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The Constitutionality of Contributing to Climate Change

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The Constitutionality of Our Government's Contributions to Climate Change

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I. Introduction

Though the issue of human-caused climate change has been upheld by science for decades, topics of its legitimacy, relevance, and repercussions are still debated heavily today. In an attempt to argue for their constitutional right to a safe and livable climate, 21 young plaintiffs have sued the federal government for its affirmative action increasing America's dependency on fossil fuels, thus exacerbating the climate crisis. The obstacles facing their case can be reduced to an argument concerning the court's jurisdiction over climate issues. This article will argue that the plaintiff's case is centered around the civil rights of children, and thus the court must use its powers of judicial review to condemn the federal government's actions and oversee a plan to remediate the plaintiffs' complaints.

The Intergovernmental Panel on Climate Change (IPCC) provides an overview of the most current science regarding climate change for governments and policy makers. Recently they published a report explaining the decreased dangers of minimizing global warming to below 1.5 degrees Celsius for post-industrial times.

The report explains that any increase in global temperature by 0.5 degrees Celsius is projected to adversely affect human health. With increases in global surface temperature, risks for diseases such

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as malaria are projected to increase, both in prevalence and in geographical range. If global warming of 2 degrees Celsius is achieved, this is expected to pose greater risks to urban areas, based on their infrastructure and proximity to coastal regions. The IPCC cites that coastal areas and island infrastructures will be negatively impacted by rising sea levels.[2] The EPA has also linked human induced climate change with a likely increase in the frequency of extreme weather events, such as heat waves or large storms. These storms displace families and destroy infrastructure, in addition to the death toll.[3]

The CDC confirms that the health effects of climate disruptions include "increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, change in prevalence and geographical distribution of food- and water-borne illnesses and other infectious diseases, and threats to mental health."[4]

As global warming increases, the risks of these consequences become greater, and some examples have already been proven today. Adverse health effects, safety threats from extreme weather, damaged property, and risk of illness are simply a few of the threats directly affecting today's youth and future generations.

II. Background

The US government's response to climate change and environmental protection is under increasing polarization, ultimately undermined by each administration's continued dependance on the fossil fuel industry. The earliest forms of environmental legislation were created and amended in the 1960s and 1970s. These include the

2 The Intergovernmental Panel on Climate Change, *Global Warming of 1.5 ºC* (2018).

3 United States Environmental Protection Agency, *Climate Change Indicators: Weather and Climate* (August 1, 2022).

4 Center for Disease Control and Prevention, *Climate Effects on Health* (April 25, 2022).

Clean Air Act, Clean Water Act, and the Endangered Species Act.[5] The EPA, a government agency devoted to curbing health risks, was also created during this time. The EPA conducts research, as well as creating and enforcing environmental regulations.[6] Yet despite this new wave of conservation legislation, every administration in the last 50 years has consciously chosen to increase America's dependence on the fossil fuel industry. Each successive administration after President Carter has had the opportunity to begin a trajectory away from fossil fuel dependency in light of new scientific findings. By the 1960s, climate models proving an increase in atmospheric CO2 were made available to the Carter Administration. The increase in atmospheric CO2 was linked to ocean warming, sea level rise, and other dangers. Despite this, the Carter Administration expanded coal leasing on federal lands under oil embargo pressures, and amended the Outer Continental Shelf Lands Act, which would assure the oil leases in this area would contribute to domestic energy production. By the end of his administration exploratory drilling, natural gas production, and coal production had reached an all-time high.

Every presidential administration since Carter has had access to alternative policy pathways to develop renewable energy and increase efficiency, and yet opted for the short-term cost-effective option. By the end of the Obama Administration fossil fuel production in the US was again at an all-time high. Although Obama was arguably more concerned about the climate than some of his predecessors, his "all of the above" energy strategy only further entrenched America's dependance of fossil fuels. This continued despite the EPA's Endangerment Finding in 2009, a declaration under the Clean Air Act professing the imminent threat of climate change. It stated that "the evidence provides compelling support for finding that greenhouse gas air pollution endangers the public welfare of both current and future generations.

5 Salvatore Cardoni, *Top 5 Pieces of Environmental Legislation* (July 1, 2010), https://abcnews.go.com/Technology/top-pieces-environmental-legislation/story?id=11067662.

6 Michelle Bachelet, Office of the United Nations High Commissioner for Human Rights: *OHCHR and Climate Change* (September 9, 2019), https://www.ohchr.org/en/climate-change.

The risk and severity of the adverse impacts on public welfare are expected to increase over time."[7]

James Speth, a federal government environmental leader who worked with each administration, concluded, "We had a series of administrations that began to take the issue of climate change seriously. And, in my view, they were Carter and Clinton and Obama. And each one of them was followed by a flamethrower that was determined to destroy the steps that had been taken. And that was Reagan, and that was George W. Bush, and that was Trump."[8]

Over the last two decades, the US has experienced its most extreme pendulum of progression and halts to environmental regulation. A lack of decisiveness within American politics has led to grid locks within legislatures. The US government's tactics against climate change are undermined by the cycle of changing administrations, with each new majority simply trying to undo the progress that the previous had achieved, either for or against climate action. The effectiveness of the government against climate change has been slowed to a pace more sedative than the rate of our warming planet.

By 2003 after heavy debates, the US withdrew from the Kyoto Protocol, an international treaty which would have placed limits on countries' greenhouse gas emissions based on individual targets. A few years later in 2009, The American Clean Energy and Security Act passed the house but was never brought to the senate, due to threats of a Republican filibuster.[9] Yet in Obama's time as president, he used his executive power to create the Climate Action Plan, which would set the first limits on carbon pollution from US power plants. When we transitioned from a liberally held executive to a conservative one in 2016, many environmental setbacks ensued. President Trump

7 James Gustave Speth, *They Knew : The US Federal Government's Fifty-Year Role in Causing the Climate Crisis* (2021).

8 James Gustave Speth, *the Yale School of the Environment: An Interview with James Speth* (September 15, 2021), https://e360.yale.edu/features/they-knew-how-the-u-s-government-helped-cause-the-climate-crisis

9 *American Clean Energy and Security Act of 2009,* H.R.2454 — 111th Congress (2009-2010).

withdrew from the Paris Agreement, an international legally binding treaty on climate change. He also replaced President Obama's Clean Power Plan[10], a decision that was challenged through lawsuits for many years after. His administration deeply weakened the Clean Air Act by imposing procedural hurdles and other requirements that limited the EPA's ability to use the most effective science to develop regulations.[11]

During this time, the extent of the Clean Air Act's jurisdiction over greenhouse gas emissions was also being challenged in the highest courts. Previous decisions were overturned in a matter of years. In the 2007 case *Massachusetts v. EPA*, the supreme court concluded that the federal government could regulate carbon emissions through the EPA under the Clean Air Act. Yet in 2022, the supreme court removed this ability in *West Virginia v. EPA*[12]. This ultimately led to a different approach to reinstate this ability through the legislature.[13]

Now that Biden has assumed the presidency, he has attempted to rejoin the Paris Agreement and pass the largest climate bill in the history of the US.[14] However, our credibility as an exemplary force

10 Natural Resources Defense Council, *What Is the Clean Power Plan?* (September 29, 2017), https://www.nrdc.org/stories/how-clean-power-plan-works-and-why-it-matters#:~:text=The%20Clean%20Power%20Plan%2C%20announced,that%27s%20driving%20dangerous%20climate%20change

11 Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, The Atlantic, March 29, 2017, https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/

12 Nives Dolsak and Aseem Prakash, *Supreme Court And Carbon Regulation: West Virginia V. EPA Requires Rethinking Climate Activism*, Forbes Magazine, July 4, 2022.

13 Karen Feldscher, *The Supreme Court curbed EPA's power to regulate carbon emissions from power plants. What comes next?*, Harvard School of Public Health (July 19, 2022) https://www.hsph.harvard.edu/news/features/the-supreme-court-curbed-epas-power-to-regulate-carbon-emissions-from-power-plants-what-comes-next/

14 Lisa Friedman, Somini Sengupta and Coral Davenport, *Biden, Calling for Action, Commits U.S. to Halving Its Climate Emissions*, The New York Times, July 8, 2021

for climate action to the rest of the international community has been desecrated by our lack of commitment. The last 20 years are a prime example of how polarization and indecision decrease the ability of the government to handle climate problems efficiently.

For these reasons, little progress in the shift towards renewable energy has been made in America, in part by the polarization of changing administrations, as well as the federal government's conscientious decision to remain dependent on fossil fuels for their convenience consistently across all administrations.

III. Proof of Claim

The federal government's polarization surrounding climate change and its affirmative action towards fossil fuels has exacerbated the climate crisis and infringed on the rights of youth in America. Juliana and 20 other youth plaintiffs sued the federal government for this reason. The case brought forth is one of civil rights, giving the court the necessary jurisdiction to intervene, by declaring the federal government's actions unconstitutional, and by overseeing a plan to remediate the plaintiffs' complaints. The scope of our constitutional rights to life, liberty, and property change with the demands of our century. Civil rights are intricately tied to a livable and safe climate, as exhibited by health risks and threats to safety linked to climate change. The urgency of the climate crisis and the vulnerability of America's youth demands an intervention from the court to restore balance to the separation of powers and hold the federal government accountable for their actions, thus encouraging them to change.

In 2015, 21 young plaintiffs filed a complaint against the federal government, asserting that its affirmative actions towards fossil fuel subsidization and subsequent contributions to climate change violate the youngest generation's constitutional rights and other public trust doctrine[15]. They argue that the government's involvement in increasing fossil fuel dependency was a conscious decision that went against not only climate experts but also our country's historically held moral value of protecting its youth. The ultimate question of

15 Youth v. Gov, a film directed by Christi Cooper, November 11, 2020.

their case is whether youth have a constitutional right to a climate that sustains life.

In their complaint, the plaintiffs first cited that their 5th and 14th amendment rights had been violated. The plaintiffs argue that the federal government has infringed on their right to life, liberty, and property. The government has knowingly caused a dangerous interference with climate systems, endangering the plaintiff's health and welfare by promoting fossil fuel development. They claim that this also violates the due process clause. The equal protection clause additionally plays a large role in this case, because the government's actions are disproportionately putting future generations at risk. Thus, the federal government is specifically discriminating against children, who have no control over their age or the environmental circumstance in which they were raised. They cannot yet consent to any government action, and are specifically vulnerable to an infringement of rights, thus requiring vigilant attention.

Secondly, plaintiffs cite the ninth amendment as the right to be sustained by America's natural systems, which includes climate. The ninth amendment assures that, although not specifically mentioned, the right to life, liberty, and property is inextricably linked to a stable climate, as shown in the recent degradation of our climate systems and consequent societal struggles. Our earth's resources are vital to our rights, a value exemplified even by America's own conservation legislation.

Lastly, the plaintiffs reiterate their right to a livable environment through the public trust doctrine, which states that the public has a right to essential natural resources including air, water, and wildlife. The federal government has a duty to refrain from infringement of these natural resources, and yet has consciously failed to do so.

The plaintiffs ask for resolution, which includes a declaratory statement condemning the federal government's actions using the court's power of judicial review. They also ask that the courts oversee a plan to remediate the plaintiffs' complaints.

The case was received with positive affirmations in its beginnings, with both Judge Thomas Coffin and Judge Ann Aiken denying motions to dismiss from the federal government and a host of fossil fuel companies who had joined. Judge Aiken issued a supportive

statement: "Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." A trial date was set as the fossil fuel industry backed out of the case.

Subsequently the case hit multiple roadblocks from the federal government, including writs of mandamus, a request to review the case before the district court's trial, and applications for stay. Finally an emergency motion was granted for the plaintiffs, and numerous amicus briefs as well as amicus curiae briefs were filed in their support.

When the evidence was presented in the Ninth Circuit Court of Appeals in 2020, the plaintiffs found that the redressability requirement of their complaint was the most difficult to convey to judges. In order for a party to sue, they must prove injury to the plaintiffs, a causation of that injury by the defendant, and redressability, or the ability of the courts to remedy the situation. The Ninth Circuit Court of Appeal's three judges all affirmed these first two requirements after reviewing the evidence, by agreeing that the federal government had indeed violated the youth's constitutional rights. Two of the three judges' main opposition thus came from the issue of standing. They argued that a remedial plan violates the courts area of jurisdiction and thus separation of powers. The remedies requested can only be executed by the executive and legislative branches, because the scope of the proposed plan is too wide for the courts to control.[16]

Moving forward, the plaintiffs are left to convince the judges that their grievances can be addressed under the jurisdiction of the courts. They will need to address their errors in requested relief, and appeal these changes to the courts, all while avoiding settlement and keeping their case relevant.

Plaintiffs need to reiterate that when the legislative and executive make gross infringements on a specific group's rights, it has been remedied through the courts before in ways that change the course of history, redefining the interpretations of the constitution to meet today's needs. The case presented today, like many in the past, is one of social injustice. Focusing this case on civil rights helps plaintiffs make connections to historical landmark civil rights cases that

16 Juliana v. U.S., 947 F.3d 1159 (9th Cir. 2020).

set new precedents to increase equality. These cases include Brown v Board of Education, in which segregation, a deeply entrenched American system, was deemed unconstitutional and the courts oversaw its remedy. Other examples include Loving v Virginia, which legalized interracial marriage, or Obergefell v Hodges, which legalized gay marriage. Roe v Wade gave women the right to an abortion through the right to privacy. Throughout our nation's history, when a group has had a grievance concerning the infringement of their rights, it has been remedied through the courts.[17]

Today, our future generations and today's youth face a specific challenge unforeseen by the writers of the constitution. Thankfully due to the living nature of the document the unalienable rights instituted by the fifth amendment are susceptible to changes in interpretation, and receptive to changes in scope with the demands of the century. The harm instigated by the federal government against the rights of these children has already been confirmed in plentiful court statements. It is within the court's jurisdiction to remedy the situation given the urgency of our time, the vulnerability of the youth, and our constitutional rights that mold with time's progression. There is a need for accountability of the federal government's actions and a change in their future behaviors. The court must be the avenue through which this is accomplished. The legislative and executive branches have exerted large amounts of power in their actions towards the climate, and thus the court's intervention is not an attack on separation of power, but a restorative keystone in the balance of them.

As of today, Plaintiffs are grappling with two options, the first being a proposed congressional resolution that meets the demands of their original suit. The resolution was reintroduced in 2021 by members of Congress. It acknowledges that the current climate crisis disproportionally affects the rights of future generations and demands that the US develop a just climate recovery plan to reduce emissions.

The second option is to continue working with the Biden Administration and the Department of Justice to amend their complaint, ultimately seeking a condemnation of the US national energy institution

17 Julia Rosen, *Is it our constitutional right to live in a world safe from climate change?*, Los Angeles Times, June 3, 2019.

as unconstitutional. In 2021 the plaintiffs and the Department of Justice attempted to settle, but the meeting ended without a resolution. With settlement distant on the horizon, the Biden Administration has the option to soften the Department of Justices' approach to the case, which would be in line with the administration's own position on climate change. The administration can work with the plaintiffs to recognize that a declaration of rights is within the courts' jurisdiction, and then settle the case by committing to climate remedies, which the Department of Justice has broad discretion over.[18]

Youth are also suing their state governments for similar grievances caused by the state's promotion of fossil fuels. In 2022 seven of Utah's youth filed a constitutional climate lawsuit against their state. They argued that Utah was infringing on their constitutional rights to life, health, and safety through its policies to maximize, promote, and systematically authorize the development of fossil fuels. They claim that Utah legislators knew of the dangers linked to fossil fuel use, such as poor air quality or climate crisis impacts, which would affect younger generations, yet still took affirmative action to increase fossil fuels influence.

Soon after the youth plaintiffs' filing, the state filed a motion to dismiss on May 6th, 2022. The state cited that the court should dismiss the plaintiffs' claims because of the political question doctrine, which prevents the Court from overstepping its authority by creating climate change and fossil fuel policy. The state argued that the court cannot extend the substantive due process doctrine into areas where it has not previously been applied, such as policy for global climate change and fossil fuel policy. They additionally argued that the plaintiffs' requested relief cannot effectively resolve the alleged harm that has been done to them.

On June 10, 2022 attorneys for the youth plaintiffs filed their response to the motion to dismiss, contending that there is no exception in Utah's due process clause for fossil fuel policy. They reiterated that a declaratory judgment would be meaningful plaintiff relief. This entails a condemnation of specific policies that the state has adopted that disagree with Utah's constitution. They assert their right

18 Juliana v. U.S., 947 F.3d

to a day in court because they have gathered evidence for a violation of rights under Utah's constitution. The plaintiffs appeared in court on November 4, 2022 to give their oral arguments.[19]

On November 9, 2022 the Judge granted the state's motion to dismiss, and the plaintiffs began preparing an appeal. The judge noted that the "plaintiffs have a valid concern", but that the issues of political question doctrine, redressability, and substantive due process led to his decision.

Today the plaintiffs are preparing an appeal with the senior staff attorney at *Our Children's Trust*. He emphatically contests Judge Faust, arguing that the state of Utah cannot substantially reduce the lifespan of Utah's children without violating their constitutional right to life. He claims that the Court's ruling has silenced the children's claims and is thus not serving its role as a check on the other political branches.

Again, this case is an issue of human rights, and thus this article argues that the courts have the jurisdiction to intervene. In this instance, the courts need only use their power of judicial review to make a declaratory statement condemning the Utah government's actions, creating a state level recognition of the plaintiffs right to a livable climate. This would restore balance to the separation of powers by giving the children a voice in court.

IV. Conclusion

Issues of our right to a livable climate have been confirmed in federal courts and are seeking confirmation in lower state courts. This is the first step in the process for relief of the grievances set forth by youth plaintiffs. An acknowledgement of children's rights and a condemnation of government action are substantive steps towards holding the federal government accountable and restoring balance to the separation of powers. The federal government has proven ineffectual at sufficiently addressing climate change. The courts have the jurisdiction to intervene according to the civil rights of vulnerable youth and the urgency of the climate crisis. They must hold

19 Natalie R. v. State of Utah, No. 220901658, (D. Utah 2022).

the federal government accountable by overseeing a plan to address climate change to prevent another fifty years of indecision and an increasing dependency on fossil fuels for their convenience.