicted evidence showing that the government has historically

known about the dangers of greenhouse gases but has continued to take steps promoting a fossil fuel based energy system, thus increasing greenhouse gas emissions," and (2) "the pattern of federally authorized emissions challenged by plaintiffs in this case do make up a significant portion of global emissions." ER 37. Because of Defendants' fossil fuel-based energy system, CO_2 emissions during 1850-2012 from the United States (including from land use) constituted more than one-quarter of cumulative global CO_2 emissions. *See* ER 37, ER 391, ER 421. Defendants have never disputed that a national energy system exists and present no evidence to refute Defendants' control over the fossil fuel-based energy system and the GHG emissions resulting therefrom. *See, e.g.*, ER 40 (quoting Dr. Joseph Stiglitz) ("'the current national energy system, in which approximately 80 percent of energy comes from fossil fuels, is a direct result of decisions and actions taken by Defendants.'").

Plaintiffs challenge Defendants' fossil fuel energy system on a systemic basis. Plaintiffs do not individually challenge isolated acts within that system.[9] Nor do they challenge Defendants' failure to ban fossil fuels or only claim Defendants "should have done more." DOB 21. Rather, Plaintiffs challenge Defendants' affirmative conduct in promoting and perpetuating the use of fossil fuels as part of the Nation's

[9] Aggregated actions making up a systemic pattern of conduct can establish causation. *Brown v. Plata*, 563 U.S. 493, 500 n.3 (2011) (recognizing causation based upon aggregate, systemic acts).

energy system, in spite of knowing the catastrophic consequences. The Nation's dependence on fossil fuels could not have occurred but for Defendants' unconstitutional conduct, persisting over decades. SER 474-504; ER 249-252, 265-266, 284-285, 287-290; SER 194 ("the current level of dependence of our energy system on fossil fuels is a result of intentional actions taken by Defendants over many years"); SER 388.

Plaintiffs presented significant, uncontested evidence detailing nine components of Defendants' national fossil fuel-based energy system, which establishes Defendants are substantially responsible for the dangerous levels of GHG emissions that result in global climate change.[10] ER 337-349, ER 38-41. For

[10] **(1) Energy planning and policies**, SER 740; SER 881; SER 857; SER 859-862; SER 764-766; SER 892; SER 863-864; SER 875; SER 871-874; SER 870; SER 784-787; SER 472-477, 481-483, 485-488, 491, 494, 496, 498, 500-505; ER 249-251, 284-285, 287-290; SER 189, 194, 214; SER 389-390; **(2) fossil fuel extraction and production**, SER 442-446; SER 920, 922; SER 918; SER 789, 790; SER 783; SER 780-782; SER 779; SER 767-777; SER 758; SER 756; SER 759-762; ER 391, 409, 424 (¶¶ 7, 112, 165-168, 170); SER 912; **(3) subsidies, financial and R&D support**, SER 886, 887-891, 892-893; SER 880, 881-882; SER 908; SER 693; SER 843; SER 876; SER 752-755; SER 751; SER 749-750; SER 439-442; SER 194, 216-221; ER 391 (¶ 7); **(4) imports and exports**, ER 391, 426-427 (¶¶ 7, 182-184); SER 704-705; SER 878-879; SER 791-792; SER 698-702; SER 694-697; SER 904; SER 735-739; SER 897-900; **(5) interstate fossil fuel infrastructure and transport**, SER 221-222; ER 406-407, 425-426 (¶¶ 105, 181); SER 806; SER 817; SER 815; SER 812-814; SER 807-811; SER 804; SER 831-835; SER 865-867; **(6) power plants and refineries**, SER 689; ER 414, 420-422, 427 (¶¶ 125, 146, 153, 186); **(7) energy standards for appliances, equipment, and buildings**, SER 895; SER 848, 849; ER 407, 411 427-428 (¶¶ 105, 119(a), 188); **(8) road, rail, freight, and air transportation**, SER 826; SER 662; SER 639; SER 822-824; SER 821; SER 820; SER 795-796; SER 797-803; SER 793; SER 818; ER 406-407, 409, 428-429 (¶¶

example, "[i]t is uncontested that [Defendants] control leasing and permitting on federal land. Third parties could not extract fossil fuels or make other use of the land without Federal Defendants' permission." ER 39; 30 U.S.C. § 201, *et seq*. Defendants do not dispute that third parties can only extract, produce, and transport fossil fuels on federal lands and waters, or otherwise burn fossil fuels for energy, with the express authorization and control of Defendants.[11] The actions of third parties that cause GHG emissions are not "independent" of the national fossil fuel energy system challenged here, but are produced by "determinative or coercive effect" of Defendants as part of their creation and control of the national energy system. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Defendants' extensive control of the fossil fuel energy system, and each of its component parts, distinguishes this case from *Simon v. E. Ky. Welfare Rights Org,* where it was merely speculative whether the alleged harms were due to government "encouragement" via the

105, 114(b), 189, 190); **(9) government operations**, SER 741; SER 743-744; SER 745.

[11] *See, e.g.*, ER 38-41; SER 476, 485-486, 501, 503-504; U.S. Const. art. I, § 3, cl. 2; 15 U.S.C. § 717b; 16 U.S.C. §§ 528, 531, 551, 576; 16 U.S.C. §§ 1600-1611; 30 U.S.C. §§ 181-287, 351-359; 33 U.S.C. §§ 403, 1344, 1503; 42 U.S.C. §§ 6201, 6212(a), 6291-6317, 7111(3), 7112(2)-(6), 7321(a), 7321(b), 7401, *et seq*. 8201, *et seq.*; 43 U.S.C. §§ 1302, 1331, *et seq*., 1701-1784; 49 U.S.C. §§ 5103, 32902, 40103(a); 54 U.S.C. § 100101; 15 C.F.R. § 754.2(a); 33 C.F.R. § 2.22; Exec. Order No. 13,337, 69 Fed. Reg. 25,299; *see also* ER 38-40, SER 338-345.

challenged IRS revenue ruling or the independent choice of third parties. 426 U.S. 26, 42-43 (1976); *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

Plaintiffs also proffered substantial, uncontradicted evidence to show Defendants not only authorize fossil fuel extraction and production, but historically and presently promote the use of fossil fuels in the United States in lieu of renewable forms of energy. SER 474-477, 482-483, 485-491, 493-496, 498, 501-502; ER 249-251, 284-285, 287-290; SER 189, 194, 214-221, 226-229; SER 370, 389-390; SER 439-446.

Plaintiffs proffered substantial evidence, including Defendants' own documents, directly tying Defendants' conduct in effecting a fossil fuel-based energy system, which results in substantial amounts of GHG emissions, to Plaintiffs' injuries.[12] ER 337-349; SER 429-430, 439-446; ER 249-252, 284-290; *see also* ER 40-41 (district court summarizing evidence that "tether[s] plaintiffs' specific injuries to climate change and climate change related weather events."). To claim there is no "causal nexus," without referencing, let alone refuting, Plaintiffs' evidence cited in

[12] This evidence and the conduct challenged distinguishes this case from the recent dismissal in *Clean Air Council v. United States*, where the Eastern District of Pennsylvania found "much of the challenged conduct does not contribute to greenhouse gas emissions" and the district court was left to "speculate as to what actions the Federal agencies and the fired personnel would have taken *but for* the budget cuts or firing decisions." No. 17-4977, 2019 WL 687873, at *6 (E.D. Pa. 2019). Here, Plaintiffs' evidence eliminates the need for such speculation.

the summary judgment order confirms Defendants did not meet their summary judgment burden under *Celotex Corp*., 477 U.S. at 324.

Because of the direct correlation between atmospheric CO_2 concentrations, temperature, and sea level, ER 33, many of Plaintiffs' injuries are "signature" climate change injuries[13] explainable only by the increased atmospheric concentrations of GHG emissions and climate change. *See, e.g.*, ER 285-287; SER 347-361, 364-365; SER 18, 22-24, 30-42; SER 395-402, 404-422; SER 158-168, 174-178. A signature harm, like a signature disease, is "one so associated with a particular cause that the presence of the disease presumes that cause." *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 n.33 (D. Or. 1996). Defendants presented no evidence to contest Plaintiffs' extensive evidence documenting their signature climate change harms.

[13] *See, e.g.*, SER 927-928 (¶¶ 4-6); SER 1088-1095, 1097-1099 (¶¶ 12, 14-17, 20, 22-24, 28, 33-35, 42-47); SER 1080-1083 (¶¶ 11, 13, 18-23); SER 1075-1076 (¶¶ 4, 6-7, 9-11); SER 1067-1068, 1070 (¶¶ 2-3, 11-12); SER 1057-1062 (¶¶ 4, 7, 10-14, 18-23); SER 1046-1053 (¶¶ 4-5, 9, 12, 16-17, 21-22, 24, 26-27, 33); SER 1024-1025, 1031 (¶¶ 2-3, 33-34); SER 1016-1021 (¶¶ 4-5, 7-20, 26); SER 1004-1007 (¶¶ 6, 10-14); SER 998-1000 (¶¶ 1-4, 10-12); SER 986-989, 991-995 (¶¶ 3, 9-16); SER 980-984 (¶¶ 3-9, 12, 15); SER 976-977 (¶¶ 2-6); SER 972-973 (¶¶ 8-9, 15-16); SER 966-968 (¶¶ 4-5, 8); SER 961-962, 964 (¶¶ 4-7, 12); SER 956-958 (¶¶ 2, 4-5, 8-9, 11-13); SER 950-952 (¶¶ 5-7, 9-13, 15); SER 940-942 (¶¶ 6-7, 12-13); SER 931-934 (¶¶ 5, 8, 10-13). Plaintiffs' experts linked these injuries to climate change. *See, e.g.,* ER 285-287; SER 347-361, 364-365; SER 18, 22-24, 30-42; SER 395-402, 404-422; SER 158-168, 174-178; SER 288, 291-293, 303-305, 311.

The district court appropriately distinguished *Washington Environmental Council v. Bellon*, where the emissions at issue (5.9% of Washington state's total GHG emissions in 2008) were "scientifically indiscernible." 732 F.3d 1131, 1142-43 (9th Cir. 2013); *see also* SER 604-605 ("[T]he emissions at issue in this case greatly exceeds the amount at stake in *Massachusetts v. EPA*, 549 U.S. 497 (2007)."); *cf. Massachusetts*, 549 U.S. at 543-44 (Roberts, C.J., dissenting). Defendants' argument that the district court "failed to meaningfully distinguish *Bellon*" should be rejected. DOB 19. *First*, the district court relied upon *WildEarth Guardians v. U.S. Dep't of Agriculture*, not for purposes of causation, but for the principle that "the mere existence of multiple causes of an injury does not defeat *redressability*." ER 42 (quoting 795 F.3d 1148, 1157 (9th Cir. 2015) (emphasis added)). Nonetheless, many Ninth Circuit cases stand for the proposition that multiple causes do not defeat causation and it makes no difference for purposes of causation whether the source of the harm alleged is predator damage or climate change. *See Barnum Timber Co. v. Envtl. Prot. Agency*, 633 F.3d 894, 901 (9th Cir. 2011) (plaintiff "need not eliminate any other contributing causes to establish its standing."); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d at 846, 860 (9th Cir. 2005); *see also Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017), *cert. denied sub nom. Teva Pharm. USA, Inc. v. Wendell*, 138 S.Ct. 1283 (2018) (analyzing for "substantial causative factor"). *Second*, Defendants

erroneously claim Plaintiffs have not "attempt[ed] to trace the connection between particular government actions and the resulting emissions." DOB 20. The district court engaged in this very analysis of Plaintiffs' evidence. ER 40-41, ER 338-349 (describing aggregate government actions that systemically caused Plaintiffs' injuries). Plaintiffs do not challenge "everything," DOB 20, but rather Defendants' fossil fuel-based energy system, detailing its component elements in aggregate that are causing them harm.[14]

Finally, there is no standing requirement to pinpoint the molecules of CO_2 that contribute to Plaintiffs' harms. *Bellon*, 732 F.3d at 1142-43; *Natural Res. Defense Council v. Sw. Marine, Inc.,* 236 F.3d 985, 995 (9th Cir. 2000) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 161 (4th Cir. 2000)) ("to prove an injury is fairly traceable, 'rather than pinpointing the origins of

[14] This Court should reject Defendants' invitation to conduct a causation analysis that focuses only on individual acts rather than systemic causes. DOB 21. In *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), a school board attempted to defeat a desegregation action on behalf of a group of students on grounds that any particular student's assignment to any particular school required an individualized analysis. The Fifth Circuit rejected this argument: "Properly construed, the purpose of the suit was not to achieve specific assignment of specific children to any specific . . . school." *Id*. at 288. Rather, the suit "was directed at the system-wide policy of racial segregation." *Id*. A similar analysis applies here given Plaintiffs' challenge to a systemic government practice. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011); *Horton by Horton v. City of Santa Maria*, No. 15-56339, 2019 WL 405559, at *10 (9th Cir. Feb. 1, 2019) (a "constitutional violation may nonetheless have taken place, including as a result of the collective acts or omissions of Santa Maria Police Department officers.").

particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.'"). *Defendants admit* "allowing 'business as usual' CO_2 emissions will imperil future generations with dangerous and unacceptable economic, social, and environmental risks" and "the use of fossil fuels is a major source of these emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path." ER 421. Plaintiffs bolstered these admissions with extensive evidence documenting Defendants' control and administration of the national energy system causing and contributing to Plaintiffs' injuries. The district court did not err in finding that genuine issues of material fact exist as to causation.

4. Plaintiffs' injuries are redressable

A plaintiff's burden to demonstrate redressability is "relatively modest." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Bennett*, 520 U.S. at 171). Redressability is established when a plaintiff shows it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted); *Bellon*, 732 F.3d at 1146. The remedy need not guarantee redress for all of Plaintiffs' injuries. *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982); *Renee*, 686 F.3d at 1013. To "slow or reduce" the harms, *Massachusetts*, 549 U.S. at 525 (citing *Larson*, 456 U.S. at 244,

n.15) (2007), or to "minimize the risk" is sufficient, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010).

At minimum, Plaintiffs indisputably demonstrated material issues of fact on redressability through uncontested Plaintiff and expert testimony that, if the courts affirm their fundamental rights and order Defendants to stop infringing their rights by exacerbating climate change, Plaintiffs' psychological and emotional injuries will lessen and not worsen at the hands of their government. SER 89, 103-103, 111-112; SER 1120-1121, 1123, 1125. As Dr. Van Susteren opines, "a remedy to ease the psychological suffering of our children and the youth Plaintiffs is clear and available: immediate and effective federal government action to reduce greenhouse gas emissions that are the root cause of the climate crisis and the consequential psychological suffering." SER 89. Even alone, a judicial declaration of the unlawfulness of governmental climate destruction will help protect the mental wellbeing of these young people.[15] SER 105-106 (Plaintiffs' psychological injuries are "particularly harmful and insidious" because their very government is causing and sanctioning climate change.); *see Brown*, 347 U.S. at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored

[15] Declaratory relief is a viable, important partial remedy. *See Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 703-04 (9th Cir. 1992); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (announcing only declaratory judgment in the first instance and ordering further briefing to seek "the full assistance of the parties in formulating [injunctive] decrees."); ER 44.

children. *The impact is greater when it has the sanction of the law . . .*" (emphasis added)). Climate change is a recognized threat to mental health and Defendants are waging injuries on Plaintiffs' emotional wellbeing by sanctioning it. SER 92-103; SER 706. Given their unique vulnerabilities as youth, the injuries Plaintiffs are already experiencing may well result in life-long consequences, if not promptly redressed. SER 106-111.[16]

Relatedly, a remedial order to stop Defendants from discriminatorily discounting the economic value of young people's lives in decisions about energy and climate would immediately provide partial redress for Plaintiffs' equal protection claim. ER 609-610; SER 223-228; SER 454-458; Exec. Order No. 12,866 (1993); *see Martinez v. Clark County*, 846 F.Supp.2d 1131, 1141 (D. Nev. 2012) (equal protection claim redressable by "[e]liminating the allegedly unconstitutional distinction," regardless of whether Plaintiffs obtained full requested relief).

[16] The "extent of psychological knowledge" today, including through Defendants' own reports, amply supports these findings. *See Brown*, 347 U.S. at 494 ("'Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.' Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority." (citations omitted)); SER 706-708.

As to Plaintiffs' request that Defendants prepare a remedial plan, *of their own devising*,[17] Defendants abandoned their argument below that they are without authority to implement Plaintiffs' requested relief. ER 43 (referring to the "various statutory authorities" available to Defendants); *see* SER 665-666. Instead, Defendants take the extreme position that no court can order the executive branch to come into constitutional compliance. DOB 22-24. Fortunately, that is not how this Nation's constitutional democracy functions. ER 44. This kind of relief is firmly within the competence of the judiciary. ER 46-47, 79; SER 521; *see, e.g.*, *Brown*, 347 U.S. 483; *Plata*, 563 U.S. at 526, 533. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Florida v.*

[17] Plaintiffs do not ask the district court to usurp legislative and executive authority, DOB 23, but rather that Defendants use their existing authorities to create the remedial plan. *Cf. Cent. Delta Water Agency*, 306 F.3d at 946 (finding redressability where court could order Bureau of Reclamation "to select different means to comply with the Act"); *see* Substantive Limits on Liability and Relief, 90 Harv. L. Rev. 1190, 1248 (1977) ("[I]n each of the [institutional reform] cases . . . the court sought a proposed plan from the defendant officials before being forced to consider shaping one of it[s] own over their objections"). Much of the same authority Defendants used to create and promote the unconstitutional fossil fuel energy system can be employed to undo that system and create a clean, decarbonized system.

Georgia, 138 S.Ct. 2502, 2517 (2018); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977).[18]

The Supreme Court recently reaffirmed that remedies should be linked to the actions that produced the injury, and where a wholesale structural remedy is necessary to redress a constitutional injury, a court may so order it:

> The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were 'statewide in nature' rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale 'restructuring of the geographical distribution of seats in a state legislature.'

Gill v. Whitford, 138 S.Ct. 1916, 1930 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Justice Kagan, in her concurrence, explained that an appropriate remedy will depend upon what it takes "to cure all the packing and cracking" which caused the constitutional infringement. *Id*. at 1937 (Kagan, J., concurring). Noting that determination of a proper remedy will necessarily depend on the scope of the constitutional violations found, if any, ER 47, the district court here properly concluded: "for the purposes of this motion, that plaintiffs have shown an issue of

[18] Courts have long applied the traditional rules of equity. *See Am. Sch. of Magnetic Healing v. MacAnnulty*, 187 U.S. 94, 108, 110 (1902); *Scott v. Donald*, 165 U.S. 107, 114-115 (1897); *Bell v. Hood*, 327 U.S. 678, 684 n.4 (1946) (stating "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

material fact that must be considered at trial on [a] full factual record." ER 45; *Celotex Corp.*, 477 U.S. at 324; *see also Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

In terms of the practicality of decarbonizing the U.S. energy system through federal planning, the only evidence in the record shows there are multiple technologically and economically feasible paths to phase out fossil fuel use in the United States that would result in reductions in GHG emissions consistent with returning the global concentration of CO_2 to 350 ppm by 2100 and still meet the Nation's energy needs. SER 370-390; SER 142-151; ER 251 (quoted on ER 43); SER 319-343; SER 209-229. Plaintiffs do not pretend that the requested remedial plan alone will solve "the complex phenomenon of global climate change," DOB 22, but Plaintiffs have adduced uncontradicted evidence to show their "injur[ies] would be to some extent ameliorated" by the relief requested in this case. *Los Angeles County Bar Ass'n*, 979 F.2d at 701.

Without any supporting evidence, Defendants argue a remedial plan could not be ordered because U.S. GHG emissions may become a smaller percentage of global emissions as developing countries, like China, increase their emissions. DOB 23. Not only is Defendants' assumption lacking evidentiary support, "the possibility that some other individual or entity might later cause the same injury does not defeat standing . . . ." ER 42 (citing *WildEarth Guardians*, 795 F.3d at 1148); ER 272-273.

Given the range of remedial powers available to the judiciary in redressing constitutional violations, the district court did not err in concluding Plaintiffs showed a genuine issue of material fact as to whether "reducing domestic emissions, which plaintiffs contend are controlled by federal defendants' actions, could slow or reduce the harm plaintiffs are suffering." ER 44-45.

B. Plaintiffs' claims of constitutional violations present a case or controversy cognizable under Article III

This Court should not adopt Defendants' argument that the entrenched, systemic constitutional violations at issue here do not present a "case or controversy" within the scope of Article III. Such a decision would upend the judiciary's core role as a check and balance in our Nation's system of separated powers, particularly in enforcing constitutional rights. Contrary to Defendants' contention regarding "the courts at Westminster," DOB 25, "the ability to sue to enjoin unconstitutional actions by state and federal officials is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1384 (2015).

"The Framers of the Constitution 'lived among the ruins of a system of intermingled legislative and judicial powers.'" *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). Through Article III, they established an independent judiciary to "'render dispositive judgments,'" *id.*, as "'an inseparable

element of the constitutional system of checks and balances,' – a structural safeguard that must 'be jealously guarded.'" *Id*. at 1951 (citation omitted). Since Article III authority under "the separation of powers exists for the protection of individual liberty, its vitality 'does not depend on whether the encroached-upon branch approves the encroachment.'" *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citations omitted); *Wellness*, 135 S.Ct. at 1955 (Roberts, C.J., dissenting).

Defendants' theory that the judiciary is without power to assess the constitutionality of large and pervasive government policies and systems would have been the downfall of cases addressing desegregation, prison reform, interracial and same-sex marriage, and the rights of women to serve on juries and have access to contraception, among other rights. The canon of our Nation's most celebrated cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Bolling v. Sharp*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Brown v. Plata*, 563 U.S. 493 (2011); *Loving v. Virginia*, 288 U.S. 1 (1967); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).[19]

[19] None of the cases Defendants cite address the authority of courts to remedy deprivations of constitutional rights, except for *Missouri v. Jenkins*, 515 U.S. 70 (1995). Supporting justiciability, *Jenkins* confirmed the well-established principle that "the nature of the . . . remedy is to be determined by the nature and scope of the

When it abandons its duty under Article III to review the constitutionality of the political branches' conduct, the judiciary permits infringements of constitutional rights to persist unchecked for decades.

> Judicial abstention left pervasive malapportionment unchecked. In the opening half of the 20th century, there was a massive population shift away from rural areas and toward suburban and urban communities. Nevertheless, many States ran elections into the early 1960's based on maps drawn to equalize each district's population as it was composed around 1900. Other States used maps allocating a certain number of legislators to each county regardless of its population. These schemes left many rural districts significantly underpopulated in comparison with urban and suburban districts. *But rural legislators who benefited from malapportionment had scant incentive to adopt new maps that might put them out of office*.

Evenwel v. Abbott, 136 S.Ct. 1120, 1123 (2016) (emphasis added). Here, too, Defendants' long-standing conduct demonstrates they will persist in their pervasive, unconstitutional deprivations absent judicial intervention.[20]

Over two hundred years of Supreme Court precedent make clear that "[t]he declared purpose of separating and dividing the powers of government, of course,

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constitutional violation." *Id.* at 88 (quoting *Milliken*, 433 U.S. at 280 (internal citation omitted)).

[20] The constitutional nature of Plaintiffs' claims fundamentally distinguishes this case from common law nuisance actions against private parties in which courts have found it appropriate to defer to the political branches regarding climate change. *See, e.g., Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (finding nuisance claims displaced). The instant case involves direct, affirmative claims as to the constitutionality of the political branches' actions concerning climate change. Accordingly, the judiciary must not shed its duty to measure those actions against the Fifth Amendment.

was to diffuse power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). As the district court concluded: "At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." ER 78. This case is properly within the scope of Article III, not in spite of, but because of the judiciary's role within our divided system of government.

III. The district court did not err in concluding Plaintiffs' claims can proceed directly under the Constitution

Defendants' argument that the APA's statutory limitations could "foreclose" Plaintiffs' constitutional claims, DOB 30, runs contrary to precedent and would upend the primacy of the Constitution over statutory law in our Nation's hierarchy of legal authority. The APA was enacted to reign in the conduct of the growing number of agencies that were acting as both legislator and judge and to protect private rights of action and due process of law, not eliminate private rights under the Constitution for the protection of the agencies. *Wong Yang Sung v. McGrath,* 339 U.S. 33, 37-45 (1950). Defendants wield the APA as a sword to limit the rights of these children, which would be anathema to the Constitution.

A. Supreme Court and Ninth Circuit precedent establish that equitable constitutional challenges to agency conduct can proceed directly under the Fifth Amendment

For over 100 years, federal courts have had jurisdiction to hear claims for injunctive relief arising directly under the Constitution. *See Ex Parte Young*, 209 U.S. 123, 143, 145 (1908). As the district court noted, both the Supreme Court and this Court have ruled on many occasions that constitutional claims are not subject to the strictures of the APA and may be brought independently. ER 24. In *Franklin v. Massachusetts*, a case "rais[ing] claims under both the APA and the Constitution" against the Secretary of Commerce, the Supreme Court reached the merits of the constitutional claims after finding the APA claims not viable for lack of "final agency action." 505 U.S. 788, 796-801 (1992). Likewise, in *Hills v. Gautreaux*, a non-APA case brought directly under the Fifth Amendment and 28 U.S.C. § 1331 against the Department of Housing and Urban Development for systemic violations of fundamental rights, the Supreme Court approved a structural remedy for a comprehensive remedial plan similar to the relief requested here. 425 U.S. 284 (1976). These cases are irreconcilable with Defendants' argument that the APA's strictures foreclose consideration of Plaintiffs' claims. Similarly, in *Webster v. Doe*, the Supreme Court held the APA's exclusion from review of decisions committed to agency discretion by law did not apply to constitutional claims. 486 U.S. 592, 601, 603-05 (2004). Justice Scalia's lone dissent, in which he postulated that "if

relief is not available under the APA it is not available at all" serves only to prove the *Webster* majority's rejection of Defendants' argument that all constitutional claims are subject to the limitations of the APA.

This Court's precedent is also well-defined that Plaintiffs' claims can proceed directly under the Fifth Amendment. *Presbyterian Church (U.S.A.) v. United States* made clear that the APA's strictures do not apply to "constitutional claims brought under the federal question jurisdiction statute, 28 U.S.C. § 1331." 870 F.2d 518, 525 n.9 (9th Cir. 1989); *Navajo Nation v. U.S. Dep't of Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017). Ignoring this clear language, Defendants attempt to limit these cases to the principle that the APA merely waives sovereign immunity for non-APA actions. *Id.*; DOB 33. However, as the district court wrote: "[I]t makes little sense to hold that the APA waives sovereign immunity for both APA and non-APA claims against federal agencies if the only viable claims are subject to the APA's judicial review provisions." ER 23.

Defendants erroneously rely on inapposite cases concerning Congress' power to limit the authority of courts to redress violations of *statutory* rights,[21] cases

[21] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1385 (2015) (judicial authority to enforce provision of Medicaid Act restricted by statute itself); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996) (provisions of Indian Gaming Regulatory Act restricted judicial enforcement thereof). These cases are wholly inapplicable to whether Congress could permissibly restrict the courts' equitable authority in *constitutional* cases. *Exceptional Child Center, Inc.* is also inapposite because, irrespective of whether the Supremacy Clause creates a right of action, it is

concerning the limitations on actions *brought under the APA*,[22] and cases where courts have considered extending a claim *in damages* for constitutional violations,[23] which are different than Plaintiffs' equitable constitutional claims. As the district court noted, "it is critical to avoid conflating the Supreme Court's treatment of claims for damages with its treatment of claims for equitable relief." ER 20-21. The court aptly explained that whether Congress enacted a "comprehensive remedial scheme" that might restrict constitutional claims "is specific to the availability of a remedy *for damages*." ER 21-22. That inquiry is inapplicable to actions seeking equitable relief for violations of fundamental rights. Such actions are and always have been available:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . . Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Bell v. Hood, 327 U.S. 678, 684 (1946); *see also, e.g., Allen v. Baltimore & Ohio R.R.*, 114 U.S. 311, 316 (1885) ("Where the rights in jeopardy are those of private

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a rudimentary principle of constitutional law that Plaintiffs may rest their claims "directly on the Due Process Clause of the Fifth Amendment." *Davis v. Passman*, 442 U.S. 228, 243-44 (1979); *accord, Hills*, 425 U.S. 284; *Bolling v. Sharp*, 347 U.S. 497 (1954).

[22] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). Additionally, both cases challenged statutory violations under the APA, not constitutional violations.

[23] *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116 (9th Cir. 2009); *Wilkie v. Robbins*, 551 U.S. 537 (2007).

citizens, and are of those classes which the constitution of the United States either confers or has taken under its protection . . . necessity invokes and justifies . . . jurisdiction in equity vested by the constitution of the United States . . . ."); *Marbury*, 5 U.S. at 146. The right of every citizen to injunctive relief from "official conduct prohibited" by the Constitution does not "depend upon a decision by" the legislature "to afford him a remedy. Such a position is incompatible with the presumed availability of federal equitable relief." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J. concurring).

The Supreme Court confirmed this reasoning in *Ziglar v. Abassi*, where plaintiffs sought damages against "high executive officers" challenging "large-scale policy decisions" rather than "individual instances of discrimination" as violative of their Fifth Amendment substantive due process rights. 137 S.Ct. 1843, 1851-52, 1862 (2017). The Court dismissed the claim for damages, instructing that, "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief." *Id.* at 1862. It is a central precept of constitutional law that the Fifth Amendment provides a right of action for equitable relief from systemic infringements of fundamental rights. Defendants' argument that the APA provides the sole means to challenge the constitutionality of agency conduct conflicts with established precedent, lacks merit, and is contrary to the intent of the Framers.

B. Limiting Plaintiffs' constitutional claims to the strictures of the APA would violate their right to procedural due process

Even if Defendants' arguments were not foreclosed by precedent, limiting Plaintiffs to the strictures of the APA would violate Plaintiffs' procedural due process right to meaningful review of their constitutional claims. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (statutory limitations on review inapplicable where they would foreclose "meaningful judicial review" of agency's pattern of unconstitutional conduct). Constitutional rights are "congressionally unalterable," *Exceptional Child Center, Inc.*, 135 S.Ct. at 1383, and the presumption that they "are to be enforced through the courts" can be rebutted only by a "textually demonstrable *constitutional* commitment of [an] issue to a coordinate political department," *Davis*, 442 U.S. at 242 (citation omitted), a legal question already persuasively rejected by the district court and abandoned by Defendants on this appeal. ER 70-73, 78-79.

Even assuming, *arguendo* Congress *could* alter the judiciary's authority over constitutional rights, "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster*, 486 U.S. at 603. This heightened showing "is required in part to avoid the 'serious constitutional questions' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citations omitted). Here, as the

district court concluded, the APA contains no clear statement of intent to "preclude review of constitutional claims," *id.*, and Defendants have pointed to none.

Determining whether procedural limitations, like those governing review of agency conduct in the APA, effectuate a violation of due process requires consideration of three factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute safeguards; and (3) the government's interest, including the burdens that additional or substitute safeguards would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Each of these factors favors Plaintiffs.

First, the private interest at stake is unquestionably of the highest constitutional importance because, as the district court determined, "Plaintiffs have adequately alleged infringement" of "fundamental right[s]." ER 95. *Second*, there is an absolute risk of erroneous deprivation of Plaintiffs' fundamental rights if Plaintiffs must plead their claims subject to the strictures of the APA. As the district court found: "Plaintiffs do not contend that any single agency action is causing their asserted injuries . . . . They seek review of *aggregate action* by *multiple agencies*, something the APA's judicial review provisions do not address." ER 25. To individually challenge each of the thousands of agency actions making up Defendants' fossil fuel energy system, which have contributed to Plaintiffs' injuries independently, and within the APA's narrow time frames, would be a herculean, if

not impossible, task, and would not present the true case and controversy of the *systemic* nature of Defendants' affirmative conduct, which is the cause of Plaintiffs' injuries. *See* Section II.A.3, *supra*; *McNary*, 498 U.S. at 496 (limiting review of agency's pattern of constitutional violations to administrative records would preclude meaningful review); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (procedural safeguards must be offered "at a meaningful time and in a meaningful manner").[24] As the Supreme Court ruled in *Gill v. Whitford*, a remedy is to be structured to address the government conduct that caused the injury, not more expansive, nor less. 138 S.Ct. at 1930. While the APA may not permit challenges to "broad programmatic" or systemic agency action, *Norton*, 542 U.S. at 64, such challenges can undoubtedly proceed directly under the Fifth Amendment. *E.g.*, *Ziglar*, 137 S.Ct. at 1862; *McNary*, 498 U.S. 479; *Hills*, 425 U.S. 284. To hold otherwise would subject Plaintiffs to more than a risk of erroneous deprivation of their rights; it would render such deprivation inevitable. *Third*, the government's interest in administrative efficiency favors litigating Plaintiffs' claims as a single systemic challenge rather than a myriad of challenges to a vast multitude of

[24] Defendants assertion that their APA argument "would not bar Plaintiffs from asserting their constitutional claims" is disingenuous and belied by their statement that the APA "foreclose[s]" Plaintiffs' claims. DOB 30, 32; SER 3-5. That the APA would "authorize Plaintiffs to bring" an individual "constitutional challenge to a lease of federal lands by the Bureau of Land Management for the purpose of extracting fossil fuels," DOB 32, does not speak to the *systemic* actions of Defendants challenged herein.

individual agency actions, which would undoubtedly prove costly, inefficient, and unduly burdensome for all parties involved, including the courts.

Thus, every *Eldridge* factor strongly favors proceeding with Plaintiffs' claims as pleaded in order to avoid a procedural due process violation.[25] It is unimaginable in our divided system of government that the systemic and catastrophic constitutional violations at issue here could be placed beyond the judiciary's basic power and duty to safeguard individual fundamental rights. *Marbury*, 5 U.S. at 163.

IV. Plaintiffs have properly asserted valid substantive due process claims under the Constitution

A. The district court correctly recognized an unenumerated climate right underpinning other recognized substantive due process rights

A right deemed alienable, or not fundamental, is a right that government may deprive its citizens of with any rational basis for doing so. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). To determine whether a right is unalienable, a core function of the judiciary, the Court looks to whether it is either "fundamental to the Nation's scheme of ordered liberty . . . or . . . 'deeply rooted in this Nation's history and tradition.'" *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010) (quoting *Glucksberg*, 521 U.S. at 721); *see also Obergefell,* 135 S.Ct. at 2598

[25] This analysis applies equally to the "other statutes" Defendants assert foreclose Plaintiffs' claims, DOB 29 n.2, 30-31, one of which Defendants raise for the first time, and none of which were addressed by or "fairly included" in the district court's orders. *Yamaha Motor Corp., U.S.A.*, 516 U.S. at 205.

(finding no specific formula for identifying fundamental rights). A thorough fundamental rights analysis involves an empirical inquiry and is often decided on appeal of merits decisions. *Brown v. Bd. of Educ.*, 347 U.S. at 486 n.1 (four district court records); *Plata*, 563 U.S. at 499-500 (two district courts); *Obergefell*, 135 S.Ct. 2584 (three final decisions for plaintiffs and one preliminary injunction);[26] *see also Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Furman v. Georgia*, 408 U.S. 238 (1972); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). In the instant case, both historical and scientific factual evidence are material to this analysis.

The district court properly found that the right "to a climate system capable of sustaining human life,"[27] (hereinafter "climate right")[28] is both fundamental to

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[26] *See Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Cal. 2010) (holding bench trial).

[27] The climate system is made up of earth's atmosphere (our gas-composed air), hydrosphere (our freshwater and oceans), cryosphere (our ice), biosphere (our living ecology and organisms like trees), and lithosphere (our land and soils). NOAA, Geophysical Fluid Dynamics Laboratory, Develop improved and more comprehensive Earth System Models, https://www.gfdl.noaa.gov/climate-and-ecosystems-comprehensive-earth-system-models/ (last visited Feb. 16, 2019); NOAA, *National Weather Service Glossary 'C'*, https://www.weather.gov/ggw/GlossaryC (last visited Feb. 16, 2019).

[28] Plaintiffs do not advocate for, nor has the district court recognized, a "right to particular climate conditions." DOB 36. The climate system naturally varies across time. Plaintiffs seek to protect their climate system from government-sanctioned impairment resulting in dangers to their lives, liberties, and property. Nor do Plaintiffs assert a right to live in a "pollution-free" or "healthy environment." The inapposite cases Defendants cite addressing such eminently distinguishable rights,

ordered liberty and deeply rooted in our Nation's history and traditions. ER 93-95. Consistent with other unenumerated fundamental rights recognized by the Supreme Court, the climate right is one "underlying and supporting other vital liberties." ER 93. "To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink." ER 95.

Remarkably, Defendants contend that the federal government can knowingly deprive American children of a life-sustaining climate system, *the very foundation of all life*, without violating the Constitution. By positing that the climate right is not fundamental, Defendants misappropriate the ongoing power to deliberately alienate, infringe upon, and deprive these children of a livable future without meaningful due process. Without this Court's check on that unrestrained power, that is precisely what Defendants will continue doing to these children and future generations. SER 869-870; SER 871-874; SER 875; SER 784-785.

Defendants' groundless arguments would dismantle the concept of unalienable rights settled since the Declaration of Independence (U.S. 1776). Unalienable rights like "Life, Liberty and the pursuit of Happiness," are natural rights, not bestowed by the laws of people, but "endowed by their Creator."

DOB 36, are neither binding nor persuasive, and should be disregarded for their lack of analysis and because of the different rights sought.

Declaration of Independence para. 2 (U.S. 1776). The right of these children to live with the climate system that nature provides, "endowed by their Creator," free of government-sanctioned destruction, is the very foundation of, and preservative of, all of their unalienable natural rights. It is, in fact, the prerequisite to life itself. ER 292. As James Madison said in 1818, "[d]eprived of it, they all equally perish." SER 643[29]; *see Timbs v. Indiana*, ___ S.Ct. ___, No. 17-1091, 2019 WL 691578, at *4 (Feb. 20, 2019) (considering whether infringement of asserted right would "undermine other constitutional liberties"). Defendants' argument that the climate right "apparently would run indiscriminately to every individual in the United States," DOB 36, concedes the point, demonstrating a profound misunderstanding of the very concept of fundamental rights, which by their very nature are those in which everyone may claim an interest. *See* also SER 531. By Defendants' logic, not even our inherent rights to life, liberty, and property would qualify as fundamental since they could be asserted by all citizens.

Defendants wholly ignore the Nation's founding documents, the common law origins of the Constitution,[30] and the uncontradicted historical and scientific evidence Plaintiffs submitted demonstrating the climate right's deep roots in our

[29] James Madison, Address to the Agricultural Society of Albemarle (May 12, 1818).
[30] Indeed, "[t]he language of the constitution . . . could not be understood without reference to the common law." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

Nation's traditions. *See* DOB 35-38. In sharp contrast to other fundamental rights cases where the parties disputing the fundamental nature of the asserted right proffered counter-historical arguments, Defendants submit no contrary evidence. *Timbs*, 2019 WL 691578 at *5 (Indiana did "not meaningfully challenge" whether the right was deeply rooted or fundamental to liberty); *cf. District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) ("The two sides in this case have set out very different interpretations of the Amendment."); *id.* at 580-619 (reciting and extensively analyzing common law and the historical meaning of "bearing arms"); *cf. Obergefell*, 135 S.Ct. at 2593-2596 (reciting history of marriage). Although Defendants have not wrestled with the deep historic basis for the climate right, to address whether this newly recognized claim is valid, this Court must perform that analysis.

History bears favorably on the climate right and demonstrates its fundamental primacy in our Nation's concept of ordered liberty. In declaring independence, the Framers invoked "the powers of the earth" and the "Laws of Nature and of Nature's God," to reject a form of governance under a king that "plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people." Declaration of Independence para 1, 26. By infringing the climate right, Defendants are in more profound and long-lasting ways waging harm to our seas, our coasts, our towns, and

the lives of our people than did George III's tyranny. ER 244-295; SER 10-44; SER 180-229; SER 344-365; SER 391-423.

Consistent with the Declaration of Independence, and at least since Roman times, it was understood that "the following things are by natural law common to all – the air, running water, the sea, and consequently the seashores." ER 99 (quoting J. Inst. 2.1.1 (J.B. Moyle Trans.)). The Roman codification of natural law became part of the common law that passed from England to the original States and ultimately the founding of the Nation. *See Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *see also Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821). The Supreme Court affirmed that "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

That air, water, and the seas and their shores would be unalienable and held in common for Posterity is reflected in the writings of influential jurists like William Blackstone, "the preeminent authority on English law for the founding generation." *Heller*, 554 U.S. at 593-94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)); *see* 2 William Blackstone, *Commentaries* *14 (1766) ("[T]here are some few things, which . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . . ."); *id*. at *3 ("The earth, therefore, and all

things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.").

The Framers adopted John Locke's philosophy that human laws must conform to nature's laws for the preservation of humankind. *See* John Locke, *Second Treatise*, *Of Civil Government* ¶ 136, n.3 (quoting Hooker's *Ecclesiastical Polity,* III, 9 ("laws human must be made according to the general laws of Nature . . . otherwise they are ill made")); *id.* at ¶¶ 6, 12, 27, 32-33, 135, 158; *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States*, ch. 45, at 687, §1314 (3d ed. 1858). Thomas Jefferson wrote extensively about the earth belonging "*in usufruct to the living*,"[31] by which he meant "[t]hat our Creator made the earth for the use of the living and not of the dead; . . . that one generation of men cannot foreclose or burthen its use to another, ... these are axioms so self-evident that no explanation can make them plainer . . ." Thomas Jefferson to Thomas Earle, Sept. 24, 1823, *The Writings of Thomas Jefferson* vol. VII, 310-11 (H.A. Washington ed. 1854). This fundamental premise, that nature was endowed by the Creator and was unalienable, was repeatedly affirmed by the Framers:

> Are [later generations] bound to acknowledge [a national debt created to satisfy short-term interests], to consider the preceding generation as having had a right to eat up the whole soil of their country, in the course

[31]Thomas Jefferson to James Madison, Sept. 6, 1789, *The Writings of Thomas Jefferson* vol. VII, 454 (A.E. Bergh 1907); *see also* Thomas Jefferson to John W. Eppes, June 24, 1813, *The Writings of Thomas Jefferson* vol. XIII, 269-70 (A.E. Bergh 1907).

> of a life, to alienate it from them, (for it would be an alienation to the creditors,) and would they think themselves either legally or morally bound to give up their country and emigrate to another for subsistence? Every one will say no; that the soil is the gift of God to the living, as much as it had been to the deceased generation; and that the laws of nature impose no obligation on them to pay this debt.

Thomas Jefferson to John W. Eppes, June 24, 1813, *The Writings of Thomas Jefferson* vol. XIII, 272 (A.E. Bergh 1907); *see* James Madison, *Property*, Mar. 29, 1792, *The Writings of James Madison* vol. VI, 101 (Gaillard Hunt ed. 1906) (stating the importance of leaving a "like advantage" to others for their own preservation). "[T]he draftsmen of the Constitution invariably took the view that their generation had an obligation to protect the well-being of future generations." *See* Jim Gardner, *Discrimination Against Future Generations: The Possibility of Constitutional Limitation*, 9 Envtl. L. 29, 35 (1978).

Expert historian Andrea Wulf describes the deep roots of the climate right in the Nation's history and traditions. SER 113-136. Wulf explains that the natural environment was a critical underlying principle of liberty on which our Nation was founded. The Founders believed "Nature is the domain of liberty," SER 117, linking national "happiness, dignity and independence" to the quality of the lands. SER 117-118. Wulf avers "it was America's nature, soil and plants that provided a transcendent feeling of nationhood. Nature was inextricably linked to guarding liberty." SER 118. James Madison's speech of 1818 was "emblematic of how deeply

rooted the importance of nature in balance was to the Framers and to the young nation":

> Madison was the first American politician to write that 'the atmosphere is the breath of life. Deprived of it, they all equally perish,' referencing animals, man and plants. He spoke of the balanced composition of the atmosphere and the give and take of animals and plants, which allowed the atmosphere the aptitude to function so as to support life and the health of beings, according to nature's laws. The threat to nature in 1818 was largely from deforestation, the degradation of soils and the agricultural practices that Humboldt spoke of—threats to what Madison called the 'symmetry of nature.'

SER 118.

Just as the right to marry is "fundamental to our very existence and survival," the same can be said for the climate right. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *id.* ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *see also Obergefell*, 135 S.Ct. at 2594; ER 290-295; SER 127-128. In an 1893 legal proceeding, the United States argued that rights to basic survival resources are unalienable and to consume or destroy them is a "notion so repugnant to reason as scarcely to need formal refutation." Argument of the United States, *Fur Seal Arbitration* (U.S. v. Gr. Brit. 1893), *reprinted in* 9 Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration (Gov't Printing Office 1895) (emphasis added).

Defendants cite no authority or evidence to dispute the district court's finding that "a stable climate system is quite literally the foundation 'of society, without

which there would be neither civilization nor progress.'" ER 94. The record demonstrates a clear scientific basis for this finding, ER 244-295, and Wulf explains its ample support in the historic record:

> The 'breath of life' that the atmosphere, forests, soils, waters (the climate system) was to the agrarian society in which the founding fathers lived was also foundational to the liberties they staked out for their new nation. There may be no other implicit liberty right more rooted in the history and traditions of the United States than the right to a climate that sustains life, the life that humans have enjoyed for generations and that is now catastrophically threatened.

SER 118. Wulf references American Presidents, like Theodore Roosevelt who said:

> The function of our Government is to insure to all its citizens, now and hereafter, their rights to life, liberty and the pursuit of happiness. If we of this generation destroy the resources from which our children would otherwise derive their livelihood, we reduce the capacity of our land to support a population, and so either degrade the standard of living or deprive the coming generations of their right to life on this continent.

SER 657; SER 118, 121-122.

Plaintiffs and their experts make clear that the present dangers of climate destabilization do in fact, as President Roosevelt predicted, threaten personal choice central to individual dignity and autonomy. SER 1046-1049, 1051-1052 (¶¶ 4, 12–14, 26–27) (drought and lack of water forced Jaime from her home on the Navajo Nation reservation and eliminated her ability to harvest important traditional plants and medicines; extreme heat forces her to stay inside all day when she would rather be active outdoors); SER 175; SER 287-291, 294-299, 306-309; SER 31; SER 1110-1131. To find that a climate system capable of sustaining human life is not implicit

in ordered liberty requires this Court to defy the evidence, science, ecology, human evolution, and foundations of human civilization. There is no rational argument to conclude that our climate system, the foundation on which all of our human systems and institutions have been built, is not fundamental to people's lives, liberties, and property. The uncontested evidence proves otherwise. ER 244-295; SER 10-44; SER 180-229; SER 344-365; SER 391-423.

B. Plaintiffs properly asserted a state-created danger claim

A "state-created danger" claim under the Due Process Clause arises where "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known or obvious danger'. . . ." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (citations omitted).[32] To establish "deliberate indifference," Plaintiffs must show: (1) Defendants' actual knowledge of or willful blindness to; (2) an unusually serious risk of harm; and (3) Defendants either failed to take obvious steps to address the risk or exposed a claimant to the risk. *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). Deliberate indifference is shown by evidence that a governmental actor "'disregarded a known or obvious consequence of his action.'" *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011) (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997)).

[32] Given space limitations, Plaintiffs are not briefing in detail the extensive factual record supporting their state-created danger claim, as they addressed that claim at length in their Motion for Preliminary Injunction before this panel. Doc. 21-1.

The district court correctly recognized Plaintiffs adequately pleaded, and introduced sufficient evidence to demonstrate a question of material fact regarding, a state-created danger claim under the Due Process Clause. ER 53, 98. Defendants submitted no evidence contradicting the extensive evidence submitted by Plaintiffs going to each element of their claim. ER 50-53 ("At this stage of the proceedings, plaintiffs have introduced sufficient evidence and experts' opinions to demonstrate a question of material fact as to federal defendants' knowledge, actions, and alleged deliberate indifference."); ER 373-375 (Plaintiffs setting out evidence in support of each element of the state-created danger test in opposition to summary judgment); *see* ER 667 *et seq.*, 709 *et seq.*. This Court must defer to the district court's recitations of the evidence on summary judgment. *Mendocino Envtl. Ctr.*, 192 F.3d at 1291.

Defendants' argument that a state-created danger claim is, as a matter of law, categorically inapplicable to the present facts is without merit. The fundamental flaw in Defendants' argument is its reliance on Judge Murguia's concurrence and dissent in *Pauluk*, 836 F.3d at 1129-30. However, as the majority opinion in *Pauluk* correctly notes, Plaintiffs need only establish "the state engaged in 'affirmative conduct' that placed him or her in danger." 836 F.3d at 1124 (quoting *Patel*, 648 F.3d at 974). Affirmative conduct is conduct that creates, exposes, or increases a risk of harm Plaintiffs would not have faced to the same degree absent such conduct.

Hernandez v. City of San Jose, 897 F.3d 1125, 1134-35 (9th Cir. 2018); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

Ignoring Plaintiffs' allegations in the complaint and evidence on summary judgment, Defendants assert "Plaintiffs have identified no harms to their 'personal security or bodily integrity' of the kind and immediacy that qualify for the state-created danger exception." DOB 39. Again citing Judge Murguia's dissent in *Pauluk*, Defendants contend such harms must be "immediate, direct, physical, and personal." DOB 40. Yet the majority in *Pauluk* found that gradual-onset, indirect harms from ambient toxic mold constitute harm for the purposes of a state-created danger claim. *Pauluk*, 863 F.3d at 1126 ("Plaintiffs have stated a claim despite the fact that Pauluk's injury was caused by physical conditions in the workplace."). The majority in *Pauluk* explicitly rejected the portions of Judge Murguia's dissent on which Defendants rely, and Defendants have not argued that *Pauluk* should be overruled. Further, as explained in Section II.A.2, *supra*, Plaintiffs' harms *are* personal, and many are physical.

Defendants next claim "Plaintiffs identify no specific government action" that "endangered *Plaintiffs* in particular." DOB 40-41 (Defendants' emphasis). These assertions again rely on dissenting arguments rejected by this Circuit, are belied by the record, and are comprehensively rebutted by Plaintiffs' standing analysis. *See* Section II.A, *supra*; *see also* ER 372-375; Doc. 21-1 at 25-34. In short, Plaintiffs do

not need to establish Defendants are the sole contributors to the danger they face, or Defendants are the sole individuals harmed by this danger, in order for their state-created danger claim to prevail. *See Farmer v. Brennan*, 511 U.S. 825, 843 (1994) ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a [claimant] faces an excessive risk. . . for reasons personal to him or because all [others] in his situation face such a risk."). Plaintiffs offered ample evidence to show Defendants substantially caused, contributed to, increased, and continue to increase dangerous climate destabilization and the already-occurring and imminently threatened harms Plaintiffs face. ER 605-607; ER 372-375. Defendants' actions unequivocally placed Plaintiffs "in a situation more dangerous than the one" they would otherwise face. *DeShaney*, 489 U.S. at 196. As the district court recognized, "'[t]o allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of 'public importance.'" ER 54 (quoting *TransWorld Airlines, Inc. v. Amer. Coupon Exchange, Inc.*, 913 F.2d 676, 684 (9th Cir. 1990)). The Supreme Court emphasized that the viability of due process claims, such as those raised by Plaintiffs, are inherently intertwined with the facts and circumstances of the case. *See County of Sacramento v. Lewis,* 523 U.S. 833, 850 (1998) (recognizing "[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory," and "preserving the constitutional

proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking").

Considering both the allegations in the complaint and the uncontested evidence introduced on summary judgment as true, Plaintiffs adequately claimed a state-created danger claim. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006).

C. Plaintiffs have adequately pleaded a public trust claim

1. The public trust doctrine binds the federal government

The public trust doctrine is an unalienable attribute of sovereignty and a matter of federal law. ER 98-102. In arguing "there is no basis for Plaintiffs' public trust claim against the federal government under *federal* law," DOB 47-48, Defendants cite a fragment of *dicta* from a case where the federal public trust doctrine was not at issue. *PPL Montana, LLC v. Montana,* 565 U.S. 576 (2012) ("*PPL*"). The district court provided a careful and thoughtful analysis rejecting Defendants' interpretation of *PPL,* correctly explaining that *PPL* "cannot fairly be read to foreclose application of the public trust doctrine to assets owned by the federal government." ER 105; *see also* ER 54-55; SER 561-562. "The question whether the United States has public trust obligations for waters over which it alone has sovereignty . . . was simply not presented to or decided by the Court in *PPL Montana, LLC*." SER 562; ER 105.

Defendants' arguments conflate the uncontroversial proposition that the scope of each *state* public trust doctrine is a matter for that state, with the proposition that there is, therefore, no *federal* public trust doctrine. DOB 50. There is scant authority on the federal public trust doctrine because, by operation of the Equal Footing Doctrine, "it is rare to find instances where the United States retains vestiges of trust obligations once territories become states." SER 565. In the instances in which they have addressed the issue, courts have routinely found public trust obligations to attach to federal property. ER 107-109 (citing cases); *see also* SER 563-566. Defendants raise no new authority or analysis here justifying reversal of the district court's finding that there is a federal public trust doctrine.[33]

Moreover, the federal government has repeatedly asserted itself as a public trustee in other legal contexts. *See, e.g.*, *United States v. CB&I Constructors, Inc*.,

[33] *Clean Air Council v. United States*, No. 17-4977, 2019 WL 687873 (E.D. Pa. 2019) ("*Clean Air Council*"), is eminently distinguishable on multiple grounds. Judge Diamond's opinion in that case turns fundamentally on the absence of a plausible causal nexus between the plaintiffs' injuries that were *sustained in 2011* and conduct that *began in 2017*. *Clean Air Council* *6. Here, Plaintiffs challenge Defendants' *historic and ongoing* conduct causing *existing and ongoing harms*. Additionally, Judge Diamond's opinion failed to acknowledge the district court's historical analysis and qualified scope of the climate right, *see* ER 94; conflated the right recognized by the district court with a "right to a pollution-free environment." *Clean Air Council* *8; applied Third Circuit law that, *inter alia*, conflates the "state-created danger" and "special relationship" *DeShaney* exceptions; *id.* *9, and disregarded the district court's thorough federal public trust analysis here, *id.* *11.

685 F.3d 827 (9th Cir. 2012); *Conner v. U.S. Dep't of Interior*, 73 F.Supp.2d 1215, 1219 (D. Nev. 1999); *United States v. Burlington N. R.R.*, 710 F. Supp. 1286 (D. Neb. 1989); *In Re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980). In litigation against British Petroleum over the Deepwater Horizon oil spill, the United States claimed damages for "[n]atural resources under the trusteeship of the United States." Compl., *United States v. BP Exploration & Production, Inc*., No 2:10CV04536, 2010 WL 5094310, ¶ 66 (E.D. La. Dec. 15, 2010); SER 637; SER 633-635; SER 655; SER 617-618; SER 615.

Defendants articulated no principled basis as to how or why, under the law of this country, public trust obligations would attach to all other sovereigns but not the federal government. ER 107, 109; *see also PPL*, 565 U.S at 603 (citing D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990), which states at 4: "there are over fifty different applications of the doctrine, one for each State, Territory of Commonwealth, *as well as the federal government*." (emphasis added)). Contrary to Defendants' assertions and complete lack of any *Glucksberg* analysis, there is ample basis in this nation's laws, history, and traditions for the existence of a federal public trust doctrine. *See* Section IV.A., *supra*.

2. The public trust doctrine is not displaced by statute

The federal public trust doctrine is not displaced by the Clean Air Act, or by any of the "numerous federal statutes and regulations" Defendants raise but fail to

identify. DOB 53. The district court resolved this issue correctly, ER 110-113, and Defendants' reliance on *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), is inapposite for two reasons.

First, the statutory displacement analysis in *AEP* is simply inapplicable to Plaintiffs' constitutional claims. ER 111. As the district court correctly recognized, Plaintiffs' public trust claims rest "directly on the Due Process Clause of the Fifth Amendment." ER 113 (quoting *Davis v. Passman*, 442 U.S. 228 (1979). Additionally, because the public trust doctrine has long been recognized as an attribute of sovereignty, it is also an inalienable element of the Constitution's reserved powers doctrine and "cannot be legislated away." ER 111; *see also Ill. Cent. R.R. v. Illinois*, 146. U.S. 387, 455 (1892). Only constitutional claims for *damages* have been subject to a displacement analysis, when there is an explicit statutory substitute for recovery, pursuant to *Carlson v. Green*, 446 U.S. 14, 18 (1980).[34]

Second, even if this Court were to find Plaintiffs' public trust claims are rooted in federal common law and not the Constitution, the nature of Plaintiffs' claims is easily distinguishable from those at issue in *AEP*. The public nuisance claims in *AEP* concerned the abatement of CO_2 emissions from specific power plants (and the

[34] Importantly, Plaintiffs presented uncontested evidence showing Defendants' unconstitutional acts are not based exclusively on their implementation of the Clean Air Act. *See, e.g.,* ER 338-347 (summarizing evidence of Defendants' unconstitutional actions that, taken in the aggregate, result in the constitutional injuries for which Plaintiffs seek redress).

Tennessee Valley Authority). *AEP*, 564 U.S. at 415. The Supreme Court did not hold the Clean Air Act displaces all actions relating to CO_2 emissions generally, but instead held "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from *fossil-fuel fired power plants*." *Id.* at 424 (emphasis added). *AEP* displaced a common law cause of action directly against private party emissions, because the Clean Air Act's regulatory scheme is directed towards the same class of emitters and the same type of pollution. Plaintiffs' public trust claims, in contrast, concern a more fundamental issue: whether Defendants' fossil fuel energy system substantially impairs federal public trust assets, including federal navigable and territorial waters and the atmosphere. That is not a question the Clean Air Act asks or answers.

Additionally, the declaratory relief and systemic equitable remedy sought by Plaintiffs are categorically distinct from the requested abatement of discrete sources of CO_2 from a limited number of power plants in *AEP*. The Clean Air Act is merely a single element of the "regulatory system developed by Congress and federal agencies," DOB 54, that is being carried out by Defendants in a manner that is causing Plaintiffs' injuries. Whether Defendants' national energy system is constitutionally-compliant, or substantially impairs fundamental sovereign resources, is an entirely different matter from that governed by the Clean Air Act and addressed by the Supreme Court in *AEP*. Defendants provide no new or further

analysis that would justify reversing the district court's holding that neither the Clean Air Act, nor any other statute, displaces Plaintiffs' public trust claims.

3. The district court did not yet decide whether the public trust doctrine applies to the atmosphere, but it does apply to federally-controlled territorial waters

This Court should not decide a mixed question of law and fact not yet decided by the district court – and therefore not "fairly included" in its orders, *Yamaha Motor Corp., U.S.A.*, 516 U.S. at 205 – as to whether the atmosphere is a public trust resource controlled by Defendants. In arguing that single, non-dispositive issue, Defendants ignore that "plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea," ER 102, and have presented factual evidence detailing how Defendants breached their fiduciary obligation as trustees of federal waters. *See, e.g.,* SER 344-365, SER 391-423; *see also* SER 567 ("Nor can I imagine that our coastal waters could possibly be privatized without implicating principles that reflect core values of our Constitution and the very essence of the purpose of our nation's government."); SER 570-572; SER 637; SER 633-635. Defendants do not dispute the Public Trust Doctrine applies to "submerged and submersible lands, tidelands, and waterways" nor do they dispute the district court's finding "[b]ecause a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets." ER 104; ER 526, 530, 532-533, 536-538, 541-542, 545-546, 550 (¶¶ 16, 27, 33, 43, 45,

47, 59, 61, 69-70, 83). Therefore, Plaintiffs' public trust claims should proceed to trial on that basis alone.

Defendants are sovereign trustees of public trust resources within the federal public domain, such as resources which transcend state borders, including the air and atmosphere, the oceans, migratory wildlife, and federal public lands. 2 William Blackstone, *Commentaries* *14; *United States v. Beebe*, 127 U.S. 338, 342 (1888); *United States v. California*, 332 U.S. 19, 33 (1889); *United States v. Causby*, 328 U.S. 256, 260, 266 (1946) (holding airspace is part of the federal public domain); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890) (finding public lands are "held in trust for all the people"); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-84 (1997); *United States v. Oregon*, 295 U.S. 1, 14 (1935); 49 U.S.C. § 40103(a)(1) ("[t]he United States Government has exclusive sovereignty of airspace of the United States."); *see* 1958 Air Commerce and Safety Act, Pub. L. No. 85-726, § 101(33), 72 Stat. 731, 740 (1958); SER 637; SER 633-635; SER 655; SER 617-618; SER 615.[35] In short, Defendants provide no compelling factual or legal basis to reverse the district court's decision that "[t]he application of the public

[35] Defendants state "no court has held that the climate system or atmosphere is protected by a public trust doctrine." DOB 56. That is not true. *See, e.g.,* ER 102-103 n.10; *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("[A] public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state."); SER 588-597; *see also* SER 575 (counsel for Defendants conceding that trial court decisions have extended the public trust doctrine to the atmosphere)).

trust doctrine to [Plaintiffs'] claims would be better served with a full factual record to help guide this Court and any reviewing courts." ER 55.

CONCLUSION

The Framers substituted a constitutional democracy with a tripartite form of government in place of a monarchy. Since the early days of the Republic, our judiciary has been a last line of defense against governance that threatens the lives and liberties of the People. As a critical check on governance, the courts have reckoned with large, entrenched government systems and institutions that deprive people of unalienable rights, including widespread systems of racial and sex discrimination, which harm and burden our Nation's children. When the tripartite system of governance did not timely redress the gross deprivation of unalienable rights resulting from legalized slavery, the result was civil war. While imperfect, our constitutional democracy allows these children to seek to protect their lives, liberty, property, and pursuit of happiness without declaring independence from their government, so long as those who govern assent to review by our courts and let the facts be told in the light of day so that justice may be illuminated and the vital constitutional conversation had between the three branches of government. These young people deserve that chance to present their full case against those who through their governance harm them, and let the light of justice fall where it may.

Plaintiffs respectfully request that the Court remand to the district court for trial.

DATED this 22nd day of February, 2019, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson
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STATEMENT OF RELATED CASES

These cases were previously before this Court and each is a related case within the meaning of Circuit Rule 28-2.6: Defendants' four prior Petitions for Writs of Mandamus and a Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b). *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1101 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776 (denied as moot Nov. 2, 2018); *In re United States*, No. 18-73014 (denied as moot Dec. 26, 2018); and *Juliana v. United States*, No. 18-80176 (granted petition for permission to appeal Dec. 26, 2018).

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.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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