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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
THE HON. ANN AIKEN, JUDGE PRESIDING

KELSEY CASCADIA ROSE JULIANA, et)
al.,)
)
Plaintiffs,)
)
v.) No. 6:15-cv-01517-TC
)
UNITED STATES OF AMERICA, et al.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EUGENE, OREGON
TUESDAY, SEPTEMBER 13, 2016
PAGES 1 - 81

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1 PROCEEDINGS

2 TUESDAY, SEPTEMBER 13, 2016

3 THE COURT: Please be seated.

4 THE CLERK: Now is the time set for Civil Case
5 No. 15-1517, Juliana, et al. versus United States of
6 America, et al. for oral argument.7 THE COURT: For some ground rules, let's talk
8 about them ahead of time. Because there is overflow here,
9 there is overflow in a number of courtrooms up the West
10 Coast, Portland and beyond, it will be important for people
11 to go to the podium to speak because there is one camera and
12 it's trained on that podium. So if you speak from the desk,
13 it's not going to pick it up.

14 Number two, please don't read your briefs to me.

15 Number three, speak slowly or I will interrupt
16 immediately because my court reporter has been with me for
17 more than 20 years, and I am not going to make this a
18 difficult day for her.19 But for the audience purposes, I am not
20 particularly worried, for those of you who are here in the
21 courtroom in and out on a fairly regular basis, but for
22 those who have never been here, please do not in any way
23 display any feelings one way or the other. We are here to
24 listen, all of us. This is an argument. There is massive
25 and extensive briefing in this case and a lot of work done,

1 and today is the day to hear argument from everyone to
2 supplement the written documents that they have provided and
3 to do what lawyers do best, and that is address issues that
4 they feel they need to underscore for the millionth time,
5 shall we say, because I have read everything over and over
6 again. Please don't be repetitive.

7 All right. So is everybody ready to proceed?

8 All right. For the plaintiffs, ready to proceed?

9 MS. OLSON: Yes, Your Honor.

10 THE COURT: For the defendants, ready to proceed?

11 MR. DUFFY: Yes, Your Honor.

12 THE COURT: For the intervenors, ready to proceed?

13 MR. SORENSON: Yes, Your Honor.

14 THE COURT: So please tell me what -- each of you,
15 each side, it's your -- these are your motions. I would
16 like to know how you plan to organize your argument and your
17 time.

18 MR. DUFFY: Okay.

19 THE COURT: And when you speak, please state your
20 name before you speak.

21 MR. DUFFY: Yes, Your Honor. Sean Duffy for the
22 federal defendants.

23 We are going to essentially address three issues
24 that we think need to be addressed, and that is plaintiffs'
25 claims -- their due process claims, the public trust

1 doctrine claims, and then with the issue of redressability.

2 And, of course, we are happy to address any other
3 issues that we have briefed if Your Honor has any questions.

4 THE COURT: Okay. That answers maybe part one.

5 Part two is how are you dividing your argument
6 with people at counsel table with you? Some people like to
7 do the sole argument and they just have people sitting with
8 them. Some people divide the argument between and among
9 other counsel at the table. I would just like to know.

10 MR. DUFFY: Sure. Sean Duffy for federal
11 defendants. I will be doing all of the arguments for the
12 federal defendants.

13 With me at counsel table is Cynthia Huber, who is
14 a senior counsel with the Department of Justice. She is to
15 my right.

16 And to my left is Lorie Schmidt, who is an
17 associate general counsel with the United States
18 Environmental Protection Agency.

19 They will not be doing arguments today.

20 THE COURT: Okay. For the intervenors.

21 MR. SORENSON: Thank you, Your Honor. Quin
22 Sorenson for the intervenors.

23 With me at counsel table is Ben Tannen as well as
24 Marie Eckert. We will be presenting -- I will be presenting
25 argument on behalf of the intervenors myself. I had planned

1 to speak after Mr. Duffy, of course, subject to Your Honor's
2 preferences.

3 In terms of the issues to be addressed, I planned,
4 with -- again, with respect to Your Honor's wishes always
5 precedent, to address the public trust doctrine, briefly the
6 two constitutional issues that are raised, the cause of
7 action issue and then move briefly on to political question
8 and then very briefly addressing standing, causation issues.

9 THE COURT: It's just you doing the argument?

10 MR. SORENSON: Yes, Your Honor, correct.

11 THE COURT: And who is at counsel table again?

12 MR. SORENSON: Oh, I am sorry. Ben Tannen and
13 Marie Eckert, and my name, again, is Quin Sorenson.

14 THE COURT: For the plaintiffs.

15 MS. OLSON: Good morning, Your Honor. I am Julia
16 Olson, and with me is Philip Gregory and Daniel Galpern. I
17 will be conducting the argument this morning, and we will be
18 addressing our substantive arguments as well as responding
19 to standing and political question arguments raised by the
20 intervenor-defendants, Your Honor.

21 THE COURT: All right. Go ahead Mr. Duffy.

22 MR. DUFFY: Okay.

23 May it please the court, good morning, Your Honor.
24 My name is Sean Duffy with the Department of Justice, and I
25 represent the United States in this matter.

1 I'd like to start this morning by discussing where
2 I believe there is common ground between the plaintiffs and
3 the United States in this case.

4 Climate change is a very serious problem. We do
5 not question the science. Climate change threatens our
6 environment and our ecosystems. It alters our climate
7 systems, and it will only worsen over time. It is the
8 result of man-made emissions.

9 Now, where the federal defendants and the
10 plaintiffs disagree is as to who determines how to address
11 climate change in the first instance. Our position is that
12 Congress and the Executive Branch should address climate
13 change in the first instance and should do so by
14 coordinating with other nations.

15 The plaintiffs' position, as far as we can tell,
16 is that the federal courts should address climate change by
17 exercising authority over other federal agencies. That, I
18 believe, is the basic difference between the plaintiffs and
19 the federal defendants in this case.

20 Now, as I have mentioned, I am going to discuss
21 why the government believes that the plaintiffs have not
22 stated a due process claim, cannot state a federal public
23 trust claim and, even if they did state a claim, cannot --
24 would be seeking a remedy that the court cannot provide.

25 I will start with the due process claims.

1 Government action that impacts fundamental rights
2 or liberties is subject to strict scrutiny. The Supreme
3 Court has stated that a fundamental right or liberty is one
4 that is deeply rooted in our nation's history or implicit in
5 the concept of ordered liberty. The court has used a very
6 cautious approach, urging care and restraint before finding
7 new fundamental rights that are not enumerated in the
8 Constitution for good reason. Establishing a fundamental
9 right carves out a space where legislative activity can no
10 longer occur.

11 The court has also indicated that fundamental
12 rights need to be precisely articulated. Stated at too high
13 a level of generality, a fundamental right could accomplish
14 many things. So, for example, in the case of *Washington v.*
15 *Glucksberg*, the case that involved physician-assisted
16 suicide, the plaintiffs alleged the fundamental right to
17 die. The Supreme Court disagreed with that and described
18 the right at issue as the right to commit suicide with
19 assistance, and it ultimately concluded that that is not a
20 fundamental right.

21 Over the years, the Supreme Court has articulated
22 a narrow set of unenumerated fundamental rights. There is a
23 common theme that runs through these, and that is a liberty
24 interest in intimate and personal areas.

25 No court has ever found a fundamental right to a

1 stable climate system. This is not surprising because
2 climate change does not impact intimate or personal rights
3 of individuals; it impacts everybody. Moreover, to find
4 such a right would subject efforts to fight climate change
5 to strict scrutiny.

6 And we see an analog in issues dealing with racial
7 discrimination where universities or state legislatures try
8 to promote diversity through affirmative action. Those
9 programs, which are designed to help diversity, are also
10 subjected to strict scrutiny.

11 The general rule is that the Due Process Clause
12 does not confer a right to governmental protection from harm
13 caused by others. That's the *DeShaney* rule that's discussed
14 in the briefs.

15 The Ninth Circuit has carved out some exceptions
16 to that rule where there is a special relationship between
17 the plaintiff and the government defendant where the
18 government removes the plaintiff from a safe place and puts
19 them into harm's way. Cases that have recognized the danger
20 exception to the *DeShaney* rule have only done so in a
21 custodial or workplace setting where the government has some
22 control over the plaintiff. Also, cases recognizing this
23 exception have done so only after an actual violation of an
24 enumerated fundamental right occurred, such as life or some
25 restraint.

1 Here, the magistrate adopted a three-part test
2 where plaintiff need only assert an act or inact by the
3 government, deliberate indifference to their needs, and
4 imminent harm.

5 Now, in the *Pauluk* case that the -- the
6 supplemental authority that the plaintiffs submitted
7 yesterday, the court there clarified that deliberate
8 indifference cannot be gross negligence. It needs some
9 culpable state of mind.

10 Here, I do not believe that there is deliberate
11 indifference. The government's actions, the EPA's actions,
12 specifically, are trying to reduce greenhouse gas emissions.

13 The magistrate's tests applied too liberally would
14 permit a plaintiff to launch a constitutional challenge to
15 virtually any government program. In our briefs, we use the
16 example of the country deciding to go to war. Children of
17 military personnel in that instance would easily be able to
18 satisfy that test, I believe, and assert a constitutional
19 due process claim by asserting that the act by the
20 government, the decision to go to war, was done with
21 deliberate indifference to their needs and is going to cause
22 them imminent harm.

23 Another example would be in the case -- assuming
24 the plaintiffs were to get the redress that they seek, there
25 would be a dramatic reduction in fossil fuel emissions.

1 Under this three-part test, if applied too liberally,
2 persons who work in the fossil fuel industry, in fact, would
3 be able to set out a due process claim. They could say that
4 the government's decision, for example, to shut down the
5 coal industry was done with deliberate indifference to their
6 needs and is going to cause them imminent economic harm.

7 In sum, the court should not recognize an
8 exception to the *DeShaney* rule here, which is well outside
9 the context in which the Ninth Circuit has recognized such
10 exceptions.

11 I'd like to turn now to the public trust doctrine.

12 THE COURT: I just want to raise something I just
13 want you to talk about.

14 I think you tried to have a concrete difference
15 between what you agree and what you disagree with with the
16 plaintiff, and I want to have you think about this:

17 The language that was used in one of the examples
18 that you gave, an issue that has to do with racial issues
19 and desegregation, as I recall, how about the term "with all
20 deliberate speed"? That language was used in this opinion.
21 The government will have the pressure to find a way to the
22 table to do -- maybe you are doing the best work you can do
23 under the circumstances but, with all deliberate speed,
24 break down silos and do it better, faster, smarter because
25 of the impending damage and why this is how Coffin ruled,

1 look to that as a redress and why are we just limited to
2 older, past examples that might not be as helpful in this
3 case?

4 If the government's looking for a remedy because
5 they think they have been doing the right thing, doesn't all
6 deliberate speed tell them to speed up and take advantage of
7 what they need to have and ask for what they need and get
8 it?

9 And doesn't the court have a role as the third
10 branch of government to assist you in doing that by saying
11 that there is the potential for damage and injury and a
12 bigger question and with all deliberate speed, it needs to
13 be addressed?

14 I am just saying if you are going to use other
15 examples of how the courts have intervened to move things
16 along, there is one.

17 The second one is we have a consent decree, for
18 example, in Portland with the police, bringing everybody to
19 the table to resolve the issues, as I know you are aware
20 because it's the justice department involved with it, was
21 brought to the table. But, again, it's brought everybody to
22 the table, and it is supervised by a court, not hands-on
23 telling them what to do but making sure everybody is moving
24 and getting things done and moving and progressing with all
25 deliberate speed so that that problem is resolving, for

1 example, just in Oregon, in Portland. I am just giving you
2 some of those examples.

3 MR. DUFFY: Okay.

4 THE COURT: So there is a role for the court.

5 MR. DUFFY: I agree that there is a role for the
6 court, and with respect to all deliberate speed, I believe
7 that pertains to the remedy.

8 THE COURT: Correct. But I am just saying you
9 have already started in with what I would describe as almost
10 imaginary horrors about what the role of the court might
11 be to become more entangled than it would need to be or
12 should be but to keep the pressure on because there's
13 something more than -- as a third branch of government,
14 there is that shared responsibility.

15 So I am just -- just posing that question so other
16 people can think about it.

17 MR. DUFFY: Okay. Well, I will address that
18 issue, then.

19 And I start by noting that -- I am not sure this
20 comes out quite as clearly as I would like in the briefs --
21 that the EPA is currently taking significant steps to
22 regulate greenhouse gas emissions, and so in recent years
23 it's issued rules limiting greenhouse gas emissions to new
24 cars and trucks, and that's 30 percent of emissions in the
25 United States; to new and existing power plants; to new oil

1 and gas production facilities; and to landfills. And it's
2 continuing these efforts.

3 I believe that as *Massachusetts v. EPA*, that case
4 shows that there is means of challenging specific agency
5 actions, and those are the means that we believe the
6 plaintiffs can and should avail themselves of in this case.
7 For example, within the Clean Air Act itself --

8 THE COURT: No. I have read all that. I
9 understand your compartmentalized arguments. This poses a
10 different situation, and that is having a mosaic approach to
11 the way the agencies work in conjunction with one another.

12 So, again, I'd like to have you say, again, with
13 all deliberate speed and the ability -- I mean, I would
14 think, actually, in some ways, the government might want the
15 help of the court to push the good work that has been
16 started and it's doing and have the pressure to do it with
17 alacrity, shall we say, in the democratic process with the
18 Congress but that somebody makes certain that there is a --
19 there is a need to get out a turf and to bring people
20 together and to galvanize.

21 I mean, anybody who has sat in here on any one of
22 my cases in the environmental arena knows that I really do
23 believe most of these are so complex that resolving them at
24 a table is oftentimes one of the best ways to do it. So why
25 wouldn't the court, in this instance, if there is -- if I

1 find plaintiffs have made their case and the case continues,
2 it's not to be dismissed at this stage, I guess I am giving
3 you a suggestion that I think there is an opportunity
4 because there is so much common ground and recognize the
5 problem, and you can help fashion your own solution that's a
6 broader solution and welcome that other people are keeping
7 the pressure on you. I am justing suggesting that.

8 MR. DUFFY: Well, I believe, Your Honor, the
9 Supreme Court's decision the *American Electric Power*, it
10 addresses the respective roles the courts and agencies play,
11 and there, the court notes that agencies have the ability to
12 draw upon expert scientific resources.

13 THE COURT: Yep.

14 MR. DUFFY: They use the notice and comment period
15 to solicit feedback. And really, anybody can provide that
16 feedback, the plaintiffs, the industry groups. Everybody
17 has a seat at the table, I believe, in that process.

18 And then based upon that feedback and based upon
19 the expertise of personnel within the agency and outside the
20 agency as well, the agencies make a determination to
21 regulate based on all of that information.

22 THE COURT: So how far does your limitation on
23 substantive due process extend? And let me give you the
24 other example, and that is take the crisis in Flint. If
25 it's shown that the officials were knowingly permitting

1 children to drink lead-poisoned water, causing brain damage,
2 is there a substantive due process claim there? Does that
3 violate the substantive due process right to life and
4 liberty? I am just saying there are examples around that I
5 can argue either way with.

6 MR. DUFFY: I don't know all of the facts other
7 than what I have heard in the media involving that case.
8 And really, I think it depends on what exactly the public
9 officials knew in that case and what they did. It's a
10 certainly more specific example in a more immediate problem
11 involving one municipality.

12 This is -- this is the kind of case that involves,
13 I mean, literally everybody.

14 THE COURT: Yes, that's correct.

15 MR. DUFFY: Yeah.

16 THE COURT: To varying degrees of damage.

17 MR. DUFFY: I am not sure there is much more I can
18 offer on the Flint example.

19 THE COURT: Um-hmm.

20 MR. DUFFY: Well, I'd like to turn briefly, then,
21 to the public trust doctrine.

22 This is exclusively a state common law doctrine,
23 and it is that a state may not completely alienate riparian
24 lands. There is no equivalent doctrine in the federal law,
25 and, as *PPL Montana* notes, it's not a constitutional

1 doctrine.

2 Plaintiffs cite a number of cases for the
3 proposition how that there is a federal public trust.
4 However, if you look at the cases that they cite, these
5 merely establish the proposition that the federal government
6 has a sovereign right to protect federal land from
7 infringement; not that there is a federal public trust
8 doctrine.

9 The magistrate relied on an old case, *Shively v.*
10 *Bowlby*, for the proposition that it recognized the federal
11 public trust. I have read that case, and *Shively* has said
12 no such thing. The holding in *Shively* is the title to
13 riparian lands is governed by state law, Oregon law in that
14 case, and that it is subject to rights granted to the United
15 States by the Constitution.

16 Under the Property Clause, Congress's power over
17 federal lands is plenary. It is not subject to a public
18 trust doctrine.

19 And even if a federal public trust doctrine
20 existed at common law, it would be preempted by the Clean
21 Air Act. Again, in *American Electric Power*, plaintiffs were
22 bringing a common law nuisance suit against power companies,
23 and there the court held that the suit was preempted by the
24 Clean Air Act, which provides the means for regulating
25 greenhouse gases and because Congress designated EPA as the

1 agency charged with regulating greenhouse gas emissions. In
2 the words of the court in that case, there is no room for a
3 parallel track where, on the one hand, the EPA is regulating
4 greenhouse gasses and then, on the other hand, the federal
5 courts are doing the same.

6 Your Honor has addressed, I believe, the issue of
7 redressability, and I'd like to give you our take on that
8 issue.

9 For the plaintiffs' claims -- I am sorry. For the
10 federal court to have Article III jurisdiction, if the
11 plaintiffs' claims --

12 THE COURT: I only went to that because you
13 started out saying you had so much in common but it had
14 everything to do with how we would -- how the courts would
15 fashion a remedy, we would be overstepping our bounds. So
16 don't make any assumptions.

17 MR. DUFFY: Okay.

18 THE COURT: All counsel here should be aware that
19 that would be not a good idea. I just ask lots of different
20 questions.

21 MR. DUFFY: Okay. And the reason I stressed the
22 common ground is I just think we need to make clear that we
23 agree that climate change is a very, very serious problem
24 and one that has to be addressed. And that's really
25 responding to some of the things I believe are inferred in

1 plaintiffs' briefing.

2 So here, the remedy that the plaintiffs seek is to
3 have the government phase out CO₂ emissions over a period
4 that would last decades or more.

5 Now, the magistrate claims that EPA could issue
6 sweeping regulations under the Clean Air Act. We don't
7 believe that this is an appropriate remedy. The agencies
8 can only do what Congress authorizes them to do, and in this
9 instance, the EPA has some discretion. It has different
10 fonts under the Clean Air Act that it can use to regulate
11 greenhouse gas emissions. A court order requiring sweeping
12 regulations we believe would supplant the legislative and
13 executive branches. It would supplant federal statutes that
14 require agencies to balance environmental considerations,
15 energy development, and other considerations, and it would
16 also require agencies to do things that they are not
17 statutorily authorized to do, and this would upset the
18 separation of powers principle inherent in the Constitution.

19 Ultimately, whatever decision the agency makes, it
20 is going to be subjected to judicial review, and we believe
21 that's the avenue that the plaintiffs should take in this
22 case, and that would require them to identify what
23 regulations the agencies, we'll use EPA as an example, what
24 regulations they have enacted and to identify why those
25 regulations don't go far enough and to present their case.

1 Alternatively, the Clean Air Act permits them to
2 bring an action to force the EPA to do something if they
3 believe there is something that the EPA is not doing.

4 Industry and others have challenged EPA's efforts
5 to reduce greenhouse gas emissions. They argue that the EPA
6 is doing too much. The environmental groups so far have not
7 challenged EPA's recent efforts, but the framework for doing
8 so is available to them.

9 In sum, we would ask the court to grant our motion
10 to dismiss. We don't believe the Due Process Clause
11 provides a right to a stable climate system. We don't
12 believe that there is a federal trust doctrine, and even if
13 there was, it would be preempted by the Clean Air Act.

14 Courts cannot order agencies to issue sweeping
15 regulations without supplanting the legislative and
16 executive branches and thereby upsetting the separation of
17 powers inherent in the Constitution.

18 The federal statutes provide an avenue for the
19 plaintiffs to challenge the federal efforts to combat
20 climate change.

21 That is all I have. If Your Honor has any
22 questions, I am happy to respond.

23 THE COURT: If that's all you have, that's all you
24 have.

25 Thank you.

1 MR. DUFFY: Thank you.

2 MR. SORENSON: Good morning, Your Honor. Thank
3 you.

4 May it please the court, if Your Honor is
5 prepared, I will continue.

6 THE COURT: Of course I am prepared. I want to
7 ask you, my first question off the bat --

8 MR. SORENSON: Excellent.

9 THE COURT: -- do you agree with counsel that
10 human activity caused climate change and that it is a
11 particular crisis that needs to be addressed and that he's
12 found common ground with the plaintiffs on that fact?

13 MR. SORENSON: I believe that my clients would
14 differ, in certain respects, to the extent of climate
15 change, to the emissions that cause it, and to other
16 scientific principles.

17 THE COURT: But you do agree that -- or on behalf
18 of your clients, do you agree that human activity has caused
19 the climate change to occur?

20 MR. SORENSON: I -- Again, I would differ --

21 THE COURT: A substantial -- a substantial portion
22 of it?

23 MR. SORENSON: I believe I would differ with them
24 and my clients would differ with them on the extent of which
25 and how it does it, but that is, I think, and I do agree

1 fully, though, with the statement that was made that this
2 particular case at this particular stage is not really about
3 that. We do not have any disagreement at this point
4 about --

5 THE COURT: Well, I was just pleased that the
6 government got up and acknowledged that right off the bat,
7 and so when they did that, I thought I would take this
8 opportunity to see if the intervenors read what I read and
9 what the plaintiffs read, what the government read to see
10 that that was -- it was a problem that was in need of
11 redress.

12 MR. SORENSON: I certainly do say -- and they are
13 taking actions to redress it as the government's set forth
14 in its brief and as it has set forth elsewhere.

15 And, again, at this stage of the proceedings, for
16 these purposes, the intervenors would take no qualms about
17 acknowledging that, at this stage of the case, there are
18 climate change issues that are being addressed, and we would
19 not dispute what remedies could, should be adopted by the
20 federal government.

21 THE COURT: But this is a motion to dismiss.

22 MR. SORENSON: Precisely. So we can accept that
23 for these purposes.

24 THE COURT: Um-hmm.

25 MR. SORENSON: I would also agree that within the

1 case or controversies under Article III, a federal court of
2 this type has broad remedial authority generally with
3 respect to claims brought before it. That includes with all
4 deliberate speed direction in a desegregation case. It
5 includes approving consent decrees in police misconduct
6 cases. It could encompass a whole wide range of those
7 issues in a case or controversy.

8 But that is the sphere of influence in which the
9 judiciary operates and in which it is limited by the
10 Constitution. And that is really the fundamental question,
11 for these purposes, in my mind whether this is a case or
12 controversy within the meaning of Article III.

13 And I think there are three questions that are
14 basically relevant to that: One, if there is a valid
15 statement, a valid claim of a constitutional violation or
16 deprivation; two, whether this case is justiciable under the
17 political question doctrine; and three, whether these
18 plaintiffs have standing to proceed with the case if it is
19 in case or controversy otherwise.

20 And for the reasons we have argued previously, we
21 would say no to each of those, but I will focus on a few
22 discrete issues that I think were mentioned by Mr. Duffy but
23 bear some emphasis at this point in time by the intervenors
24 as well. And I will start, unless Your Honor prefers
25 otherwise, with the claims themselves and start with the

1 public trust doctrine claim.

2 The premise of the claim, as far as I can tell, in
3 the complaint is that the public trust doctrine is a
4 constitutionally mandated principle applicable to the
5 federal government, and for that reason, it gives the court
6 authority to order executive actions that would otherwise
7 not be permitted by statute because it is under the
8 Constitution.

9 Now, that premise is simply incorrect. The
10 Constitution itself says nothing, makes no mention
11 of the public trust doctrine at all. And, in fact, in the
12 only relevant, possibly relevant clause, the Property
13 Clause, it states to the contrary that with respect to
14 resources, assets, other property owned by the federal
15 government, the federal government has plenary authority to
16 dispose of those assets and, in fact, says further that
17 nothing in the Constitution shall be construed as limiting
18 that authority.

19 To acknowledge, recognize the public trust
20 doctrine in the Constitution would thereby be to add
21 language to the document and to subtract language from the
22 Property Clause, and this point has been repeatedly
23 confirmed by courts across the country but most recently in
24 three decisions: *PPL Montana* by the Supreme Court, *United*
25 *States v. 32.42 Acres* of the Ninth Circuit, and *Alec L. of*

1 the D.C. Circuit.

2 *PPL Montana* was presented with precisely the
3 argument here that there is a public trust constitutional
4 doctrine, and the court roundly rejected it unanimously,
5 saying public trust doctrine is a matter of state law whose
6 contours do not depend on the U.S. Constitution.

7 The Ninth Circuit in *32.42 Acres* affirmed that the
8 Supreme Court meant what it said and that there is no
9 federal public trust doctrine, constitutional, common law,
10 whatever, and that, in fact, even if the federal government
11 obtains lands that are otherwise subject to that doctrine,
12 it cannot apply to the federal government.

13 And finally, most on point, *Alec L.* was presented
14 with precisely the claim for relief here, citing public
15 trust doctrine under the Constitution as well as due process
16 and equal protection principles and rejected in a summary
17 decision that *PPL Montana* unambiguously held that there is
18 no such doctrine and no claim can be made. I would argue
19 the same result should adhere here.

20 Second, I will briefly touch on the due process
21 and equal protection claims. With respect to due process,
22 the plaintiffs acknowledge, it seems to me, that they cannot
23 make out a standard, traditional due process claim; that is,
24 one in which there is a deprivation of life, liberty, or
25 property by the government itself.

1 Rather, they argue that they fall within an
2 exception to that limitation under the Due Process Clause.
3 And that exception, which has its roots in *DeShaney v.*
4 *Winnebago County* and has been recognized by the
5 Ninth Circuit, is the so-called "danger creation" exception.
6 Now, that exception is very limited in nature, and it has
7 essentially two requirements, which have been put forth in a
8 lot of cases, including *Pauluk*, the case that was cited by
9 the plaintiffs yesterday, and it is that the state must play
10 some role in creation of the danger by affirmative act, that
11 is the language from *Pauluk*, and also must place the
12 plaintiff in a position of greater danger with respect to
13 that created danger than they would have occupied otherwise,
14 limiting their ability to protect themselves.

15 Neither of those aspects is satisfied here. The
16 government is not alleged to have created climate change.
17 They are alleged to have allowed climate change to be
18 created by not restricting the emissions of other parties
19 throughout the last century and a half.

20 That is not creation of a danger. That is
21 allowance of a danger, and that is what *DeShaney* and the
22 Ninth Circuit cases do not allow because they require an
23 affirmative act.

24 Likewise, the government is not alleged to have
25 had and could not be shown to have exercised any control in

1 terms of placing these plaintiffs in a position of greater
2 danger than they would have been otherwise with respect to
3 climate change.

4 Again, the only allegation is that government did
5 not do enough to protect them, and that is not permissible,
6 that is not sufficient under *DeShaney* or any of the
7 Ninth Circuit cases.

8 Moving on briefly to equal protection, the essence
9 of an equal protection claim is a classification that
10 results in discrimination intended by the state. Neither
11 aspect is here. There is no classification identified in
12 any of the myriad of regulations or rules, administrative
13 orders cited in the complaint, and there is nothing that has
14 been shown to intentionally classify youth or an age group
15 differently. Rather, the allegation is that the
16 regulations, rules, orders adopted by the government have
17 resulted in allowing companies to produce emissions that
18 thereby contribute to a phenomenon that affects these
19 individual plaintiffs differently. That is not
20 discrimination as a result of regulation and is not a
21 classification sufficient to show an equal protection claim.

22 And that -- all those points show why there is no
23 constitutional violation established here and thus no case
24 in that regard.

25 But even if there could be a violation

1 established, to recognize a claim would be an exercise of
2 judicial common lawmaking. The court has recognized that
3 because there is no statute that authorizes this case
4 otherwise.

5 And the Supreme Court has said that that type of
6 exercise is disfavored generally but has said it is
7 precluded under circumstances in which there is a
8 comprehensive scheme allowing for the regulation of the
9 issues at hand and the adjudication of disputes, and that,
10 as Mr. Duffy mentioned, is precisely what we have with the
11 Clean Air Act, which provides a comprehensive scheme, to
12 quote the words of *AEP v. Connecticut*, for the regulation of
13 greenhouse gas emissions and also provides, in 42 U.S.C.
14 7607, an opportunity for adjudication of petitions with
15 judicial review that is open to all individuals, including
16 the plaintiffs here.

17 And as such, just as in *AEP* where the claims were
18 displaced because of the appearance and the opportunity to
19 present claims -- excuse me -- through that process, these
20 claims are displaced.

21 For all those reasons, there is simply no
22 constitutional violation, no claim alleged in this case that
23 can be adjudicated as a case or controversy, and therefore
24 it is without the jurisdiction of this court.

25 That is the reasons why that aspect of case or

1 controversy isn't met. There are two other limitations, as
2 I mentioned, just as important, and I think the most clear,
3 to my mind, is the political question doctrine. And I say
4 that not only because of the remedy that is requested,
5 although that is exceptional in and of itself, but also
6 because of the nature of the claims themselves.

7 These claims would require this court to, in
8 essence, assess each and every action, rule, regulation
9 issued by the federal government over the last hundred years
10 to assess whether it is adequate in light of climate change,
11 but to do so, there would not be a statute that guides this
12 court's analysis. There would be no administrative rule
13 that guides this court's analysis because it would have to
14 do so as a *sui generis* constitutional matter. And as such,
15 the only way that this court could make that assessment,
16 determine whether these actions were, in fact, adequate and
17 appropriate and acceptable and constitutional, the court
18 would have to consider not only the scientific risks
19 associated with climate change, various legal principles
20 that are well known to the court, but it would have to go
21 beyond that to determine and issue and consider policy
22 considerations, and that's relating to economic
23 considerations that would result from the regulation of
24 greenhouse gas emissions, both domestic and exterior. That
25 includes job losses, commercial difficulties, international

1 agreements, negotiations, as Mr. Duffy mentioned, and those
2 are precisely the type of issues, precisely those that are
3 left at the legislative and executive branches under our
4 form of government, as the Supreme Court said in
5 *Massachusetts v. EPA* as well as *AEP v. Connecticut* and in
6 other cases, for that matter.

7 At that point, the court could only resolve these
8 claims by making policy, ad hoc policy judgments over what
9 regulations should have been adopted in light of the myriad
10 interests at issue and is simply not a case or controversy
11 as the court has previously suggested.

12 And when you do get to the remedy, the problems
13 become all the more apparent; in fact, exponentially so.
14 The claims in this case ask this court, and this is made
15 clear in the briefing, to take -- to basically oversee
16 executive branch agencies, directing them to -- and
17 including the office of the president, to adopt particular
18 regulations or at least a regulatory scheme that would be --
19 I am sorry.

20 THE COURT: I just need to say you are getting in
21 the weeds because you are asking -- you are assuming --
22 making assumptions that the court's going to get --
23 micromanage this, but the court doesn't have to do that, as
24 you know, and we don't have to talk about remedies today at
25 all and that one of the nice things about where we are in

1 this particular litigation is you can use those imaginary
2 horribles about, God forbid, that judges should be more
3 involved.

4 But there is a history of where there is a need, I
5 am thinking of mental hospitals, I am thinking of just
6 taking over general hospitals, schools where these are
7 fundamental rights where the court has a role to help guide.
8 Not micromanaging is what is important, and nobody should
9 think -- be fearful of people saying -- or figuring out a
10 path to do that should we go to that -- should we get to
11 that phase.

12 I want to go back to -- you talked about *Illinois*
13 *Central*, and I wanted to just give you a chance to respond.
14 When the Supreme Court recognized the public trust
15 obligations without discussing any provision of the Illinois
16 Constitution and found, under Illinois law, there was a
17 public trust, why is the federal government any different,
18 why is the United States Constitution any different than
19 what happened in the Illinois case? Why isn't it inherent
20 because of the role that, and part of the sovereign, the
21 sovereign nation, that comes way before the Constitution was
22 drafted as part of the essence of who we are, which is the
23 fiduciary of finite resources and the obligation as a
24 fiduciary as a sovereign government to manage those
25 resources for now and for the future? And so it seems to me

1 some -- whether it's stated specifically or drawn from the
2 language that is one of the essences of our Constitution, do
3 you want to address that? In *Illinois*, they didn't -- it
4 isn't written there either.

5 MR. SORENSON: Oh, absolutely, Your Honor, you are
6 correct. And in many states, it is not a constitutional
7 doctrine. It is a common law doctrine. And in those states
8 which recognize it as a constitutional doctrine, it has
9 constitutional footings, constitutional statements
10 establishing a public trust responsibility. That is, for
11 example, in California, Pennsylvania, many other states do
12 that. Some adopt it by statute. It varies from --

13 THE COURT: Oregon.

14 MR. SORENSON: I am sorry?

15 THE COURT: Oregon. Our public beaches, you know,
16 we are --

17 MR. SORENSON: Exactly.

18 THE COURT: Public resources. You know, I am just
19 thinking, I want you to think broader about the principles
20 of this.

21 MR. SORENSON: Absolutely, and I can get to that
22 as well, but the point I was making there is that in those
23 states, the reason it exists is because it is codified in a
24 statute or in the Constitution or adopted as a matter of
25 common law, and those principles do not apply to the federal

1 government, one with respect to the Constitution because the
2 Constitution doesn't say anything about it. The statutes
3 don't say anything about it.

4 Now, if you want to argue as a matter of common
5 law whether it exists, that is an argument that has been
6 presented and could be made elsewhere, I assume. It has not
7 been made here because the only way you get to relief in
8 this case is if the doctrine is constitutional in nature
9 because if it's just a common law doctrine, it cannot
10 supersede statute, it cannot allow for control of executive
11 actions.

12 Now, but to get to your, I think, more fundamental
13 point, and actually, just before I get there, I will say,
14 again, that *PPL Montana* kind of eliminated that --

15 THE COURT: That's your read of it.

16 MR. SORENSON: That is true, and it's also every
17 other court to consider the matter.

18 THE COURT: Well, no. Judge Coffin, I think --

19 MR. SORENSON: That's true. That's a very good
20 point.

21 THE COURT: Yeah. It's not all --

22 MR. SORENSON: But I think the Ninth Circuit has
23 rejected it.

24 But I think to the more fundamental question of
25 why it is this stated way, why there is no federal public

1 trust doctrine, at a very conceptual level, it is how the
2 doctrine was introduced to this country. The doctrine was
3 introduced when the colonies were first formed. As a matter
4 of English common law, it was imported to the colonies at
5 that point in time because they were the fundamental
6 jurisdictional entity with police power, with control over
7 the resources and the people at that point.

8 And at that state, when they became states, they
9 continued to import that common law doctrine, which could be
10 modified in any form or fashion, by statute or the
11 constitution, at their discretion. But it was the states
12 that adopted it at that time. The states formed the federal
13 government, of course, with the constitution of the people
14 through the constitutional confederate convention, the
15 articles of confederation.

16 But the federal government was formed as a much
17 different entity, as a -- as not a primary regulator of
18 individual conduct but as an overarching entity that shared
19 certain sovereign powers. But that is why there is no
20 common law doctrine of the public trust, and that is because
21 there was no and there is as a general matter no general
22 federal common law. We do not apply to the federal
23 government how -- all common law principles from England
24 because those England principles were meant for something
25 very different. And you see this case -- you see this

1 discussion, I think, is actually nicely laid out, although a
2 bit difficult to parse, admittedly, in *Shively v. Bowlby*,
3 which is the case Mr. Duffy referred to and which
4 Judge Coffin also referred to. And in that discussion, you
5 see a long discussion of the equal footing doctrine, which
6 is when new states are formed, they take title --

7 THE COURT: I read that.

8 MR. SORENSON: Yeah. But the discussion of public
9 trust occurred after the state is formed, and with respect
10 to the state's obligation, both before and after that
11 discussion you see in *Shively* the court reference the
12 unlimited essential power of the United States to transfer,
13 alienate, use federally owned property when it is in
14 territorial form before it goes to the state. And that
15 is -- the reason I am saying it right now, as a conceptual
16 matter, the federal government is not and cannot be subject
17 to the public trust doctrine.

18 Now, the -- having concluded with the political
19 question doctrine as far as Your Honor would like in terms
20 of the remedial stage, moving on to the standing doctrine,
21 Mr. Duffy referred mostly to redressability. I would say in
22 my thought, the more difficult claim to make here is one of
23 causation.

24 And I say that not as a scientific principle
25 because, of course, science you can prove more, offer more

1 evidence, but I think as a very logical factual matter it is
2 simply impossible to establish causation in this particular
3 case. And I make that point because of what the
4 Ninth Circuit described in *Environmental Council v. Bellon*
5 as the, quote, natural disjunction, end quote, between
6 emissions of greenhouse gasses, whether they be from a
7 specific source, a sector, or a nation, and the effects that
8 are ultimately felt, the risks that are associated with
9 climate change, whether it be a hurricane, whether it be a
10 flood, whether it be a draught.

11 There is simply no way to determine, when one
12 emission source begins and ends its emissions, how they
13 contributed, when they contributed to the strengthening of a
14 particular event, a risk, what have you. And that is
15 because of the diffusive nature of the process. Again, all
16 emissions go up. They aggregate for several years with
17 emissions from several years before worldwide. They cause
18 unknown changes in the environment, unknown climatological
19 effects, which cause specific effects on the ground, or
20 alleged to be. There is no way, because of the diffusive
21 nature of that process, to say whether if the United States'
22 emissions were curbed to a particular degree one risk would
23 have occurred or would not have occurred. It simply cannot
24 be done. That was the point, I believe, of *Bellon*, the
25 Ninth Circuit's decision, and I think the same reasoning

1 applies here.

2 And also, the subsidiary point of *Bellon*, one that
3 Mr. Duffy referred to, is that there are emissions
4 worldwide, emissions that would not be controlled by this
5 court's decision, could not be controlled by this court's
6 decision, and we just don't know and it would be totally
7 speculative to think about what China, other nations are
8 going to do in response if this country is required or does
9 voluntarily reduce its emissions by a set amount. They may
10 increase emissions to equalize.

11 So the point being that there is no way,
12 nonspeculative way, I should say, to determine what effect
13 any emissions or reductions here in this country will have
14 on overall greenhouse gas levels, on climate change, or, and
15 this is the most clear point, on specific risks. And
16 without that causal chain, without any logical possible way
17 to draw a causal link between the event -- the risks, harms,
18 and the challenged conduct, which is failure to regulate,
19 there can be no causation.

20 And I think all of those points simply state what
21 I -- the point I made at the -- to support the point I made
22 at the start, which is this is not a case or controversy.
23 Certainly the court has broad remedial authority in many
24 cases, but you must first get to the point where there is a
25 constitutional violation that has been legitimately pled and

1 can be established and one that -- and one that asks for
2 relief that can be granted by this court and to the
3 plaintiffs who have standing to bring it.

4 And with that, unless Your Honor has any further
5 questions, I will sit.

6 THE COURT: No.

7 MR. SORENSON: Thank you.

8 THE COURT: I thought I understood your briefs. I
9 did.

10 Counsel.

11 THE CLERK: Ms. Olson, will you just let me know
12 when you are ready to put something on the document camera?

13 MS. OLSON: I will. Thank you, Paul.

14 Good morning, Your Honor. May it please the
15 court, I am Julia Olson here on behalf of the plaintiffs. I
16 would like to acknowledge their presence in the courtroom
17 today. They are seated in the front two rows, along with
18 Dr. James Hansen, who is here on behalf of his
19 granddaughter, Sophie, and on behalf of future generations.

20 And I would like to, again, thank the court and
21 the court staff for accommodating all of us today.

22 Your Honor, this case is about government-imposed
23 danger and harm over at least five decades that shocks the
24 conscience and rises to the level of infringement of these
25 young plaintiffs' inalienable constitutional rights to their

1 personal security, to life, liberties, and property, as well
2 as public trust resources.

3 Just last week, after the hottest summer on
4 record, President Obama said to the *New York Times* that the
5 reports he gets from his top science advisor on climate
6 change are, quote, terrifying.

7 The plaintiffs who have brought this case forward
8 have such a personal stake in its outcome that they are the
9 most effective advocates to present these critical and
10 timely constitutional questions to the court.

11 I want to begin with Jayden's story I submitted to
12 the court last week in her declaration because it is
13 illustrative of the injuries in fact and plaintiffs'
14 personal stake in this case, and then I will turn to
15 affirmative government acts and tell the story that really
16 illustrates what the core of the problem is in this case.

17 And I am grateful, Jayden and Cherri, that you are
18 able to be here today after everything you have suffered.

19 Plaintiff Jayden is 13 years old. She lives in
20 Rayne, Louisiana, and in Paragraph 87 of our first amended
21 complaint, we alleged that she would suffer from these
22 increased storm events and floods. And I want to tell her
23 story because it's impactful.

24 She woke up at five a.m. on the morning of
25 August 13th, and she was ankle deep in water in her bedroom.

1 As she said, she stepped out of bed and right into climate
2 change. Water was pouring in from doors, from under the
3 house. It was coming through the roof, and it was coming up
4 through the toilets and sinks and bathtubs of their home.

5 While Jayden's mom is desperately trying to get
6 home from helping family and friends in neighboring
7 communities who were fighting back flood waters the day
8 before, orange sewage and floodwaters were running through
9 Jayden's house like a river, destroying their possessions,
10 their floors, their furniture, the walls, and insulation in
11 their home. It took Jayden's mother 13 hours through water
12 up to her thighs and water flooding her car to finally
13 return home. Jayden's family survived but 13 people did
14 not.

15 Now, after the damage from the sewage and the
16 waters, they have begun to restore their home. But then the
17 sickness comes that inevitably results from contaminated
18 storm water and exposure to that, and their walls are now
19 threatened with black mold.

20 Jayden was living through what has been measured
21 to be a 1,000-year storm event, only now these storms are
22 not coming every 500 and 1,000 years anymore. As defendant
23 Department of Commerce's National Oceanic and Atmospheric
24 Administration reported just last week, the increased
25 frequency and severity of these storms and floods are

1 directly attributable to climate change.

2 This illustrates what the federal defendants said
3 is common ground in this case. We all agree to these facts
4 and that they are happening.

5 And in your objections, I appreciated that you
6 said that climate change poses a monumental threat to
7 Americans' health and welfare by driving long-lasting
8 changes in our climate, leading to an array of severe
9 negative effects, which will worsen over time. On these we
10 agree.

11 But given those admissions in this case, the
12 question is whether defendants' conduct has contributed to
13 that monumental threat and if it rises to the level of a
14 constitutional violation.

15 Those, of course, are questions for the merits,
16 but the clear allegations of harm and conduct that we have
17 alleged in the complaint and admissions by the federal
18 government are more than adequate at this preliminary stage
19 to show that plaintiffs have stated a claim for which relief
20 can be granted, constitutional claims over which this court
21 has clear Article III jurisdiction.

22 Defendants argue that their conduct is above
23 constitutional review, but it is inconceivable in our
24 Democracy and under our U.S. Constitution that when our
25 federal government has acted for decades knowingly,

1 affirmatively, and deliberately to take actions that caused
2 the infringement of constitutional and public trust rights
3 of these citizens that their actions would be insulated from
4 judicial review.

5 Because the defendants have mischaracterized what
6 this case is about in some ways, I want to be very clear
7 that this case is not about a federal government sitting
8 passively by while private industries or while the members
9 of intervenor-defendants pollute and destabilize our climate
10 system all on their own. That is not this case.

11 Instead, these federal defendants have been active
12 perpetrators of constitutional infringements over decades
13 through systemic programs, plans, national policies,
14 thousands of authorizations and permits of the federal
15 defendants. The United States not only controls the makeup
16 of our energy system, which has been dominated and remains
17 dominated by fossil fuels, it controls the energy supply and
18 it controls the pollution that comes out of that energy
19 system at the end of the day.

20 In defendant President Obama's own words to the
21 *New York Times* again, he said, quote, All of these
22 individual and collective steps that have been taken, they
23 lock in, they embed us moving in a certain direction, end
24 quote.

25 So while every defendant we have named has a very

1 critical role to play in the harm that's being caused, I
2 want to tell the story of two defendants because they have
3 critical responsibility and I believe would lead the plan
4 for a remedy in this case.

5 The first is the Department of Energy. And by 42
6 U.S.C. § 7111 and the following sections, the Department of
7 Energy was created in 1977 with the explicit purpose of
8 creating national plans, policies, and regulations for a
9 national energy system. They were created to control the
10 content and supply of energy sources for the nation.

11 So the Department of Energy and the president
12 control and dictate that energy supply, and there are
13 innumerable decisions that go into implementing our national
14 energy plan, including the authorization of infrastructure
15 that supports it and for approving the production of fossil
16 fuels.

17 And to that end, the Department of Energy works in
18 concert with the defendants Department of State, Interior,
19 Agriculture, Defense, but especially the president to ensure
20 that permits for extraction, drilling, exports and imports,
21 transmission lines and pipelines across state lines and
22 interstate lines are all in place to accommodate this fossil
23 fuel-based energy system. And it is the totality of that
24 national energy policy through the affirmative acts of the
25 federal defendants that has caused the pollution that is

1 destabilizing the climate system and acidifying our oceans.
2 And that's one of the side of the coin, and I like to call
3 that heads.

4 On the tail side of the coin we have the
5 Environmental Protection Agency. And EPA has been delegated
6 not only the authority but the duty by Congress to ensure
7 that the pollution resulting from the energy system in all
8 sectors, including transportation, is controlled to protect
9 the public health and welfare of the nation.

10 EPA, however, through affirmative regulatory acts
11 and plans has permitted greenhouse gas pollution for decades
12 to escalate to dangerous levels. At various times in past
13 administrations it even denied that carbon dioxide was a
14 pollutant, even though it's known since 19 -- our government
15 has known since at least the 1950s that it was.

16 So this problem of carbon pollution and its
17 terrifying consequences is not the result of inaction; it's
18 the result of affirmative action created by the Department
19 of Energy and other defendants to create that fossil fuel
20 energy system for our nation. It's also the result of EPA's
21 affirmative conduct to allow the pollution coming out of
22 that system.

23 So the federal defendants control both sides of
24 that coin, Your Honor, the heads and tails, and that coin
25 ends up in the pockets of the fossil fuel industry

1 represented here by the intervenor-defendants to the
2 economic and liberty cost of a carbon-based energy system
3 being borne today by these plaintiffs and the generations of
4 children they represent.

5 That is the practical effect of the federal
6 conduct at issue in this case, and the inalienable rights of
7 these children cannot be left to the toss of that coin with
8 no check by our third branch of government.

9 And so the solution and the remedy that can
10 practically address climate destabilization and ocean
11 acidification and the constitutional violations we have
12 brought to the court, the heads and tails of that
13 federally-controlled coin is a comprehensive plan where the
14 defendants work together to address the energy makeup of the
15 nation and apply greenhouse gas emissions limits grounded in
16 the science of stabilizing the climate and protecting our
17 oceans.

18 Both the Department of Energy and the EPA as well
19 as other federal defendants have broad statutory authority
20 to develop such a plan and to work together to do so, and
21 they can call on experts from institutions like Columbia
22 University and Stanford where experts have shown that it's
23 both technically and economically feasible to transition our
24 energy system to 100 percent clean energy and away from
25 fossil fuels by 2050.

1 So while there are clear emissions and egregious
2 failures, as Judge Coffin -- there are also these
3 affirmative acts, and I think Judge Coffin said it well at
4 Page 14 of his findings and recommendations.

5 "The complaint does raise issues of whether
6 government action/inaction violates the
7 Constitution, and these are issues committed to
8 the courts rather than either of the political
9 branches."

10 We believe this case is justiciable and that his
11 findings and recommendations should be affirmed and that the
12 objections are without merit.

13 I will now move on, Your Honor, to address more
14 specifically our substantive due process claims, the public
15 trust doctrine. I will touch on the political question
16 doctrine and standing briefly and -- but for -- giving just
17 a big picture snapshot of the remedy and the conclusion and
18 answer any questions the court has.

19 Related to the state-created danger argument under
20 the Fifth Amendment, plaintiffs have stated a claim for
21 relief following the guidance set forth by *Sacramento County*
22 *v. Lewis*, the Supreme Court decision, and a long line of
23 Ninth Circuit cases, including the case, the *Pauluk* case,
24 that was decided just last week.

25 And on Page 7 of the Westlaw version of that case,

1 they set forth the well-established test. In that case, the
2 Ninth Circuit affirmed that the plaintiff, who was deceased,
3 had his due process rights violated by the state because the
4 state had put him in an unconstitutionally unsafe
5 environment with black mold in his workplace and that the
6 state, in that case, hadn't affirmatively created the black
7 mold but had allowed him to work in an environment that was
8 unsafe.

9 One of the criticisms of this claim that the
10 defendants have brought is that this claim must involve a
11 specific relationship between two people, like a police
12 officer and somebody else.

13 And I'd like to point the court to the *HENRY A. v.*
14 *Wilden* case, which is another Ninth Circuit case at 678 F.3d
15 996. And there -- this was about a foster care situation.
16 And the court describes the allegations of harm in that case
17 about state -- the state's failures to protect foster
18 children and how that systemic failure to protect foster
19 children harmed individual children who were plaintiffs in
20 that case.

21 So I will just walk through the test of deliberate
22 indifference because that seems to be where they focus their
23 arguments.

24 First, there is an unusually serious risk of harm,
25 which the defendants concede, and that is made clear through

1 Dr. Hansen's declaration attached to our complaint as well
2 as many paragraphs we have cited in our briefs. And the
3 president calls the threats terrifying.

4 The second part of the test is that defendants
5 must have actual knowledge of the elevated risk.

6 And, Paul, if you wouldn't mind turning on the
7 screen for that.

8 And Your Honor, if we may, we blew up some
9 exhibits so that the audience could see them.

10 THE COURT: That's great.

11 MS. OLSON: Great. Thank you.

12 THE COURT: Do we have an easel down there?

13 THE CLERK: I can grab one.

14 THE COURT: Do we have a couple? We are going to
15 use one -- we have one or are you going to line up --

16 MS. OLSON: We have two total.

17 THE COURT: If you could find two easels.

18 THE CLERK: Okay.

19 THE COURT: And I would ask you to stand up here.
20 I have people who have worked on this case here and who are
21 a part of it. Just move up so -- at least walk around.
22 Don't walk to the back so people can't see it. Once they
23 look at it -- once they kind of look at it -- and they have
24 got screens, right? You guys have got screens on? Okay.
25 So they have screens. So if they don't need you, then you

1 can go up there -- great -- by they well.

2 We can do better than Vanna White. She is in a
3 suit and I suspect a lawyer and we'll get an easel. How
4 about that?

5 THE CLERK: I am going to have another one brought
6 in, Judge.

7 THE COURT: We'll have another one brought up, but
8 I presume you are going to work off this for the moment.

9 MS. OLSON: And then we can switch.

10 So Your Honor, so this -- what this time line
11 reflects is based on allegations in the complaint. And we
12 can see that by the mid 1950s, the United States Office of
13 Naval Research and top experts were concluding that the
14 increased burning of fossil fuels and the emissions of
15 carbon dioxide were in fact changing our temperatures and
16 increasing storm events.

17 By 1965, this is one of the critical facts in our
18 complaint where the White House report said that if we kept
19 burning fossil fuels, it would cause irreversible climate
20 change. They predicted a ten-foot rise in sea level and
21 called the change apocalyptic.

22 Pieces of this evidence continue to grow and
23 reaffirm what experts began to know in the mid 1950s.

24 More recently, in 2003, the congressional budget
25 office, which repeatedly says that we need a national plan

1 and the government accountability office, which says we need
2 a national plan, have said that the burden is going to be
3 borne by generations of people not even on the planet yet.

4 One important point also on this chart is that
5 Republicans in Congress in 1986 asked EPA and asked the
6 Office of Technology Assessment to prepare plans and
7 roadmaps for how we could decarbonize and move off of fossil
8 fuels. And I actually brought those plans with me here
9 today, Your Honor. This was the one from the Office of
10 Technology Assessment and the EPA's report.

11 Those plans got put on the shelf and were never
12 implemented. The EPA plan was a plan to stabilize carbon
13 dioxide levels at 350 parts per million, what we seek in
14 this case.

15 So that's the time line of the knowledge of the
16 danger that continuing to build fossil fuels would result in
17 these catastrophic impacts, and that's the second part of
18 the deliberate indifference test.

19 The third part of the test is that defendants
20 failed to take obvious steps to address that known risk.
21 And here I'd like to show Exhibit A-5 from Jayden's
22 declaration.

23 What -- this graph is from the Department of
24 Energy's Energy Information Administration.

25 And this was --

1 THE COURT: Could you do me a favor? I think --
2 when I -- I don't know how far out the date goes on that.
3 What's the last date on the bottom?

4 MS. OLSON: It goes to 2040.

5 THE COURT: It doesn't quite -- there.

6 MS. OLSON: Thanks, Dan.

7 This is based on information from the Department
8 of Energy this summer. You can see the two lines, the
9 orange-reddish line and the blue line. The orange-reddish
10 line is if we don't implement the Clean Power Plan, which is
11 currently stayed by the U.S. Supreme Court. The blue line
12 is where our emissions will head through 2040 if the power
13 plan is implemented fully, along with all of the other
14 policy measures that defendants spoke of during their
15 arguments. And what we see that's very clear to anyone
16 looking at this is our emissions in the United States
17 flatline at dangerously high levels.

18 And what this would mean is that it would put us
19 on about a 500 parts per million CO₂ trajectory with
20 temperature increases of about 2.5 degrees Celsius or more,
21 assuming we don't unleash all of the methane that's in the
22 frozen tundra and further exacerbate the heating that we are
23 facing.

24 This confirms, and I think the court can take
25 judicial notice of this, it's a government graph, about

1 where emissions are headed. And the important thing for
2 everyone to understand is that these emissions are happening
3 at this level on an annual basis, and so they are
4 accumulating. And carbon dioxide stays in the atmosphere
5 for thousands of years. So this is a dangerous situation
6 that we are faced with and I think shows the deliberate
7 indifference of the federal defendants in this case.

8 And, again, that's an evidentiary question for the
9 merits, but we have properly alleged it in our complaint.

10 Your Honor, in discussing the fundamental rights
11 at stake, I want to briefly touch on the argument that we
12 have alleged an -- only an unenumerated right. We have not.
13 Personal security is an identified right by the Supreme
14 Court under the liberties part of the Fifth Amendment.

15 So we have brought our case to plead that
16 fundamental rights have been violated that have already been
17 identified by the U.S. Supreme Court.

18 However, in looking at the heart of the
19 fundamental right that is at issue, I'd like to point the
20 court to the *Obergefell v. Hodges* decision.

21 THE COURT: I have been waiting for somebody to
22 actually talk about that because, yes, I understand that
23 completely and I understand the premise of all of that.
24 Yes.

25 MS. OLSON: Yeah. And what I love about this

1 decision and its applicability to our case are a few phrases
2 I would just like to read to it -- read to the court about
3 why the right to marry was fundamental because I think they
4 apply equally here to a safe climate system.

5 The court said, throughout human history it's of
6 transcendent importance, sacred to those who live by their
7 religions, rising from the most basic human need, essential
8 to our most profound hopes and aspirations, centrality to
9 the human condition, existed for a millennia and across
10 civilizations, untold references to the beauty of the right
11 in religious and philosophical texts spanning times,
12 cultures, and faiths, as well as in art and literature in
13 all their forms. History is the beginning of these cases.

14 That is absolutely true of our air and our water
15 and the climate system that sustains life.

16 And I believe that the defendants have largely
17 ignored the examination of that question about what is the
18 fundamental right and could liberty and justice exist
19 without it.

20 I want to also briefly touch on the equal
21 protection argument with respect to the class.

22 We believe that the court should find that the
23 complaint states a viable claim of discrimination against
24 plaintiffs, even if they are not members of a protected
25 class, a suspect class, because the discrimination that they

1 are suffering harms their fundamental rights. We also
2 believe the court could identify a suspect class in future
3 generations.

4 We have alleged in the complaint and we can prove
5 at trial that the federal defendants have discounted the
6 value and lives and the personal security of future
7 generations and children for the short-term economic benefit
8 of the present generation. As Judge Coffin aptly noted,
9 it's robbing Peter to pay Paul. Youth are a class, even if
10 they are not suspect.

11 And to address the issue of discrimination and the
12 test set forth by the Supreme Court, discrimination does not
13 have to be facial in laws. So *Arlington Heights* at 429 U.S.
14 266 to 268 says that intent to discriminate can be
15 established by looking at a clear pattern of discrimination,
16 the historical background of the decisions, the sequence of
17 the events, and departures from normal procedure or
18 substantive conclusions.

19 And this, again, is a question for the merits. We
20 believe we can show through legislative history,
21 administrative decision processes, that this test has been
22 met for intentional discrimination.

23 Your Honor, I'd like to turn now to the public
24 trust doctrine claim. The public trust doctrine does
25 survive Article IV of the Constitution.

1 At a very fundamental level, the public trust
2 obligation attaches to the sovereign and it predates
3 constitutions, and therefore it cannot be abrogated by the
4 sovereign. After all, it comes to us from ancient law from
5 Roman times and the king of England where constitutions
6 didn't exist. And the *Illinois Central* decision stands for
7 this principle, and it's eloquently stated in the *Robinson*
8 *Township* decision by the Pennsylvania Supreme Court that the
9 trust need not be written in the Constitution because it is
10 older than any constitution.

11 There is also a practical principle of property
12 law that's at issue here, and that principle is that if you
13 are a property owner, you cannot give away more property or
14 more power over that property than what you have to begin
15 with.

16 And so let's look at where the federal government
17 got its federal property. Got it from the states. And what
18 did the states hold? The states held property and
19 territories, resources in trust as public trustees for our
20 present and future generations. They could not have granted
21 to the federal government through the U.S. Constitution
22 Property Clause more than what they held. And that is why
23 the federal government is a government of limited powers.
24 The public trust doctrine is a limit on its rights and power
25 over public lands, and many Supreme Court decisions have

1 affirmed that it is a trustee.

2 I want to touch on the *U.S. v. California* and
3 *Alabama v. State of Texas* cases. I think we explained those
4 in our brief, the language that is slightly confusing in
5 those. But what I want to point out is that while the
6 Supreme Court said in those cases that it's not for the
7 courts to say how the trust is administered, it is for the
8 courts to say if the trust has been breached. And that is
9 what is before the court in this case.

10 The trust can be administered in any way that the
11 federal defendants see fit as long as they are ensuring that
12 public trust resources are not substantially impaired and
13 are not alienated from the public's needs and beneficial
14 uses.

15 Mr. Duffy, during the last oral argument, made a
16 couple of important concessions related to this. One was at
17 the transcript, Page 10, Line 21, and the other was at
18 Page 12, Lines 6 to 7, where he said that the federal
19 government certainly held the lands that were ceded in trust
20 for the states and the people. He also said, in answering
21 Judge Coffin, that the atmosphere and waters are vital to
22 life.

23 And those really get to the essence of this public
24 trust doctrine claim and whether there has been substantial
25 impairment is a matter for the merits, but we allege that

1 there has been.

2 I would hope also that the court would leave open
3 the possibility of identifying our air, our atmosphere, as a
4 public trust resource over which the federal government is
5 its trustee.

6 As Judge Hollis Hill said in the *Foster v.*
7 *Washington Department of Ecology* case in the State of
8 Washington, "The navigable waters and the atmosphere are
9 intertwined, and to argue a separation of the two or to
10 argue that greenhouse gas emissions do not affect navigable
11 waters is nonsensical." And, in fact, as the pollution goes
12 into the atmosphere, our oceans become the large repository
13 of the carbon dioxide that is sucked out. There is a
14 relationship between the two.

15 Air was one of the first named trust resources in
16 the time of Justinian and Blackstone, and the Supreme Court
17 recognizes both of those authorities.

18 On the political question doctrine, there are
19 three arguments that the intervenor-defendants make. I
20 think related to the judicially discoverable and manageable
21 standards, those are clear from the *DeShaney* line of cases,
22 the equal protection cases, and *Illinois Central* for the
23 public trust doctrine.

24 Related to the textual commitment argument, courts
25 review acts of Congress all of the time, and to suggest that

1 because they are making decisions that relate to interstate
2 commerce or relate to natural resources they shouldn't be
3 reviewed simply because climate change is such an enormous
4 problem is not compelling.

5 As the League of Women Voters wrote in their
6 amicus brief filed yesterday, quote, It would be a
7 convoluted application of principle to hold the very actions
8 taken by defendants, which have proven inadequate to address
9 and curtail their infringement of youth plaintiffs'
10 fundamental rights, effectively block these young plaintiffs
11 from the doors of our nation's courthouses.

12 Your Honor, related to standing, it appears
13 defendants have conceded injury in fact, so I will address
14 causation and redressability.

15 Our briefs lay out the paragraphs in the complaint
16 where we allege causation, and I think the graph that I
17 showed about where emissions are headed show that the
18 approvals and authorizations and the energy policy of the
19 United States is continuing to allow dangerous levels of
20 emissions.

21 Defendants argue that we should be playing
22 Whac-A-Mole and we should be challenging every site-specific
23 project and every regulation and rule, and as the *Brown v.*
24 *Plata* decision instructs, when a problem is systemic in
25 nature and that's what's causing the constitutional

1 violation, the case should be pled to address the systemic
2 problem. The court said, "Only a multifaceted approach
3 aimed at many causes, including overcrowding, will yield a
4 solution."

5 And then the court affirmed the federal court's
6 authority to, quote, fashion practical remedies when
7 confronted with complex and intractable constitutional
8 violations at Page 1937.

9 The incrementalism that defendants would like us
10 to take in this case would consign my plaintiffs to not have
11 a meaningful remedy. And, again, as Justice Kennedy wrote
12 in *Obergefell*, the court would not stay its hand to do a
13 case-by-case determination of every law depriving citizens
14 of rights, and it issued a nationwide remedy.

15 On redressability, the emissions that are at stake
16 currently at -- with current levels going out through 2040,
17 right now they represent 16 percent of total global
18 emissions. The United States, as we have alleged in our
19 complaint, is responsible historically for 25 percent of
20 global emissions.

21 In *Massachusetts v. EPA*, the amount at stake was
22 six percent of global emissions, and in *Bellon* where the
23 Ninth Circuit found there was no standing, it was only six
24 percent Washington State emissions.

25 We believe the amount of emissions at stake makes

1 this case ripe for review and the plaintiffs outstanding and
2 the issue is redressable.

3 Related to remedy, I won't go into the weeds on
4 remedy, Your Honor, but I want to address a framework
5 because I think there are many opportunities for the parties
6 to work together.

7 The remedy will become clear after hearing the
8 evidence on the merits of the case. And, as Your Honor
9 knows, this district has made a mark both with its
10 innovative remedies and also with the court-sponsored ADR
11 program, and we are interested in that.

12 We believe that a remedy, if the court ends up
13 having to issue one itself outside of a consent decree
14 process, it would be similar in nature to the relief ordered
15 in the civil rights cases or in the prison reform cases, or
16 we could hopefully come up with a solution similar to the
17 Columbia River Treaty rights litigation, which began in 1968
18 and over which this court still retains jurisdiction.

19 Like those cases, a remedy will involve a
20 framework for immediately developing and promptly
21 implementing a systemic plan to achieve science-based
22 emissions limits. And that plan should be developed by the
23 federal defendants, submitted to the court for review, and
24 approved.

25 And Your Honor, if you don't have anymore

1 questions, I will proceed with a closing.

2 THE COURT: I do have some questions.

3 MS. OLSON: Sure.

4 THE COURT: Does the scope of this relief, is it
5 affected by what qualifies, then, as a trust resource?
6 Again, it goes back to your -- the point you made, which I
7 think answers, in many respects, the questions are
8 intertwining, in the quote by Washington, right? Is there
9 something more I need to know?

10 MS. OLSON: I think the court could keep the
11 public trust doctrine claim and find a remedy even if the
12 court finds the trust resources are the oceans and navigable
13 waters. However, I think the court can legitimately extend
14 the doctrine to cover the air and the atmosphere. Either
15 way, the carbon dioxide emissions that are being caused by
16 defendants' actions are harming all of those resources.

17 THE COURT: Um-hmm. Go ahead. I think I hear
18 what you said. I answered my question. I have a list of
19 them and I have been checking off where I have some gaps,
20 and I think you have answered what I was looking for.

21 MS. OLSON: Thank you, Your Honor.

22 THE COURT: Um-hmm.

23 MS. OLSON: As its preamble so eloquently states,
24 our Constitution was enacted to secure blessings of liberty
25 to ourselves and our posterity; yet these young plaintiffs

1 and future generations are before this court today because
2 the federal defendants are squandering the blessings of that
3 liberty and causing, contributing to our nation's most grave
4 and urgent crisis.

5 Denying these motions to dismiss and setting the
6 case for trial will be the first important step in halting
7 the ongoing constitutional and public trust violations we
8 have alleged in this case and securing the critically
9 important and urgent greenhouse gas emission reductions that
10 we need to protect their rights.

11 There is a role for the court. This is a moment
12 in history when the court should rise and be that
13 impenetrable bulwark against the majoritarian political
14 system that sometimes dangerously veers off course and wages
15 injustice on those in the minority who are politically and
16 economically powerless.

17 We are on the precipice of irretrievably
18 subjecting our children to levels of pollution and heating
19 and melting ice sheets that erode the very foundation of
20 life on which human survival and constitutional liberties
21 and our systems of public and private property depend.

22 What happened to Jayden last month in Louisiana is
23 just one example of a new pattern of disasters that threaten
24 our young plaintiffs.

25 While admitting the severity of the climate

1 crisis, neither set of defendants address the fundamental
2 inquiry before this court, which is whether liberty and
3 justice can exist if the vulnerable climate system that
4 supports all life and personal security is destroyed.

5 If these defendants are allowed to continue a
6 national fossil fuel-based energy system that knowingly
7 causes those levels of greenhouse gasses and carbon dioxide,
8 can liberty and justice exist?

9 These 21 youth plaintiffs we fully acknowledge
10 have brought a case of enormous magnitude to the court, and
11 we ask that Your Honor provide that constitutional check on
12 the other branches of government before implementation of a
13 remedy that's so desperately needed becomes too late. We
14 need the deliberate speed with which Your Honor spoke.

15 The harms these plaintiffs and future generations
16 face are so shocking to the conscience, it is sometimes
17 easier to turn away from than to face up to the climate
18 devastation being inflicted by the defendants.

19 But the very nature of the incomparable harms and
20 their irreversibility makes it all the more imperative that
21 we do, and the Judicial Branch is primed and ready to
22 address these constitutional violations with meaningful
23 solutions in working with the parties.

24 These children need this court to be the bulwark
25 of all over which our seas cannot rise and our planet cannot

1 heat and our posterity cannot suffer.

2 Both the federal government and intervenor
3 American Petroleum Institute sounded the alarm bells more
4 than 50 years ago. They said that climate change was caused
5 by burning fossil fuels. These children cannot wait another
6 50 years. They cannot even wait another five to secure
7 their rights because the damage as alleged will be
8 irreversibly locked in.

9 And I believe the system can work. But the
10 political system has had five decades to work, and it's
11 failed, and it's clear it will not work in time without the
12 check by this branch of government.

13 Plaintiffs will show that viable solutions exist,
14 as I mentioned early on, Your Honor. The technology is
15 available for clean energy and clean transportation systems,
16 and we have before us enormous opportunities to still change
17 the course if we act now, but we are running out of time.

18 And what these 20 young people seek is far from
19 radical. It's just and equitable, for would we look back
20 today and say that desegregating our schools and buses was
21 radical or giving all people the right to marry? There were
22 certainly political majorities who found those ideas radical
23 or unprecedented; yet the courts upheld their inalienable
24 rights.

25 The current political system has suppressed

1 solutions that are within reach to decarbonize our energy
2 system. Our posterity will look back and affirm that it was
3 not radical at all for our court to step in at this time and
4 confer protection of the climate system that is requisite to
5 not only liberty and justice but, indeed, to the endurance
6 of our nation.

7 And for these reasons, Your Honor, we respectfully
8 request that the court affirm Judge Coffin's findings and
9 recommendations, deny these motions to dismiss, and promptly
10 set a case management conference so plaintiffs may have an
11 immediate trial to secure their fundamental rights under the
12 Constitution.

13 As Terry Tempest Williams said, "The eyes of the
14 future are looking back at us and they are praying for us to
15 see beyond our own time."

16 Thank you, Your Honor.

17 THE COURT: Um-hmm.

18 MR. DUFFY: May I have some time for rebuttal,
19 Your Honor?

20 THE COURT: Right.

21 MR. DUFFY: Thank you.

22 Sean Duffy for the United States.

23 I just want to raise a couple of points on
24 rebuttal, Your Honor, and then be available for any
25 questions that you may have.

1 With respect to the issue of all deliberate speed,
2 there is another point we agree with the plaintiffs on, and
3 that is that the actions of the federal government are not
4 above judicial review. We agree with that.

5 Unlike the case of the school desegregation where
6 there is a constitutional violation, Congress was not
7 occupying the field at the time when *Brown v. Board of*
8 *Education* was decided, and the court, with its remedial
9 authority, engaged in some very important measures to ensure
10 that that decision was implemented.

11 This is different. Here, we have a case where
12 Congress has already acted. And Congress has provided the
13 plaintiffs with a remedy in this case, both through the
14 Administrative Procedure Act, to the extent plaintiffs are
15 challenging actions of federal agencies, or to the organic
16 statutes themselves, and specifically in this case, the
17 Clean Air Act provides a remedy.

18 I want to turn just briefly to -- again, to the
19 Supreme Court's opinion in *American Electric Power* because I
20 feel that that case addressed the issue that is -- what's at
21 stake in this case, which is who acts and what the
22 respective role is under our constitutional system.

23 There, the court found that -- the unanimous
24 court found that "It's altogether fitting that
25 Congress designated an expert agency, here, the

1 EPA, as best suited to serve as the primary
2 regulator of greenhouse gas emissions."

3 The court there noted that "Judges may not
4 commission scientific studies or convene groups of
5 experts for advice or issue rules under
6 notice-and-comment procedures inviting input by
7 any interested person or seek counsel of
8 regulators in the states where defendants are
9 located. Rather, judges are confined by a record
10 comprising the evidence the parties present.
11 Moreover, federal district judges, sitting as sole
12 adjudicators, lack the authority to render
13 precedential decisions binding other judges or
14 even members of the same court."

15 Now, I don't say this to diminish the role that
16 courts play. They do play a role, and, in fact, Congress
17 has set out that role by providing for judicial review.

18 So I believe that to step in here, permit the
19 plaintiffs to go around that rule because they say we are
20 playing Whac-A-Mole or forcing them to challenge individual
21 actions by --

22 THE COURT: Aren't you, counsel?

23 MR. DUFFY: No, we are not.

24 THE COURT: You haven't addressed the flipping of
25 the coin and the fact that those reports are shelved and not

1 implemented, and you have your own management office telling
2 you that there is a plan and they need to be implemented.
3 So aren't you asking them, instead of appreciating that they
4 are helping to deconstruct complexity and relock
5 systemically at how to address a complex problem, aren't you
6 instead asking them to continue to waste their resources and
7 go chasing small agency actions with no way to get at the
8 broader complexity mosaic of the damage being done as we
9 speak?

10 And I am kind of surprised that you aren't
11 appreciative of the ability to move the way in which those
12 specific individual agencies have acted to require their
13 working more in concert outside their silos, governmental
14 silos and as individual bureaucrats within those silos and
15 rulemaking. We have made it so complex that we can't take
16 on something that is a complex, multiagency,
17 multi-responsibility problem.

18 So the difference between the Congress sort of
19 being in the role of -- the education issues by race that
20 was raised earlier and the fact that we have overfilled,
21 perhaps, to the point where we have paralyzed everybody to
22 reach a solution, it requires us to be somewhat systemic and
23 to look differently.

24 So I am kind of surprised at the way you are
25 arguing that you don't -- aren't taking a look at, frankly,

1 the time line and the notice that was given and the report
2 that's done by the management office that calls for, calls
3 for action and not implemented. I am kind of surprised you
4 aren't asking for the courts to help you move that forward
5 and, instead, actually giving imaginary horrors about what
6 we might do by intervening because I think you know better
7 than that how the courts can fundamentally play a role
8 without intervening over the boundaries of our
9 three-branched obligation, our third branch obligation.

10 MR. DUFFY: Well, I believe, when you look at
11 those reports, these are written as policy prescriptions for
12 Congress to do precisely that, to get these agencies to
13 coordinate, to pass laws that would battle climate change.
14 I believe in the EPA report there is even mention of a
15 carbon tax.

16 THE COURT: Um-hmm.

17 MR. DUFFY: The parties can all sit down together.
18 We can get in a room, but none of us can pass a carbon tax.
19 That's for Congress to do.

20 And what applies there, it applies to all of these
21 agencies. They can only do what Congress has authorized
22 them to do. So Article I and Article III can sit down -- or
23 Article -- all three branches of government have a role to
24 play at this point.

25 THE COURT: Yes, we do.

1 MR. DUFFY: And I think the plaintiffs have made a
2 wonderful case that should be heard in the halls of Congress
3 for why there should be --

4 THE COURT: It has been heard in the halls of
5 Congress, and the trouble is that branch hasn't responded to
6 adequately address the needs. So at some point, when you
7 come before the court, in your solutions that maybe somebody
8 will rise to that occasion. But I think I can safely say
9 without disagreement that, you know, we are in a complex
10 world right now, and we are in a changing administration.
11 So who knows what's next or what's ahead. So in many
12 respects, the courts have the consistency to stand as we may
13 move one direction or the other and keep the eye on the
14 bigger problem and require people to move, not intervene
15 beyond our role but to move because there is this
16 deprivation or these violations in place that are
17 fundamental.

18 Time is of the essence, and so what all deliberate
19 speed means is the court said what's happening isn't
20 sufficient. Do something or we'll do more. And people rose
21 to the occasion in that day and age.

22 What this court might say is the government's made
23 an effort and has worked now across the global boundaries
24 and been somewhat successful, if not fundamentally
25 successful, as I read the paper, bringing China to the

1 table.

2 But isn't it better to have the pressure to
3 continue to do that and to move that time line faster
4 because to leave people to their own devices, we'll go
5 another 50 years?

6 So there is a role between the different branches
7 at different times. And one actor, one branch may need that
8 boost or two branches may need that boost. And the court
9 may need to look out for people who are not being heard or
10 don't have a role. That's why the examples of foster care,
11 children in foster care, who speaks for them? That's why
12 the role of children in education, who speaks for them? The
13 role of police misconduct, who speaks for them? And
14 sometimes the court -- the Columbia River Tribes,
15 sometimes -- who speaks for them?

16 So sometimes the court just has to pay attention
17 and function as a backstop without intervening and messing,
18 so to speak, in the middle of a complex legislative branch
19 but requiring them to actually do their job. I think many
20 members, including leadership and non-leadership are begging
21 for that help, and that's how I read some of the newspaper
22 articles.

23 So I am just suggesting that this might be, maybe
24 for a later time, an opportunity to do something about
25 deconstructing the complexity that's been created that's put

1 barriers in the place of people's fundamental opportunities
2 to live the lives that are permitted to them through the
3 Constitution.

4 So I am just -- sometimes lawyers get so caught in
5 their arguments, they miss the opportunity to declare
6 victory and move forward. So I am suggesting maybe you want
7 to take a look at that when you get back and debrief this
8 argument because I think -- I think you are more there than
9 not.

10 MR. DUFFY: I certainly appreciate the concern.

11 I just want to discuss a couple of other points.

12 THE COURT: Sure.

13 MR. DUFFY: With regard to the *Obergefell*
14 decision, we believe that that is consistent with the
15 Supreme Court's prior due process decisions, and if you look
16 at a decision such as the *Planned Parenthood v. Casey*, the
17 Supreme Court there discussed its prior cases, and it noted
18 that they involved intimate and personal areas, and I
19 believe *Obergefell* is entirely consistent with that. I
20 don't think that the present case falls anywhere within that
21 rubric.

22 With respect to the public trust doctrine, I just
23 want to discuss a few of the cases that the plaintiffs rely
24 upon because I don't believe any of those establish the idea
25 that there is a federal public trust, whether by common law

1 or the Constitution.

2 So the plaintiffs cite *U.S. v. Beebe* and *U.S. v.*
3 *Missouri, Kansas & Texas Railway*. Those cases merely upheld
4 federal actions to set aside fraudulent land grants.

5 In *Camfield v. United States*, it upheld a federal
6 law prohibiting enclosure of federal lands.

7 *Light v. United States* upheld a federal law
8 requiring permits for grazing on federal land.

9 And *United States v. California* upheld the United
10 States' right to prevent states from trespassing on federal
11 lands.

12 None of these cases suggest that the trust is of a
13 constitutional dimension or that it provides an implied
14 right of action against the United States.

15 And finally, on the issue of standing, we don't
16 concede our standing arguments. We have narrowed what we
17 focused on the standing arguments, and I believe
18 redressability is the biggest problem. And I know that the
19 Supreme Court traditionally breaks the analysis into three
20 parts, whether there is harm, whether it's traceable, and
21 then the redressability issue.

22 My own way of looking at that analysis is that all
23 of the parts are sort of related. And so in general, yeah,
24 we don't believe that the plaintiffs do have standing in
25 this case.

1 And if you have no further questions, that's all I
2 have.

3 THE COURT: Thank you.

4 MR. SORENSON: Thank you, Your Honor.

5 No one would doubt, I think, the intensity of the
6 advocacy, of the interest, of the concern over risks of
7 climate change and harms that have been shown from these
8 plaintiffs and others. And I think those are
9 extraordinarily good issues for them to present and should
10 be applauded for doing so. I would, however, say, again, as
11 Mr. Duffy has argued and as I have as well, that the forum
12 in which these interests can at this time be addressed is
13 not this courthouse, not the federal judiciary. And that is
14 because not every injury, not every risk is something that
15 is a cognizable judicial matter.

16 The judiciary is limited by Article III to cases
17 or controversies. Nothing that I heard from the plaintiffs'
18 presentation today has established a case or controversy
19 under the Constitution that would allow or warrant judicial
20 intervention of the type they are requesting.

21 And I can make the points very briefly in rebuttal
22 to Ms. Olson's points. Under all of the doctrines we have
23 been discussing, public trust doctrine, which was just
24 addressed by Mr. Duffy to some degree, is not a
25 constitutional doctrine under *PPL Montana* -- I didn't hear

1 any discussion of that case -- or *32.42 Acres*, which
2 specifically held, by the Ninth Circuit, that there was no
3 federal public trust doctrine, even to lands acquired by a
4 state.

5 On the Due Process Clause, the argument seems to
6 be that if there is a risk, if there is something of which
7 the federal government is or should be aware and if it fails
8 to take action commensurate with the injury or risk in these
9 plaintiffs' views, then there is a constitutional
10 deprivation or a constitutional injury that may be remedied.
11 And that is simply not the standard to be applied, and that
12 includes the risks of climate change.

13 As I indicated before, as *Pauluk* explains very
14 forcefully, there must be an affirmative, intentional act by
15 the government with respect to the plaintiffs directly,
16 whether they are contained within police custody, whether
17 they are on the road and interacted with police, at a mental
18 facility, in an employment relationship. There must be a
19 direct movement, direct control by government placing the
20 plaintiffs in greater danger than they otherwise would be.
21 That is not present here, and therefore there can be no due
22 process claim even if you get to the point of considering
23 climate security, fundamental right, what have you, because
24 the danger at issue is an external threat, and this is a
25 failure to protect claim, as plaintiffs themselves have

1 characterized it.

2 Equal protection claim, I would make the same
3 points I did before. Ms. Olson pointed to no classification
4 of which I am aware. She pointed to disparate effects on
5 youth by the emissions of third parties but no
6 classification established by government, much less an
7 intentional one.

8 Political question, I heard references to
9 standards that could be employed by this court, but I did
10 not hear any discussion of how those standards would
11 actually be applied.

12 I heard no discussion of how this court would
13 manage --

14 THE COURT: I'd remind you we are at a motion to
15 dismiss.

16 MR. SORENSON: Of course we are. Exactly right,
17 Your Honor, but we still need to think through how these
18 claims would be adjudicated.

19 THE COURT: I don't know. We would have to go
20 through a trial and find out what they are and then take a
21 look at the remedy. It's premature.

22 MR. SORENSON: I don't think it is premature, Your
23 Honor. I think part of the political question doctrine, the
24 threshold inquiry is a discussion of whether the claims can
25 be adjudicated consistent with the judicial authority, and

1 in this case, there is no way to adjudicate them without
2 addressing policy issues that are foreclosed to this court
3 under *Massachusetts* --

4 THE COURT: I don't think the court said that in
5 the *Columbia River* case or the police cases or the school
6 districts cases with the discrimination. I mean, you can
7 argue those now, but that's premature.

8 MR. SORENSON: Okay.

9 THE COURT: I mean, I understand the issue and why
10 you have raised it and how you have raised it, but it's
11 still premature.

12 MR. SORENSON: And that avoids, of course, talk of
13 the remedy, which would intrude this court.

14 But going beyond that into standing again, again,
15 there has been no evidence or no allegation presented that
16 would create a causal link, at least one that I can see,
17 between effects -- emissions and effects that is the causal
18 disruption, the diffusive disruption that *Bellon* held
19 precluded standing in a case such as this, and it's the same
20 one that applies here.

21 And just as a concluding matter, I would say, in
22 reference to Mr. Duffy's own statements, that *AEP*
23 *Connecticut* is on all fours in certain respects with this
24 case. The same arguments for lack of political
25 accountability, lack of political ability, lack of political

1 judgment were made in that particular case to support the
2 claims in that case. They were presented to the Second
3 Circuit, the District Court, and to the Supreme Court that
4 the reason why the judiciary must be involved in these
5 claims is because there is a lack of political will and a
6 lack of political accountability with respect to the
7 plaintiffs in that case.

8 And the Supreme Court decisively rejected that,
9 stating that the only circumstances in which courts could
10 become involved in climate change-related issues because of
11 the myriad interests involved is through the Clean Air Act
12 and legislative action. This is a legislative issue, one
13 that should be addressed and can only be addressed through
14 the Article II, Article I mechanisms established by our
15 Constitution.

16 This court, this judiciary, notwithstanding the
17 magnitude of the problem, is simply not the proper forum for
18 these claims, and we would ask that they be dismissed.

19 Thank you.

20 THE COURT: Anything further?

21 MS. OLSON: Your Honor, we have no further
22 argument and would request that the case -- the decision be
23 submitted to the court.

24 THE COURT: Thank you. We will take it under
25 advisement. I appreciate everybody's attention and time and

1 excellent argument and briefing. As you can see, we have --
2 we have been looking at everything for a while. I had the
3 questions I needed looked at.

4 But I always, for the audience, I come in here
5 having read everything and listen very carefully to what's
6 been stated because I understand, I want the lawyers to make
7 their best cases. The questions that I have, I have put out
8 there, but there is other work that we do following this.

9 So for purposes of your education, the court takes
10 these matters under advisement and we rule, generally have
11 an obligation to try and get a ruling out in 60 days. I
12 will do my best to get that out on or before that date. But
13 I am not going to promise any particular time line. All
14 right?

15 Thank you. We are in recess. Appreciate
16 everybody's hard work.

17 MS. OLSON: Thank you.

18 *(The proceedings were concluded this*
19 *13th day of September, 2016.)*

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1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 22nd day of September, 2016.

5
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter

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