

Case No. 17-71692

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
EUGENE,
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Real Parties in Interest.

On Petition For A Writ of Mandamus
In Case No. 6:15-cv-01517-TC-AA (D. Or.)

***AMICUS CURIAE* BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF MANDAMUS**

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CORPORATE DISCLOSURE STATEMENT

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Amicus curiae Environmental Law Alliance Worldwide—US (ELAW) is a nonprofit corporation registered as a public charity in Oregon (Secretary of State Corporation Division Registry #165926-85, July 26, 1989) and designated as a tax exempt public charity in accordance with Sections 501(c)(3) and 509(a)(1) of the Internal Revenue Code. ELAW has no corporate parent company and no publicly held corporation owns stock in ELAW.

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IDENTITY AND INTEREST OF *AMICI*

Amici submit this *amicus curiae* brief pursuant to Fed. R. App. P. 29.¹

Amici Center for International Environmental Law (CIEL) and Environmental Law Alliance Worldwide (ELAW) are nonprofit corporations that use the rule of law to protect the environment and human rights. Since 1989, CIEL has been a leader in the development of environmental and human rights law, including with respect to climate change. ELAW serves as Secretariat of a global network of public interest environmental lawyers and has been a leader in global environmental legal issues for over 25 years.

Petitioners' assertion that the district court committed clear legal error in allowing plaintiffs to allege violations of their fundamental due process rights in the context of climate change is contrary to the missions, interests, and experience of *amici* in the protection of fundamental rights. The Government's argument ignores relevant international law and guidance from foreign jurisdictions recognizing that climate change impairs fundamental rights and that governments have obligations to avoid, reduce, and redress those impacts.

¹ No party's counsel contributed to writing this brief in whole or in part or contributed funds for preparation or submission of this brief. No person other than *amici* or their counsel contributed funds specifically intended to fund preparation or submission of this brief.

Accordingly, *amici* respectfully request the Ninth Circuit deny the petition and allow plaintiffs to litigate their claims.

ARGUMENT

Since the Supreme Court’s finding in *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007), that “[t]he harms associated with climate change are serious and well recognized,” the urgent threat to the very atmospheric conditions that make our rights to life, liberty, and property possible has only grown. In the face of this reality and based on the record before it, the district court concluded that Plaintiffs adequately stated a due process claim when they alleged government action is “affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.” Order at 32.

Petitioners now seek an extraordinary writ of mandamus from this Court arguing implicitly that the United States Government can knowingly render the climate system incapable of sustaining life without violating any duty to its citizens. The implications of Petitioners’ arguments are contrary to the acknowledged responsibilities of every government, including the United States, to protect the fundamental right to life and ordered liberty of its citizens.

Ninth Circuit precedent bars the issuance of mandamus in the absence of “clear error as a matter of law.” *In re United States*, 791 F.3d 951, 955 (9th Cir. 2015) (“the absence of ... clear error as a matter of law – will always defeat a petition for mandamus”). The present brief demonstrates that the district court’s opinion is consistent with the evolving understanding of climate change’s impact on fundamental rights under international law and in foreign courts and does not constitute clear legal error. Accordingly, *Amici* respectfully urge the Court to deny the writ of mandamus, and afford these Plaintiffs the opportunity to litigate their claims before the courts.

I. The district court’s recognition of a right to a climate system capable of sustaining human life does not constitute clear legal error.

Government Petitioners’ writ of mandamus is inappropriate given evolving international law and foreign jurisprudence with respect to human rights, climate change, and the intrinsic linkages between a livable environment and fundamental rights. In light of this precedent, the district court did not clearly err in finding a fundamental right to a climate system capable of sustaining human life.

In denying Petitioners’ motion to dismiss below, the district court followed both the Supreme Court’s reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and established precedent enjoining courts to discern and

defend even unenumerated rights where their protection is “fundamental to our ordered scheme of liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010). The district court reasoned that “a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’” Order at 32 (quoting *Obergefell*, 135 S. Ct. at 2598). Accordingly, the district court concluded “**the right to a climate system capable of sustaining human life** is fundamental to a free and ordered society.” Order at 32 (emphasis added).

In allowing Plaintiffs to pursue their case, the district court recognized the unremarkable proposition that a climate system capable of sustaining human life is a necessary precondition for exercising their Fifth Amendment rights.

In so doing, the district court also implicitly echoed the Ninth Circuit’s own observation nearly three decades ago that

...it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources.

Stop H-3 Ass’n v. Dole, 870 F.2d 1419, 1430 (9th Cir. 1989). While the Ninth Circuit found it unnecessary to decide in that case whether a constitutional environmental right existed, its recognition that a livable environment is essential to the enjoyment of other fundamental rights should allow for the

adjudication of Plaintiffs’ more narrowly tailored claims to a climate system capable of sustaining human life. *See* Order at 32 (“framing the fundamental right at issue as the right to a climate system capable of sustaining human life”).

II. The international community, including the United States, recognizes the threat posed by climate change to fundamental rights and the corresponding duties of governments with respect to climate impacts.

In the Paris Agreement on Climate Change, 195 nations, including the United States, acknowledged that governments should respect, promote, and consider human rights when taking actions to address climate change. Paris Agreement pmb. para. 11, Dec. 15, 2015, T.I.A.S No. 16-1104. This explicit recognition of linkages between human rights and climate change follows four decades of international precedent. At the 1972 United Nations Conference on the Human Environment, the United States and the global community endorsed an explicit link between environmental protection and the fulfillment of human rights, including the right to life. Stockholm Declaration on the Human Environment, 11 I.L.M 1416, pmb. para. 1, Principle 1 (1972) (endorsed by 112 countries) (recognizing that the environment is essential to the enjoyment of basic human rights, including the right to life; and the solemn duty to protect the environment for present and future generations).

The United States, along with virtually every other country, expressly recalled the Stockholm principles and acknowledged the human threats posed by climate change, when it signed and ratified the 1992 U.N. Framework Convention on Climate Change (UNFCCC). UNFCCC pmbl. paras. 2, 7, May 9, 1992, 1771 U.N.T.S. 107. The United States committed to achieving the Convention's objective of stabilizing atmospheric greenhouse gas concentrations at a level that "would prevent dangerous anthropogenic interference with the climate system ... within a time frame sufficient" to avoid threatening certain functions necessary for life. UNFCCC at art. 2. Additionally, it recognized that the United States and the international community "should protect the climate system for the benefit of present and future generations of humankind." *Id.* at art. 3(1).

In negotiating, signing, and ratifying the Paris Agreement, the United States acknowledged that achieving this objective would require, at minimum, "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" to avoid the most catastrophic impacts of climate change, including by inference those impacts that threaten fundamental rights. Paris Agreement at art. 2(1)(a)(b). Plaintiffs have proffered substantial scientific evidence that the goals established in the Paris Agreement are not sufficient to prevent

devastating impacts on the lives and the fundamental rights of Plaintiffs and others similarly situated. *Amici* share Plaintiffs' concerns and consider them well-supported by science. Significantly, the ratification of the UNFCCC and the Paris Agreement provide express recognition by the United States that warming at or near those targets creates a significant likelihood of harm.

The Paris Agreement reflects the broader global recognition that climate change poses significant threats to fundamental human rights and all governments have obligations to address these threats under established principles of international law.

Since 2008, the Member nations of the United Nations Human Rights Council (HRC), including the United States, have repeatedly affirmed that climate change has “an adverse impact on the full and effective enjoyment of human rights” and have recognized that a stable climate system is necessary for the realization of human rights, including the right to life. *See* Human Rights Council Res. 32/33, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016); *accord* Human Rights Council Res. 31/8, U.N. Doc. A/HRC/Res/31/8, at pmb., para. 4(a) (Apr. 22, 2016); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/35/20 (July 7, 2017); *see also* Organization of American States General Assembly, AG/RES. 2818 (XLIV-O/14), at pmb. para. 2 (June 4, 2014) (U.S. joining consensus).

As recently as July 2017, the United States joined the consensus adopting a new HRC resolution acknowledging that climate change contributes “to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights” and emphasizing the “urgent importance of continuing to address ... the adverse consequences of climate change impacts for all.” H.R.C. Res. 35/20 at paras. 1-2. In joining consensus, the U.S. again expressly recognized “the effects of climate change have a range of implications for the effective enjoyment of human rights.” U.S. Explanation of Position on HRC Climate Change Resolution, <https://geneva.usmission.gov/2017/06/22/u-s-explanation-of-position-on-hrc-climate-change-resolution/>; *accord* U.S. Statement at the HRC 29 on Human Rights and Climate Change, <https://geneva.usmission.gov/2015/07/02/u-s-statement-at-the-hrc-29-on-human-rights-and-climate-change/>.

The HRC’s formal resolutions have been informed and further elucidated by human rights bodies and mandate holders integral to the interpretation and implementation of international human rights law, whose analysis demonstrates that governments have an obligation to prevent and redress climate impacts under international law. As the Office of the United Nations High Commissioner for Human Rights (OHCHR) informed the States Party to the

UNFCCC, “States ... have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change.” OHCHR, Submission to the 21st Conference of the Parties to the UNFCCC (27 November 2015) at 2 [hereinafter OHCHR Key Messages]; *see also* Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/31/52, paras. 23-39, 65, 68 (Feb. 1, 2016) (declaring that “each State has an obligation to protect those within its jurisdiction from the harmful effects of climate change” and the “greater the increase in average temperature, the greater the effects on the right to life and health”); Office of the U.N. High Commissioner for Human Rights, An Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UNFCCC (Oct. 17, 2014) (declaring climate change has “consequences that transform life on earth”); Joint statement by UN Special Procedures on the occasion of World Environment Day (June 5, 2015), (reiterating that “an average increase in global temperature of even 2.0°C will adversely affect a wide range of human rights, including the rights to life ...”). Of particular significance to the present Petition is the government’s duty to ensure current and future generations affected by climate change have “access to meaningful remedies including judicial ... mechanisms.” OHCHR Key Messages at para. 3.

It bears particular mention, in a case brought by and on behalf of children and youth, that the International Community has noted with concern the disproportionate impacts of climate change on children and their rights. *See, e.g.,* H.R.C. Res. 32/33; Office of the U.N. High Commissioner for Human Rights, Analytical Study on the relationship between climate change and rights of the child, U.N. Doc. A/HRC/35/13 (May 4, 2017). Accordingly, the OHCHR recommends taking “ambitious mitigation measures to minimize the future negative impacts of climate change on children to the greatest extent possible.” *Id.* at para. 54(a).

III. The district court’s recognition of the right to a climate system capable of sustaining human life is consistent with and narrower than the interpretation accorded the right to life under international law.

International human rights bodies have interpreted the right to life broadly. *See, e.g.,* U.N. Human Rights Committee, General Comment No. 6: Article 6 (Right to life), para. 1 (1982) (the right to life is the “supreme right” and “should not be interpreted narrowly”); African Commission on Human and Peoples’ Rights, General Comment No. 3 on The African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), para. 3 (2015) (the Charter “envisages the protection of not only a life in a narrow sense, but of dignified life. This requires a broad interpretation of States’ responsibilities to protect

life.”); Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs), para. 150 (given the fundamental nature of the right to life “no restrictive approach ... is admissible”). Significantly, human rights courts have held that States must not only prevent harm, but must take steps to “protect and preserve the right to life.” *Id.* at para. 152; *see also Öneriyildiz v. Turkey* [GC], Application no. 48939/99, Eur. Ct. H.R. para. 71 (2004) (the right to life includes a State’s obligation to safeguard the lives of people in their jurisdiction); *Budayeva and Others v. Russia*, Application no. 15339/02, Eur. Ct. H.R. para. 128 (2008) (States should protect the lives of people within their jurisdiction from environmental harm including from a predictable or preventable environmental disaster). It follows, *a fortiori*, that a State’s obligations to prevent such harms are violated if and when, as Plaintiffs have alleged, its actions actually contribute to those harms.

The interpretation accorded the fundamental right to life under international law, including protection from serious environmental harm, further supports a finding that the district court did not commit clear legal error.

IV. The district court’s recognition of the right to a climate system capable of sustaining human life is supported by jurisprudence in foreign courts and the United States.

The district court’s conclusion that a “climate system capable of sustaining human life” is fundamental to our enjoyment of our Fifth Amendment rights to “life, liberty and property” is further supported by a growing body of foreign jurisprudence. U.S. courts have long looked to foreign jurisprudence to elucidate the law, including in identifying and applying fundamental rights. *See, e.g., Latta v. Otter*, 779 F.3d 902, 906 & n.7 (9th Cir. 2015) (citing the European Court of Human Rights in a case determining a state’s right to define marriage); *Thompson v. Oklahoma*, 487 U.S. 815, 830 & nn.31, 34 (1988) (recognizing that laws, judicial practice, and statistics of other countries can be relevant considerations in a court’s decision-making); *Trop v. Dulles*, 356 U.S. 86, 101-04 & nn. 35, 37-38 (1958) (noting “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”); *Twining v. New Jersey*, 211 U.S. 78, 113 (1908) (considering “jurisprudence of civilized and free countries outside the domain of the common law” in reference to the Fifth Amendment’s privilege against self-incrimination).

Foreign jurisprudence supports the finding of a constitutional right to a stable climate system. In 2015, the Lahore High Court in Pakistan invoked

constitutional rights to address climate change. In *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015, a farmer alleged that the government's delay in implementing the National Climate Change Policy and addressing vulnerabilities associated with climate change violated fundamental constitutional rights to life and dignity. In a September 2015 order, the court declared: "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. ... On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan." *Id.* at para. 6. The Lahore High Court invoked the right to life and the right to dignity protected by the Constitution of Pakistan and international principles to call for a "move to Climate Change Justice." *Id.* at para. 7. Recognizing the threat to food, water, and energy security, it directed the government to identify and begin implementing climate change adaptation measures to protect Pakistani citizens and established a Climate Change Commission to help the court monitor progress and achieve compliance with guidelines. *See id.* at para. 8.

That same year, the Hague District Court in the Netherlands adjudicated a complaint by 900 Dutch citizens after the government decided to retreat from its international commitments to address climate change. While acknowledging that the Netherlands' treaty commitments could not be directly

enforced by plaintiffs, the court concluded that these international commitments create “the framework for and the manner in which the State exercises its powers” and thus inform the government’s duty of care to its citizens. *Urgenda Found. v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015) (Para.4.63). The court then found “[d]ue to the severity of the consequences of climate change . . . the State has a duty of care to take mitigation measures” and the impacts of the government’s retreat from climate action would fall disproportionately on youth and future generations. *Id.* at para. 4.83. The court ultimately concluded that the Netherlands government must further reduce greenhouse gas emissions to meet its obligations to the plaintiffs.

The district court below carefully distinguished the right to a climate system capable of sustaining human life from a broader attempt to constitutionalize “all environmental claims.” In so doing, the district court rendered Petitioners’ extensive argument that courts have not recognized environmental rights largely inapposite. Nonetheless, the district court’s conclusion that a climate system capable of sustaining human life is fundamental to the enjoyment of our Fifth Amendment rights to life, liberty, and property finds support in the extensive jurisprudence in other countries finding equivalent rights in the environmental context and in the evolving constitutional jurisprudence of U.S. states.

For decades, courts in India have recognized that the right to life encompasses the right to live in a healthy environment. India's Constitution, in language nearly identical to the due process clause of the U.S. Constitution, guarantees: "No person shall be deprived of his life or personal liberty except according to a procedure established by law." India Const. art. 21. In *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 A.I.R (AP) 171, the High Court of Andhra Pradesh explained:

Examining the matter from the . . . constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation. . . .

Id. at paras. 24-25; *see also Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 SCC 520 (Supreme Court of India recognized the right to life includes the right to a decent environment); *M.C. Mehta v. Union of India*, Writ Petition No. 182 of 1996 (2000) ("Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for 'life', would be hazardous to 'life' within the meaning of Article 21 of the Constitution.").

Courts in Bangladesh, Nigeria, Pakistan, and Costa Rica have also recognized a sufficiently healthy environment as inherently linked to the right to life and other fundamental rights. *See, e.g., Mohiuddin Farooque v. Bangladesh* [1997] 17 B.L.D. (A.D.) 1 (the right to life “encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.”); *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] AHRLR 151 (the right to life includes right to healthy environment and dignity of the human person); *Shehla Zia v. WAPDA*, P.L.D. 1994 S.C. 693 (Pakistan) (the rights to life and dignity incorporate rights to a clean atmosphere and unpolluted environment); *Sentencia 6240-93*, la Sala Constitucional de la Corte Suprema de Justicia (26 de noviembre de 1993) (Costa Rica) (the right to life coupled with the state’s duty to protect natural beauty creates other enforceable rights equal in hierarchy to these enumerated rights, including the right to a healthy environment).

In the Philippines, where the Constitution includes a specific right to a healthy environment, the Supreme Court determined such a right “may even be said to predate all governments and constitutions.” *Minors Oposa v. Sec’y of the Dep’t of Env’tl. & Nat. Res.*, G.R. No. 101083, 33 I.L.M. 173, 187 (S.C., Jul. 30,

1993). As the district court notes, the Philippines Supreme Court found “the right of future generations to a ‘balanced and healthful ecology’ is so basic that it ‘need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind.’” Order at 50 (citing *Minors Oposa*, 33 I.L.M. at 187).

As the Philippines example suggests, the extensive recognition of environmental rights in the world’s constitutions provides further evidence of the rapidly evolving law in this area. More than half the world’s nations now include explicit references to the environment in their constitutions. Of these, over ninety include substantive rights to a healthy environment. *See generally* James R. May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge Univ. Press 2015); James R. May & Erin Daly, *Environmental Constitutionalism: A Research Compendium* (Edward Elgar 2016).

Nor has this recognition stopped at U.S. borders. Nearly half of all U.S. state constitutions now include environmental provisions, with at least sixteen recognizing substantive constitutional rights to a healthy, stable, or quality environment. James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in *Principles of Constitutional Environmental Law* 305, 306 (James R. May ed., 2011); accord James M. McElfish, *State Environmental Law and Programs*, in *Law of Environmental Protection* (Envtl. Law Inst. ed.,

2017). These rights are being actively interpreted and elucidated by state courts.

See, e.g., Mont. Envtl. Infor. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236

(Mont. 1999) (finding the right to a clean and healthful environment a

“fundamental right” entitled to the highest level of constitutional protection).

State practice and jurisprudence in this field demonstrate not only the growing recognition of fundamental environmental rights, but the ongoing evolution of the law in this field.

CONCLUSION

Together, the review of international instruments and foreign jurisprudence support the conclusion that the district court did not err in holding that a climate system capable of sustaining human life is a necessary condition for the right to life and other fundamental rights. Accordingly, the petition for writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of Times New Roman that is of 14 points or more, and contains 3,895 words (based on the word processing program used to prepare the brief).

Dated: September 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief in Opposition to Petition for Writ of Mandamus with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 5, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, a courtesy copy of the foregoing documents have been provided via email to the following counsel:

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