Case No. 17-71692

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON,
Respondent,
and,
KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs-Appellants

On Petition For Writ of Mandamus In Case No. 6:15-cv-01517-TC-AA (D. Or.)

BRIEF OF AMICUS CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS–APPELLANTS' OPPOSITION TO DEFENDANTS' MOTION FOR WRIT OF MANDAMUS

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Identity, Interests, and Authority of the *Amici Curiae*

Amicus curiae are law professors and scholars (listed on the signature page) who teach, research, and write about constitutional, environmental, and climate law.[1] *Amici* have an interest in informing the Court about the role of the Due Process Clause in climate change litigation. The *amici* conclude that the district court's denial of Defendants-Petitioners' ("Defendants") motion to dismiss does not warrant issuance of the extraordinary writ of mandamus.

Summary of Argument

The Fifth Amendment provides "No person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. Amd. 5. Both constitutional text and corresponding jurisprudence demonstrate that the amendment encompasses Plaintiffs' claim that government action has deprived them of a liberty interest to a stable climate system.

[1] *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. Defendants have consented to the filing of this brief. No person or party has made a monetary contribution towards the preparation or submission of this brief.

Rather than engage the argument that governmental action on climate change can constitute a constitutional deprivation of liberty, Defendants merely state that constitutional law cannot adapt to new conditions and that to consider new claims is so clearly erroneous that the only response is to issue a writ of mandamus. Pet. 22-29. In its view, Defendants can threaten constitutional liberty interests, by causing or contributing to climate instability with impunity and without *any* judicial oversight, because of general separation of powers concerns. However, such concerns can and should be addressed – as with any other case involving the government – in the normal course of litigation. *Id.*

It is not erroneous at all, let alone clearly erroneous, for the District Court to find that Plaintiffs' well-pleaded complaint was sufficient to state a cause of action and thus to deny defendants' motion to dismiss – the only question before this Court at this time. The District Court's determination that the constitutional right to liberty protected in the Fifth Amendment Due Process Clause may encompass a right to a stable climate system is not inconsistent with current Supreme Court precedent. It is also not inconsistent with the role of the federal judiciary's historic function of ensuring that government action falls within constitutional constraints. In ignoring

the text of the Fifth Amendment and all but ignoring the Supreme Court's most recent case concerning the due process clause, Defendants have failed to meet its burden to justify the extraordinary remedy of mandamus.

I. The District Court's Denial of Defendants' Motion to Dismiss Plaintiffs' Due Process Claims is not Clearly Erroneous

Plaintiffs' due process claim is logical and direct: (1) the federal government has authorized, funded, or carried out policies and programs that cause or contribute to an unstable climate system; (2) an unstable climate system diminishes liberty; and therefore (3) the government's actions have deprived plaintiffs of liberty protected by the U.S. Constitution. Dkt. 7 (Amended Complaint) ¶¶ 283-299.

Following extensive oral argument and several rounds of briefing before both the trial and magistrate judges in the case, the district court found this claim to be constitutionally cognizable. Dkt. 83 at 33 ("In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process

violation."). The district court did not determine that plaintiffs had carried their burden of proof on the merits. *Id.* at 36. At issue at this juncture is simply whether the courts of the United States are open to those who carefully plead claims alleging violation of their right to liberty.

This case thus turns on whether certain actions of the federal government result in a constitutional deprivation of liberty. Conceptually, "liberty" means now what it meant to the Framers, that is, freedom from oppressive governmental action. "This 'liberty' is . . . a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan J., dissenting from dismissal on jurisdictional grounds).

Liberty interests are undoubtedly at stake. As the current hurricane and fire season reminds, the district court and plaintiffs are correct to conclude that an unstable climate system can adversely affect many profound extensions of liberty, including occupation, education, family, food, shelter, travel, drinking water, residence, relationships, and so on. Dkt 83 at 35; Dkt. 7 ¶¶ 15, 18, 21, 26, 46, 283. It is equally clear that conditions manifesting climate change impinge not only on liberty interests but on life and property

interests as well. Dkt 83 at 33; Dkt. 7 ¶¶ 87, 130, 247, 255, 280, 282, 288, 289.

The district court's determination that "liberty" encompasses an implied right to a stable climate system is supported by ample Supreme Court precedent, including its most recent instruction in this area in *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015). Dkt 83 at 30-32. Plaintiffs' claims thus stand firmly on the established right to liberty under the Due Process Clause.

On the other hand, Defendants' rigid reading of the Due Process Clause ignores the jurisprudence that requires a balancing of interests over time. Pet. 22-26. For nearly a century, the Supreme Court has recognized that the liberty interests protected by the Due Process Clause encompass unenumerated rights. Indeed, landmark decisions exist from almost every decade of the last one hundred years establishing and reaffirming that, in addition to incorporating most of the enumerated rights, the liberty clauses of the Fifth and Fourteenth amendments include interests of fundamental importance, including the rights to direct the education and upbringing of one's children (*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)), procreation (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535

(1942)), bodily integrity (*Rochin v. California*, 342 U.S. 165, 172-73 (1952)), contraception (*Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)), abortion (*Planned Parenthood of South Eastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade,* 410 U.S. 113, 153 (1973)), sexual intimacy (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)), family (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), marriage (*Loving v. Virginia*, 388 U.S. 1, 12 (1967)), and even against grossly excessive punitive damages (*BMW of North America v. Gore*, 517 U.S. 559 (1996)). Many of these cases involved the interests of children. *E.g., Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). Thus, due process analysis requires a balancing of individual liberties against governmental interests as both evolve over time – a task that is appropriate for the District Court.

The cases cited here, as a whole, insist that liberty is a rational continuum requiring close examination of governmental justification of deprivation:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a

> reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 848–49, (1992) (Opinion of Justices O'Connor, Kennedy, and Souter) (quoting *Poe v. Ullman,* 367 U.S. 497, 543 (1961) (Harlan J., diss.)).

It is clear that the outer boundaries of the due process clauses – no more than any other aspect of the Constitution – are not frozen in time, for as Justice Frankfurter explained, "[t]o believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Rochin v. California, supra,* 342 U.S., at 171–172. Rather, as Justice Harlan said, and as has been often repeated:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society…. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

Poe, 367 U.S. at 523-24 (Harlan, J., dissenting). The Supreme Court followed this approach in its most recent major due process case. See *Obergefell v. Hodges*, *supra*. In elucidating "[t]he identification and protection of fundamental rights," *Obergefell* emphasized that this responsibility "has not been reduced to any formula." 135 S. Ct. at 2598. Courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)). In exercising such "reasoned judgment," courts should keep in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Obergefell,* 135 S. Ct. at 2598. This approach allows "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning." *Id. See generally*, Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 Harv. L. Rev. 147 (2015).

The District Court's interpretation of the Due Process Clause is fully consistent with the central lesson of *Obergefell* – that "liberty" is a "living thing" that can accommodate new claims – whether the

interests protected were foreseen by the drafters of the constitution or not.

Defendants' reliance on *Washington v. Glucksberg,* 521 U.S. 702 (1997) is of no avail. First, Chief Justice Roberts said in *Obergefell* that *Glucksberg* was "effectively overrule[d]." 135 S. Ct. at 2621 (Roberts, C.J., dissenting). Even if *Glucksberg*'s more formulaic and more archaic approach reflected the governing standard in due process cases, the district court's decision here would not constitute clear error. For the reasons the district court and Plaintiffs explain at length, a stable climate system is both deeply rooted in the nation's history and traditions, and implicit in the concept of ordered liberty such that "neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 721 (citations omitted); Dkt 83 at 32; Pl. Ans. at 34-42.

II. Mandamus Would Have the Effect of Eliminating Judicial Oversight of Government Actions Implicating Liberty

Defendants' arguments rest on two fundamental errors. First, it makes the profoundly misplaced argument that it is clearly erroneous for federal courts to consider tough cases involving the government. Second, it ignores the core federal judicial function of

holding a trial to determine the meaning of a constitutionally protected fundamental right. Defendants here have the same alternative that it – and every disappointed party – has under the federal rules: it can appeal a decision (and any aspect of it) with which it finds fault. Defendants misapprehend the role of the federal courts and it confuses disappointment with clear error. The extraordinary remedy of a writ of mandamus is not warranted.

A. Defendants Misapprehend the Role of Federal Courts

Defendants take the incorrect position that federal courts should avoid tough cases of first impression because of separation of powers. Pet. 32-33. But every case involves controversy, many of them tough. That is what makes it a *case*. Every federal case involving the federal government implicates separation of powers. That is why *powers are separated*. The district court should be permitted to perform its constitutional functions under our tripartite system to manage the case, develop a record, issue rulings, and reach a decision.

Defendants' cramped view of the federal judicial function is misplaced. While the words of the Constitution are fixed, their

application to new conditions has never been frozen in time. Rather, it has always been understood that the Constitution was adaptive:

> [I]ntended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument . . . . It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

McCulloch v. Maryland, 17 U.S. 415 (1824).

Now no less than ever before, courts must be available to hear all constitutional claims, even those that raise factual issues the framers might not even have dimly foreseen.[2] Changing circumstances must be provided for as they occur. As recently stated in *Obergefell v. Hodges*:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

[2] Plaintiffs point to historical evidence that some of the framers considered the necessity of a stable climate. Pl. Ans. at 36-38.

135 S.Ct. at 2598 (2015).

Simply, there is no constitutionally founded reason for federal courts to duck controversial issues so as to guard against "embarrassing" Defendants: "[T]he federal courts' legitimacy is quite robust, [] there is no evidence that particular rulings have any effect on the judiciary's legitimacy, and [] in any event, the courts' mission should be to uphold the Constitution and not worry about political capital." Erwin Chemerinsky, *Constitutional Law: Principles And Policies* 131-32 (Aspen Law & Business 2d ed. 2002).

Nor is it a jurisdictional bar that the claim concerns important questions that are essential to our system of ordered liberty – that is, to the various crises of human affairs. Rather, to determine the constitutional merits of such claims is the core function of the federal judiciary. Through the ages, federal courts have been the locus for resolving even the most contentious and profound questions: slavery in *Pennsylvania v. Prigg*, 41 U.S. 539 (1842); Presidential authority in *Youngstown Sheet & Tube Co. v Sawyer,* 343 U.S. 579 (1952); discrimination and affirmative action in a series of cases spanning more than 50 years (e.g., *Cooper v. Aaron*, 358 U.S. 1

(1958), *Grutter v. Bollinger*, 539 U.S. 306 (2003)). In the due process context as well, the federal courts have not demurred from deciding cases that raise profound and complex questions of policy: nationalism in *Meyer v Nebraska*, 262 U.S. 390 (1923), reproductive rights in *Griswold v Connecticut*, 381 U.S. 479 (1965), the nature of family in *Moore v City of East Cleveland*, 431 U.S. 494 (1977), and *Obergefell v Hodges*, 135 S. Ct. 2584 (2015), and even the war on terror, *Boumediene v Bush*, 553 U.S. 723 (2008). While one may agree or disagree with the holdings in these cases, there is no doubt whatsoever that the federal judiciary had jurisdiction to hear them. Whether or not these partake of global phenomena or implicate sensitive political matters as some of these do is irrelevant to a federal court's authority to hear a well-pleaded claim.

The climate context of this case makes it all the more amenable to judicial resolution. The constitution protects what is of fundamental importance and what cannot be relegated to protection in the political branches. A stable climate system satisfies both of these, arguably more than anything else in history. Protection against the degradation of the environment is precisely the kind of thing that the political branches are *least* likely to be able to protect:

it requires long-term thinking for the benefit of those who have no political voice. This is a case of first impression because we now know what we failed to grasp before: that government action can and does impact the stability of the climate system and the ability of American citizens to own property along the shoreline for fishing and farming, to exercise all their other rights, and indeed to live full and free lives. Federal courts can apply well-entrenched constitutional principles to determine the limits of governmental power to infringe on these liberty interests.

B. Defendants Confuse Disappointment with Error

Far from constituting clear error to hear the claim, the Supreme Court has held that jurisdiction in cases like this is mandatory. The Court said that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . *must* entertain the suit . . . ." and that "the court *must* assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy." *Bell v Hood,* 327 U.S. 678, 681-2 (1946) (emphasis added). To take jurisdiction in this case is not

clearly erroneous. It is not a violation of separation of powers; it is not even discretionary. It is an obligation.

Rather than violating separation of powers, the district court's assertion of jurisdiction over this Fifth Amendment claim implicates the core function of the federal courts in our system of separation of powers: to determine the meaning and scope of constitutionally protected fundamental rights. This is, essentially, the power to say what the law is, a power that has been allocated to the federal judicial department since *Marbury v. Madison,* 5 U.S. 137 (1803), and repeated ever since. As the Court firmly asserted in *Cooper v. Aaron* 538 U.S. 18 (1958), Chief Justice John Marshall's determination that it is "emphatically the province and duty of the judicial department to say what the law is," "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v Aaron*, 358 U.S. 18 (1958) (citing *Marbury*, 5 U.S. at 177).

To place the question before the federal courts is not to remove it from the political sphere. As the *Obergefell* court reminded us in

the context of marriage, "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process." 135 S. Ct. at 2596 (2015). In our constitutional democracy, policies are shaped within the limits of the Constitution. The question before the district court concerns not the wisdom of the policies but their compliance with constitutional rights. That is fundamentally a judicial question.

Indeed, it would be an unprecedented arrogation of *executive* power for the Court to concede to the executive the power to say what the law is and to hold itself immune from judicial scrutiny where due process rights are at stake. The Supreme Court has said as much in a series of cases on another unforeseen, unprecedented, and global phenomenon, the war on terror. Indeed, the Supreme Court recently rejected a similar claim of political branch authority "to govern without legal constraint" in a brief but firm paragraph in *Boumediene v. Bush*: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution' . . . . To hold

the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" 553 U.S. 723, 765 (2008). Nor can Defendants switch off the Constitution because this case concerns a stable climate system. Separation of powers is a two-way street. Defendants' position has all traffic headed in one direction, however, notwithstanding this nation's constitutional design.

This isn't to say of course that separation of powers isn't relevant here. It is. But it is too soon to say how and how much so as to determine if constitutional cabins are overrun. There is no basis for maintaining that the district court's case management is other than reasonable and responsible. It has bifurcated the proceedings into separate phases of liability and remedy. Doc. No. 12. It has managed discovery without *any* substantive objection from Defendants. *Id.* When the time comes, it will develop a record to enable careful decisionmaking and review. *Id.* at 3. Thus, separation of powers implications, if any, will be addressed during the discovery

and trial management process, and – if need be – on appeal. *Id.* at 2-3.

Although at times Defendants contradict their own hyperbole by recognizing that the district court order did no more than set a cause for trial, they repeatedly misstates what is at issue. The district court's decision found a basis for holding a trial on a constitutional claim; it did not assume the responsibility to "dictate and manage—indefinitely—all federal policy decisions related to fossil fuels, energy production, alternative energy sources, public lands, and air quality standards." Pet. at 1. The court below simply determined, correctly, that the plaintiffs had raised a "claim to liberty [that] must be addressed." *Obergefell*, 135 S. Ct. at 2598.

III. Defendants have Failed to Meet its Burden to Justify the Extraordinary Remedy of Mandamus

Defendants fail to carry their heavy burden that mandamus should issue. Doc. No. 12 at 1-2, and cases cited therein. Three shortcomings stand out. First, Defendants do not cite to a single case from any level in the federal judicial system *ever* to have issued mandamus at this early stage of litigation – in the absence of a discovery dispute, or the involvement of an independent

constitutional right such as the First Amendment, or national security. Doc. No. 12 at 2-3. Second, Defendants *do not even mention the words of the Due Process Clause*, and makes only two passing references to the Supreme Court's most recent engagement of it in *Obergefell*. U.S. Const. Amd. 5. Pet. vii; Pet. 22-29.

Third, rather than engage *Obergefell*, Defendants' Due Process argument distills to a string cite to four inapposite cases that it imagines show that mandamus and dismissal are "required by the Supreme Court." Pet. 22-23. But *all* of these cases precede *Obergefell* by many decades, *none* alleges a deprivation of a liberty interest to a stable climate, and *none* stands for the proposition that mandamus is "required." *Id.*

Conclusion

For the reasons given herein, the Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,889 words (excluding the parts of the brief exempted based on the word processing system used to prepare the brief).

DATED: September 5, 2017

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I hereby certify that on September 5, 2017, I electronically filed the foregoing Brief of Amicus Curiae Law Professors in Support of Plaintiffs-Appellants' Opposition to Defendants' Motion for Writ of Mandamus with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via-email to the following counsel:

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