JULIA A. OLSON (CA Bar 192642)
julia@ourchildrenstrust.org
ANDREA K. RODGERS (applicant *pro hac vice*)
andrea@ourchildrenstrust.org
CATHERINE SMITH, Of Counsel (applicant *pro hac vice*)
csmith@law.du.edu
OUR CHILDREN'S TRUST
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

Attorneys for Plaintiffs
(Additional Counsel Listed on Next Page)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GENESIS B., a minor, by and through her Guardian, G.P.; et al.

Plaintiffs,

vs.

The UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; et al.

Defendants.

Case No.: 2:23-CV-10345-MWF-AGR

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (ECF No. 36)

Date: April 29, 2024
Time: 10:00 a.m.
Judge: Hon. Michael W. Fitzgerald
Courtroom: 5A

PHILIP L. GREGORY (CA Bar 95217)
pgregory@gregorylawgroup.com
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

PAUL L. HOFFMAN (CA Bar 71244)
hoffpaul@aol.com
UNIVERSITY OF CALIFORNIA AT IRVINE SCHOOL OF LAW
Civil Rights Litigation Clinic
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697
Tel: (310) 717-7373

JOHN WASHINGTON (CA Bar 315991)
jwashington@sshhzlaw.com
SCHONBRUN SEPLOW HARRIS HOFFMAN & ZELDES LLP
200 Pier Avenue #226
Hermosa Beach, CA 90254
Tel: (424) 424-0166

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INTRODUCTION

Throughout history, courts have heard and decided cases invoking constitutional protections of Children when the political branches of government engage in discriminatory and harmful conduct that threaten Children's health and well-being. These Children, Plaintiffs here, ask the Court to hear their claims of systematic harm and discrimination by these government defendants, which Plaintiffs allege deprive them of their constitutional rights of equal protection of the law, life, and a life-sustaining climate system.

Accepting the government's defenses today would mean retrospectively that: (1) the students in *Brown v. Board of Education* never could have had their trial because the Supreme Court had already ruled in controlling precedent in *Plessy v. Ferguson* that segregation was constitutional; (2) the young plaintiffs never would have had standing to seek declaratory judgment because the court could not have, under existing precedent, provided any meaningful remedy and the children could not have relied on the government to conform its conduct to the court's judgment; (3) a challenge to an entire system of segregation in public schools, which involved many policies and actions with nationwide implications, would have been too big for the court to handle; (4) the sovereign would have been immune from a constitutional suit for equitable relief because there was no explicit waiver in a statute; and (5) no Black child like Linda Brown could have brought such a case for relief in the first place because none was allowed before the Courts at Chancery. Instead, consistent with Article III and the Declaratory Judgment Act, the young students and parents in *Brown* had standing to sue, the district court assumed jurisdiction, held a trial within four months, found facts, and concluded by declaration that *Plessy* controlled, which the Supreme Court then reversed in 1954 in a *declaratory judgment* in favor of Linda Brown and the other plaintiffs, without awarding any further relief until a year later. *Brown v. Bd. of Educ.*, 347 U.S. 483,

493–95 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (The 1954 opinion declared "the fundamental principle that racial discrimination in public education is unconstitutional," holding a year later that "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."). Segregation—as a previously accepted systemic construct—was thereafter wholly unconstitutional. While efforts to effectuate the full judgment and "fundamental principle" of the *Brown* opinions continue today, as does invidious racism, that there was Article III "redress" by the courts, however partial or imperfect, is indisputable.

Defendants' other arguments ignore the most relevant precedent in child-centered cases. The Supreme Court ruling that older white men are not a suspect class due to age is not dispositive in this case about Children, who are biologically distinct from adults. This is *not* a Clean Air Act case, and Defendants cannot contort it to be one. This is a Fifth Amendment case about the total accumulation of climate pollution EPA has allowed through discriminatory practices, and continues to allow, as part of its system of control over the air and what pollutants may enter it. Just as in *Brown*, it is not piecemeal actions, but the totality of EPA's conduct over climate pollution alleged to be unconstitutional here. Nothing in the law prevents these Children from bringing this Fifth Amendment suit over the harm resulting to them from that conduct.

For over 50 years, Congress has entrusted EPA with controlling the Nation's air pollution, and Children are subjects of that control. Yet, today, Children in the western United States breathe polluted air from climate-fueled wildfires and fossil fuel operations and their health and lives are injured. Climate pollution-driven heat, fires, floods, and other disasters allowed by EPA cause Children to stay inside to protect their health, lose ability to engage in spiritual and cultural practices, face regular evacuation, and experience loss of home and property. Ultimately, EPA's cumulative contribution to the climate crisis shortens Children's lifespans and

creates adverse lifelong consequences to their health and safety. Before they gain the right to vote, Plaintiffs will have experienced 18 years of physiological climate injuries that will burden the rest of their lives. This Court should reject EPA's invitation here to tell Children without the franchise to go to the electorate at large or the very political branches that have been causing this harm for over 50 years. Meanwhile, Plaintiffs have been hospitalized, their homes have burned down, they miss weeks of school, and they suffer physical and mental health injuries throughout the year. Defendants could have avoided all of it. Instead, as the Complaint alleges, Defendants caused it.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. **One's right to life**, liberty, and property, to free speech, a free press, freedom of worship and assembly, **and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections**.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). There is still time for Defendants to alleviate the ongoing harm to Plaintiffs if Defendants' conduct is declared unconstitutional by this Court.

This Court has the duty to adjudicate this constitutional controversy in this declaratory judgment action. That the magnitude of the climate crisis can be daunting, as was systemic segregation, does not remove the duty of this Court to review ongoing, affirmative government conduct alleged to violate the Constitution. As the Supreme Court articulated 200 years ago, "Questions may occur which [courts] would gladly avoid; but [courts] cannot avoid them. All [they] can do is, to exercise [their] best judgment, and conscientiously to perform [their] duty." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Plaintiffs ask the Court to exercise its duty here and deny Defendants' motion to dismiss in full.

STATEMENT OF FACTS

Plaintiffs are 18 children, ages 8 to 17, who experience ongoing and devastating harm from climate pollution. Compl. ¶¶ 24–99. For example, in 2017, when Ione was only five years old, her home was completely destroyed by the Tubbs Fire and she lost all of her possessions except her family's car, which allowed a narrow escape, and a charred swing set in the yard. Compl. ¶ 60. Dani has severe allergies caused by wildfire smoke and poor air quality, which require medical intervention and caused 15 missed days of school in a single year. Compl. ¶ 41. Genesis suffers from climate-driven extreme heat which causes heat-exhaustion and interferes with her schoolwork. Compl. ¶ 24. She must choose between keeping her windows open to keep cool, or exposing herself to increasing wildfire smoke, ash, and pollen that worsen her allergies. Compl. ¶ 26. The oppressive heat causes Maryam A. to have eczema and headaches. Compl. ¶ 32. As she ages into her full practice of Islam, the increasing heat will interfere with her ability to fast for Ramadan, wear a hijab, and participate in the Hajj pilgrimage. *Id*. Noah was forced to relocate from their home after being evacuated on three separate occasions because of increasing wildfires, harming their mental health, and leading to the development of asthma from smoke exposure. Noah is also sensitive to heat from a medication they take to treat ADHD and cannot safely be outside with increasing temperatures. Compl. ¶¶ 50–54. Both heat and smoke harm Noah physically and prevent them from being in nature, which is the single most important treatment for their mental health challenges. Compl. ¶¶ 50–59.

Plaintiffs' injuries are no surprise to EPA, which has known for decades about the detrimental effects on Children of the climate pollution it permits and their unique vulnerability, which differs from adults. Compl. ¶¶ 162, 168, 171, 175, 178–81, 222, 234, 237, 249–50. EPA's experts and its own reports verify the cause of these harms. *See* Compl. ¶¶ 142–70. Extreme heat driven by climate pollution puts

developing Children at increased risk for heat-related illnesses and death, including kidney and respiratory disease. Compl. ¶¶ 182–87. This heat affects cognitive function, disrupting Children's learning and ability to concentrate during the school year, and burdening their religious and cultural practices. Compl. ¶¶ 188–89. Increasing wildfires and drought threaten Children's homes and food and water sources. Compl. ¶¶ 196–211. Children exposed to smoke and particulate matter have higher risks of respiratory symptoms, decreased lung function, worsening asthma, increased sinus issues, and development of chronic bronchitis, heart failure, and premature death. Compl. ¶ 215. Harms from climate pollution contribute to adverse childhood experiences ("ACEs") that put Children at greater risk of lasting effects on health (increased risk of obesity, diabetes, heart disease, chronic pulmonary disease), behaviors, and life potential. Compl. ¶ 245.

EPA has exclusive delegated federal authority to regulate air pollution. Compl. ¶ 114. That statutory authority mandates EPA to systemically control pollution of all stationary sources of pollution, all mobile sources of pollution, fuels, locomotives, ocean-going vessels and large ships with marine diesel engines, and aircraft. Compl. ¶ 124. EPA monitors carbon emissions and has continued to authorize levels of climate pollution that are unsafe for Children. Compl. ¶ 262. Between 1751 and 2021, under EPA's control since 1970, the U.S. emitted approximately 25% of the world's cumulative CO_2 pollution to the air; with some fluctuations in the past three decades, U.S. climate pollution is still close to what it was in 1990. Compl. ¶¶ 257, 259. Under its regulatory control and permitting of climate pollution, EPA is responsible for intentionally allowing approximately 422,000 million metric tons ("MMT") of CO_2 pollution in the Nation's air. Compl. ¶ 261. EPA's discriminatory conduct prioritizes the interests of the fossil fuel industry and corporations over Children's health and welfare. Compl. ¶ 250.

EPA also knowingly harms Children by disregarding the best available science. Defendants know 350 parts per million ("ppm") CO_2 is the uppermost level of climate pollution that will protect human health and welfare and the climate is already above that danger zone, currently at 419 ppm. Even with this knowledge, EPA continues allowing life-threatening amounts of climate pollution. Compl. ¶¶ 311–24. Every added ton of climate pollution to the air today exacerbates current harm to Children. Compl. ¶ 320.

Explicitly, EPA discriminates against Children through the discount rates used in its regulatory impact analyses. Compl. ¶ 279–80. Since 1980, EPA has used discount rates varying from 10%, 7%, 5%, 3%, and 2.5% in evaluating the costs and benefits of controlling climate pollution. Compl. ¶¶ 282, 284. Any discount rate over zero values the life of an adult today more than a child's life and underestimates the true social costs of climate pollution. Compl. ¶ 284. EPA recognizes that a zero or negative discount rate would account for intergenerational equity, and yet knowingly uses discount rates above zero with deliberate indifference to excessive risks of harming Children. Compl. ¶¶ 295–300.

STANDARD OF REVIEW

Article III Case or Controversy Standing: In deciding standing on a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the Court must "accept as true all material allegations" and "construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). At the pleading stage, courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). To establish standing, only one plaintiff need allege: (1) an injury in fact; (2) fairly

traceable to defendants' conduct; (3) likely to be at least partially redressed by a favorable decision. *Meese v. Keene*, 481 U.S. 465, 476 (1987).[1]

Declaratory Judgment Act: "[T]he fundamental test is whether the plaintiff seeks merely advice or whether a real question of conflicting legal interests is presented for judicial determination." *Gillette Co. v. '42' Prod. Ltd.*, 435 F.2d 1114, 1118–19 (9th Cir. 1970). A complaint sufficiently alleges a "controversy" under the Declaratory Judgment Act if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 1118 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Failure to State a Claim: To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This Court need not find Plaintiffs will ultimately prevail on their claims, only that the Complaint states valid claims for relief. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

[1] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), which Defendants invoke, is irrelevant here. The burden Defendants reference in *Kokkonen* pertains to establishing *ancillary jurisdiction* (in a diversity jurisdiction case) after stipulated dismissal of the case with prejudice where the district court did not retain jurisdiction to enforce a settlement agreement, but could have, and thus, enforcement became a contract dispute in state court. *Id.* at 378, 381–82. There is no heightened burden to establish this Court's jurisdiction beyond the traditional Article III test for case or controversy in a federal question case such as this.

LEGAL ARGUMENT

I. PLAINTIFFS HAVE ADEQUATELY ALLEGED ARTICLE III CASE OR CONTROVERSY STANDING TO BRING THIS SUIT

Defendants challenge only one prong of Plaintiffs' standing: redressability. The text of the Declaratory Judgment Act and Supreme Court precedent make clear that a declaratory judgment in Plaintiffs' favor will resolve their case or controversy and also provide partial redress for their present and ongoing injuries. Declaratory judgments have long been the heart of resolving constitutional controversies regarding the rights of children. *See, e.g.*, *Brown*, 347 U.S. 483. Defendants' 12(b)(1) motion therefore fails as a matter of law.

A. Plaintiffs Have Adequately Alleged, and Defendants Do Not Contest, the Injury and Causation Prongs of Standing

Defendants do not dispute Plaintiffs satisfy the injury-in-fact prong of standing. Plaintiffs met their burden by alleging specific injuries to their bodies, their homes, and their daily lives that are ongoing, worsening, and likely to recur. *Supra* Statement of Facts; Compl. ¶¶ 24–99, 175–248.

Similarly, Defendants do not dispute Plaintiffs satisfy the causation prong by showing their alleged injuries are fairly traceable to Defendants' conduct. Plaintiffs met their burden by alleging that EPA intentionally and systematically allows the climate pollution causing Plaintiffs' injuries and that EPA takes the position that its policies and practices are *not* unconstitutional, thereby creating the controversy. *See* Compl. ¶¶ 142–51, 176–95, 271 (alleging Plaintiffs' injuries are caused by pollution from burning fossil fuels); *id.* ¶¶ 100–02, 107, 109, 112–24, 333 (EPA has singular control over the country's air quality, including the level of climate pollution); *id.* ¶¶ 103–04, 154, 157, 164, 257–77 (EPA allows substantial amounts of climate pollution to enter the nation's air); *id*. ¶¶ 279–305 (EPA has intentionally manipulated its regulatory cost-benefit calculations regarding climate pollution to artificially

discount the value of the lives of Children, leading to large amounts of climate pollution); *id.* ¶¶ 99, 142, 149, 182, 191–94, 307–08, 317, 320 (every ton of additional climate pollution allowed by EPA increases Plaintiffs' exposure to future climate injuries and lessens opportunities to alleviate those life-threatening injuries). Plaintiffs cannot escape the air or climate on which their lives depend. *Id.* ¶ 98. Like a prison, these Children are confined to the climate pollution that is completely within Defendants' control. *Id.* ¶ 99. These and other allegations in the Complaint must be accepted as true and, therefore, Plaintiffs have met their burden to show injury and causation at this stage.

B. Declaratory Judgment Satisfies the Redressability Prong of Standing

Plaintiffs' requested declaratory relief would resolve "a real question of conflicting legal interests" and at least partially redress Plaintiffs' continuing and impending injuries. Compl. Prayer ¶¶ 1–7; *Gillette Co. v. '42' Prod. Ltd.*, 435 F.2d at 1119. Resolving a real question of conflicting constitutional interpretation in a case with significant injury caused by the government is all Plaintiffs need allege to satisfy the case or controversy element of Article III. This Court unquestionably has the power to award declaratory judgments. 28 U.S.C. § 2201; *cf.* MTD at 11 (contradicting 28 U.S.C. § 2201).[2]

The Supreme Court has held that in constitutional cases declaratory judgment alone can redress an ongoing injury for purposes of Article III standing. *See, e.g.*, *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 77–78 (1978); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Ninth Circuit precedent

[2] *See* Erwin Chemerinsky, *Constitutional Law: Principles & Policies* 58 (2023); *see Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (holding that if there is an applicable declaratory judgment statute, it is within the power of Article III courts to issue declaratory judgments to resolve constitutional disputes).

conforms to the principle that declaratory judgments sufficiently redress *ongoing or impending* injuries for purposes of standing. *Cornett v. Donovan* held that a declaratory judgment on the constitutionality of the state's conduct toward institutionalized persons sufficiently redressed the ongoing injuries of plaintiffs who remained institutionalized. 51 F.3d 894, 897 (9th Cir. 1995); *see also Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1120 (9th Cir. 2022) (declaratory judgment clarifying the constitutionality of California's foie gras ban could redress ongoing injuries). The Ninth Circuit only finds declaratory judgments insufficient to redress an ongoing injury in situations when the injury is not cognizable, or when the ongoing injury was caused exclusively by the defendant's past conduct. *See, e.g.*, *Arakaki v. Lingle*, 477 F.3d 1048, 1064 (9th Cir. 2007); *Mayfield v. United States*, 599 F.3d 964, 972–73 (9th Cir. 2010). Those conditions are not present here because Plaintiffs seek declaratory relief to redress cognizable ongoing and impending injuries caused by Defendants' *ongoing* conduct. *See* Compl. Prayer ¶¶ 1–7; *Id.* ¶¶ 260, 264, 266, 272, 279–81, 283–90, 303–05, 316, 324.

All eleven of the Ninth Circuit's sister circuits that have addressed this issue have either expressly held, or implied, that declaratory judgments are sufficient to satisfy the redressability prong for ongoing or impending injuries. *Efreom v. McKee*, 46 F.4th 9, 21 (1st Cir. 2022); *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 390 (2d Cir. 2015); *Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770 (4th Cir. 2023); *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019); *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1027 (6th Cir. 2024); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990); *Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1162 (8th Cir. 2019); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10th Cir. 2012); *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999); *Am. Clinical Lab'y Ass'n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir.

2022); *Apotex, Inc. v. Daiichi Sankyo, Inc.*, 781 F.3d 1356, 1371 (Fed. Cir. 2015). Some of these decisions note that declaratory judgments are the corollary of nominal damages: whereas nominal damages may redress a completed past injury, declaratory judgments may redress an ongoing or impending injury. *See, e.g.*, *Kareem*, 95 F.4th at 1027.

Relatedly, both the Supreme Court and the Ninth Circuit have recently recognized that nominal damages are the corollary to declaratory judgments and satisfy the redressability prong of standing. In *Uzuegbunam v. Preczewski*, the Supreme Court held nominal damages, "a form of declaratory relief in a legal system with no general declaratory judgment act," "satisfies the redressability element of standing" under Article III. 592 U.S. 279, 141 S. Ct. 792, 798, 802 (2021). The Ninth Circuit has since favorably quoted *Uzuegbunam*'s treatment of nominal damages as a form of declaratory relief and emphasized: "There is scant difference between a claim for declaratory relief and incidental damages and one for nominal damages." *Platt v. Moore*, 15 F.4th 895, 903 (9th Cir. 2021). Because declaratory relief and nominal damages are corollaries, and because declaratory relief is no less capable of providing actual redress than nominal damages, *Uzuegbunam* further reinforces the rule that declaratory relief sufficiently redresses an ongoing or impending injury for purposes of Article III standing.

The ***sole case*** Defendants cite in support of their contrary view, *Juliana v. United States*, is unavailing for several reasons. 947 F.3d 1159, 1170 (9th Cir. 2020). The dispositive issue on redressability in *Juliana* was plaintiffs' request for specific injunctive relief, 947 F.3d at 1170–75 ("The crux of the plaintiffs' requested remedy [was] an injunction."). Because the *Juliana* plaintiffs' claims for *injunctive* relief were found unredressable for reasons not relevant here, *Juliana's* redressability analysis is not controlling. While *Juliana* summarily discussed declaratory relief in *dicta, id.* at 1170, the Ninth Circuit did not cite or analyze the Declaratory Judgment

Act and did not cite any precedents binding on this Court addressing declaratory judgments' ability to redress ongoing or impending injuries. *Id.* Instead, *Juliana* cited only an out-of-circuit district court case holding declaratory judgment could not redress a *past* injury, and a Supreme Court case holding that an injunction requiring a defendant to pay civil penalties cannot redress injuries from "*purely past* violations." *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 249 (E.D. Pa. 2019); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 107 (1998) (emphasis added). *Juliana*'s discussion, in what can only be considered *dicta* regarding declaratory relief with respect to *past* injuries, is irrelevant to the ability of declaratory relief to redress these Plaintiffs' *ongoing and impending* injuries.

This Court faces nothing close to a binary choice of either totally solving climate change or refusing to act as a check on unconstitutional conduct of Defendants continuing towards the "eve of destruction." *See Juliana*, 947 F.3d at 1164. Such a red herring argument would have prevented the Supreme Court's vital opinions in *Brown v. Board* as well. Rather, Plaintiffs ask this Court to resolve an active constitutional controversy, where Defendants are causing physical harm to Children and discriminating against them, based on a full evidentiary record. In response to a declaratory judgment, Plaintiffs allege that Defendants would conform their conduct to control climate pollution consistent with the Court's findings and judgment and that there are a range of choices EPA would have to adjust its affirmative conduct in ways that would at least partially mitigate Plaintiffs' injuries. *See* Compl. ¶¶ 327–30, 332, 334 (EPA's numerous methods for complying with a declaratory judgment in this case, include, but are not limited to, ending its discriminatory discounting practices; issuing national ambient air quality standards; prescribing science-based standards for mobile and stationary sources of climate pollution; denying discretionary permits for more climate pollution). Because every ton of fossil-fuel-sourced pollution added to the air exacerbates Plaintiffs' injuries,

Compl. ¶ 320, and because even localized declines in fossil fuel pollution have an immediate effect on improving local air quality and health, apart from climate change, and can prevent 10,200 premature deaths in California each year, Compl. ¶ 325, EPA's compliance with a declaratory judgment would reduce Plaintiffs' injuries. Such partial relief satisfies the redressability requirement. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Defendants present a theory that, absent an injunction, EPA could simply ignore the judgment and continue its unconstitutional behavior, in which case a declaratory judgment would give Plaintiffs only psychic satisfaction. *See* MTD at 9–10. That theory lacks merit for two reasons. First, Plaintiffs are not required to "negate the kind of speculative and hypothetical possibilities suggested [by Defendants] in order to demonstrate the likely effectiveness of judicial [declaratory] relief." *Duke Power Co.*, 438 U.S. at 78. Second, Defendants are government entities, and courts assume government officials will comply with declaratory judgments without an injunction. *See, e.g.*, *Franklin*, 505 U.S. at 803. The presumption of governmental compliance thus negates Defendants' theory. Plaintiffs' well-informed allegations that Defendants would comply with an order of this Court also must be taken as true at this stage. Compl. ¶¶ 329–30.

In short, declaratory judgment will resolve seven ongoing constitutional controversies regarding the rights of Children and the lawfulness of EPA's conduct. Compl. Prayer. These will remain in controversy until resolved by this Court. The enormity of these declaratory consequences will determine the health, safety, opportunity, and longevity of these Plaintiffs who face ongoing harm—but so too did the declaratory judgment in *Brown v. Board*. Further, binding precedent and the factual allegations taken as true here establish that declaratory relief is likely to at least partially redress Plaintiffs' ongoing and impending injuries for purposes of Article III standing.

C. No Other Justiciability Doctrine Bars the Children's Case

Defendants do not argue the tests of any other specific justiciability doctrines as barring this case. MTD at 11–13. Instead, Defendants argue a new Frankenstein-like "case or controversy" hodge-podge from across a range of doctrines hoping one of them will stick like spaghetti on a wall. *See id.* (citing cases addressing the political question doctrine, standing, the limits of Congress's power, *Erie* doctrine on choice of law in diversity suits, the Courts of Chancery, and whether a court has power to transfer assets belonging to a non-party). This Court should reject Defendants attempt to create a new Article III "case or controversy" requirement outside the established doctrines such as Article III standing or the political question doctrine.[3]

Defendants' argument regarding the courts of equity is without merit. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Even before the Declaratory Judgment Act, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *In re Clean Water Act Rulemaking*, 60 F.4th 583, 594 (9th Cir. 2023) ("The Supreme Court has also long recognized the inherent authority of federal courts to award equitable remedies against . . . unlawful executive actions." (citations omitted)). Since Article III

[3] Defendants invocation of *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019), should be soundly rejected for three reasons: (1) political gerrymander cases have their own unique separation of powers concerns not present here; (2) Defendants ignore the *Baker v. Carr,* 369 U.S. 186 (1962), factors; and (3) the Constitution does not dedicate the Nation's air, pollution control, climate policy, energy policy, or Children's health to any single branch of government. The questions presented by these Children are not "entrusted to one of the political branches or involve[ ] no judicially enforceable rights." *See Veith v. Jubelirer*, 541 U.S. 267, 277 (2004).

authority under "the separation of powers exists for the protection of individual liberty, its vitality 'does not depend' on 'whether the encroached-upon branch approves the encroachment.'" *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citations omitted).

Accepting Defendants' argument that the judiciary is without power to assess the constitutionality of large-scale government policies and practices would have been the downfall of cases addressing desegregation, prison reform, education reform, foster care, interracial and same-sex marriage, and the rights of women to serve on juries and have access to contraception. The canon of our Nation's most celebrated cases is replete with decisions approving equitable relief to remedy systemic constitutional violations like those at issue here. *See, e.g.*, *Brown*, 349 U.S. 294; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Brown v. Plata*, 563 U.S. 493 (2011); *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

"[O]ne of the judiciary's characteristic roles is to interpret the Constitution, and 'we cannot shirk this responsibility merely because our decision may have significant political overtones.'" *Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005) (internal citation omitted). When the judiciary abandons its duty under Article III to review the constitutionality of the political branches' conduct, it permits infringements of constitutional rights to persist unchecked for decades. *See, e.g.*, *Evenwel v. Abbott*, 578 U.S. 56, 58 (2016) (judicial abstention allowed rural legislators to continue to benefit from malapportionment for decades).

At its essence, Defendants' argument is that this Court should decline to take this case because the problem of climate change is just too big. Yet, the judiciary is the branch tasked with interpreting and applying the law to controversies properly before it, irrespective of whether the problems implicated by those controversies are

small or big. *See* U.S. Const. art. III; *Marbury*, 5 U.S. at 177.[4] Because Plaintiffs' declaratory judgment complaint satisfies all three prongs of Article III standing and does not ask this Court to adjudicate a matter dedicated exclusively to the other branches of government, this Court has jurisdiction—and a duty—to hear Plaintiffs' case. Defendants' 12(b)(1) motion to dismiss should be denied.

II. THE COMPLAINT STATES FIFTH AMENDMENT EQUAL PROTECTION CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Defendants' discriminatory climate pollution policies and practices violate the Plaintiffs' Fifth Amendment (and incorporated Fourteenth Amendment) equal protection guarantee by imposing injuries upon Children's developing bodies and brains through EPA's intentional allowance and permitting of dangerous levels of climate pollution, while economically discounting the benefit to Children of limiting the pollution currently allowed.

A. The Imposition of Lifetime Hardships from Climate Pollution on Children for Matters Beyond Their Control Is a *Sui Generis* Equal Protection Violation

"Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). However, the extent to which Children have special status under the Equal Protection Clause has not been conclusively resolved in a single test by the Supreme Court. Because courts have traditionally relied on an adult-rights bearing archetype, there is no child-specific framework within the

[4] As the Supreme Court held in *Barnette,* 319 U.S. at 639–40*:* "Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

classic tiers of scrutiny in equal protection cases. "In other words, the Supreme Court has neither decided if children as a class should be deemed 'suspect' or 'quasi-suspect' nor explicitly provided an alternative doctrinal route to determine when state action runs afoul of young people's rights." Catherine E. Smith, Brown*'s Children's Rights Jurisprudence and How it Was Lost*, 102 B.U. L. Rev. 2297, 2300 (2022). Nonetheless, there is a line of Supreme Court precedent in Children's cases to guide this Court's *sui generis* analysis. In the last 70 years, the Supreme Court has factored the unique qualities, characteristics, and needs of young people into its constitutional calculus. Plaintiffs' *sui generis* child-centered equal protection claim rests on this line of children's rights cases that provide an "area of special constitutional sensitivity" mandating closer scrutiny of laws that impose a lifetime of hardship on young people for matters beyond their control. *See Plyler v. Doe*, 457 U.S. 202, 226 (1982).

Children have faced a long and persistent history of discrimination, which justifies their special treatment today under the Equal Protection Clause. The law has treated young Americans as "objects and not subjects of law." Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. Ill. L. Rev. 1567, 1577 (2009). In keeping with the English tradition, the American colonial family imbued the father with absolute power over his children in what amounted to "child coverture":

> Children born within a marriage in the United States thereby became subject to their fathers' control in much the same way that wives were subject to their husbands' control. A father could dictate almost every aspect of his children's lives: he could force children to work, marry off daughters to persons of his choosing, and physically punish children for failure to follow his dictates, in some states up to the point of death.

Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 Duke L.J. 75, 84, 88–89 (2021) [hereinafter Dailey & Rosenbury]. Young people were also used

to fill the ranks of indentured servants. Steven Mintz, *Huck's Raft, A History of American Childhood* 38 (2004). Enslaved children of African descent were treated as "commodit[ies] rather than as the child of a family, community, and nation." *See id.* at 41; Dailey & Rosenbury at 90. As post-Civil War ideologies of the ownership and control of other human beings shifted, so too did concepts of race and gender equality. Dailey & Rosenbury at 90–94. But Children's rights remained stifled under the regime of child coverture in both state and federal law. Dailey & Rosenbury at 90*; see also* Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 Ala. L. Rev. 533, 540 (2013).

It took the civil rights movement and the Supreme Court's decision in *Brown v. Board* to catalyze Children's equal protection rights. *Brown,* 347 U.S. at 493–95; Smith, Brown*'s Children's Rights Jurisprudence* at 2300.[5] While *Brown* is a landmark racial discrimination case, it is also a bedrock Children's rights decision, striking down segregated education and its lifelong injury to the youth plaintiffs because they were Black and young.[6] The Court explained that "[education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown*, 347 U.S. at 493. Denying Children the tools needed to advance in society provided by that educational opportunity, affected their success in life. *Id.* at 492. The Court recounted the district court's factual findings that segregation exacted a psychological toll on children because separating Black children from their peers "generates a feeling of inferiority as to their status in the

[5] Earlier cases also explicitly recognized children's constitutional rights. *See Powell v. Alabama*, 287 U.S. 45 (1932) (youths entitled to a right to counsel in criminal proceedings); *Barnette*, 319 U.S. at 631 (1943) (children "stand on a right of self-determination in matters that touch individual opinion and personal attitude").

[6] Smith, Brown*'s Children's Rights Jurisprudence* at 2308–09.

community that may affect their hearts and minds in a way unlikely ever to be undone." *Id*. at 494. *Brown* emphasized that the government's early injury to Children's development can significantly damage those Children's future well-being.

Levy v. Louisiana, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972), powerfully developed Children's rights precepts as part of equal protection law. These cases struck down state laws denying wrongful death and worker's compensation claims of children of unwed parents. In *Levy*, the Court started "from the premise that . . . children . . . are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy*, 391 U.S. at 70. In *Weber*, the Court objected to the long history of moral condemnation of children of unmarried parents: "visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth . . . ." *Weber*, 406 U.S. at 175. *Levy* and *Weber* recognized that less deference is accorded legislative decisions in order to protect Children's rights.[7] *See Pickett v. Brown*, 462 U.S. 1, 7 (1983) ("Our consideration of these cases has been animated by a special concern for discrimination against illegitimate children.").

Thereafter, the Supreme Court explicitly extended intermediate scrutiny to classifications that draw distinctions between marital and nonmarital children. *Clark*

[7] Numerous cases have relied on the holdings in *Levy* and *Weber* to address the plight of children of unmarried parents. *See* Lawrence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 Cap. U. L. Rev. 1, 25 (1999).

v. Jeter, 486 U.S. 456, 465 (1988). More recently, the Supreme Court reinforced the importance of acknowledging young people's economic and psychological injuries, striking down the Defense in Marriage Act, in part, because of the rights and benefits the Act denied children of same-sex married couples. *United States v. Windsor*, 570 U.S. 744, 772 (2013). This "brings financial harm to children of same-sex couples" and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* at 772–73. *Windsor* demonstrates the judiciary's continuing role in intervening when government subjects Children to a lifetime of disability and harm.

In another landmark case protecting Children for matters beyond their control, the Supreme Court focused on the "lasting impact of [education's] deprivation on the life of the child" and the harm caused to society by denying an education to children of undocumented parents. *Plyler*, 457 U.S. at 221. Similar to the reasoning in *Brown*, the *Plyler* Court noted "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.* (internal citations omitted).

Levy, *Weber*, and *Plyler* all signal a *sui generis* analysis by sparsely referencing the classic indicia of "suspect" or "quasi-suspect" classifications rooted in the classic *Carolene Products* test. *United States v. Carolene Prod. Co*., 304 U.S. 144, 152 n.4 (1938). As explained in *Plyler*:

> [M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.

Id. at 223. The *Plyler* Court did not recognize a suspect classification or a fundamental right, yet applied a heightened level of review, identifying this form of discrimination as an "area of special constitutional sensitivity." *Id.* at 226.

Children's special sensitivities and exclusion from voting, while still being entitled to their constitutional rights as citizens and natural persons, creates a special constitutional obligation of judicial guardianship of Children's rights. *See* Anne C. Dailey, *Developing Citizens*, 91 Iowa L. Rev. 431, 497 (2006). Moreover, it cannot be presumed that adult voters represent Children's interests. Catherine E. Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 Kan. L. Rev. 539, 545 (2023).

Defendants' systematic control over and intentional allowance of climate pollution threatens Plaintiffs' physical, mental, and emotional development and long-term health, and subjects Plaintiffs to physical and mental traumas they must bear the rest of their lives. Compl. ¶¶ 236–37, 239, 245. Like *Plyler*, *Levy*, and *Weber*, Plaintiffs' claims here can be reviewed *sui generis* for the extent to which EPA's conduct is unconstitutionally burdening Plaintiffs' ability to live and enjoy their lives by imposing on them present, and a lifetime of, hardship for matters beyond their control. *See supra* Statement of Facts. Ultimately, when Children bear the adverse consequences of majoritarian political power for matters over which they have no control, an "area of *special* constitutional sensitivity" warrants a heightened level of equal protection review. *Plyler,* 457 U.S. at 226 (emphasis added).

B. Even Under Traditional Equal Protection Framework, Plaintiffs Have Sufficiently Alleged Children Are a Class Warranting Heightened Scrutiny

Plaintiffs' Count II alleges alternatively that Children are a suspect or quasi-suspect class not based on their age, but rather, in their capacity *as Children* who are developmentally and legally distinct from adults. Compl. ¶¶ 343–55. The age-classification precedent that Defendants rely on in their brief (at 16-18) both is the wrong precedent to apply here and is contradicted by Supreme Court precedent discussed below. For instance, *Massachusetts Board of Retirement v. Murgia*, 427

U.S. 307, 309, 313–14 (1976), which held that older age is not a discrete and insular group requiring heightened protection, cannot be imputed to Children, who have nowhere near the political and economic power of the fully-grown, uniformed state policeman over 50. The Supreme Court consistently treats Children differently and any court relying on *Murgia* to deny Children special protection has erred.

On a motion to dismiss, this Court need not conclusively determine an equal protection standard of review for Children, which is fact dependent; this Court need only determine Plaintiffs have sufficiently *alleged* facts supporting a class that *plausibly* warrants heightened review. *Twombly,* 550 U.S. at 570; *see Hargrave v. McKinney*, 413 F.2d 320, 324–25 (5th Cir. 1969) (stating "narrow duty of determining the sufficiency of alleged facts" in novel equal protection case; "we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs"). A full factual record with expert testimony from scientists and historians will inform this Court's conclusions that Children are a class distinct from adults, and who meet the indicia for protected status. *See*, *e.g.*, *Brown*, 347 U.S. 483 (relying on newly available social science about the psychological impact of segregation on children, as well as historical evidence, to hold segregated schools could never be separate and equal). Such a factual record has been absent in the Children's rights cases cited by Defendants. *See United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (age as a suspect class not raised below); *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988) (dismissed without a factual record); *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980) (case brought by 19-year-old wanting to consume alcohol; no factual record). In *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997), the young plaintiff challenged a curfew law as a violation of a fundamental right, never arguing age was a suspect class. The Ninth Circuit applied strict scrutiny in determining the ordinance was not narrowly tailored but, importantly, the Court relied on the Supreme Court's specific

factors in reviewing government laws regarding Children as distinct from adults, identifying the "peculiar vulnerability of children." *Id.* at 945. Because Plaintiffs' complaint adequately pleads a factual basis for treating Children as a class entitled to heightened scrutiny, this Court should allow Count II to proceed to discovery, so this fact-intensive legal question may be decided on an appropriate factual record.

In evaluating class status, courts evaluate whether the class (1) has endured a history of discrimination, (2) has immutable characteristics, and (3) is politically powerless. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Murgia*, 427 U.S. at 313–14. Even under this adult-centric test, Children as a class satisfy the standard for heightened scrutiny. Plaintiffs pled each of these factors in turn. Compl. ¶ 344. This Court can rely upon a long line of cases interpreting the Constitution where the Supreme Court has recognized both political and developmental vulnerabilities of Children, affording special consideration to Children's rights and wellbeing in nearly every area of law, especially when the consideration of the right at issue might result in grave consequences on the child's life or liberty. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding capital punishment of a child under the age of 18, as opposed to an adult, violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding mandatory life-without-parole sentences for Children is cruel and unusual punishment, unlike adults); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376–77, 379 (2009) (holding a strip search of a middle school student violated the student's Fourth Amendment right of privacy); *New Jersey v. T.L.O.*, 469 U.S. 325, 336–38 (1985) (holding Fourth Amendment protects minors from unreasonable searches and seizures by public school officials); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (holding school officials could not impose a 10-day suspension on students without due process); *Breed v. Jones*, 421 U.S. 519, 528–31, 541 (1975) (holding prosecuting a minor in adult court, after adjudication in Juvenile Court violated the Fifth Amendment); *In re Winship*, 397 U.S. 358, 368

(1970) (holding due process requires a minor's case to be proved beyond a reasonable doubt); *In re Gault*, 387 U.S. at 33–34, 41, 55 (holding Children are guaranteed rights under the Due Process Clause and Bill of Rights in juvenile adjudication proceedings).

First, Children's history of being subject to discrimination goes far beyond being "denied full rights of adulthood while shouldering such burdens of citizenship as military service." *Gabree*, 614 F.2d at 2. Children have faced a long history of discrimination where they have been continuously subjected to unequal treatment. Like women, Children were once considered property and many children were treated as indentured servants or were enslaved. Compl. ¶ 344; *supra* 17-18. Children continue to lack political power and autonomy.

Second, Children are a prime example of a "discrete and insular" minority requiring close judicial scrutiny in situations of invidious discrimination because Children have characteristics that are different from adults that entitle them to consideration on their own terms. Children are physiologically and psychologically vulnerable with developing lungs, brains, and immune systems that are particularly sensitive to climate harms, and exposure to these harms can more easily subject Children to a lifetime of hardship. *See, e.g.*, Compl. ¶¶ 175–84. Children are dependent on their caregivers and have life expectancy many decades beyond living adults. Compl. ¶ 344. Being a member of the class of Children is thus more than a chronological fact.

Finally, the Court could decide that Children warrant suspect or quasi-suspect classification when facing lifetime injuries from state conduct on this factor alone—Children are politically and economically powerless in our constitutional democracy and cannot meaningfully participate in and influence the policy decisions that cause the climate crisis, discriminate against them, and irreversibly harm them for the remainder of their lives. They have no vote—the most important right of citizenship

that helps preserve all other rights. By the time they can vote, Plaintiffs have experienced 18 years of climate injuries that they carry for the rest of their lives. Compl. ¶ 5. They must "rely on others to ensure adequate protection of their rights." *Ramos v. Town of Vernon*, 353 F.3d 171, 181 (2d Cir. 2003). "In its contemporary form [], the principle [of suspect classification] has been most prominently associated with the more specific idea that judicial scrutiny should increase when a socially subordinated group cannot compete fairly in the political process."[8]

Blind adherence to the notion that analyzing equal protection cases involving Children should be placed in the same bucket as all age-based classifications and reviewed for mere rationality ignores the allegations in this Complaint, which must be taken as true at this stage, and the critical distinctions between Children and adults. Plaintiffs all fall within the protected class of Children. Compl. ¶ 345. Plaintiffs have alleged sufficient facts for it to be at least plausible that Children are a class that warrants heightened scrutiny. *Twombly*, 550 U.S. at 556. Thus, Plaintiffs have stated a cognizable equal protection claim at this stage.[9]

C. EPA's Use of a Discount Rate in Regulatory Decisions Affecting Climate Pollution and Children's Health Is Facially and Intentionally Discriminatory Toward Children

EPA's use of a discount rate is a *per se* invidious classification of Children. In Equal Protection cases, the Supreme Court generally gives great latitude to classifications related to "social and economic legis[la]tion." *Levy*, 391 U.S. at 71.

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[8] Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1364 (2011).

[9] Plaintiffs allege Defendants discriminate against their exercise of their fundamental enumerated constitutional right to life through Defendants' affirmative actions alleged in their Complaint. Compl. ¶¶ 163–67, 262, 275–76, 289. Thus, even if Children were not entitled to any specialized equal protection test or protected status, the discrimination as to a fundamental right also requires strict scrutiny analysis. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

Yet, the Supreme Court did not defer in *Levy,* a case about rights of children of unwed parents, because the Court has "been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Id*. at 71 (citing *Brown*, 347 U.S. 483).

Here, Plaintiffs alleged EPA's longstanding economic analyses are intentionally discriminatory in the context of allowing climate pollution. The effects of climate pollution are long-lasting and cumulatively worse over time. Compl. ¶ 285. Thus, the discount rate purposely devalues the long-term harm of climate pollution on Children and the benefit of controlling and abating that pollution for Children, which biases public decision-making against Children. Compl. ¶¶ 285, 289.

Often, laws that treat Children differently than adults do so with the intention to protect Children. EPA's use of the discount rate does the exact opposite, allowing and permitting unsafe levels of air pollution that jeopardize the health and safety of Children's present and future in violation of the Equal Protection Clause. As such, Plaintiffs have alleged a cognizable equal protection claim against EPA's use of discounting in its economic analyses.

D. In the Alternative, Plaintiffs Sufficiently Alleged EPA's Actions Fail to Survive Rational Basis Scrutiny

Even without protected status or a *sui generis* analysis, Plaintiffs' equal protection claims should not be dismissed because they have also alleged sufficient facts to meet even the rational basis threshold that the challenged government conduct bears no "rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Not meeting one of these prongs is sufficient to fail rational basis scrutiny. *See Quinn v. Millsap*, 491 U.S. 95, 106–09 (1989); *Plyler*, 457 U.S. 202; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Challenged conduct serves a legitimate end when it serves some identifiable purpose, and its

discriminatory element is "narrow enough in scope" to allow a court "to ascertain some relation between the classification and the purpose it served." *Romer*, 517 U.S. at 632–33. For a discriminatory act to have a rational relationship to a legitimate end it may impose only "incidental disadvantages" on certain persons which "can be explained by reference to legitimate public policies." *Id.* at 635, 633 (ballot initiative did not pose merely "incidental disadvantages" on LGBTQ persons because it "denie[d] them protection across the board" and disqualified an entire "class of persons from the right to seek specific protection from the law".)

First, the discriminatory element of EPA's discounting rates—like the ballot initiative in *Romer*—"impos[es] a broad and undifferentiated disability on" Children. *Id.* at 632. The economist who invented discounting as an economic tool for certain circumstances, Frank Ramsey, advised in 1928 that discounting the welfare of future generations, *i.e.*, Children who will live longer than adults, was "ethically indefensible." Compl. ¶ 298. EPA admitted "the discount rates should be lower when evaluating programs implicating climate pollution, climate change, and Children. Yet EPA continues to apply discount rates that intentionally discriminate against Children." *Id.* ¶ 296. Similarly, EPA's sovereign control over the air and the unnecessary and life-threatening amounts of climate pollution it allows is broadly discriminatory toward children who suffer disproportionate harms from these levels of climate pollution. *Id.* ¶¶ 332, 349, 353. Second, EPA's discount rate and allowance of climate pollution imposes far more than only "incidental disadvantages" on Children. *Romer*, 517 U.S. at 635. EPA's discount rates and allowance of climate pollution irreversibly forecloses Plaintiffs from accessing a stable climate capable of supporting their basic human needs. Therefore, EPA's economic valuation of Children's lives and discriminatory allowance of air pollution does not meet rational basis.

III. THE COMPLAINT STATES FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. Plaintiffs Sufficiently Allege EPA's Conduct Infringes the Fundamental Right to Life

EPA has "of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637 (calling for "scrupulous protection of Constitutional freedoms" of Children to not "strangle the free mind at its source"). Despite Defendant's attempts to mischaracterize Plaintiffs' claims as asserting a positive right,[10] Plaintiffs claim a deprivation of their Fifth Amendment right to life by Defendants' *affirmative* conduct that allows life-threatening amounts of air pollution. Compl. ¶¶ 357–66. Notably, Defendants do not dispute Plaintiffs have a constitutional right to life, or EPA has exclusive federal authority and control over the pollution that enters the Nation's air, and is thus, legally responsible for the pollution. Compl. ¶¶ 109–26; *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423, 428 (2011) ("Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."). EPA has served as controller, regulator, and permitter of climate pollution (greenhouse gas emissions) since 1970. Compl. ¶¶ 102–04, 114, 116, 118–24.

Further, this Court must accept as true the facts alleged based on EPA's own data regarding its conduct:

- "Between 1970 and 2021, the United States, under EPA's regulatory control and permitting of climate pollution, has been responsible for intentionally allowing approximately 422,000 million metric tons

[10] MTD at 15. Moreover, Plaintiffs are not required to allege EPA itself has emitted the climate pollution; Plaintiffs allege EPA's affirmative policies, practices, regulation, and permitting has resulted in dangerous levels of climate pollution.

("MMT") CO_2 pollution to enter the nation's air from within its territories[.]" ¶ 261.

- "Based on its own data, EPA has continued to authorize high levels of climate pollution in the past thirty years, resulting in a sustained annual rate of climate pollution[.]" ¶ 262.

- "Cumulatively, under EPA's control and authority, the United States has been responsible for about 271,922 MMT of CO_2 from 1970 to 2021, which is 1.85 times more CO_2 than the U.S. emitted cumulatively in the 169 years prior to the creation of the EPA (149,985 MMT of CO_2 from 1800 to 1969)." ¶ 269.

- "EIA projects climate pollution will continue at current levels in the United States in 2024. The EIA also projects continued climate pollution through 2050, with 2050 pollution being about 81% of 2022 pollution." ¶ 272.

Two allegations exemplify the harm to Plaintiffs' right to life from EPA's pollution policies and practices:

- "Extreme heat places young Children at higher risk of kidney and respiratory disease as well as fever and electrolyte imbalance. Heat illness is also a leading cause of death and illness in high school athletes with nearly 10,000 episodes occurring annually. Plaintiffs Huck, Dean, and Emma have experienced physical injury from heat exposure during athletics and Emma's recent diagnosis of exercise-induced asthma is exacerbated by heat." ¶ 186.

- "Hotter temperatures lead to more emergency department visits for Children with heat-related illnesses, bacterial enteritis, otitis media and externa, infectious and parasitic diseases, nervous system diseases, and other medical issues. Emergency department visits for Children in the West have been increasing with higher ambient temperatures. Plaintiff Noah is extremely sensitive to heat, which has caused severe discomfort and has led to hospitalization." ¶ 187.

"Defendants have infringed Plaintiffs' rights to life through their systemic control over and management of sources of climate pollution, and by intentionally allowing levels of climate pollution that have diminished Children's health and safety, exposed them to increased adverse childhood experiences with harmful lifelong consequences, are shortening their average lifespan, increasing their risk of death and additional physical injury, and causing loss of enjoyment of life." *Id.* ¶ 361; *see Harris By & Through Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (Whether under the Due Process Clause or the Eighth Amendment, "[w]here one's very right to life is at stake, and where prison officials control the conditions of confinement, thereby reducing the prisoner's ability to protect himself, it takes no great acumen to determine that, constitutionally, prison officials may not exercise their responsibility with wanton or obdurate disregard for or deliberate indifference to the preservation of the life in their care."); Compl. ¶¶ 98–99 (Plaintiffs cannot escape the conditions of confinement to the climate system and air pollution Defendants have created and control).

Cases involving bodily integrity, risk of permanent injury and premature death, intrusions into personal security, health and safety, and even an inmate's exposure to smoky conditions that posed a "risk of serious damage to his future health" have been regularly decided by federal courts. *Helling v. McKinney*, 509 U.S. 25, 33, 35 (1993); s*ee also Rochin v. California*, 342 U.S. 165 (1952); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Youngberg v. Romeo*, 457 U.S. 307, 315, 318 (1982); *Winston v. Lee*, 470 U.S. 753, 761 (1985); *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring). These Children also state valid constitutional claims for relief.

The Fifth Amendment "forbids the government to infringe" fundamental rights "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 293, 299,

302 (1993). Plaintiffs have sufficiently alleged a deprivation of their enumerated right to life caused by Defendants' affirmative conduct and are entitled to prove their case at trial. Likewise, Defendants can attempt to show a compelling state interest and narrowly tailored conduct. There is a live constitutional controversy over these Children's right to life that requires adjudication.

B. A Life-Sustaining Climate System is Implicit in the Fundamental Rights to Life and Liberty

The Fifth Amendment also incorporates unenumerated rights applicable against the federal government. *See Bolling*, 347 U.S. 497. A fundamental right to a life-sustaining climate system is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights." *Plyler*, 457 U.S. at 217 n.15. "[T]he Union of these States is perpetual[,]" because "[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments." Abraham Lincoln, First Inaugural Address and Message to the Special Session of the 37th Congress (1861). Preserving "the existence of the Union" underlies the text and structure of the Constitution. The Federalist No. 1, at 11 (Alexander Hamilton) (E. H. Scott ed., 1898). The Union may only exist if there is a livable atmosphere and climate in which humans may thrive. As articulated by James Madison: "Animals, including man, and plants may be regarded as the most important part of the terrestrial creation. . . . To all of them, the atmosphere is the breath of life. Deprived of it, they all equally perish. But it answers this purpose by virtue of its appropriate constitution and character." James Madison, Address to the Agricultural Society of Albemarle (May 12, 1818). Madison recognized in the infancy of our country that the nature of the atmosphere was crucial to human rights.

Courts have recognized rights to a life-sustaining climate system, as part of the body of fundamental constitutional and human rights. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) reversed on other grounds and assuming the right existed, 947 F.3d 1159, 1169–70 (9th Cir. 2020); *Matter of Hawai'i Elec. Light Co., Inc.*, 526 P.2d 329, 337 (Haw. 2023) (recognizing implicit right); *Navahine v. Hawai'i Dep't of Transp.*, No. 1CCV-22-0000631, Order Denying Defs.' MTD at 5 (Haw. 1st Circ. Ct. Apr. 19, 2023) (same); *Held v. Montana*, CDV-2020-307, Findings of Fact, Conclusions of Law, and Order at 102 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023) (fundamental constitutional right "includes climate as part of the environmental life-support system"); *Stichting Urgenda v. The State of the Netherlands*, No. 19/00135 Judgment ¶ 5.7.9 (Sup. Ct. Neth. Dec. 20, 2019) ("Climate change threatens human rights"); *Leghari v. Fed'n of Pakistan*, W.P. No. 25501/2015, Order ¶ 6 (Lahore High Court of Lahore, Pak. Sep. 4, 2015) ("On a legal and constitutional plane [climate change] is clarion call for the protection of fundamental rights of the citizens"); Inter-Am Ct. H.R. (ser. A) No. 23, The Environment and Human Rights, Advisory Opinion OC-23/17, ¶ 54 (Nov. 15, 2017) ("[C]limate change has a wide range of implications for the effective enjoyment of human rights, including the rights to life, health, food, water, housing and self-determination"); Inter-Am Ct. H.R. (ser. C) No. 511, *Inhabitants of La Oroya v. Peru* (Preliminary Exceptions, Merits, Reparations and Costs) Judgment, ¶143 (Nov. 27, 2023) ("States have a heightened duty to protect children and actions against risks to their health produced by the emission of polluting gases that contribute to climate change.") (unofficial translation).[11] A full factual and historical record will establish

[11] The list of cases Defendants cite on p.14–15 involved different claimed rights than the specific right asserted here. None of those cases is binding on this Court. Moreover, those cases did not conduct an historical analysis per the *Glucksberg* test.

this deeply-rooted unenumerated right. At this stage, Plaintiffs have sufficiently alleged Defendants are depriving Plaintiffs of a fundamental right.

IV. EPA'S CONDUCT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS

Finally, Plaintiffs' Complaint states a cognizable claim alleging violations of constitutional separation of powers principles and the Take Care Clause of Article II, Section 3. Though Plaintiffs' Take Care Clause claim involves allegations that Defendants acted beyond the scope of their delegated authority, these allegations do not remove its constitutional nature. As the Ninth Circuit has recognized, "some actions in excess of statutory authority may be constitutional violations, while others may not." *Sierra Club v. Trump*, 963 F.3d 874, 889 (9th Cir. 2020) (remanded on other grounds).

Both the Ninth Circuit and the Supreme Court found constitutional causes of action exist when the executive "exceeds his or her statutory authority, and in doing so, *also* violates a specific constitutional prohibition." *Id.* at 890. Federal courts have repeatedly found a cause of action exists for private parties to enforce constitutional separation-of-powers principles. *Bond v. United States*, 564 U.S. 211, 222–23 (2011) (recognizing injured person's standing to sue when they have "sustain[ed] discrete, justiciable injury from actions that transgress separation-of-powers limitations"); *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (Separation of powers doctrine is "designed to preserve the liberty of all the people" and so "whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge."); *United States v. McIntosh*, 833 F.3d 1163, 1174–75 (9th Cir. 2016) (cause of action based on Appropriations Clause); *NLRB*, 573 U.S. at 556–57 (cause of action based on Recess Appointments Clause); *Clinton v. City of New York*, 524 U.S. 417, 434–36 (1998) (cause of action based on Presentment Clause); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020)

(cause of action based on President's removal powers in Article II); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (same).

Plaintiffs sufficiently pled a violation of separation of powers principles premised on the major questions doctrine. Compl. ¶¶ 377–86. The major questions doctrine is founded on "both separation of powers principles and a practical understanding of legislative intent." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (exercise of agency authority far beyond scope of statutory authority Congress could reasonably have been understood to grant "would deal a severe blow to the Constitution's separation of powers"). Since 1970, Congress has consolidated and delegated exclusive authority to EPA to protect the Nation's air and prevent pollution that endangers human health and welfare from entering or accumulating in the air. *See* 42 U.S.C. § 7401(b)(1); Compl. ¶¶ 116–25. Plaintiffs allege EPA has instead "intentionally allowed an accumulation of climate pollution that EPA's own documents and the best available scientific information show is harmful to the health and welfare of Children," Compl. ¶ 103, and has "systematically ignored or rejected citizen requests to control climate pollution." Compl. ¶ 169; *see also id.*, ¶¶ 159–60, 163–67. There is no statutory language in the Clean Air Act that explicitly or implicitly gives EPA the authority to allow pollution at levels that degrades Children's public health and welfare, decreases the productive capacity of the population, and which discriminates against and injures Children. Likewise, EPA has been delegated no authority by Congress to discount the lives of Children when it exercises its authority to control air pollution.[12] As Congress "does not usually hide elephants in mouseholes," the Clean Air Act cannot reasonably be read to authorize EPA's

[12] Defendants cite only Executive Orders and Office of Management and Budget Circulars for EPA's purported authority to discount the lives of Children, something Congress has *never authorized* EPA to do. MTD at 16–17.

systemic conduct in allowing climate pollution in amounts that degrade the Nation's air, alter the Nation's climate, and harm the Nation's Children, including Plaintiffs. *See Nat'l Fed. of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring). Plaintiffs have stated a claim that EPA's conduct does not faithfully execute the law in violation of the Take Care Clause.[13]

Defendants incorrectly argue there is no private right of action under the Take Care Clause. Defendants' reliance on non-binding district court opinions is unavailing because there is no controlling Ninth Circuit or U.S. Supreme Court precedent on this question, and several district courts have adjudicated claims brought under the Take Care Clause. *See In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092, 1137–38 (S.D. Cal. 2018) (concluding Take Care Clause applies to President's subordinates); *Florida v. United States*, No. 3:21CV1066, 2022 WL 2431414, at *13 (N.D. Fla. May 4, 2022) (denying federal government's motion to dismiss Florida's Take Care Clause claim and reasoning there is "no reason why [a Take Care Clause] claim could not be pursued at least in circumstances where . . . the executive branch has completely abdicated its responsibly to enforce the law as written"). Notably, the Supreme Court suggested the Clause's justiciability is an open question by *sua sponte* directing the litigants in *United States v. Texas* to brief whether certain immigration policies of the Obama Administration violated the Take Care Clause. 577 U.S. 1101 (2016) (Mem). That question was left unresolved when

[13] This Court should reject Defendants' reliance on *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866) to argue that the Take Care Clause is entirely non-justiciable. MTD at 20. An identical argument was rejected in *Citizens for Responsibility & Ethics in Washington v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018), where the court read *Johnson* as addressing "limitations on the ability of federal courts to issue an *injunction* against the President," and clarified that *Johnson* "does not so clearly foreclose" the issuance of a "declaratory judgment order . . . for a Take Care Clause violation." 302 F. Supp. 3d at 138–139 (emphasis original).

the lower court's decision was affirmed by an equally divided Court. *United States v. Texas*, 579 U.S. 547 (2016).

This Court should reject Defendants' attempts to shield EPA's systemic conduct, which dangerously exceeds the authority Congress granted, from judicial review. The executive branch's violations of the separation of powers can be remedied by declaratory judgment, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and this Court should allow Plaintiffs' well-pleaded Take Care Clause claim to proceed to trial on the merits.

V. CONSTITUTIONAL CLAIMS FOR NON-MONETARY EQUITABLE RELIEF ARE NOT SUBJECT TO SOVEREIGN IMMUNITY UNDER THE CONSTITUTION OR AT COMMON LAW, AND ADDITIONALLY HAVE BEEN STATUTORILY WAIVED

Defendants make a frivolous sovereign immunity argument that would undermine constitutional democracy, contradict their own briefing before the Supreme Court, refute the Department of Justice's own website, and ignore over a hundred years of binding precedent.

A. Non-Monetary Claims Under the Fifth and Fourteenth Amendments Are Not Subject to Sovereign Immunity and Defendants Know It

The Supreme Court has held substantive due process and equal protection rights are self-executing because the power to enforce the safeguards within the Bill of Rights is a judicial, not legislative, power. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("[T]he Fourteenth [Amendment] is undoubtedly self-executing without any ancillary legislation"); *see also City of Boerne v. Flores*, 521 U.S. 507, 523 (1997); *Hills*, 425 U.S. at 289 (case brought directly under the Fifth Amendment). The Due Process Clause serves "as a limitation on the State's power to act," and is thus negative in character. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S.

189, 195 (1989). It is an imperative feature of the separation of powers doctrine that the courts, not the legislature, remain able to enforce provisions in the Bill of Rights and interpret the Constitution. *City of Boerne*, 521 U.S. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."). Under the common law, courts have long recognized that non-monetary claims under the Fifth Amendment do not require a waiver of sovereign immunity. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 143 (1908). Defendants know this, and in recent briefing to the Supreme Court conceded that sovereign immunity does not apply to Fifth Amendment claims in equity: "As this Court has explained, an individual's 'ability to sue to enjoin unconstitutional actions by state and federal officers' is a 'creation of courts of equity,' reflecting 'a long history of judicial review of illegal executive action.'" Brief for the United States as Amicus Curiae Supporting the Respondent at 8, *Devillier v. Texas*, No. 22-913 (Dec. 12, 2023) (cleaned up). Defendants have zero claim to sovereign immunity for this Fifth Amendment declaratory judgment action brought by Children.

B. Sovereign Immunity Is Also Explicitly Waived Under 5 U.S.C. § 702

Congress agrees and codified the sovereign immunity waiver of non-monetary claims against federal agencies and officers who "acted or failed to act in an official capacity or under color of legal authority" in 5 U.S.C. § 702. The Justice Department's own website states: "The sovereign immunity defense has been withdrawn only with respect to actions seeking specific relief other than money damages, such as an injunction, **a declaratory judgment**, or a writ of mandamus."[14] The Ninth Circuit held repeatedly that § 702 "is an unqualified waiver of sovereign

[14] U.S. Dep't of Just., Just. Manual, Civil Resource Manual § 36, https://www.justice.gov/jm/civil-resource-manual-36-declaratory-judgment-act-and-ada

immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable," and "[n]othing in the language of the [1976] amendment [to § 702] suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'" *Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims").

Plaintiffs here—like the plaintiffs in *Presbyterian Church*—seek non-monetary relief against the United States and one or more federal agencies. The Complaint asserts only freestanding constitutional claims and does not challenge any specific agency action under the Clean Air Act. Therefore, here as in *Presbyterian Church*, § 702's unqualified waiver of sovereign immunity is additionally fatal to Defendants' sovereign immunity defense.

C. Plaintiffs Do Not and Are Not Required to Bring Their Constitutional Claims Under the Clean Air Act or the APA.

Defendants argue Plaintiffs can only bring their constitutional claims under the Clean Air Act, but the Ninth Circuit has already disposed of the same argument in the context of the APA.

> Forcing all constitutional claims to follow [APA's] strictures would bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation. Because denying any judicial forum for a colorable constitutional claim presents a serious constitutional question, Congress's intent through a statute to do so must be clear. Nothing in the APA evinces such an intent. Whatever the merits of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA.

Juliana, 947 F.3d at 1167–68 (cleaned up).

Plaintiffs do not contend any single EPA action is causing their asserted injuries. They seek review of the cumulative climate pollution allowed by EPA and its systematic discrimination against Children in the process, which infringes their fundamental rights. These claims *can only be brought* under the U.S. Constitution, not the Clean Air Act. The judicial review framework Congress provided in the Clean Air Act provides for challenges to discrete agency actions and imposes in instances a 60-day statute of limitations, both of which foreclose Children from seeking redress for past, present, and ongoing cumulative harm to their constitutional rights. Congress did not preclude or displace the type of systemic claims Plaintiffs bring here directly under the Constitution and that are regularly brought to our federal courts. *See Jeremiah M. v. Crum,* No. 3:22-CV-00129, 2023 WL 6316631, at *1 (D. Alaska Sept. 28, 2023) (denying motion to dismiss in Children's case challenging structural issues in child welfare system as violative of constitutional rights).

CONCLUSION

For now, the only facts that matter are those alleged in the Complaint, considered in the light most favorable to Plaintiffs. Those facts properly allege constitutional claims for relief. In this case where Defendants do not contest the grave injuries of these Children, or EPA's role in causing these injuries, the Court has a vital duty to take jurisdiction, find the facts, wrestle with the extensive body of Children's rights law cited herein, and render declaratory judgment. With respect, these young Plaintiffs ask this Court to deny Defendants' motion to dismiss and set the case for trial.

If this Court finds facial deficiencies with Plaintiffs' standing allegations or finds the Complaint fails to state a claim in any respect, Plaintiffs respectfully request leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003); *see Foman v. Davis,* 371 U.S. 178, 182 (1962).

DATED this 8th day of April, 2024.

Respectfully submitted,
s/ Julia A. Olson

JULIA A. OLSON (CA Bar 192642)
julia@ourchildrenstrust.org
ANDREA K. RODGERS (applicant *pro hac vice*)
andrea@ourchildrenstrust.org
CATHERINE SMITH, Of Counsel
(applicant *pro hac vice*)
csmith@law.du.edu
OUR CHILDREN'S TRUST
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (CA Bar 95217)
pgregory@gregorylawgroup.com
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

PAUL L. HOFFMAN (CA Bar 71244)
hoffpaul@aol.com
UNIVERSITY OF CALIFORNIA AT IRVINE, SCHOOL OF LAW
Civil Rights Litigation Clinic
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697
Tel: (310) 717-7373

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JOHN WASHINGTON (CA Bar 315991)
jwashington@sshhzlaw.com
SCHONBRUN SEPLOW HARRIS HOFFMAN & ZELDES LLP
200 Pier Avenue #226
Hermosa Beach, CA 90254
Tel: (424) 424-0166

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs, certifies that this brief contains 12,485 words, which exceeds the 7,000 word limit of L.R. 11-6.1. Plaintiffs simultaneously filed with the Court an Ex Parte Application for an Overlength Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss of up to 12,500 words.

DATED this 8th day of April, 2024.

s/ Julia A. Olson
JULIA A. OLSON

Attorneys for Plaintiffs