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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **BARACK OBAMA**, in his official capacity as President of the United States; et al.,

Federal Defendants.

Case No.: 6:15-cv-01517-TC

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

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AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

I. IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States ("LWVUS") is a grassroots, nonpartisan, nonprofit organization that encourages informed, active, and inclusive participation in government in order to promote political responsibility and to better serve the democratic interests and principles of *all* peoples of the United States, including underrepresented groups. LWVUS's primary focus and activities consist of: (1) protecting voters by ensuring that *all* voters – particularly those from traditionally underserved or underrepresented demographics, including young adults, new citizens, and minorities – have the opportunity and information to exercise their vote; (2) educating and engaging voters by assisting and encouraging voter registration, education with respect to candidates and their positions, and voter turnout; (3) reforming the influence of money in politics through reclaiming our nation's campaign finance system in order to increase governmental transparency, combat corruption, and maximize citizen participation in the political process; and (4) protecting the environment by supporting legislation that seeks to protect our country from the physical, economic, and public health effects of climate change while providing pathways to economic prosperity. LWVUS's believes that climate change is the greatest environmental challenge of our generation and that averting the damaging effects of climate change requires actions from both individuals and governments at local, state, national, and international levels. In raising awareness and advocating for solutions

[1] The Federal Defendants take no position on whether *amici curiae* should be allowed to participate in this case. The Intervenor-Defendants likewise take no position on whether *amici curiae* should be allowed to participate in this case. Plaintiffs consent. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any monetary contribution.

to climate change and its impacts, LWVUS supports legislative solutions and strong executive branch action, and works to build grassroots support for action on climate change nationally and at the state and local levels to avoid irrevocable damage to our planet.

The League of Women Voters of Oregon ("LWVOR") is also a grassroots, nonpartisan, nonprofit organization. LWVOR shares LWVUS's primary mission and focus of ensuring effective representative government through voter registration, education, and mobilization and works to ensure that the voices and interests of all individuals, particularly those underrepresented in government, are spoken and accounted for in political decision-making. Additionally, like LWVUS, LWVOR works to advocate for sound environmental policy. Since the 1950s, LWVOR has been at the forefront of efforts to protect air, land, and water resources. LWVOR's members work to preserve the physical, chemical, and biological integrity of the ecosystem, with maximum protection of public health and environment. LWVOR's Social Policy directs members to secure equal rights and equal opportunity for all as well as promote social and economic justice and the health and safety of all Americans. Additionally, LWVOR's position on climate change is that global climate change is one of the most serous threats to the environment, health, and economy of our nation. Recent scientific studies show that global warming is already causing environmental changes that will have significant global economic and social impacts.

Focused as they are on engaging citizens to participate in the democratic process to ensure that the interests of *all* Americans are represented in a transparent, participatory, and politically accountable government, and respecting the proper role of each branch of government, *amici* direct their limited efforts at effectuating change primarily through the

legislative and executive branches. However, where appropriate in certain limited circumstances, *amici* recognize that judicial involvement is necessary to safeguard the fundamental rights of underrepresented individuals when the other branches have failed them. In such limited circumstances, *amici* participate in litigation in order to see that the interests of representative democracy are served. To that end, *amici* have occasionally, but sparingly, joined in suits or filed amicus briefs in cases, primarily with respect to disputes in which the voting rights of individuals have been infringed[2], but *also* in similar cases, such as this one, in which other fundamental rights of underrepresented groups have been adversely impacted.[3]

Amici file this brief in support of the Youth Plaintiffs in this case to emphasize that Youth Plaintiffs' claims do not implicate the political question doctrine and, accordingly, it is the constitutional duty of the judiciary to exercise its jurisdiction over this case. It is the role of the courts, in keeping with the separation of powers, to serve as a check and balance to the legislative and executive branches, particularly when their actions, as here, have infringed upon the fundamental rights of individuals.

II. SUMMARY OF ARGUMENT

In the foundational U.S. Supreme Court case of *Marbury v. Madison*, Chief Justice

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[2] *See, e.g.,* Brief of Amici Curiae Common Cause, League of Women Voters of the United States and Project Vote, Inc., In Support of Appellants, *Ohio A. Philip Randolph Institute, et al. v. Husted*, No. 16-3746 (6th Cir.) (Appeal regarding Ohio's removal of voters from voter roles under National Voter Registration Act) *available at* http://lwv.org/files/Filed%20Amici%20Curiae%20Brief%20-%20Common%20Cause%2C%20LWV%2C%20Project%20Vote.pdf; *League of Women Voters v. Newby*, No. 16-236 (RJL) (D.D.C. June 29, 2016) (Challenge to HB 589 as voter suppression bill); and *League of Women Voters of the United States v. Fields*, 352 F.Supp. 1053 (E.D. Ill. 1972) (Challenge to discrimination in voter registration practices).

[3] *See* Brief of League of Women Voters of Oregon, et al., as Amici Curiae in Support of Plaintiffs-Appellants, *Chernaik v. Brown*, No. A159826 (Or. Ct. App.) (Mar. 3, 2016).

Marshall wrote that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[4] This general principle applies notwithstanding the political question doctrine, a narrow canon of justiciability, rooted in the separation of governmental powers and the duty of each branch to serve as a check and balance on coordinate branches.[5] Where the legislative and executive branches have, as here, failed to protect the fundamental liberties of citizens, and have, as here, actively infringed upon those rights, the very separation of powers concerns on which the political question doctrine is based mandate that the judiciary fulfill its role to serve as a check and balance to protect the rights of individuals.[6]

The political question doctrine holds that unless one of the following factors is "*inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence": (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing the lack of respect due coordinate branches of government"; (5) "an unusual need for unquestioning

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[4] 5 U.S. (1 Cranch) 137, 163 (1803).
[5] *Baker v. Carr*, 369 U.S. 186, 217 (1962) (The political question doctrine is "essentially a function of separation of powers.").
[6] *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty."); *Nat'l Labor Relations Board v. Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, A., concurring) (Explaining that the separation of powers exists to safeguard individual liberties and that "policing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court.") (internal quotations and citations omitted).

adherence to a political decision already made"; or (6) the potential of embarrassment from multifarious pronouncements by various departments on one question."[7] As explained below, none of these concerns is present in Youth Plaintiffs' case.[8] Youth Plaintiffs simply call upon this Court to exercise its paramount authority under the Constitution to decide claims of infringement of individual rights.[9] The exercise of this duty is especially necessary in light of the latest and best available science regarding the current and projected impacts of climate change.

III. ARGUMENT

A. Introduction

The climate crisis threatens the very survival of future civilization, with increasingly severe impacts projected to befall youth and future generations in a progressively pronounced manner. Like disenfranchised plaintiffs in voting rights cases, those who stand to be most severely impacted by climate change – youth and posterity – cannot adequately assert their interests through the system of representative government. Despite government knowledge of the dangers of climate change dating back more than fifty years, the legislative and executive branches have failed to take appropriate action to protect the rights of youth and future generations from infringements associated with climate change. Quite the opposite, the

[7] *Baker*, 369 U.S. at 217 (emphasis added).
[8] The Federal Defendants have not argued that Youth Plaintiffs' claims implicate a poltical question. Intervenor-Defendants' political question arguments focus on formulations 1, 2, and 4 (*See* Memorandum In Support of Intervenor-Defendants' Motion to Dismiss, Dkt. 20, 11-16 (Int. MTD); Reply In Support of Intervenor-Defendants' Motion to Dismiss, Dkt. 59, 10-14 (Int. Rep.); and Intervenor-Defendants' to Magistrate's Findings and Recommendations, Dkt. 73, 21-28). Accordingly, amici focus their analysis on those factors.
[9] *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.")

legislative and executive branches have actively and knowingly exacerbated the dangers of climate change and its effects on the fundamental rights of youth and posterity by permitting, encouraging, and enabling the continued exploitation, production, and combustion of fossil fuels. Where the legislative and executive branches have placed in peril the fundamental rights of individuals who are unable to protect their own interests through representational government, as here, it is the duty of the judicial branch to exercise its constitutional mandate and authority to exercise its jurisdiction.[10]

B. The History of the Political Question Doctrine

The Supreme Court first delineated a narrow and clear conception of the political question doctrine in *Marbury v. Madison*.[11] The Court articulated a clear delineation of circumstances in which a case presents a nonjusticiable political question: "By the Constitution of the United States, the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable to his country only in his political character, and to his own conscience…. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive…."[12] The Court made clear that "[t]he province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are by the

[10] *Bowsher*, 478 U.S. at 721 ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty."); *Marbury*, 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").
[11] 5 U.S. (1 Cranch) at 163.
[12] *Id.* at 165-66.

Constitution and laws, submitted to the executive, can never be made in this Court."[13] By contrasting purely political matters constitutionally delegated to executive discretion with individual rights dependant on legal duties, Chief Justice Marshall established under *Marbury* that questions in which individual rights are at issue could never be political questions, while those involving purely discretionary political acts might.[14] Under *Marbury*, "[i]f a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question."[15] Magistrate Judge Coffin used this precise language in his Order and Findings & Recommendations, finding that this case does not present a political question.[16]

After the pronouncement of the test enunciated in *Marbury* delineating political questions from those involving the vindication of *individual* rights, in subsequent cases, the Court found nonjusticiable political questions in a series of challenges involving the Guarantee Clause.[17] One commentator has characterized at least one of these cases as finding a nonjusticiable political question "when individual rights [were] implicated."[18] However, it is noteworthy that the

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[13] *Id.* at 170.
[14] *Id.*
[15] Erwin Chemerinsky, *Federal Jurisdiction*, § 2.6 n.7 (5th ed. 2007) (quoting Howard Fink & Mark Tushnet, *Federal Jurisdicition: Policy and Practice* 231 (2d ed. 1987)).
[16] *See* Order and Findings & Recommendation, Dkt. 68, 13 (citations ommitted) (Order and Findings).
[17] *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *Taylor & Marshall v. Beckham*, 178 U.S. 548 (1900); *State of Georgia v. Stanton*, 73 U.S. 50 (1867); *but see New York v. United States*, 505 U.S. 144, 185 (1992) ("More recently, the Court has suggested that not all claims under the Guarantee Clause present nonjusticiable political questions. Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.")(citations omitted); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable.").
[18] *See* Jared P. Cole, Cong. Research Serv., R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, 4 (December 23, 2014) (citing only *Luther v. Borden*, 48 U.S. 1(1849) (underlying right asserted under Guarantee Clause).

Guarantee Clause's text expressly states that "[t]he United States shall guarantee to every *State* in this Union a Republican form of government…"[19] In contrast, Youth Plaintiffs' claims arise from violations of the Fifth, Ninth, and Fourteenth (as applicable to the Federal Government through the Due Process Clause of the Fifth) Amendments, and the public trust doctrine[20], the provisions and mandates of which apply to the benefit of "person[s]"[21] and "people,"[22] respectively.

Notwithstanding the express language of the Guarantee Clause to the benefit of "every

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[19] U.S. Const. art. IV. § 4.

[20] Ample authority exists supporting the existence of public trust rights as fundamental rights arising under the Constitution. Magistrate Judge Coffin's Order recognized that "the court should decline to dismiss any notions that the Due Process Clause provides a substantive right under the public trust doctrine." Order and Findings at 15. *See, e.g.,* Charles Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 459 (1989) (Commerce Clause); Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 311 (2010) (Tenth Amendment); Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA,* 4:2 WAKE FOREST J. L. & POL'Y 281, 290, 293, 294 (2014) (Vesting Clause, Preamble, Equal Protection Clause, and Due Process Clause of Fifth Amendment); George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006) (Ninth Amendment); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849 (2001) (Reserved Powers Doctrine and Ninth Amendment); *see also, Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 928, 947-48 (Pa. 2013) (Holding that the public trust doctrine is "inherent in…and preserved rather than created by the Pennsylvania Consititution" and that the political question doctrine does not prevent adjucidation of public trust claims.).

[21] U.S. Const. amend. V ("[N]or shall and *person*…be deprived of life, liberty, or property without due process of law." (emphasis added); U.S. Const. amend. XIV ("[N]or shall any state…deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added).

[22] U.S. Const. amend. IX ("The enumeration in the Constituiton of certain rights shall not be construed to deny or disparage other retained by the *people*.") (emphasis added); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 449 (1892) (The title under which sovereign's hold public trust resources "is a title held in trust for the *people*...") (emphasis added); *Light v. U.S.*, 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the *people* of the whole country.") (emphasis added); *U.S. v. Trinidad Coal*, 137 U.S. 160, 170 (1890) (finding that public lands are "held in trust for all the *people*") (emphasis added).

State" rather than to individuals, the citations by *Luther* and its progeny to *Marbury* without apparent adherence to Justice Marshall's distinction between political questions and individual rights appeared to cause confusion.[23] This confusion is most evident in *Pacific States Telephone & Telegraph Co. v. Oregon*, in which the Court dismissed Due Process, Equal Protection, and Guarantee Clause claims as presenting a political question without reference to the test announced in *Marbury*.[24] However, the Court's plain language in *Pacific States* explains that the defendant company had not contended "that there was anything inhering in the [challenged] tax or involved intrinsically in the law which violated any of its constitutional rights," but rather, that the claims of infringement of individual rights were mere variations on its arguments under the Guarantee Clause.[25] "If such questions [of individual rights] had been raised," the Court stated, "they would have been justiciable, and therefore would have *required* the calling into operation of judicial power."[26] The Court further noted that the individual due process and equal protection rights had been asserted "not for the purpose of testing judicially some exercise of power assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it

[23] *See Comer v. Murphy Oil USA*, 585 F.3d 855, 871 (5th Cir. 2009) ("The Court's citation to *Marbury* in those cases, without explaining why Chief Justice Marshall's theory was not strictly adhered to, caused confusion.")
[24] 223 U.S. 118 (1912).
[25] *Id.* at 136-37, 150 ("The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution").
[26] *Id.* (emphasis added).

establish its right to exist as a State, republican in form."[27]

Attempting to dispel the apparent confusion, the Court developed the modern encapsulation of the political question doctrine in the 1962 case of *Baker v. Carr*, in which Baker and other plaintiffs alleged that the Tennessee Secretary of State, Joe Carr, had violated their equal protection rights under the Fourteenth Amendment by failing to reapportion legislative districts in response to significant population migrations.[28] The *Baker* plaintiffs alleged that the malapportionment scheme had resulted in a "debasement of their votes" and accompanying diminishment of their voice in representational government.[29] The Court distinguished the plaintiffs' claims in *Baker* from those arising under the Guarantee Clause in *Luther* and its progeny, determining that the case was justiciable.[30] In doing so, the Court further distinguished the Due Process and Equal Protection claims deemed to constitute political questions in *Pacific States* as alleged "merely in verbal aid of issues which…entailed political questions," namely, resolution of a Guarantee Clause claim.[31] The Court went on to distinguish *Pacific States* from cases in which individual rights claims had been properly asserted as distinct from Guarantee Clause claims in the same suits:

> *Pacific States* may be compared with cases such as *Mountain Timber Co. v. Washington,* 243 U. S. 219 [(1917)], wherein the Court refused to consider whether a workmen's compensation act violated the Guaranty Clause but considered at length, and rejected, due process and equal protection arguments advanced against it, and *O'Neill v. Leamer,* 239 U.S. 244 [(1915)] wherein the Court refused to consider whether Nebraska's delegation of power to form drainage districts violated the Guaranty Clause, but went on to consider and reject the contention that the action against which an injunction was sought was not a

[27] *Id.* at 150-151.
[28] 369 U.S. 186 (1962).
[29] *Id.*
[30] *Id.* at 217-230.
[31] *Id.* at 228.

taking for a public purpose.[32]

Accordingly, *Baker* did not abandon *Marbury*'s delineation between political questions and claims implicating individual rights, but rather suggests that bona fide disputes claiming infringement of individual rights enshrined in the Constitution will not ordinarily present political questions.[33] "Consequently, the Court should be exceedingly reluctant to find an individual rights claim to be nonjusticiable, even though it may concern 'politics,' the political process, or the internal workings of the political branches."[34] A "question of constitutional construction concerning the most fundamental right[s]" does not implicate the political question doctrine.[35]

In ruling that the *Baker* plaintiffs' equal protection claims were justiciable, Justice Brennan articulated the modern test for whether a claim presents a nonjusticiable political question:

Prominent on the surface of any case held to present a political question is found

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[32] *Id.*

[33] *See, e.g.,* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1468 (2005) ("Removing questions of individual rights from the judiciarys realm [is] something that would (and should) occur very infrequently."; "The necessity of vindicating consitutionally secured personal liberties is the principal justification for the awesome…power that judicial review confers upon the federal judiciary.")

[34] *Id.* at 1469.

[35] *Kucini v. Forbes*, 432 F.Supp. 1101, 1109 (N.D. Ohio 1977) ("Further, this case does not revolve around a 'political question' as that term is used in *Baker v. Carr* but rather a question for which federal courts have been the final arbitrator throughout the existence of the United States; the interpretation of the United States Constitution. Here the court is asked to determine whether the plaintiff's right to freedom of speech has been violated by the defendants. This is not a 'political question', but a question of constitutional construction concerning the most fundamental right enjoyed by Americans, the right to freedom of speech.")(citations omitted); *see also Kurtz v. Baker*, 829 F.2d 1133, 1149 (D.C. Cir. 1987) (R. Ginsburg, J., concurring) (Even "Congress' Rules and their implementation 'may not . . . ignore constitutional restraints or violate fundamental rights,' and on that score—and that score only—they are subject to judicial review." (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

> [:(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potential for embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for nonjusticiability on the grounds of a political question's presence.[36]

Baker and subsequent precedent establish that the political question doctrine remains under this test an exception to the exercise of judicial jurisdiction that is of narrow applicability. Determinations must be made by a searching inquiry on a case-by-case basis.[37] Indeed, in the over fifty years since *Baker,* the Supreme Court has dismissed only two cases as presenting nonjusticiable political questions.[38] As the Court noted in *Baker*, simply because a case implicates significant and entrenched political issues does not make it a case involving a "political question."[39] The "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"[40] Courts adjudicate cases with significant political overtones on a regular basis. For

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[36] *Baker*, 369 U.S. at 217.
[37] *Id.* at 211.
[38] *See Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Nixon v. United States*, 506 U.S. 224 (1993).
[39] *Baker*, 369 U.S. at 217; *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) (quoting *INS v. Chadha*, 462 U.S. 919, 942-43 (1983)) ("[W]hile the controversy may be termed 'political,' the 'presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.")).
[40] *Zivotofsky*, 132 S. Ct. at 1427 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (the political question doctrine is "a narrow exception to that rule").

example, the Supreme Court upheld a subpoena directed at the President of the United States[41] and even adjudicated the legitimacy of a presidential election without so much as a mention of the political question doctrine.[42] That Youth Plaintiffs' claims, rooted in fundamental rights guaranteed by the Constitution, touch upon divisive political issues, is of no moment here: "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking."[43] "Traditionally…it is established practice for [the] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution …."[44]

In fact, the very basis of the political question doctrine, rooted as it is in the separation of powers, establishes the justiciability of this case. In *Baker v. Carr*, Justice Brennan made clear that the political question doctrine is "essentially a function of separation of powers."[45] A pronouncement of equal clarity from the Supreme Court came in *Bowsher v. Synar*, in which the Court stated that "the declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty."[46] As a check on the legislative and executive branches, "[i]t is emphatically the province and duty of the judicial department to say what the law is"[47] in the course of "policing the enduring structure of constitutional government when the political branches fail to do so."[48] Where the other branches have infinged upon the

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[41] *United States v. Nixon*, 418 U.S. 683 (1974).
[42] *Bush v. Gore*, 531 U.S. 98 (2000).
[43] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (citing *Schuette v. BAMN*, 572 U.S. ___, slip op. at 17 (2014)).
[44] *Davis v. Passman*, 442 U.S. 228, 242 (1979) (internal citations omitted).
[45] 369 U.S. at 217.
[46] 478 U.S. at 721.
[47] *Marbury*, 5 U.S. (1 Cranch) at 177.
[48] *Nat'l Labor Relations Board v. Canning*, 134 S. Ct. at 2593 (Scalia, A., concurring).

rights of individuals, the exercise of this duty does not present a "'political question', but a question of constitutional construction concerning the most fundamental right[s] enjoyed by Americans…."[49]

That the Court seized upon the factual circumstances of *Baker* to announce the modern test for determining the presence of a political question, and found the plaintiffs' equal protection claims in that case justiciable, is illustrative of the importance and justiciability of Youth Plaintiffs' claims here. The *Baker* plaintiffs' equal protection claims, like those in other malapportionment cases[50], were rooted in a "debasement of their votes" and an accompanying diminishment of their voice in representational government.[51] Cases touching upon equal protection principles with respect to voting rights are particularly suitable for judicial review as the right to vote is "a fundamental political right, because [it is] preservative of all rights."[52] As Youth Plaintiff's have aptly noted: "The underlying constitutional violation in malapportionment cases shares a commonality with Plaintiffs' claims here: both involve harms that are significantly difficult to redress through the normal political process, and both present questions of fundamental preservative rights, essential in a free and democratic society."[53] Plaintiffs in voting rights cases must rely on the courts for redress because, by the nature of their claims, they cannot

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[49] *Kucini*, 432 F.Supp. at 1109; *see also* Torres & Bellinger, note 20, *supra*, at 297-300 (The political question doctrine does not apply to public trust claims because, among other reasons, the determination of public trust rights "is nothing more than the vindication of a constitutional right," and "[w]here courts examine doctrines that exist to serve later generations, the political question doctrine simply does not apply in the same way it would in other contexts.") (citations omitted).
[50] *See, e.g., Reynolds*, 377 U.S. 533.
[51] 369 U.S. at 186.
[52] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[53] Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss, Dkt. 56, 27.

effectively preserve their fundamental rights through the political process. Youth Plaintiffs share that characteristic. Youth Plaintiffs, whose fundamental rights arising under the Fifth, Ninth, and Fourteenth (as applicable to the Federal Government through the Due Process Clause of the Fifth) Amendments, and the public trust doctrine, have been and are being infringed by the Federal Defendants' historical and continuing creation and exacerbation of a dangerous climate system, cannot rely on the normal representational political process to safeguard their fundamental rights; their only redress is through the judiciary.[54] If this Court declines to exercise its constitutional mandate to assert jurisdiction over Youth Plaintiffs' claims and "preserve the right of every individual to claim the protection of the laws, whenever he receives an injury,"[55] Youth Plaintiffs will have lost the constitutionally protected right to preserve their liberties since, by the time they are able to participate in the political process to preserve their rights, the stable climate system on which their rights depend will have already sustained irreparable damage. Indeed, those rights have already been violated by the dangerous climactic conditions created and exacerbated by the Federal Defendants. Youth Plaintiffs' claims, like those of plaintiffs in malapportionment cases, do not implicate the political question doctrine. Rather, the very nature of the fundamental constitutional rights at issue in this case, by the separation of powers principles underlying the political question doctrine, calls upon this Court to fulfill its constitutional duty to serve as a check and balance to the other branches and safeguard the rights of Youth Plaintiffs.

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[54] Jesse H. Choper, note 33 *supra*, at 1468-69 ("This distinction" between fundamental individual rights and claims presenting political questions "exists because, where personal rights of underrepresented interests are at stake, it cannot often be assumed that the majoritarian political process can produce a trustworthy result.")

[55] *Marbury*, 5 U.S. (1 Cranch) at 163.

B. This Case Does Not Implicate A Political Question Under the *Baker* Factors

Under *Baker v. Carr*, unless one of the following considerations is "*inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence": (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing the lack of respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) the potential of embarrassment from multifarious pronouncements by various departments on one question."[56] As explained below, these concerns are not present in Youth Plaintiffs' case.[57]

1. The First *Baker* Formulation

Under the first *Baker* formulation, a court should dismiss a claim as presenting a nonjusticiable political question if there has been "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[58] This is the *Baker* formulation that, if present, counsels most strongly in favor of nonjusticiability: "Although the Supreme Court has identified these six separate contexts in which the political question doctrine applies, '[b]ecause the nonjusticiability of political questions is primarily a function of the constitutional

[56] *Baker*, 369 U.S. at 217 (emphasis added).
[57] The Federal Defendants have not argued that Youth Plaintiffs' claims implicate a political question. Intervenor-Defendants' political question arguments focus on formulations 1, 2, and 4 (*See* note 8, *supra*) and accordingly, *amici* focus their analysis on those factors
[58] *Baker*, 369 U.S. at 217.

separation of powers the dominant consideration in any political question inquiry is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.'"[59]

The Intervenor-Defendants have argued that the first *Baker* formulation is implicated here because: "The Constitution by its terms commits legislative power—in particular, authority '"To regulate Commerce'"—to Congress, U.S. Const. art. I, §§ 1, 8, and executive power to the President, *see* U.S. Const. art. II, § 1."[60] However, neither of these Constitutional provisions vests unchecked authority over these fields to Congress or the President, respectively, such that they may exercise their authority in a manner that infringes upon individuals' constitutional rights.[61] "[A] federal court may decide a matter that merely implicates a matter within the authority of a political branch. For example, Congress alone has the authority to pass legislation, but the courts have authority to assess the constitutionality of a statute that has been properly challenged."[62] Indeed, it is clear that "the Commerce Clause is not a political question wholly committed to congressional discretion…."[63] Stated otherwise: "[T]he assignment of power to Congress to regulate interstate commerce or to provide for the general welfare, may be exercised only within the constraints of other constitutional provisions."[64] This principle is equally

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[59] *Republic of Colombia v. Diageo North America Inc.*, 531 F.Supp. 2d 365, 417 (E.D.N.Y. 2007) (quoting *767 Third Avenue Assocs. v. Consulate Gen., of Socialist Fed. Rep, of Yugoslavia*, 218 F.3d 152, 160 (2d Cir.2000)).
[60] Int. MTD at 12.
[61] *See, e.g., Murphy Oil USA*, 585 F.3d at 874 ("[F]ederal courts may not decide an issue whose resolution is committed by the Constitution to the *exclusive* authority of a political branch of government…") (citations omitted).
[62] *Id.*
[63] *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (no pin cite available)
[64] *Nixon v. United States,* 938 F.2d 239, 256 (D.C. Cir. 1991), *aff'd* 506 U.S. 224 (1993).

applicable to the President and agencies within the executive branch.[65]

The Intervenor-Defendants claim that the relief requested by Youth Plaintiffs requires the court to impermissibly engage in activities in which a textually demonstrable constitutional commitment has been made to other branches because "[t]he complaint asks this Court to direct agencies of the Executive Branch—as well as the President—to promulgate specific regulations to achieve a particular goal."[66] However, nothing in Youth Plaintiffs' prayer for relief requests of or requires this Court to issue such a ruling requiring "specific regulations"; it merely asks this Court to issue declaratory and injunctive relief appropriate to remedy the infringement of Youth Plaintiffs' fundamental rights alleged. The particular methods, intricacies, and responsibilities for remedying such infringements can be properly left to Federal Defendants to develop and implement, subject to this Court's oversight and approval to ensure that the proposed remedy provides adequate redress under the legal theories claimed. Additionally, to the extent that this Court finds that the discrete affirmative actions of Federal Defendants have violated Youth Plaintiffs' rights, it is within this Court's power to enjoin such actions. Moreover, the Intervenor-Defendants' contention that this Court is without authority to order an agency to engage in rulemaking is incorrect. Though it is not the province of this Court to mandate the exact specificity of such regulations, as Magistrate Coffin notes, "courts can order agencies" delegated authority "to craft regulations" by Congress "to engage in such process" and to order

[65] *See Elrod v. Burns*, 427 U.S. 347, 352 (1976) ("[T]here can be no impairment of executive power," implicating separation of powers concerns and the political question doctrine "whether at the state or federal level, where actions pursuant to that power are impermissible under the Constitution.").

[66] Reply In Support of Intervenor-Defendants' Motion to Dismiss, Dkt. 59, 12; Intervenor-Defendants' Objections to Magistrate's Findings and Recommendation, Dkt. 73, 22 (Int. Objections).

them to "address constitutional violations by government agencies and provide equitable relief."[67] Resolution of Youth Plaintiffs' claims does not require this Court to engage in activities committed to coordinate branches and it should not be dismissed on that basis. The principle of separation of powers mandates that the judiciary exercise its duty and authority under Article III to serve as a check and balance to Congress' legislative and the President's and agencies' executive powers where they are exercised to infringe the rights of individuals. As the Supreme Court recently stated, "the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[68] "Thus, when the rights of persons are violated, the Constitution requires redress by the Courts, notwithstanding the more general value of democratic decisionmaking."[69]

2. The Second *Baker* Formulation

Under the second *Baker* formulation, a case presents a political question if there exists a "lack of judicially discoverable and manageable standards for resolving it."[70] Under the law of the Ninth Circuit, "the crux of this inquiry is…not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate…claims in a reasoned manner."[71] The Intervenor-Defendants assert that a lack of discoverable and manageable standards is present because this Court would need "to resolve the scientific likelihood of the

[67] Order & Findings at 13.
[68] *Obergefell v. Hodges*, 135 S. Ct. at 2605 (citation and quotations omitted).
[69] *Id.*
[70] *Baker*, 369 U.S. at 217.
[71] *Alperin v. Vatican Bank*, 410 F.3d 532, 552, 55 (9th Cir. 2005).

various risks of climate change, and their likely impact on the Nation."[72] However, courts engage in deciding complex scientific issues regularly and have readily available standards for resolving them through the use and aid of expert witnesses with scientific expertise in various disciplines. The *Daubert* standard of qualification of expert witnesses serves as a ready and manageable standard to this effect.[73] Courts may also employ the aid of scientific special masters. As Justice Breyer has acknowledged:

> The Supreme Court has…decided basic questions of human liberty, the resolution of which demanded an understanding of scientific matters….Scientific issues permeate the law…. Courts review the reasonableness of administrative agency conclusions about the safety of a drug, the risks attending nuclear waste disposal, the leakage potential of a toxic waste dump, or the risks to wildlife associated with the building of a dam. Patent law cases can turn almost entirely on an understanding of the underlying technical or scientific subject matter. And, of course, tort law often requires difficult determinations about the risk of death or injury associated with exposure to a chemical ingredient of a pesticide or other product…. [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm.[74]

That climate change poses complex scientific issues does not make this case one in which manageable standards are unavailable. Like other cases involving complex science, scientific experts are available to aid the court in its determinations.

Intervenor-Defendants also claim that this Court lacks "judicially discoverable and manageable standards" to decide this case, because, as they claim, in order to do so, this Court must "weigh the risks [of climate change] against the possible benefits of emissions-producing activities (in the past and future) and associated reduction measures and then make a comparative judgment to determine which industries, sectors, and nations should have been required, and

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[72] Int. Obections at 24.
[73] *Daubert v. Merril Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993).
[74] Breyer, Stephen, J., "Science in the Courtroom," *Issues in Science and Technology* 16, no. 4 (Summer 2000).

should now be required, to reduce their emissions and by how much."[75] However, this Court has judicially discoverable and manageable standards readily at its disposal to decide Youth Plaintiffs' substantive due process and public trust claims and the standards applicable to those claims do not require this Court to "weigh the risks" of climate change against any purported benefits of "emissions-producing activities." The test applicable to due process claims in which, after placing a claimant in a position of danger, or enhancing such danger, government actions or omissions deprive a claimant of life, liberty, or property, is whether the government has acted with "deliberate indifference."[76] Courts do not engage in a balancing of interests where circumstances constituting deliberate indifference on the part of government actors have deprived a claimant of due process rights.[77] Similarly, violations of the public trust doctrine are analyzed according to whether the alleged violation has caused a "substantial impairment" to trust resources and the interests of trust beneficiaries in such resources.[78] Likewise, in deciding whether government action has effected a "substantial impairment" of trust resources or interests, courts do not balance the interests of trust beneficiaries in such resources against the alleged justifications for such impairment.[79]

Likewise, judicially manageable standards are readily available to decide Youth Plaintiffs' equal protection claims, namely the strict scrutiny test applied in claims in which government action is based on a suspect classification or infringes the fundamental rights of a

[75] Int. Obections at 24.
[76] *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).
[77] *Penilla*, 115 F.3d 707; *Wood*, 879 F.2d 583.
[78] *Ill. Central*, 146 U.S. at 435, 452, 453.
[79] *Id.*

particular class.[80] Strict scrutiny requires courts to determine whether the challenged governmental activity is "narrowly tailored to serve a compelling governmental interest."[81] In applying this test, courts are certainly called to take into account the interests asserted by the government in justification of its actions, such as, here, the interest in "the possible benefits of emissions-producing activities"[82] but should conduct a searching inquiry into the factual justifications for their alleged effectiveness[83], mindful of such considerations as, here, the economic costs of climate change and the economic benefits and potential for job creation made possible by a transition to an economy focused on clean and sustainable sources of energy.

As the *Baker* Court stated, "[j]udicial standards under the Equal Protection Clause are well developed and familiar." This Court has judicially discoverable and manageable standards at its disposal to adjudicate all of Youth Plaintiff's claims. Accordingly, dismissal under the political question doctrine would not be appropriate. This Court cannot avoid its responsibility "to decide on the rights of individuals"[84] merely "because the issues have political implications."[85]

3. The Fourth *Baker* Factor

Under the fourth *Baker* formulation, a case presents a nonjusticiable political question if there exists "the *impossibility* of a court's undertaking independent resolution without expressing

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[80] *Maher v. Roe*, 432 U.S. 464, 470 (1977) ("The basic framework for analysis of [an equal protection claim] is well settled" and requires the court to use "strict judicial scrutiny" in evaluating the constitutionality of government activity "which operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.") (internal quotations and citations omitted).

[81] *Whitman v. Personhuballah*, 578 U.S. ___, slip op. at 4 (2016).

[82] Int. Obections at 24.

[83] *United States v. Virginia*, 518 U.S. 515, 516 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.") (gender discrimination case applying intermediate scrutiny).

[84] *Marbury*, 5 U.S. (1 Cranch) at 170.

[85] *INS v. Chadha*, 46 U.S. at 943.

the lack of respect due coordinate branches of government."[86] That concern is not present in this case, which seeks only for this Court to exercise its duty to protect the fundamental rights of individuals. As the Supreme Court recently stated, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[87] Consistent with this duty, where the fundamental rights of individuals are implicated, concerns regarding separation of powers counsel in favor of justifiability because "[t]he declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty."[88]

Even in absence of the consideration that the principle of separation of powers favors the justiciability of this case, the resolution of this case does not implicate a lack of respect for other branches. The Intervenor-Defendants claim that such lack of respect is involved in this case because "Congress and executive agencies have taken a wide range of steps to assess and address the potential impacts and risks of climate change."[89] However, that Defendants have taken steps to address climate change does not absolve them of their duty to abide by the requirements of the Constitution to refrain from infringing the fundamental rights of individuals[90], nor this Court of its duty to enforce the Constitution and protect the rights of such individuals.[91] "Since the

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[86] *Baker*, 363 U.S. at 217 (emphasis added).
[87] *Obergefell*, 135 S. Ct. at 2605.
[88] *Bowsher*, 478 U.S. at 721 (1986).
[89] Int. Objections at 24.
[90] *In re Agent Orange Product Liability Litig.*, 373 F.Supp.2d 7, 72 (E.D.N.Y. 2005) ("The determination that a branch of government has exceeded its constitutional authority does not express lack of respect for it.")
[91] *Kucini*, 432 F.Supp. at 1109 ("Further, this case does not revolve around a 'political question' as that term is used in *Baker v. Carr* but rather a question for which federal courts have been the final arbitrator throughout the existence of the United States; the interpretation of the United States Constitution. Here the court is asked to determine whether the plaintiff's right to freedom

separation of powers exists for the protection of individual liberty, its vitality 'does not depend' on 'whether the encroached-upon branch approves the encroachment.'"[92] Quite the contrary: "policing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court."[93] Moreover, the fourth *Baker* formulation is "*only* implicated where judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would *seriously* interfere with important governmental interests."[94] Here, Youth Plaintiffs' case would not cause such serious interference because they seek only an order declaring that Defendants have violated their constitutional and public trust rights and a remedy, prepared by Defendants, satisfactory to rectify those violations. Youth Plaintiffs do not request that this Court substitute its judgment for that of the legislative and executive branches by invalidating any statutes or regulations enacted by Defendants to address climate change. Rather they request that this Court enjoin defendants from further violation of their rights and direct Defendants to prepare a plan, of their own devising, adequate to protect Youth Plaintiffs from further injury. Since such a plan would of necessity consist of, in Intervenor-Defendants' words, "steps to assess and address the…impacts and risks of climate change,"[95] in order to avert dangers acknowledged by Defendants[96], such

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of speech has been violated by the defendants. This is not a "political question", but a question of constitutional construction concerning the most fundamental right enjoyed by Americans, the right to freedom of speech.")

[92] *NLRB v. Canning*, 134 S. Ct. at 2593 (2014) (Scalia, A., concurring) (citations omitted).

[93] *Id.*

[94] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 298 (S.D.N.Y. 2006) (emphasis added) (internal quotations and citations omitted).

[95] Int. Objections at 24.

[96] Federal Defendants' Objections to Findings and Recommendations of Magistrate Judge, Dkt. No 74, 1 ("Climate change poses a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects, which

relief would not implicate a lack of respect. It would be a convoluted application of principle to hold that the very actions taken by the Federal Defendants which have proven inadequate to address and curtail their infringement of Youth Plaintiffs' fundamental rights effectively block these young plaintiffs from the doors of our nation's courthouses. Because Youth Plaintiffs' claims implicate none of the *Baker* factors cited by Intervenor-Defendants, the political question does not apply. On the contrary, the very foundation of the political question doctrine – the principle of separation of powers – calls upon this Court to exercise its constitutional duty to serve as a check and balance to the other branches where they have infringed Youth Plaintiffs' fundamental rights. This Court should not decline to exercise its constitutional duty to hear this case.

C. The Best Available Climate Science Counsels In Favor of Justiciability

The latest and best available climate science illustrates the urgent need for judicial intervention to protect Youth Plaintiffs, future generations, and their fundamental rights from the dangers of catastrophic climate change. As explained by Dr. James Hansen[97], former Director of

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will worsen over time.") (citing Endangerment & Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,518 (Dec. 15, 2009) (concluding that "compelling" scientific evidence supports the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases)).

[97] Dr. Hansen trained in physics and astronomy in the space program at the University of Iowa where he received a bachelor's degree with highest distinction in mathematics and physics, a master's degree in astronomy, and a Ph.D. in physics in 1967. Dr. Hansen has focused on studies and computer simulations of the Earth's climate since the mid-1970's for the purpose of studying the human impact on climate change. Dr. Hansen is an elected member of the United States National Academy of Sciences (1995), a recipient of the Heinz Award for the Environment (2001), the Leo Szilard for use of Physics for the Benefit of Society (2007), the American Association for the Advancement of Science Award for Scientific Freedom and Responsibility (2007), the Sophie Prize (2010), and the Blue Planet Prize (2010). He has testified before the United States Senate and House of Representatives on numerous occasions regarding climate change.

the NASA Goddard Institute for Space Studies and current Adjunct Professor at Columbia University's Earth Institute, where he directs the University's Climate Science Program, immediate "[a]ction is required to preserve and restore the climate system such as we have known it in order for the planet as we have known it to continue to adequately support the lives and prospects of young people and future generations."[98]

Dr. Hansen's data and research shows that, as a result of fossil fuel emissions, Earth has already warmed approximately 1ºC above the preindustrial level, which is "close to, and probably slightly above, the prior maximum of the Holocene Era, the period of relatively stable climate over the past 10,000 years that has enabled human civilization to develop."[99] Additionally, atmospheric concentration of CO_2 "now exceeds 400 ppm, over 40 percent more than the pre-industrial level."[100] The 1ºC warming attributable to anthropogenic climate change that has already occurred since the pre-industrial era has already begun to have a wide-spread effect on human and natural systems, including significant glacial retreat, heavier and more extreme flooding, intensification of droughts, expansion of subtropical climates, significant annual losses of coral reef areas, increasingly frequent temperature anomalies, wildfires of increased frequency and intensity, increases in dangerous heat waves, loss of agriculturally suitable land, proliferation of disease vectors, heat stroke and respiratory illnesses and complications, availability of fresh water, and loss of species diversity, to name a few effects.[101] The likelihood and severity of these impacts and occurrences are projected to increase if fossil

[98] Declaration of Dr. James E. Hansen in Support of Our Children's Trust et al.'s Submission to the U.N. Committee on the Rights of the Child Regarding States Obligations, Children's Rights, and Climate Change, ¶ 91 (attached hereto as **Exhibit A**) (hereinafter "Hansen Declaration").
[99] *Id*. at ¶ 29.
[100] *Id.* at ¶ 20.
[101] *Id.* at ¶¶ 47-62.

fuel emissions are not rapidly reduced.[102]

In order to avoid dangerous climate tipping points and self-reinforcing feedback loops, Dr. Hansen concludes that "global atmospheric CO_2 concentrations must be reduced to 350 ppm and long-term average global temperature increase above preindustrial levels must be limited to 1ºC in order to preserve a habitable planet for future generations, preserve the climate system, and avert irretrievable damage to human and natural systems – including agriculture, ocean fisheries, and fresh water supply – on which human civilization depends."[103] In order to achieve this goal, global emissions must be reduced by 7% annually if commenced in 2016, 8% annually if commenced in 2017, and 8.5% annually if commenced in 2018.[104] By contrast, if appropriate annual emissions reductions had commenced in 2005, only a 3.5% reduction in emissions per year would have been necessary.[105] If rapid annual reductions of emissions are not commenced until 2030, the global average temperature would remain above 1ºC for approximately 400 years, and if not commenced until 2040, atmospheric concentrations of CO_2 would not fall below 350 pm for nearly 1,000 years.[106]

Dr. Hansen's research establishes that the climate crisis is one of urgency that must be addressed on a timely basis in order to preserve a habitable planet for youth and future generations. The "present level of CO_2 and its warming, both realized and latent, is already in the dangerous zone. Indeed, we are now in a period of overshoot, with early consequences that are already highly threatening and that will rise to unbearable unless action is taken to restore

[102] *Id.* at ¶¶ 47-62.
[103] *Id.* at ¶ 64, 69.
[104] *Id*. at ¶ 68.
[105] *Id.* at ¶ 70.
[106] *Id.* at ¶ 69.

energy balance at a lower CO_2 amount."[107] Despite these dangers, Dr. Hansen's data illustrates that both the growth rate of annual fossil fuel emissions and global atmospheric concentrations of CO_2 continue to rise at an alarming rate.[108]

"If fossil fuel emissions are not systematically and rapidly abated…then youth and future generations will confront what reasonably can only be described as, at best, an inhospitable future. That future may be marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species. That is to mention only the start of it."[109]

As demonstrated by Dr. Hansen's research, the fundamental rights of Youth Plaintiffs and future generations depend on swift action and resolution of the climate crisis. Despite having known of the dangers of this crisis for over fifty years, the legislative and executive braches have failed to take meaningful action to address it and in fact have engaged in affirmative acts that have created and exacerbated the dangerous climate situation that now looms over posterity. As Magistrate Coffin acknowledged in his Order and Findings & Recommendation:

> The debate about climate change and its impact has been before various political bodies for sometime now. Plaintiffs give this debate justiciability by asserting harms that befall or will befall them personally and to a greater extent than older segments of society. It may be that eventually the alleged harms, assuming the correctness of plaintiffs' analysis of the impacts of global climate change, will befall all of us. But the intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional

[107] *Id*. at ¶ 36.
[108] *Id.* at ¶¶ 19-21.
[109] *Id.* at ¶ 90.

> parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society.[110]

Magistrate Coffin's analysis touches appropriately upon the principle that, where the representative branches of government have failed to protect the preservative rights of individuals underrepresented in the political process, it is the province and duty of the courts to adjudicate those rights, and protect those dependant on them. Like the plaintiffs in malapportionment cases, such as *Baker v. Carr*[111], who depended on the judiciary to protect their legal rights in the political process, Youth Plaintiffs and future generations cannot now protect their rights through the political branches. Just as voting rights are "preservative of all rights,"[112] so too are Youth Plaintiffs' and posterity's fundamental individual rights dependant on the existence of a stable climate system for support. None of the claims in this case presents a political question; this Court should exercise its jurisdiction to protect Youth Plaintiffs' constitutional and public trust rights where the legislative and executive branches have failed despites ample opportunities to act over at least five decades.

CONCLUSION

The political question doctrine does not present a bar to justiciability in this case. Youth Plaintiffs have alleged infringement of their fundamental individual rights under the Fifth, Ninth, and Fourteenth (as applicable to the federal government through the Due Process Clause of the Fifth) Amendments and the public trust doctrine. None of the *Baker* formulations are implicated by these claims. On the contrary, the separation of powers principles underlying the political

[110] Order & Findings at 8.
[111] 369 U.S. 186.
[112] *Yick Wo*, 118 U.S. at 370.

question doctrine counsel in favor of justiciability. It is therefore the proper constitutional role for the judiciary to exercise its jurisdiction over Youth Plaintiffs' claims and given the urgency of the climate crisis, this Court may be Youth Plaintiffs' last chance to protect their rights.

Respectfully submitted this 12th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the applicable word-count limitation under LR 7-2(b) because it contains less than 35 pages and less than 11,000 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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