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Mia Hammersley

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*117 THE RIGHT TO A HEALTHY AND STABLE CLIMATE: FUNDAMENTAL OR UNFOUNDED?

ABSTRACT

In a case orchestrated by Our Children's Trust, Juliana v. U.S., *twenty-one plaintiffs ages eight to nineteen filed suit against the federal government. In their complaint, these young plaintiffs alleged that the right to a stable and healthy climate should constitute a fundamental, unenumerated right. On April 8, 2016, Magistrate Judge Thomas Coffin of the federal District Court of Oregon denied the government's motion to dismiss the case, ruling in favor of the plaintiffs, and on November 10, 2016 the case survived a motion to dismiss in the District Court of Oregon and will proceed to trial. According to the National Climate Assessment, the average national temperature has increased by 0.6 degrees Fahrenheit since recordkeeping began in 1895. This rise in temperature is expected to impact the United States in various ways during the plaintiffs' lifetimes, from sea level rise, increased frequency and intensity of extreme weather events, drought, and increased spread of infectious diseases. In a time when the impacts of climate change are expected to intensify, and current case law effectively bars individuals from suing for climate change-related injuries due to restrictions on standing, this landmark constitutional climate change lawsuit has the potential to finally accomplish what many others have attempted to do since the 1970s: recognize that the right to a healthy environment, or in this case, a healthy climate, is fundamental to ordered liberty.*

Introduction

All around the world, children are suing their governments. From Pakistan to Norway to the United States, these children--known as the "Climate Kids"--are arguing they have a constitutionally-protected right to a healthy environment that is being burdened by their governments' failure to mitigate the impacts that climate change will have on their generation and on future generations.[1] According to the National Climate Assessment, a study conducted by a team of over 300 experts and published by the U.S. Global Change Research Program, the average national temperature has increased by 0.6 degrees Fahrenheit since recordkeeping began ***118** in 1895 and could increase by over four degrees Farenheit by 2100.[2] This rise in temperature is expected to impact the United States in various ways during the lifetimes of the younger generations, including infrastructure endangerment due to sea level rise, increased frequency and intensity of extreme weather events, prolonged periods of drought, and increased spread of infectious diseases.[3]

In the United States, *Juliana v. U.S.*--a case orchestrated by Our Children's Trust (OCT), a nonprofit group with the mission of protecting earth's atmosphere and natural systems for present and future generations--twenty-one plaintiffs ranging from age eight to nineteen filed suit against the federal government.[4] These young plaintiffs alleged that, due to its many actions and inactions allowing humans to perpetuate climate change, the government violated their generation's constitutionally protected rights to life, liberty, and property.[5] Specifically, the plaintiffs presented four claims for relief: (1) violation of the

Due Process Clause of the Fifth Amendment; (2) violation of equal protection principles embedded in the Fifth Amendment; (3) violation of the unenumerated rights preserved for the People by the Ninth Amendment; and (4) violation of the Public Trust Doctrine.[6] The first and third claims for relief are the focus of this paper.

In over 250 years of jurisprudence, the only rights not specifically enumerated in the Constitution that the Supreme Court of the United States has found to be fundamental are the right to control the upbringing of one's children,[7] the right to marry,[8] the right to access ***119** contraception,[9] the right to have an abortion pre-viability and later in the pregnancy to save the life of the mother,[10] and the right to engage in private, consensual sexual conduct.[11] In the case filed by OCT, the plaintiffs allege that the right to a healthy and stable climate qualifies as a fundamental, unenumerated right, and should be treated with the same level of protection as the rights listed above.[12] Even if *Juliana v. U.S.* is not the case that ultimately succeeds in establishing this right, this case illustrates the need for the judiciary to recognize a narrowly tailored right to be free from government-inflicted environmental harm. This paper will discuss: (1) the history of the movement to establish a constitutionally protected right to a healthy environment; (2) how the right to a healthy and stable climate compares to other existing unenumerated fundamental rights; and (3) how a ruling in favor of the Climate Kids would affect the future of climate change litigation and the possibility for redress of climate-related injuries.

I. From the Right to a Healthy Environment to the Right to a Stable Climate

A. The History of the Environmental Movement

Rachel Carson's *Silent Spring* was published in 1962 and is accredited with beginning the modern environmental movement. It includes the first known written suggestion that there should be a constitutionally-protected right to a healthy environment:

> *If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem*.[13]

***120** *In the past, there have been three proposals for an amendment to the United States Constitution to recognize a version of the right to a healthy environment which occured in 1968, 1970, and 2003, respectively*.[14] Senator Gaylord Nelson, the founder of Earth Day, first proposed an amendment that recognized the individual right to a "decent environment," but it did not pass in the House of Representatives.[15] Two years later, Representative Richard Ottinger made another attempt at this amendment, but it also was not successful.[16] *Most recently, Representative Jesse Jackson proposed an amendment,* "respecting the right to a clean, safe, and sustainable environment," that likewise did not pass.[17]

Several suits were also filed in federal court in which environmental plaintiffs asserted that the right to a healthy environment should be recognized either under the Due Process Clause of the Fifth and Fourteenth Amendments or within the penumbra of the Ninth Amendment.[18] *In 1970, a court recognized a plaintiff asserting environmental harms for the first time in Environmental Defense Fund, Inc. v. Hardin*.[19] *There, the Environmental Defense Fund (EDF) successfully established standing to challenge the Secretary of Agriculture's decision to loosen restrictions on the use of DDT, the harmful pesticide that was the impetus for Rachel Carson's Silent Spring*.[20]

In 1971, EDF sued to enjoin the construction of a dam across the Cossatot River in Arkansas. It contended that the Fifth, Ninth, and Fourteenth Amendments protected the ***121** *individual right to a healthy environment*.[21] *The complaint stated that* "[t]he right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments to the Constitution of the United States," as well as being "one of those unenumerated rights retained by the people ... as provided in the Ninth Amendment."[22] The court responded that it was not "insensitive to the positions asserted by the plaintiffs," and that such a constitutional finding may be possible in the future, but that there was no basis at the time on which to grant relief to the plaintiffs. It stated as follows:

> Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose. Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition.[23]

The court quoted Judge Learned Hand in *Spector Motor Serv., Inc. v. Walsh*, who stated that, "[n]or is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."[24] Later courts invoked this statement declining to find that the right to a healthy environment is guaranteed by the United States Constitution, but suggesting that it may be recognized one day.[25]

Congress thereafter passed environmental legislation that makes up the current system of environmental laws. The first official Earth Day was celebrated on April 22, 1970.[26] The National Environmental Policy Act and the Clean Air Act were also passed in 1970, and the ***122** Endangered Species Act was passed in 1973.[27] *Today, over thirty individual states recognize the right to a healthy environment in their own constitutions*.[28] *Pennsylvania was the first to recognize such a right*.[29] *In honor of the first Earth Day,* the legislature approved a proposed amendment to the state constitution with the intent to "give our natural environment the same kind of constitutional protection that [is] given our political rights." It passed overwhelmingly. It stated:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[30]

This requires the legislature to enact laws to ensure the protection of natural resources.[31] *Montana's constitution* directs the state to "maintain and improve a clean and healthful environment for present and future generations," and like Pennsylvania, assigns an affirmative legislative role in achieving that.[32] *Additionally, as of 2012 over 110 foreign nations included the right to a healthy environment in their constitutions*.[33]

B. Climate Change in the United States

The discovery of climate change evolved through the early years of the environmental movement in the United States. Since the United States Constitution was ratified in 1787, carbon ***123** emissions have been steadily growing due to increased urbanization and industrialization.[34] The country's use of petroleum drastically increased in the 1950s when the United States gained access to Middle Eastern oil fields.[35] Although scientists had long suspected that human activity could impact the local climate, the theory that burning fossil fuels would raise the planet's average temperature--known as the "greenhouse effect"--was not published until 1896.[36] This theory was rejected for decades due to the prevailing belief that humanity's actions were too insignificant to upset the larger balance of nature.[37] From the 1930s through the 1950s, English scientist G.S. Callendar advocated for more research into the greenhouse effect given the significant warming that had occurred in the United States over the past fifty years.[38] National security concerns stemming from the Cold War also led to an increase in government funding for climate change research, and scientists were able to develop more advanced climate modeling techniques.[39] By 1960, calculations by the scientist C.D. Keeling clearly showed that greenhouse gases were building up in earth's atmosphere, with levels increasing annually.[40]

Over the next few decades, improved computer modeling began to unveil the complexities and far-reaching impacts of climate change.[41] Climate change began to replace pollution as the main environmental concern of the times because while pollution impacted air quality on a daily and weekly basis, greenhouse gases would remain in the atmosphere for centuries.[42] By 1988, the scientific community had reached a consensus that if no steps were ***124** taken to curb carbon emissions and the emissions continued to increase at the current rate, the global temperature would increase by one to three degrees Celsius in the next century.[43]

Carbon emissions have increased seven-fold in just the past six decades.[44] The National Climate Assessment suggests that this could lead to a drastically different climate than has been seen in the history of our nation.[45] The National Climate Assessment organizes projected impacts by region and by topic, including extreme weather, human health, infrastructure, water supply, agriculture, indigenous peoples, ecosystems and biodiversity.[46] Given the pervasive nature of climatic impacts, such as rising sea levels, it seems appropriate that more recent environmental cases such as the one filed by OTC have updated their proposed constitutionally-protected right from "the right to a healthy environment" to "the right to a healthy

climate."

C. Modern Environmental Law Cases

Meeting the requirements of standing has been the largest impediment for environmental plaintiffs seeking to sue in federal court to overcome. Article III § 2(1) of the United States Constitution outlines when a claim is justiciable.[47] The three elements of constitutional standing that courts must consider when determining if a claim is justiciable are as follows: injury in fact, causality, and redressability.[48] For a court to find injury in fact, the injury must be cognizable, ***125** actual or imminent, and not a merely a generalized grievance.[49] For a court to find sufficient causality between the plaintiff's injury and the defendant's actions, there must be a "fairly traceable" causal connection.[50] For a court to find that the injury can be redressed by court action, there should not be many additional external factors that could prevent effective remedy of the plaintiff's injury even if the court rules in the plaintiff's favor.[51]

Three main cases have shaped the standing requirements for environmental plaintiffs in the Ninth Circuit. In two of these cases, *Lujan v. Defenders of Wildlife* and *Washington Environmental Council v. Bellon*, the Court found that the environmental groups did not meet the requirements of standing.[52] In *Massachusetts v. EPA*, the Court held that Massachusetts had standing because of its special status as a state.[53]

In *Lujan*, various environmental associations and individuals brought a suit against the Secretary of the Interior, Manuel Lujan, seeking enforcement of the Endangered Species Act (ESA) for federally funded projects in foreign countries.[54] There, plaintiffs asserted three main harms caused by the limited geographic scope of the Endangered Species Act: (1) harm through an ecosystem nexus, "under which a person who uses any part of a continuous ecosystem may be considered adversely affected by activity," (2) harm through an animal nexus, "whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing," and (3) harm through a vocational nexus, "under which anyone with a professional interest in the animals can sue."[55] The Court concluded that none was a sufficient basis for standing under the facts of *Lujan*, stating that "[i]t goes beyond the limit, however, and into pure ***126** speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."[56]

Two individuals in Lujan also testified to the direct harm caused to them by increased extinction rates of endangered species. They had visited the habitats of several endangered species abroad, and wanted to be able to view the endangered animals again in the future.[57] However, they did not have specific plans to travel there again.[58] The Court held that these injuries were too vague to be actual or imminent for the purposes of establishing injury-in-fact.[59] In addition to not meeting the requirements to establish injury, the Court also held that the environmental groups failed to establish redressability because the funding agencies in question were not bound by the Secretary's authority and provided only a small fraction of total funding for the foreign projects.[60] Consequently, there was no guarantee a decision in their favor would redress their alleged harms.[61]

In *Massachusetts. v. EPA*, twelve states, several local governments and environmental organizations sued the EPA to force it to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act (CAA), after it refused a rulemaking petition to do so.[62] There, environmental groups, local governments, and the State of Massachusetts alleged injuries related to various environmental changes, including intensification of extreme weather, sea level rise, and an increase in the spread of disease.[63] The Court held that they met all the requirements of ***127** standing to bring the case.[64]

For injury-in-fact, the Court held that states differ from private individuals for the purposes of establishing standing for climate-related harms due to their special position and interest in protecting their citizens and territory.[65] Because "states are not normal litigants for the purposes of invoking federal jurisdiction," and because Massachusetts has submitted its "sovereign prerogatives" to the powers of the federal government and had no ability to protect itself from greenhouse gas emissions from other states or countries, it was the EPA's duty to "protect" it.[66] The harms associated with climate change are "serious and well recognized." That these risks are "'widely shared' did not minimize Massachusetts' interest in the outcome of this litigation."[67]

The Court held that the EPA never refuted the chain of causation between human-caused greenhouse gas emissions and global warming.[68] Therefore, a finding that the EPA's failure to regulate greenhouse gas emissions contributed to

Massachusetts's injuries was narrated.[69] The Court also rejected the EPA's argument that the emissions within its power to regulate contribute so minimally to global emissions that granting relief would not actually mitigate Massachusetts's injuries or mitigate global climate change.[70] The Court held that, "[w]hile regulating motor-vehicle emissions may not by itself *reverse* global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[71] The Court also held that it was acceptable for redress of an injury to occur incrementally; courts ***128** could "whittle away over time" to create solutions.[72] Furthermore, regulating United States vehicle emissions was "hardly a tentative step," because the nation accounts for six percent of the world's total emitted carbon dioxide.[73]

The most recent case in the Ninth Circuit was *Washington Environmental Council v. Bellon*.[74] In *Bellon*, environmental groups sought to compel the Washington State Department of Ecology (WSDE) to regulate greenhouse gas emissions from five oil refineries under the citizen suit provision of the CAA.[75] The plaintiffs contended that: (1) WSDE failed to define the emission limits for greenhouse gases under the reasonably available control technology (RACT) standard as required by the CAA; and, (2) WSDE failed to regulate these limits at five oil refineries, which violated two provisions of Washington's CAA implementation plan.[76] The Ninth Circuit held that the plaintiffs met the burden of establishing injury in fact, but failed to establish causation or redressability.[77] The environmental groups thus lacked standing to bring the case.[78]

The declarations made by members of the environmental groups attesting to specific and aesthetic injuries that they suffered due to climate change were sufficient to establish injury-in-fact, because, "[a]n environmental plaintiff may satisfy the injury requirement by showing that the challenged activity impairs his or her economic interests or [a]esthetic and environmental well-being."[79] For example, two people testified that they were life-long skiers and climate ***129** change has increased winter temperatures and decreased winter snowpack.[80] However, the environmental groups failed to establish causation because they could not prove that the emissions produced by the five oil refineries in Washington contributed specifically to the changing climate in Washington.[81] Unfortunately for environmental plaintiffs, no technology currently exists that could enable them to establish this kind of causation:

> Indeed, attempting to establish a causal nexus in this case may be a particularly challenging task. This is so because there is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect. Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. Current research on how greenhouse gases influence global climate change has focused on the cumulative environmental effects from aggregate regional or global sources. But there is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region.[82]

Because five oil refineries are responsible for 5.9 percent of the state of Washington's greenhouse gas emissions, the plaintiffs failed to establish the redressability prong of standing for many of the same reasons they failed to establish causation.[83]

These cases, taken together, make it nearly impossible for environmental plaintiffs to sue individual pollution emitters, because their contribution to global climate change as a whole is not large enough to ensure redress even if their emissions were reduced by court action. *Massachusetts. v. EPA* established a lowered scrutiny standard for instances when plaintiffs include a sovereign state, but it left a gap of redressability for individual people with injuries that stem from greater global activity that impacts their local areas but cannot be measured by existing scientific or technological means. As the global temperature continues to rise, this gap is ***130** likely to grow. People will sustain injuries related to climate change in the future, yet will be unable to sue in federal court.

D. Our Children's Trust's Constitutional Climate Change Lawsuit

In 2015, twenty-one young plaintiffs filed suit against the federal government in the U.S. District Court for the District of Oregon.[84] The Climate Kids presented four claims for relief. First, they claimed that the government has violated the Due Process Clause of the Fifth Amendment and alleged that, "[o]ur nation's climate system, including the atmosphere and oceans, is critical to [their] rights to life, liberty, and property," and that the nation's climate system "has been, and continues to be," harmed by the government because it has known for decades about the dangers associated with carbon pollution, yet has knowingly continued "approving and promoting fossil fuel development, including exploration, extraction, production,

transportation, importation, exportation, and combustion, and by subsidizing and promoting this fossil fuel exploitation."[85]

Second, the Climate Kids alleged that the government violated the "equal protection principles embedded in the Fifth Amendment" by failing to afford their generation the same environmental protections as previous generations.[86] They also argued that as children, they are entitled to "extraordinary protection from the political process pursuant to the principles of Equal Protection."[87] Because the majority of the harmful effects of climate change will happen in the future, the Climate Kids argued that their generation and future generations should be treated as ***131** protected classes to avoid disproportionate discrimination against them in regard to climate change impacts.[88]

Third, the Climate Kids argued that the right to a healthy and stable climate is protected by the penumbra of the Ninth Amendment.[89] They stated as follows: "Fundamental to our scheme of ordered liberty, therefore, is the implied right to a stable climate system and an atmosphere and oceans that are free from dangerous levels of anthropogenic carbon dioxide. Plaintiffs hold these inherent, inalienable, natural, and fundamental rights."[90]

Finally, the Climate Kids alleged that the government violated the Public Trust Doctrine.[91] The Public Trust Doctrine stems from legal theory dated back to the Roman Empire that certain resources such as the sea, the air, and other water bodies are owned in common by all citizens.[92] The complaint states that, "[t]hese rights protect the rights of present and future generations to those essential natural resources that are of public concern to the citizens of our nation." They allege that the public trust to the air also includes the atmosphere, and that "[t]he overarching public trust resource is our country's life-sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere."[93]

On November 17, 2015 the government filed a motion to dismiss. They argued, (1) that the Climate Kids lacked Article III Standing under *Lujan*; (2) that the Climate Kids failed to state a claim under the Constitution, because there is no constitutional right to be free of carbon dioxide emissions; and (3) that the court lacked jurisdiction over Public Trust Doctrine suits.[94] Under the first argument, the government argued that the Climate Kids fell short of meeting the ***132** requirements to establish injury-in-fact, causality, and redressability under the precedent set by *Lujan* and other Ninth Circuit opinions.[95]

The government argued that the Kid's alleged injuries were not "particular and concrete," and did not affect them in a "personal and individual way," as required by *Lujan*. Climate change is a generalized grievance that is shared with a large class of people beyond the Climate Kids themselves. The government also argued that the Kids' asserted harms were not great enough to establish injury under *Massachusetts. v. EPA*. Rather, "they [were] in no different position than any other person when it comes to climate change impacts."[96]

For the element of causation, the government asserted that the Climate Kids failed to connect their alleged harms, including harms to recreational interests, drinking water and diets, and psychological well-being, to specific actions by the government.[97] Rather, they simply made "vague and generalized assertions that those acts contribute to global climate change."[98] The government made the point that in *Bellon*, the Ninth Circuit specifically held that "simply saying that [Defendants] have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an 'attenuated chain of conjecture' insufficient to support standing."[99]

The government further argued that the Climate Kids' alleged injuries could not be redressed "by an order within this Court's authority to issue" because the Kids' alleged harms resulted from general "government action and inaction regarding climate change," rather than specific violations of law that could be "concretely rectified by a favorable decision."[100] The ***133** government asserted that the redress requested by the Climate Kids was not within the Judiciary's power to grant:

> Plaintiffs seek a comprehensive national climate policy, overseen by a single federal district court that would require wholesale changes to energy production and consumption in this country. Meeting this demand would require many Federal energy regulations to be rewritten, and would negate the purposes and findings of several Federal statutes that explicitly direct agencies to balance various policy goals with environmental protection. Formulating and enforcing this expansive relief lies outside this Court's competence and jurisdiction.[101]

The Climate Kids, however, were able to overcome the government's arguments that they lacked standing in part due to OCT's argument that children should be treated as a special class for purposes of standing, similar to how states were labeled as a special class in *Massachussetts v. EPA*, due to the fact that they are more likely to suffer injuries from climate change impacts in their lifetimes.[102] On April 8, 2016, Magistrate Judge Thomas Coffin of the federal District Court of Oregon denied the government's motion to dismiss the case, ruling in favor of the Climate Kids.[103] In his Order, Judge Coffin held that

plaintiffs met the requirements of Article III standing.[104]

First, he concluded that the personal injuries asserted by the Climate Kids, including harm to family dwellings from superstorms and jeopardy to family farms resulting from a proposed gas line were sufficient to establish injury-in-fact, even though they stemmed from broader harms. For causation, Judge Coffin reasoned that "sweeping regulations by [the EPA] alone could result in curtailing of major [carbon dioxide] producing activities by not just the ***134** defendant agencies, but by the purported independent third parties as well."[105] Because the case was only at the pleading stage, for the purposes of causation, it was, "sufficient that EPA's action/inaction with respect to the regulation of greenhouse gases allegedly results in the numerous instances of emissions that purportedly cause or will cause the plaintiffs harm."[106] Judge Coffin stated that the scientific complexities of establishing causation could not be adequately examined at this point in the proceedings.[107] He reasoned that, "[g]iven the complexities of the allegations and the need for expert opinion to establish the harm associated with government action and the extent to which a court order can limit that harm, the issue may be better addressed at the summary judgment stage."[108]

In accordance with The Federal Magistrates Act, the case was then sent to the district court, which had the authority to, "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[109] Oral arguments were held on September 13 before District Court Judge Ann Aiken, and on November 10, 2016 she issued an opinion and order denying the government's motion to dismiss, enabling the case to proceed to trial.[110] In her decision, Judge Aiken adopted and elaborated on Judge Coffin's Findings and Recommendations.[111]

In regard to the standing of the Climate Kids, Judge Aiken pointed out the flaws in the government's argument regarding the injuries alleged.[112] She clarified that just because an injury is widely shared does not automatically render it a generalized grievance as long as the injury is ***135** not abstract or indefinite, which the Climate Kid's injuries were not. She also ruled that their injuries were sufficiently imminent given the present level of carbon dioxide in the atmosphere and warming trend.[113]

For causation, the government's reliance on *Bellon* to demonstrate that the line of causation was too attenuated did not stand.[114] In *Bellon*, the emissions at issue were only from five power pants, whereas here, a large share of the total global emissions was involved.[115] Although the science behind the causal links between the Climate Kids' alleged injuries and the government's actions and inactions was complex, the chain of causation was sufficient for the pleading stage of the proceedings.[116] For redressability, Judge Aiken ruled that the declaratory and injunctive relief requested by the plaintiffs met the standard in *Massachusetts v. EPA*.[117] The requested remedy would "slow or reduce the harm."[118] She reiterated that *Bellon's* reasoning did not apply because the government is a major, not minor, contributor to global climate change.[119] Although "[r]edressability in this case is scientifically complex," Judge Aiken noted that the redressability prong does not require certainty that a court's actions will provide meaningful relief to a plaintiff, only a substantial likelihood.[120] Therefore, she concluded that the questions of causation and redressability were better answered at trial.[121]

On the merits of the case, the government challenged the Climate Kids' due process claims on two grounds: first, it alleged that the Climate Kids failed to identify a fundamental right being infringed upon or a suspect class of person; second, it claimed that the Climate Kids ***136** could challenge government inaction where the government had no affirmative duty to protect them from climate change.[122] In response to the Kids' assertion of the fundamental right to a healthy and stable climate, Judge Aiken stated that she had "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[123] She invoked the holding of *Obergefell v. Hodges*, the 2015 case that established the fundamental right to marriage equality, stating that, "[j]ust as marriage is the foundation of the family, a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress."[124] The Climate Kids thus had standing to move forward with their suit and survived a motion to dismiss for failure to state a claim.

II. Comparison with Existing Unenumerated Fundamental Rights

A. The Source of Fundamental Rights

Two sources of fundamental rights were alleged in the OCT case. First, the Due Process Clause of the Fifth Amendment mandates that the federal government may not deprive a person of "life, liberty, or property," without "due process of law."[125] Second, the Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[126] Unenumerated fundamental rights "exist independently of the Constitution's text but have the same force as enumerated rights," such as the right to free speech enumerated in the First Amendment.[127] An unenumerated fundamental right may draw from multiple constitutional sources; for example, in *Obergefell v. Hodges*, the ***137** Court found that the right to marry is fundamental in part because it underlies and supports other fundamental liberties, such as the right to privacy in the home.[128]

When a right is not specifically enumerated in the Constitution, the applicable test to determine whether it may be an unenumerated fundamental right is whether it is fundamental to our version of ordered liberty; is it a value ingrained in the history and tradition of the United States of America?[129] According to a majority of the Court, the currently accepted test stems from *Casey v. Planned Parenthood, Obergefell v. Hodges*, and *Lawrence v. Texas*.[130] History and tradition are only the beginning of the analysis; factors such as public meaning and understanding, whether the right is central to personal dignity and autonomy, and if it is essential to expression of personhood are also considered.[131] This is determined through "reasoned judgment," on the part of the courts to identify the "interests of the person so fundamental that the State must accord them its respect."[132] If a court finds that a fundamental life, liberty, or property interest is being directly and substantially burdened, then the government's action is subject to elevated scrutiny, while indirect or insubstantial infringements are subject to rational basis review.[133] Even if a court finds that a fundamental right has been infringed upon, the government action may still be justified if the government can show it has a more compelling reason for the measure, and the measure is narrowly tailored to substantially advance that compelling end.[134]

***138** An alternative test stems from *McDonald v. City of Chicago* and *Washington v. Glucksberg*. This test requires a careful, more specific description of the asserted fundamental liberty interest and looks to the history and tradition of the country to make a determination.[135] In *Glucksberg*, the Court cautioned against the use of the Due Process Clause for purposes of judicial activism:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.[136]

However, in *Obergefell* five justices joined Justice Kennedy's opinion, which described the concept of liberty as evolving and not limited to the liberty interests that existed during the time of our founders. He stated:

> 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 ... did not presume to know the extent of freedom in all 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.[137]

There has yet to be a case after *Obergefell* that applies this substantive due process test outside of the context of marriage equality. The Court has yet to clarify if factors such as personal dignity and autonomy and public meaning and understanding can be applied to define new liberty interests outside of the scope of private life and family matters.

***139 B. The Climate Kids' Claims**

Because the right to a healthy and stable climate is not specifically enumerated in the constitution, it must pass the test outlined in *Obergefell* in order to be considered fundamental. In their Amended Complaint, OCT alleged that "[p]rotecting the vital natural systems of our nation for present and future generations is fundamental to our scheme of ordered liberty and is deeply rooted in this nation's history and tradition. Without a stable climate system, both liberty and justice are in peril."[138] The complaint also stated that "[o]ur nation's obligation to protect vital natural systems for Posterity has been recognized

throughout American history, particularly through our country's conservation legislation."[139]

The United States Constitution protects negative rights; it does not guarantee affirmative rights to food, clean water, or health care. Recognizing this, Judge Aiken clarified the difference between asking for an affirmative right, which is inconsistent with current case precedent, and the due process claims made by the Climate Kids:

> Defendants and intervenors contend plaintiffs are asserting a right to be free from pollution or climate change, and that courts have consistently rejected attempts to define such rights as fundamental. Defendants and intervenors mischaracterize the right plaintiffs assert. Plaintiffs do not object to the government's role in producing any pollution or in causing any climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives. Echoing *Obergefell's* reasoning, plaintiffs allege a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.[140]

Juliana v. U.S. thus applied the due process reasoning from *Obergefell*.

***140** Moreover, children could arguably be considered a suspect class for purposes of the equal protection component of due process in the context of climate change. Children as a class have not been historically persecuted like other classes based on race or sexual orientation. Nevertheless, children are politically vulnerable by definition; they cannot vote. In their complaint, OCT asserted that future generations will suffer greater harm as a result of climate change than older generations.[141] Judge Aiken pointed out that in OCT's case, "the majority of youth plaintiffs are minors who cannot vote and must depend on others to protect their political interests."[142] Due to these concerns of intergenerational inequality, the Climate Kids arguably may be a protected class entitled to elevated scrutiny.

Although *Juliana v. U.S.* diverges from the line of cases establishing unenumerated fundamental rights stemming from privacy in the home and family life, one underlying theme of these cases that could be extended is the right to control one's own body. In *Lucero v. Detroit Public Schools*, a federal district court judge stated that the decision to build an elementary school on a site contaminated by several dangerous substances, including heavy metals and radioactive material, was akin to subjecting the children to non-consensual medical experimentation, and "deliberately indifferent [to] ... an obvious risk of a harm that is likely to result in the violation of constitutional rights."[143] This suggests that the government should be judicially liable for particularly egregious instances of misconduct that inflicts due process harms.[144]

***141** A fundamental right to bodily integrity was also asserted in *Mays v. Snyder*, a case that sought compensation for residents of Flint, Michigan for injuries sustained from water contamination.[145] There, the Complaint asserted that, "[d]efendants had time for deliberation in their decisions to expose Flint residents to toxic water and their decision to do so was made with deliberate indifference to the known serious medical risks."[146] Because the negative health impacts of exposure to water contaminants are well known and understood, scientific certainty of harm was not at issue in *Mays* like it is in cases asserting climate change harms.[147] However, the *Mays* complaint followed a similar line of logic to *Juliana v. U.S.* regarding the federal government's inaction despite possessing knowledge of imminent harm to citizens. Although this complaint was ultimately dismissed in federal court, it survived an initial motion to dismiss in the Court of Claims.[148]

The best argument for applying the reasoning in *Obergefell* follows the logic in Judge Aiken's opinion: in the same way marriage is fundamental to family life, the avoidance of catastrophic climate change impacts is fundamental to a healthy, functional society, and consequently to the protection of life, liberty, and property interests. In order for this argument to be successful, it would have to be more narrowly tailored to limit problems with enforcement of the right to a healthy, stable climate. A new right would have to survive the argument from *Glucksberg* that a right that is too abstract would open the judicial floodgates to all varieties of lesser environmental harms. For example, it should not be construed that this right encompasses the right to prohibit plastic bottles, or challenge all lesser environmental harms that are better addressed through legislation. A narrower right, such as the right to bodily integrity suggested in ***142** response to the Flint Water Crisis, would avoid opening a judicially unmanageable door to all environmental harms. The right to a healthy and stable environment must be narrowly tailored to limit government liability to only the most egregious misconduct leading to catastrophic impacts.

Failing to stem the impacts of climate change falls within this definition. A rise in global temperature of one to three degrees Celsius is expected to dramatically change the global climate and unleash a series of environmental disasters both in the United States and across the world. In the United States, the severity of these impacts cannot be understated. Wildfires are expected to increase in frequency and intensity, and the season in which they can burn will become longer.[149] Heatwaves, or periods of abnormally hot weather, are expected to become more frequent and prolonged across the Midwest and Southwest.[150] Droughts are expected to become more extreme, and on the other hand, extreme precipitation events are expected to intensify, causing more flooding.[151] In addition to extreme precipitation, categories of hurricanes are expected to increase.[152] These impacts may contribute to an increase in water and foodborne illnesses and an expansion in the ranges of disease carriers such as mosquitos and ticks.[153] The National Climate Assessment states that children, the poor, and communities of color are most vulnerable to these negative impacts to human health.[154] These impacts will also negatively impact our country's production of crops and livestock.[155] There is no state, sector, or individual who will not be touched by these impacts, and it is imperative that such catastrophic harms be subject to judicial review under a substantive due process framework.

*143 III. The Future of Climate Change Litigation

A. Challenges to the Right to a Healthy, Stable Climate

Footnote Four of *United States v. Carolene Products Co.* states that legislation that restricts political processes, contradicts enumerated fundamental rights, or discriminates against minorities may be subject to greater judicial scrutiny, and that the court system is well equipped to step in to correct prejudice, particularly against minority groups, where the legislative branch fails to do so.[156] Here, the legislative branch has failed to protect future generations from the impacts of climate change. Although the attainment of standing in the District Court of Oregon was a significant achievement, it remains to be seen whether *Juliana v. U.S.* will finally deliver, from the womb of time, the right to a stable and healthy climate or healthy environment.[157]

The United States Constitution provides limitations on the government rather than affirmative governmental duties. However, in regard to climate change, OCT may be able to successfully assert a fundamental right to a healthy and stable climate as a narrowly tailored protection against catastrophic environmental harms caused by government action or inaction. Although a broad articulation of this right could again raise the concerns voiced in *Glucksberg* regarding judicial activism, there is a great need for judicial involvement in redressing the harms that climate change is already causing and will continue to cause in the future. As stated in Footnote Four, the court system may be the best course of redress for vulnerable populations, such as children and future generations, where the government has infringed upon their substantive rights to due process.[158]

***144** Under the holdings of *Massachusetts v. EPA* and *Bellon*, it is virtually impossible for a non-state plaintiff to have standing to sue individual emitters until the appropriate technology is developed to link local emissions to local environmental impacts. The initial survival of OCT's case from the government's motion to dismiss delineates two potential strategies that may overcome this impediment to environmental and climate change plaintiffs in the future. First, children, as individuals who will suffer the brunt of climate change impacts, may be categorized as a special plaintiff, like sovereign states, for purposes of standing; second, plaintiffs may be able to secure the causation and redressability prongs by suing an emitter that makes a significant contribution to global greenhouse gas emissions.

Of course, the ultimate analysis of any successfully asserted right to a stable, healthy climate would fall to the highest court in the land. President Trump's nominee to fill the vacant seat of the late Justice Antonin Scalia, Tenth Circuit Judge Neil Gorsuch, has been appointed to the bench.[159] Although Mr. Gorsuch was once the law clerk for Justice Kennedy, he is known as an advocate of Justice Scalia's originalist constitutional philosophy.[160] He argues that judges should look to "text, structure, and history" to make determinations, and critiques living constitutional theory as judicial activism.[161] Consequently, he would likely be a strong opponent of the un-enumerated fundamental rights test applied in *Casey* and *Obergefell*, as Justice Scalia was. But, the right to a stable, healthy climate may still prevail in a 5-4 decision like *Obergefell*. Given President Trump's early actions in support of extractive industries and a majority Republican Congress that supports him, it seems unlikely that the challenge of climate change has any hope of being addressed in either branch of government besides the judiciary.

***145 Conclusion**

As Justice Kennedy stated in *Obergefell*, "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[162] For environmental plaintiffs, this claim to liberty has been decades in the making. Particularly for those classes of people who are most vulnerable to the impacts of climate change, such as children and generations who have yet to be born, the recognition of a narrowly tailored right to be free from government-inflicted environmental harms will enable them to seek redress in court. This right could ultimately expand to other egregious environmental harms, such as the Flint water crisis.

Although environmental plaintiffs still must surmount the challenge of standing to sue in federal court, it is possible that over time, better technology will be developed to establish a more certain chain of causation between greenhouse gas emissions and consequent environmental impacts. Until then, plaintiffs asserting climate-induced harms will be barred from seeking redress. As *Juliana v. U.S.* proceeds to trial in the shadow of a new political administration that is adversarial to environmental protection and with the global climate on a trajectory of unrelenting warming, it seems it is only a matter of time until the judiciary recognizes a version of the right to a healthy, stable climate as fundamental to the protection of life, liberty, and property.

Footnotes

1 *See Pakistan Supreme Court Allows Youth's Constitutional Climate Case to Proceed on Behalf of Present and Future Generations,* OUR CHILDREN'S TRUST, http://www.ourchildrenstrust.org/pakistan (last visited Nov. 1, 2016, 7:32 PM); *see also Youth File Lawsuit Against Norwegian Government Over Arctic Oil,* OUR CHILDREN'S TRUST, http://www.ourchildrenstrust.org/norway/ (last visited Nov. 1, 2016, 7:30 PM).

2 *Recent U.S. Temperature Trends,* THE NAT'L CLIMATE ASSESSMENT, http://nca2014.globalchange.gov/report/our-changing-climate/recent-us-temperature-trends#narrative-page-16566 (last visited Oct. 2016, 2:26 PM).

3 *Id.*

4 *Landmark U.S. Federal Climate Suit,* OUR CHILDREN'S TRUST, http://www.ourchildrenstrust.org/us/federal-lawsuit/ (last visited Oct. 7, 2016, 11:07 PM).

5 *Id.*

6 *Id.*

7 Meyer v. Nebraska, 262 U.S. 390 (1923).

8 Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

9 Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977).

10 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878-79 (1992).

11 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

12 First Amended Complaint for Declaratory and Injunctive Relief, Juliana v. United States, No. 6:15-cv- 01517-TC (D. Or. Sep. 10,

2015), ECF No. 7.

[13] David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T MAG., http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html (last visited Nov. 6, 2016, 1:00 PM).

[14] Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to A Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993).

[15] *Id.*

[16] *Id.*

[17] DINAH L. SHELTON, PROBLEMS IN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS: A HUMAN RIGHT TO THE ENVIRONMENT (2011).

[18] *Id.*

[19] Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

[20] *Id.*

[21] Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 738 (E.D. Ark.), *supplemented,* 325 F.Supp. 749 (E.D. Ark. 1971).

[22] *Id.*

[23] *Id.*

[24] *Id.*; *see also* Cusack, *supra* note 14.

[25] Corps of Eng'rs, 325 F. Supp. at 738.

[26] Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997).

[27] *Federal Acts that Protect Our Environment*, LAWYERS.COM, http://environmental-law.lawyers.com/federal-acts-that-protect-our-environment.html (last visited Nov. 6, 2016, 2:18 PM).

[28] SHELTON, *supra* note 17, at 4.

[29] *Id.* (quoting Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, PA. B. ASS'N Q., Apr. 1987, at 85, 87).

[30] *Id.*

[31] Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions*, GNHRE (Mar. 9, 2016), http://gnhre.org/2016/03/09/constitutional-right-healthy-environment-enforcing-environmental-protection-state-federal-constitutions-j-p-eurick/.

[32] Deborah Beaumont Schmidt, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. LAW REV. 12 (1990).

[33] Boyd, *supra* note 13.

[34] *Evidence of Warming*, UNIV. CORP. FOR ATMOSPHERIC RESEARCH, CTR. FOR SCI. EDUC., http://scied.ucar.edu/longcontent/climate-today (last visited Oct. 7, 2016, 12:22 PM).

[35] *Id.*

[36] Spencer Weart, *The Discovery of Global Warming [Exerpt]*, SCI. AMERICAN (Aug. 17, 2012), https://www.scientificamerican.com/article/discovery-of-global-warming/.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Future Climate Change*, THE NATI'L CLIMATE ASSESSMENT, http://nca2014.globalchange.gov/report/our-changing-climate/future-climate-change#narrative-page-16565 (last visited Jan. 25, 2017, 11:58 PM).

[46] *Climate Change Impacts in the United States*, The Nat'l Climate Assessment, http://nca2014.globalchange.gov/ (last visited Jan. 31, 2017, 12:02 PM).

[47] U.S. CONST. art. III, § 2, cl. 1 (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).

[48] Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

[49] U.S. v. Hays, 515 U.S. 737 (1995).

[50] Duke Power Co. v. Carolina Envtl Study Group, Inc., 438 U.S. 59, 72 (1978).

[51] Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

[52] Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992); Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013).

[53] Massachusetts v. EPA, 549 U.S. 497, 526 (2007).

[54] Lujan, 504 U.S. at 555.

[55] *Id.* at 565-66.

[56] *Id.* at 567.

[57] *Id.* at 564.

[58] *Id.*

[59] *Id.* at 566-567.

[60] *Id.* at 571.

[61] *Id.* at 569-571.

[62] Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

[63] *Id.* at 521-23.

[64] *Id.*

[65] *Id.* at 518.

[66] *Id.*

[67] *Id.* at 522.

[68] *Id.* at 523-524.

[69] *Id.* at 522.

[70] *Id.* at 524.

[71] *Id.* at 497 (emphasis in original).

[72] *Id.* at 522.

[73] *Id.* at 524.

[74] Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).

[75] *Id.* at 1135.

[76] *Id.* at 1138.

[77] *Id.* at 1147.

[78] *Id.*

[79] *Id.* at 1140 (quoting *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (internal quotations omitted)).

[80] *Id.* at 1140.

[81] *Id.* at 1142.

[82] *Id.* at 1143.

[83] *Id.* at 1145-46.

[84] *Landmark U.S. Federal Climate Suit,* OUR CHILDREN'S TRUST, http://www.ourchildrenstrust.org/us/federal-lawsuit/ (last visited Oct. 7, 2016, 11:07 PM).

[85] First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 12, at ¶ 84-85.

[86] *Id.* at ¶ 290-92.

[87] *Id.* at ¶ 294.

[88] *Id.* at ¶ 297.

[89] *Id.* at ¶ 303.

[90] *Id.* at ¶ 304.

[91] *Id.* at ¶ 307-10.

[92] Hope M. Babcock, *The Public Trust Doctrine: What A Tall Tale They Tell,* 61 S.C.L. REV. 393, 396 (2009).

[93] First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 12, at ¶ 308.

[94] Federal Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss at ii, Juliana v. United States, No. 6:15-cv- 01517-TC (D. Or. Nov. 27, 2015), ECF No. 27-1.

[95] *Id.* at 7-8, 12-13.

[96] *Id.* at 10.

[97] *Id.* at 12.

[98] *Id.*

[99] *Id.* at 12-13.

[100] *Id.* at 13-14.

[101] *Id.* at 14-15.

[102] First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 12, at ¶ 8.

[103] Order and Findings & Recommendations, Juliana v. United States, No. 6:15-cv- 01517-TC (D. Or. Apr. 8, 2016), ECF No. 68.

[104] *Id.* at 12.

[105] *Id.* at 10.

[106] *Id.*

[107] *Id.* at 12.

[108] *Id.*

[109] 28 U.S.C. § 636(b)(1).

[110] Ruling on Motion to Dismiss at 3, Juliana v. United States, Case No. 6:15-cv- 01517-TC (D. Ore. Nov. 10, 2016).

[111] *Id.*

[112] *Id.* at 20-21.

[113] *Id.* at 21.

[114] *Id.* at 26.

[115] *Id.* at 24.

[116] *Id.* at 26.

[117] *Id.*

[118] *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 525 (2007)).

[119] *Id.* at 26-27.

[120] *Id.* at 27.

[121] *Id.* at 28.

[122] *Id.* at 29.

[123] *Id.* at 32.

[124] *Id.* (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

[125] U.S. CONST. amend. V.

[126] U.S. CONST. amend. IX.

[127] Adam Lamparello, *Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause,* 49 AKRON L. REV. 179 (2016).

[128] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[129] McDonald v. Chicago, 561 U.S. 742, 744 (2010); *See also* Roe v. Wade, 410 U.S. 113, 152 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

[130] *Obergefell*, 135 S. Ct. at 2598; Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of Southeastern Pennsylvania v.

Casey, 505 U.S. 833 (1992).

131 *Obergefell*, 135 S. Ct. 2584 at 2598.

132 *Id.*

133 Order and Findings & Recommendations, *supra* note 105, at 29.

134 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

135 *Id.;* McDonald v. Chicago, 561 U.S. 742, 744 (2010).

136 *Glucksberg*, 521 U.S. at 720 (quotations omitted).

137 Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

138 First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 12, at ¶ 303.

139 *Id.*

140 Order and Findings & Recommendations, *supra* note 105, at 32.

141 First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 12, at ¶ 8.

142 *Id.* at 16.

143 Lucero v. Detroit Pub. Schs., 160 F. Supp. 2d 767 (E.D. Mich. 2001); *cf.* Cincinnati Radiation Litig., 874 F. Supp. 796, 814 (S.D. Ohio 1995) (discussing potential bodily integrity claim where government exposed non-consenting persons to military radiation experiments).

144 Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 92 NOTRE DAME L. REV. (forthcoming 2017).

145 Complaint for Injunctive and Declaratory Relief Money Damages and Jury Demand at 36, Mays v. Snyder, No. 15-cv-14002 (E.D. Mich. Nov. 13, 2015), 2015 WL 717.

146 *Id.* at ¶ 101.

147 Massaro & Brooks, *supra* note 146.

148 *Id.*

149 *Extreme Weather*, THE NAT'L CLIMATE ASSESSMENT, http://nca2014.globalchange.gov/highlights/report-findings/extreme-weather (last visited Mar. 8, 2017, 2:40 PM).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Human Health*, THE NAT'L CLIMATE ASSESSMENT, http://nca2014.globalchange.gov/highlights/report-findings/human-health (last visited Mar. 8, 2017, 2:40 PM).

[154] *Id.*

[155] *Agriculture*, THE NAT'L CLIMATE ASSESSMENT, http://nca2014.globalchange.gov/highlights/report-findings/agriculture (last visited Mar. 8, 2017, 2:40 PM).

[156] United States v. Carolene Products, 304 U.S. 144, 153 (1938).

[157] *See* Envtl. Def. Fund, *supra* note 21.

[158] Carolene Products, 304 U.S. at 153.

[159] *Neil Gorsuch is a Good Pick For the Supreme Court*, THE ECONOMIST (Feb. 4, 2017), http://www.economist.com/news/united-states/21716048-democrats-have-powerful-reasons-oppose-him-even-so-neil-gorsuch-good-pick.

[160] *Id.*

[161] *Id.*

[162] Obergefell, 135 S. Ct. at 2598.