

Case No. 18-36082

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants,

v.

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs-Appellees.

On Appeal in Case No. 6:15-cv-01517-TC-AA (D. Or.)

**BRIEF OF AMICI CURIAE
ENVIRONMENTAL HISTORY PROFESSORS
IN SUPPORT OF PLAINTIFFS-APPELLEES'
ANSWERING BRIEF**

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I. Identity, Interests, and Authority of *Amici Curiae*

Amici curiae are history professors who teach, research and write at universities and institutions throughout the United States.¹ *See* Appendix 1. *Amici* seek to inform the Court about the history and traditions of environmental principles and values in the cultural, economic, and political development of the United States, from pre-revolutionary times to the present. *Amici* urge affirmance of the District Court summary judgment order, and that the Court return this matter to the District Court for trial.

II. Summary of Argument

The historical record as represented by original documents and as interpreted by the work of numerous historians makes clear that a commitment to the U.S. Constitution's Fifth Amendment rights to life, liberty, property, and happiness is deeply rooted in the history and traditions of the United States and goes back to the colonial era, and in particular the American Revolution and the Founding and their immediate aftermath. The universal popularity of this idea, which cuts across class, race, gender, politics, geography, and time was, and is, so popular that republican citizenship in the United States seems virtually impossible without reference to it. Americans of all kinds through the years

¹ *Amici* file this brief solely as individuals and not on behalf of any institutions with which they are affiliated. Defendants consent to the filing of this brief. No person or party has made a monetary contribution towards the preparation or submission of this brief.

have interpreted rights to life, liberty, property, and happiness broadly, and implicitly or explicitly have understood them to be premised on a reasonably open world of nature and inclusive of a full range of bio- and geo-physical resources, now universally understood to be components of the climate system.

A key component of the republican imagination of those rights includes an intergenerational responsibility to a future in which the children of today, as the adult citizens of tomorrow, will inherit a vast republican legacy. Decisions today that threaten to deprive those future citizens of life, liberty, property, and happiness--including the unalienable right to a climate system capable of sustaining human life--are foreclosing on a republican heritage, the final loss of which would bring into being a disordered existence estranged from the deepest and richest sources of what it means to be an American.

The Defendants argue, incorrectly, that no “history or tradition” of a fundamental right to a stable climate exists, and compare the right at issue here with previously rejected claims to a right to be free from pollution. Defendant’s Opening Brief at 35-38. This argument misunderstands the existential nature of the right to a stable climate, which provides an essential foundation for exercise of valuable, enumerated Due Process rights.

This brief surveys American history from the colonial, revolutionary, founding, early republic, and Civil War periods down to the modern era. It summarizes the nation’s deeply-rooted and enduring commitment to every citizen’s right to life, liberty, property, and happiness through the experience of,

and access to, those parts of the natural world understood today to be key components in the climate system. From people such as Edmund Burke, Thomas Jefferson, James Madison, Benjamin Franklin, and Abraham Lincoln down to Rachel Carson, and including numerous ordinary people forgotten except to historians, this brief reveals a widely-shared principle that society must behave responsibly so that children present and future will inherit a rich and enduring legacy. It reveals that in the nation's gradual shift to urban industrial life, citizens restated older values from the agrarian republic in fresh ways, in national parks, conservation, environmentalism, and other means. Long after the founding, the work of Rachel Carson demonstrated that those revolutionary principles were very much alive. There is no greater monument to the tradition of ordered liberty than the nation's responsible commitment to society and environment: past, present, and future.

III. Implied Due Process Rights Must Be Objectively Rooted in the Nation's History and Traditions.

The District Court has twice ruled, on motions to dismiss and for summary judgment, that Plaintiffs have a due process right to a climate “capable of sustaining human life.” 1 ER 48-49; *Juliana v. United States*, 231 F.Supp.3d 1224, 1248-50 (D.Or 2016). This matter should be returned to the District Court for trial. Regardless of disposition, however, the Court may affirm Plaintiffs' substantive due process claims through review of “our Nation's history, legal traditions, and practices.” *Washington v. Glucksberg*, 521

U.S. 702, 710 (1997); *Timbs v. Indiana*, ___ U.S. ___, No. 17-1091, 2019 WL 691578 (Feb. 20, 2019) (slip op. at 7). As set forth below, a rich and substantial vein of historical information supports the District Court's ruling on the Plaintiff's substantive due process-based climate rights.

IV. Plaintiffs' Rights to a Stable Climate Are Objectively and Deeply Rooted in United States' History and Traditions.

A. Introduction: General Considerations.

In 2000, atmospheric chemist Paul Crutzen and ecologist Eugene Stoermer proposed that we have entered a new geological epoch called the Anthropocene.² For the first time, humans have become the prime drivers of the planetary climate. We have left behind the relatively stable pattern that governed the environment during the Holocene epoch, beginning some 11,700 years ago. Holocene stability is defined by geologist Jan Zalasiewicz using several metrics, including carbon dioxide, sea level, human population, soil erosion, and global temperature. Current scientific thinking suggests a starting point for the Anthropocene around the year 1950 when human influence began to disrupt these patterns in a serious way. There are many indications in the sediments that we have entered into a new geological epoch, including the presence of nitrogen isotopes from fertilizers and pesticides like DDT, but

² P. Crutzen and E. Stoermer, *The Anthropocene*, IGBP Newsletter, May 2000, at 17–18.

perhaps the “sharpest chemical signal” comes in the form of radionuclides like plutonium and strontium 90.³

This new scientific perspective on the present alters our understanding of the past. The founding of the United States of America took place during an era before major anthropogenic changes to the earth system. We should not be surprised to learn that statesmen and scientists in the eighteenth century saw a stable environment as the foundation of political action and human flourishing; the strongest evidence for this view comes from attitudes about agriculture and natural history, described *infra*. The founders recognized that careful cultivation of the soil provided a source of value and surplus for all other economic activities, and therefore ultimately for human civilization itself. Crucially, this agrarian vision in turn incorporated a much wider set of implicit assumptions about the natural world, including stable sea levels, abundant wildlife, and a benign climate. In other words, the founders took for granted the environmental parameters of the Holocene epoch.⁴

This idea of nature also shaped views of the future in the eighteenth century. The founder of modern conservative thought, Edmund Burke, famously compared the national community to an entailed estate. Members of political

³ Jan Zalasiewicz, et. al., *Are We Now Living in the Anthropocene*, 18 *Geol. Soc. Am. Today* 5 (2008); Jan Zalasiewicz, et. al., *The Anthropocene*, 34 *Geol. Today* (2018), p. 180.

⁴ Richard L. Bushman, *The American Farmer in the Eighteenth Century* (2018); Andrea Wulf, *Founding Gardeners* (2011).

society had a responsibility to maintain the constitution in the same way that they kept up their patrimonial estates for future generations.⁵ For Adam Smith, the progress of commercial society depended fundamentally on the harmonious relation between town and country: prudent management of the soil provided the basis for urban life and economic specialization.⁶

Burke authored one of the best-known statements on the organic unity--the inherent interconnectedness--of people and things in the flow of time, and on the consequent intergenerational responsibility to uphold “the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by an inviolable oath which holds all physical and moral natures, each in their appointed place.”⁷ Burke’s statement was his version of an idea, widespread in the late eighteenth century, which influenced the founding and development of the United States. Grounded in Christian theology, expressed in republican virtue, and later underscored by the findings of modern ecological science, the idea of organic unity and intergenerational responsibility—in particular responsibility to future generations—became one of the great organizing principles of the American Republic.

⁵ Edmund Burke, *Reflection on the Revolution in France* 37, 108 (Liberal Arts Press 1955) (1790).

⁶ Adam Smith, *The Wealth of Nations* 376-380 (1976) (1776).

⁷ Burke, *supra*, at 110.

At the heart of the American Revolution was a commitment to the idea of people with sovereignty over their bodily selves, their labor, and the products of that labor. Citizens of the republic had unalienable rights to life, liberty, and property, as specified in the Fifth Amendment to the U.S. Constitution, or, as Thomas Jefferson previously put it in the Declaration of Independence, “life, liberty, and the pursuit of happiness.” Essential to that commitment was the assumption that republican citizenship was not an abstract condition, but was grounded, actualized, and fulfilled in material nature, generally in “land” but more precisely in soil, minerals, water, plants, animals, atmosphere, sunlight, and seasons, each a component in the organic unity, the indissoluble whole, now known as the climate system. People manipulated portions of the Earth, “improved” it, as they said, to make a living and to achieve their individual, collective, and republican potentials.⁸

During and after the Revolution and the Founding, republicans realized that “improvement” could fail, that human destructiveness could undermine and weaken the new nation.⁹ Population growth, soil degradation, deforestation, and other developments could destroy citizens’ ability to support themselves and to uphold their social and political obligations. The historical record—and the scholarly record of historians—is quite clear on this point. From the colonial era to the Revolution and the founding onward, people had the power to alter the

⁸ Mark Fiege, *The Republic of Nature* 156-198 (2012).

⁹ Ted Steinberg, *Down to Earth* (3rd ed. Oxford Univ. Press 2013).

environment to their detriment. At first, degradation was observed at local scales, but soon it became evident that such disturbances if left unchecked could grow to engulf regions, nations, and perhaps the planet itself. James Madison predicted that human changes to the environment could weaken the “life-supporting power” of Earth’s atmosphere in his 1818 speech to Virginia farmers in Albermarle.¹⁰

Virtually from the start, American citizens expressed concern over the condition of water, soil, and climate. They advocated for practices that would honor the human need to sustain life while recognizing the need to prevent drastic changes that would undermine the Republic. This recognition provoked them to redouble their intergenerational commitment to the future of the Republic and the citizens who would inherit it.

This imagination of a republican future—this act of intergenerational responsibility to the children-cum-adults who would inherit the nation—became a core value of republican thought and action. The Republic was an organic unity of people and nature that required responsible behavior in order to sustain the rights that gave the revolutionary inheritance direction and meaning. As Burke said of the English, but which he might have said of Americans as well,

¹⁰ James Madison, *Address to the Agricultural Society of Albemarle* (1818). <https://founders.archives.gov/documents/Madison/04-01-02-0244>.

“the idea of inheritance furnishes a sure principle of conservation, without at all excluding a principle of improvement.”¹¹

B. Colonial-Era Assumptions about Environmental Stability were Implicit in the Founding of the Nation and Its Notions of Ordered Liberty.

The Revolution and its commitment to the rights of republican citizenship drew on the colonial experience of settlement, agriculture, and politics in a new land. An important root of that responsibility to land and the intergenerational transmission of its benefits to the future lay in the Calvinist and Reformed Protestant underpinnings of settlement culture in New England.¹²

John Calvin asserted that God was an active presence in the ongoing development and care of the creation. A farmer who improved and stewarded the land was engaged in divine work and was enjoined “to hand it down to posterity as he received it, or even better cultivated.”¹³ Puritans echoed this responsibility for land. Man “is not the *absolute Lord* of it, to do with it what he sees meet,” wrote Samuel Willard in 1728; “but is put into it as a *Steward* under God, and to follow His Directions in the *Improvement* that he makes of it.”¹⁴

Benjamin Franklin learned about the nature of a new world and its importance to republicanism through community water projects. In 1739, Franklin and others cleaned up Dock Creek in Philadelphia by banning leather

¹¹ Burke, *supra* note 5, at 38.

¹² Mark Stoll, *Inherit the Holy Mountain* (2015).

¹³ *Id.* at 69.

¹⁴ *Id.* at 70 (emphasis in original).

tanneries and other polluting commercial operations. Franklin’s petition argued that the common good frequently superseded individual rights--something he often acted upon, from founding public libraries to lighting city streets. After winning his cause, Franklin continued to protect the watershed, establishing sewage disposal systems. He funded a pipeline to bring fresh water from Schuylkill River, which created Philadelphia Waterworks. One of his aphorisms was “When the well is dry, we know the value of water.”¹⁵

Franklin helped naturalist Joseph Priestley think about the discovery of oxygen, which had profound implications for the unalienable rights to life and liberty. After creating a sealed vacuum in a glass jar, Priestley observed that candles snuffed out and mice died, but a sprig of mint flourished. On August 17, 1771, Priestley altered the experiment by placing the mint plant and a lit candle inside the container. Ten days later the wick was still burning. He grasped that the plant was restoring something fundamental to the air, what we now know is oxygen. In June 1772, Franklin viewed Priestley’s research and recognized that the manufacture of breathable air was part of an interconnected system that links animals and plants to the climate’s invisible gases.¹⁶ The sprig of mint was not only producing oxygen for mice but it was also consuming the creature’s

¹⁵ A. Michal McMahon, “*Small Matters*”: Benjamin Franklin, Philadelphia, and the “*Progress of Cities*” 157, 168 (Pennsylvania Magazine of History and Biography 116 1992) (arguing that Franklin saw freedom from pollution as matter of “public rights”).

¹⁶ Steven Johnson, *The Invention of Air* 21-37, 60-83 (2008).

carbon dioxide. Franklin told Priestley, “That the vegetable creation should restore the air which is spoiled by the animal part of it, looks like a rational system, and seems to be of a piece with the rest.”¹⁷ Franklin also noted that human actions could have a dangerous impact on that system if its constituent parts were not properly protected: “I hope this will give some check to the rage of destroying trees that grow near houses... I am certain, from long observation, that there is nothing unhealthy in the air of woods; for we Americans have every where our country habitations in the midst of woods, and no people on earth enjoy better health.”¹⁸ Franklin understood that a forested Republic, like a mint plant in microcosm, helped to stabilize the gaseous exchanges of the climate system.¹⁹

By the time of the Revolution, most New England colonists agreed that deforestation could alter micro-climates. On the local level, settlers experienced more extreme weather with hotter summers and colder winters with little forest canopy to shade the ground and protect it from winds.²⁰ Colonial concerns for environmental stability would be implicit in the founding and its notions of ordered liberty.

¹⁷ *Id.* at 80.

¹⁸ *Id.* at 82.

¹⁹ Joyce E. Chaplin, *The First Scientific American* (2006).

²⁰ William Cronon, *Changes in the Land* 122 (1983); Anya Zilberstein, *A Temperate Empire* (2016).

C. In Revolutionary America, Access to Land and Physical Resources Implemented Fundamental Rights of Life, Liberty, Property and Happiness.

Fundamental rights to life, liberty, property, and happiness strongly implied access to a natural biophysical world in which to fulfill the promise of republican citizenship. That material world included human bodies and their inherent capacity for labor, and was composed of soil, water, plants, animals, atmosphere, oxygen, sunlight, and seasons, all of which are now acknowledged to be key components in the climate system. In general, Americans of all sorts during the Revolution understood “land” to be a crucial foundational element of the American Republic, and perhaps *the* key foundational element. Thwarted ambitions to acquire western land was an important cause of the Revolution. The securing of a land base, especially a western land base, was crucial to the formation of the federal government and the survival of the Republic. In so many ways, moving through and living in land--and all the specific things land gathered and contained--was absolutely central to the Republic and to republican citizenship and its unalienable rights.

At the heart of the revolutionary imagination of nature was the sovereign individual with control over his--and for increasing numbers of women, her--body. “Among the natural Rights of the Colonists,” Samuel Adams wrote in 1772, “are these: First, the Right to *Life*; Secondly to *Liberty*; thirdly to *Property*; together with the right to support and defend them in the best manner

they can.”²¹ These principles became ubiquitous as the Revolution developed. Men began to acknowledge the natural rights of women. “Are not women born as free as men?” asked James Otis, a leading pamphleteer.²² Enslaved African Americans also seized on their natural rights to life, liberty, property, and happiness. In 1777, a group of black slaves claimed “to have in common with all other men a Natural and Unaliable Right to that freedom which the Great Parent of the Unavers hath Bestowed equalley on all mankind.”²³

Historians of the colonial and Revolutionary generations are unequivocal regarding the centrality of land to the American experience up to, through, and beyond the Revolution. Owning land was central to the formation of American identity, natural rights, and citizenship in a republican political order, as the work of historian Gordon Wood makes clear.²⁴ In republican theory, ownership of land was the basis of economic independence, which lessened corruption and thus enabled citizens to behave virtuously in public and political spheres. “The individual ownership of property,” wrote Wood, “was essential for a republic,

²¹ *Tracts of the American Revolution, 1763-1776*, at 235 (Merrill Jensen ed., Bobbs-Merrill 1967). See Fiege, *supra* note 8 at 57-99, 440-48 (extensive survey).

²² James Otis, *The Rights of the British Colonists Asserted and Proved in Pamphlets of the American Revolution, 1750-1776*, at 420 (Bernard Bailyn ed., Harvard Univ. Press 1965).

²³ *A Documentary History of the Negro People in the United States* 9-10 (Herb Aptheker ed., Citadel Press 1951); Fiege, *supra* note 8, at 88.

²⁴ Gordon Wood, *The Radicalism of the American Revolution* 123 (1992).

both as a source of independence and as evidence of permanent attachment to the community.”²⁵

Contests for land in the trans-Appalachian West were fundamental to the Revolution. Colonists wanted land for burgeoning families. Speculators wanted land for profits. They chafed at British imperial policies that restrained them from moving across the mountains to secure their hold on land. Historian Alan Taylor asserted that this discontent, and related internal struggles for access to western land, was one of the two chief causes of the Revolution.²⁶

The struggle for rights to land at the heart of the American Revolution often centered on struggles between elite proprietors and backcountry settlers and farmers. In the mid-1770s, Ethan Allen and the Green Mountain Boys rebelled against distant proprietor control of lands lying between New York and New Hampshire.²⁷ Allen studied John Locke and translated his doctrines into an agrarian idiom. The Green Mountain Boys’ claim to the land was “sealed and confirmed with the sweat and toil of the farmer,” an earthy evocation of the tie between property and bodily labor in nature. If anyone should try to take that land from him, Allen reasoned, then it was “Lawful for me ... to kill him if I can.”²⁸

²⁵ *Id.*

²⁶ Alan Taylor, *American Revolutions* 6 (2016).

²⁷ Gary Nash, *The Unknown American Revolution* 103-114 (2005); Fiege, *supra* note 8, at 75-78.

²⁸ Fiege, *supra* note 8, at 112-13.

“From these fundamental Lockean propositions on the natural right to property and the right to declare war against any man who tried to hold another man in thrall,” Nash wrote, “Allen proclaimed the right to defy duly constituted government--that is, if such government abused its powers.”²⁹ Jailed by the British during the Revolution, Allen became the state attorney of Vermont. “They were a people between the heavens and the earth,” he said of Vermonters, “as free as is possible to conceive any people to be; and in this condition they formed a government upon the true principles of liberty and natural right.”³⁰

Once the founders secured independence, they used land to stabilize the republic, ensuring a future in which citizens could realize the potential of their unalienable rights. They systematized the administration of western lands. Between 1781 and 1802, the states ceded their western land claims to the government. The Land Ordinance of 1785 surveyed land so that the government could sell it, which generated revenue to pay war debts. The Northwest Ordinance of 1787 created territories and admitted them as new states in the union.³¹ In this manner, the Republic created itself from its earthen fundament.

James Madison, Alexander Hamilton, and John Jay explained the landed basis of the Republic in their arguments for a new Constitution. In *Federalist*

²⁹ *Id.* at 113.

³⁰ *Id.* at 77.

³¹ *Id.* at 95.

10, Madison proposed an extensive Republic as “a republican remedy for the diseases most incident to a republican form of government,” in particular faction and its tyrannical potential. “Extend the sphere,” Madison wrote, “and you take in a greater variety of interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ...”³² Clearly the founders recognized that an extensive land base, and the physical resources it contained and to which the people had an unalienable right, would provide a vast source of political strength.

In *Federalist* 14, Madison offered a sweeping vision of ordered liberty conferred by an extensive land base and its natural resources. The extended Republic would cohere, he argued, and would transmit its benefits to the future. A transportation network, for example--including “those numerous canals, which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete”--would knit it together. “[P]osterity will be indebted” to the founders “for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favour of private rights and public happiness ... They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate ...”³³

³² Alexander Hamilton, John Jay, James Madison, *The Federalist* 42-49 (George W. Carey and James McClellan eds., Gideon Edition ed., Liberty Fund 2001).

³³ *Id.* at 62-67

D. In the Early Republic, Access to Land and Natural Resources Was a Source of Independence and Responsibility.

According to historian Drew McCoy, Jefferson, Madison, and others developed a sobering, realistic view of the life course of republics, which they believed resembled the life course of bodies: birth, growth, maturation, and eventual decline. The West and its lands were seen as the necessary antidote to forestall republican decay by creating and maintaining a sizeable landholding population of agricultural producers. Jefferson's acquisition of the Louisiana Territory in 1803 transformed the Republic because its westward expansion in space would delay its inevitable decay in time.³⁴

Western land would foster new generations of agrarians and stimulate industrious behavior among the citizenry, leading them to greater independence, youth, and vitality. Jefferson told John Jay: "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous & they are tied to their country & wedded to liberty & interests by the most lasting bonds."³⁵

"American republicans valued property in land primarily because it provided personal independence," McCoy wrote. "The individual with direct access to the productive resources of nature need not rely on other men, or any

³⁴ Drew R. McCoy, *The Elusive Republic* (1980); Joseph J. Ellis, *American Sphinx* 240-53 (1997).

³⁵ Letter from Thomas Jefferson to John Jay (Aug. 23, 1785).
http://avalon.law.yale.edu/18th_century/let32.asp

man, for the means of existence. The Revolutionaries believed that every man had a natural right to this form of property, in the sense that he was entitled to autonomous control of the resources that were absolutely necessary to his subsistence.”³⁶ In McCoy’s telling, “land” and “resources” comprised all that enabled the citizen to be independent and self-sustaining--not just soil, but also the key components that are the very means of life for every human being.

Jefferson reasoned that North America’s climate would be as suitable for animal husbandry and agricultural cultivation as Europe’s, a belief echoed in the ideas and practices of those who inherited the Revolution.³⁷ Yet the Republic would be different from the European model; as Jefferson said in his Inaugural Address, it was “a chosen country, with room enough for our descendants to the hundredth and thousandth generation.”³⁸

Euro-American settlers to western territories understood the intimate connection between the health of their bodies and the health of the land through bodily adaptation to novel climates, which they called “seasoning.” In fall 1854, John Brown recorded of Arkansas: “The weather is cloudy and uncomfortably warm, I fear it will produce sickness.”³⁹ Antebellum newcomers’ labor was so tied to land that their agricultural pursuits could even “season,” or transform, the

³⁶ McCoy, *supra* note 34, at 68.

³⁷ Thomas Jefferson, *Notes on the State of Virginia* 46-47, 59-60 (1785).
<https://docsouth.unc.edu/southlit/jefferson/jefferson.html>

³⁸ Ellis, *supra* note 34, at 217.

³⁹ Conevery Bolton Valenčius, *The Health of the Country* 97-101 (2002).

local climate itself. An 1838 writer complained “there is no such thing in Missouri as a winter which approaches the rainy season of the tropics. There will be no change in the climate of the state until clearings and tilling of the soil have done their work.”⁴⁰

Besides moving west in search of new lands when older lands became exhausted, a nobler republican impulse was to stay in place and enrich soil fertility. As historian Steven Stoll has noted, nineteenth-century agricultural “improvement” meant investing in certain crops and animals to restore what nutrients and organic matter were taken from the earth to preserve land tenure from one generation to the next.⁴¹ In 1839, Jesse Buel, editor of America’s farming periodical *The Cultivator*, talked about improving lands in both moral and political terms: “The new system of husbandry...regards the soil as a gift of the beneficent Creator, in which we hold but a life estate, and which, like our free institutions, we are bound to transmit, UNIMPAIRED, to posterity.”⁴² Similarly, South Carolina planter David Harris wrote in 1858 that “I hope that my children reap the reward of our labor... for it is the duty of one generation to work for them that is to follow and to whom we must give place.”⁴³ Soil was the matrix that united, in the words of Stoll, “the three great spheres of life--the

⁴⁰ Valenčius, *supra* note 39, at 191-228; Eduard Zimmerman, *Travel into Missouri in October 1838*, 9 Mo. Hist. Rev. 33, 41 (1915) (W.G. Bek, trans.).

⁴¹ Steven Stoll, *Larding the Lean Earth* 13-25 (2002).

⁴² Jesse Buel, *The Farmer's Companion* 21 (1839). Emphasis in original.

⁴³ Stoll, *supra* note 41, at 142.

gases of the atmosphere, the minerals of lithosphere, and the organisms of the biosphere” upon which landed permanence rested.⁴⁴

Initially, the republican promise and its basis in fundamental natural rights did not extend to every person. A life alienated from land, and from the freedoms that laboring in nature entailed, went by two names: dispossession and slavery. American Indians resisted expropriation by rooting their claims in an intergenerational connection to the earth.⁴⁵ In 1818, Cherokee women protested against Georgia land cessions: “The land was given to us by the Great Spirit above as our common right, to raise our children upon, & to make support for our rising generations. We therefore humbly petition... to hold out to the last in support of our common rights, as the Cherokee nation have been the first settlers of this land; we therefore claim the right of the soil.”⁴⁶ Likewise, enslaved African Americans asserted that improving nature through their forced labor gave them rights to land. Solomon Northup knew fellow slaves who believed that freedom “would bestow upon them the fruits of their own labors, and that it would secure to them the enjoyment of domestic happiness,” in other words, landed proprietorship.⁴⁷

⁴⁴ *Id.* at 14.

⁴⁵ Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (2014).

⁴⁶ Karen L. Kilcup, *Fallen Forests* 35 (2013).

⁴⁷ Solomon Northup, *Twelve Years a Slave* 260 (1853).

E. America's Second Revolution, the Civil War, Liberated African Americans to Claim Due Process Rights of Life, Liberty, Property and Happiness.

The Civil War carried unprecedented death and destruction to the American people and landscape, which threatened to undermine, and promised to fulfill, republican citizenship. As one of the first examples of industrialized warfare in world history, the conflict brought coal-driven railroads, ironclad steamships, and repeating rifles to the battle over slavery, technologies that came with environmental consequences.⁴⁸ George Perkins Marsh, Lincoln's envoy to Italy during the war, challenged the assumption that human impacts on nature were benign or negligible by studying ancient Mediterranean civilizations. Marsh's *Man and Nature* (1864) intended to show that "whereas [others] think the earth made man, man in fact made the earth."⁴⁹ But in doing so, Marsh warned Americans, humans could destroy themselves and the Earth. In particular, Marsh was concerned about "how far man can permanently modify and ameliorate those physical conditions of terrestrial surface and climate on which his material welfare depends."⁵⁰

The conflict over the meaning of the Republic and its ordered liberty climaxed during the Civil War. Lincoln understood the bitter struggle through the intergenerational lens of natural rights and the unalienable life, liberty,

⁴⁸ Drew Gilpin Faust, *This Republic of Suffering* (2008); Lisa M. Brady, *War Upon the Land* (2012).

⁴⁹ David Lowenthal, *George Perkins Marsh* 267 (2000).

⁵⁰ George P. Marsh, *Man and Nature* 26 (1864).

property, and happiness they conferred. Lincoln's words throbbed with the deeply emotional imagination of human life improved and fulfilled through its interactions with an expansive biophysical world and the limitless potentialities that it offered to individual citizens and "the great body of the people." Lincoln refined his beliefs as the bloody war dragged on and crystalized them in a 272-word address that reframed the very meaning of the Revolution: "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."⁵¹

The Civil War destroyed slavery and confirmed the rights of African Americans to their bodies and to their ability to go forth into the land to use nature to fulfill their potentialities as citizens of the Republic.⁵² As historian Eric Foner argued, the meaning of "freedom" for blacks meant access to and ownership of land. One postbellum cotton manufacturer observed that the freedman wanted "to become the owner of a little piece of land ... and to dwell in peace and security at his own free will and account, to be able to do so without anyone to dictate to him hours or system of labor."⁵³ Historian Steven Hahn described the rich social experiences that informed the African American

⁵¹ Fiege, *supra* note 8, at 173-82, 195-98.

⁵² Jim Downs, *Sick from Freedom* (2012); Ira Berlin, *The Making of African America* (2010).

⁵³ Eric Foner, *Reconstruction* 109 (1988).

commitment to a natural right to land.⁵⁴ In an eloquent speech all the more authentic, dignified, and powerful because of its colloquial language, the Virginia freedman Bayley Wyat made clear the unalienable rights that were at stake:

We has a right to the land where we are located. For why? I tell you. Our wives, our children, our husbands, has been sold over and over again to purchase the lands we now locates upon; for that reason we have a divine right to the land ... And den didn't we clear the land, and raise de crops ob corn, ob cotton, ob tobacco, ob rice, ob sugar, ob everything. And den didn't dem large cities in de North grow up on de cotton and de sugars and de rice dat we made? ... I say dey has grown rich, and my people is poor.⁵⁵

African Americans sustained a commitment to land ownership long after the Civil War and Reconstruction ended. In an 1897 essay, black scholar W.E.B. DuBois summed up the republican egalitarianism of land and labor by stating that emancipated African Americans were “subject to the same natural laws as other races.”⁵⁶ Thus did emancipation acknowledge and honor the substantive, unalienable rights to life, liberty, property, and happiness so central to human flourishing and American citizenship.

⁵⁴ Steven Hahn, *A Nation Under Our Feet* 135-154 (2003).

⁵⁵ *Id.* at 135. *A Freedman's Speech* (Philadelphia, 1867), quoted in Foner, *supra* note 53 at 105.

⁵⁶ W.E. Burghardt Du Bois, *The Conservation of Races* (American Negro Academy Occasional Papers, 10 1897).

F. In the Modern Era, Conservation of Natural Resources for Public Use and Posterity Has Become a Hallmark of American Policy, Informing the Climate Right Inquiry.

The culmination of the Civil War prompted a subtle modification of republican ideology, rights, and the concept of intergenerational responsibility. In 1864, as a war to split the country raged on, landscape architect and staunch Unionist Frederick Law Olmsted supported an act of Congress to use natural resources to bolster the nation's identity and unity. Signed by Lincoln, the law transferred the Yosemite Valley in the Sierra Nevada, along with the granite monoliths that rose above it, to the state of California for safekeeping on behalf of the nation, thus establishing the first de facto U.S. national park. In 1865, as a member of the state commission responsible for administering Yosemite, Olmsted authored the first statement on the meaning of national parks which explained the benefits, including rights, that a public natural resource, held in common by the people and shielded from the market, conferred on current and future generations.⁵⁷

Olmsted's logic followed from the proposition that the duty of republican government was to secure the rights and thus the wellbeing of its citizens. "It is the main duty of government," Olmsted argued, "if it is not the sole duty of government, to provide means of protection for all its citizens in the pursuit of happiness against the obstacles, otherwise insurmountable, which the

⁵⁷ Frederick Law Olmsted, *Yosemite and the Mariposa Grove* (Victoria Post Raney ed., Yosemite Association 1995) (1865).

selfishness of individuals is liable to interpose to that pursuit.” Visiting Yosemite, experiencing and perceiving its beauty through the visual sense--but including “a change of air and change of habits”--would enlarge, strengthen, reinvigorate, and improve the minds and bodies of the citizenry. “If we analyze the operation of scenes of beauty upon the mind,” he stated, “and the whole physical economy, the action and reaction which constantly occurs between bodily and mental conditions, the reinvigoration which results from such scenes is readily comprehended.” Like Jefferson, Lincoln, and other republican stalwarts, Olmsted imagined that Yosemite would confer its benefits indefinitely. Congress ensured “that the Yosemite should be held, guarded and managed for the free use of the whole body of the people forever.”⁵⁸

Progressive reformers in the late nineteenth and early twentieth centuries elaborated on this republican vision of natural resources. Many of them saw the uncontrolled exploitation of youth and nature as detrimental to the nation’s future stability. Over the turn of the twentieth century, factory owners hired child labor for long hours and pittance wages just as industrializing cities like Chicago swallowed up grain, lumber, and meat. Congress demonstrated a concern for damaged resources by establishing the Forestry Bureau in 1901 and the Children’s Bureau in 1912. By conserving both human and landscape resources, President Theodore Roosevelt and his contemporaries conveyed an inheritance to posterity: “We must handle the water, the wood, the grasses, so

⁵⁸ *Id.* at 9, 11-12, 13, 17-18, 20.

that we will hand them on to our children and our children's children in better and not worse shape than we got them.”⁵⁹ In 1916, the same year Congress passed the Organic Act creating the National Park Service, with the objective of preserving nature “unimpaired for the enjoyment of future generations,” it enacted the Keating-Owen Child Labor Act curbing underage wageworkers.⁶⁰

The Great Depression of the 1930s generated anxieties about the fate of land and citizens within the republican experiment: fears that large dust storms, called “black blizzards,” from an eroded, drought-stricken Great Plains would be the norm for air pollution; fears that widespread unemployment and prolonged idleness would lead young men toward the totalitarian ideologies spreading across the world. The Civilian Conservation Corps dealt with these twin problems by hiring male youth in their teens and twenties to reconstruct landscapes through physical labor. The Corps employed three million young men for the work of planting two billion trees, many for shelterbelts, and slowing soil erosion on forty million acres of farmland. Carl Stark explained that he and other CCC enrollees were “engaged in useful conservation work which will accrue to the benefit of both the present and future generations.”⁶¹

⁵⁹ William Cronon, *Nature's Metropolis* (1991); Michael McGerr, *A Fierce Discontent* 166 (2003).

⁶⁰ National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916); Keating-Owen Child Labor Act *superceded by* Fair Labor Standards Act of 1938.

⁶¹ Neil M. Maher, *Nature's New Deal* 104 (2008). *See also id.* at 3-15; Donald Worster, *Dust Bowl: The Southern Plains in the 1930s* 10-25 (1979).

The atomic age brought children to the forefront of environmental concern because they, and the future they represented, were most vulnerable to nuclear fallout from atmospheric weapons testing. Between 1945 and 1963, the U.S. military detonated 206 atomic bombs above ground, 100 in Nevada and 106 in the South Pacific. In 1959, the Greater St. Louis Citizens' Committee for Nuclear Information, led by physician Louise Reiss, initiated the "Baby Tooth Survey" to collect the teeth of children born in the 1950s and 1960s and then to measure their levels of strontium-90, a cancer-causing radioactive isotope. Reiss and her biomedical team at local universities received thousands of donated teeth; and school-aged children received "I gave my tooth to science" buttons for their participation. Preliminary results, published in the journal *Science*, showed rising levels of strontium-90 in children. In concert with pressure from the activist group Women Strike for Peace, whose demonstrators pushed empty baby carriages around Las Vegas casino blocks to protest the detrimental effects of airborne radiation, the findings convinced President John F. Kennedy to sign the 1963 Limited Nuclear Test Ban Treaty. The multi-national agreement ended above-ground nuclear weapons testing that released the greatest amounts of radioactive materials into the atmosphere.⁶²

⁶² Walter Sullivan, *Babies Surveyed for Strontium 90*, N.Y. Times, Nov. 25, 1961; Louise Zibold Reiss, *Strontium-90 Absorption by Deciduous Teeth*, 134 *Science* 1669-73 (1961); Dennis Hevesi, *Dr. Louise Reiss, Who Helped Ban Atomic Testing, Dies at 90*, N.Y. Times, January 10, 2011; Women's Peace Movement Bulletin (1962-64) in Guide to the San Francisco Women for Peace Records 1943-ongoing (Bancroft Library, University of California-Berkeley);

Nuclear fallout awakened modern environmental consciousness since it powerfully demonstrated just how connected water, soil, air, plants, animals, and humans were within the earth system. No one understood these links better than Rachel Carson, a U.S. Fish & Wildlife Service ecologist, who, in her now-classic *Silent Spring* (1962) detailed how radioactive materials and synthetic chemicals followed comparable pathways. “Strontium 90, released through nuclear explosions into the air, comes to earth in rain or drifts down as fallout, lodges in soil, enters into the grass or corn or wheat grown there, and in time takes up its abode in the bones of a human being, there to remain until his death,” Carson wrote. “Similarly, chemicals sprayed on croplands or forests or gardens lie long in soil, entering into living organisms, passing from one to another in a chain of poisoning and death.”⁶³

As Carson documented, the indiscriminate use of DDT insecticide, among other carcinogenic agents she termed “biocides,” not only silenced songbirds but also denied children’s right to bodily health and well-being.⁶⁴ Harkening back to the Republic’s founding, Carson alluded to this unacknowledged but implicit fundamental right: “If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our

Sarah Alisabeth Fox, *Downwind: A People’s History of the Nuclear West* (2014).

⁶³ Rachel Carson, *Silent Spring* 6 (Anniversary ed., 2002) (1962).

⁶⁴ Linda Lear, *Rachel Carson* 306-46, 373-74, 428-38 (2009).

forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.”⁶⁵

V. Conclusion

This sweeping and necessarily abbreviated review of United States “history and traditions” demonstrates that the evolution of Fifth Amendment rights of life, liberty, property and happiness, from colonial times to the present, include a right to a sustainable climate for present and future generations. For the reasons given herein, the Court should deny the Appeal.

Respectfully submitted,

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⁶⁵ Carson, *supra* note 63, at 12. For concern about children, see pages 205, 221-22.

APPENDIX 1

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I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 6893 words (excluding the parts of the brief exempted) based on the MS Word 2013 word processing system used to prepare the brief.

DATED: March 1, 2019

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I hereby certify that on March 1, 2019, I electronically filed the foregoing Brief of Amicus Curiae Law Professors in Support of Plaintiffs-Appellants' Opposition to Defendants' Motion for Writ of Mandamus with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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