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11 **UNITED STATES DISTRICT COURT**
 12
 13 **CENTRAL DISTRICT OF CALIFORNIA**

14
 15 **GENESIS B.**, a minor, by and through
 16 her Guardian, G.P.; et al.

17 **Plaintiffs,**

18
 19 **vs.**

20 **The UNITED STATES**
 21 **ENVIRONMENTAL PROTECTION**
 22 **AGENCY;** et al.

23 **Defendants.**

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

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

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

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1 **INTRODUCTION**

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

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

1 493–95 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (The 1954 opinion
2 declared “the fundamental principle that racial discrimination in public education is
3 unconstitutional,” holding a year later that “[a]ll provisions of federal, state, or local
4 law requiring or permitting such discrimination must yield to this principle.”).
5 Segregation—as a previously accepted systemic construct—was thereafter wholly
6 unconstitutional. While efforts to effectuate the full judgment and “fundamental
7 principle” of the *Brown* opinions continue today, as does invidious racism, that there
8 was Article III “redress” by the courts, however partial or imperfect, is indisputable.

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

20 For over 50 years, Congress has entrusted EPA with controlling the Nation’s
21 air pollution, and Children are subjects of that control. Yet, today, Children in the
22 western United States breathe polluted air from climate-fueled wildfires and fossil
23 fuel operations and their health and lives are injured. Climate pollution-driven heat,
24 fires, floods, and other disasters allowed by EPA cause Children to stay inside to
25 protect their health, lose ability to engage in spiritual and cultural practices, face
26 regular evacuation, and experience loss of home and property. Ultimately, EPA’s
27 cumulative contribution to the climate crisis shortens Children’s lifespans and
28

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

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

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

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

STATEMENT OF FACTS

1
2 Plaintiffs are 18 children, ages 8 to 17, who experience ongoing and
3 devastating harm from climate pollution. Compl. ¶¶ 24–99. For example, in 2017,
4 when Ione was only five years old, her home was completely destroyed by the Tubbs
5 Fire and she lost all of her possessions except her family’s car, which allowed a
6 narrow escape, and a charred swing set in the yard. Compl. ¶ 60. Dani has severe
7 allergies caused by wildfire smoke and poor air quality, which require medical
8 intervention and caused 15 missed days of school in a single year. Compl. ¶ 41.
9 Genesis suffers from climate-driven extreme heat which causes heat-exhaustion and
10 interferes with her schoolwork. Compl. ¶ 24. She must choose between keeping her
11 windows open to keep cool, or exposing herself to increasing wildfire smoke, ash,
12 and pollen that worsen her allergies. Compl. ¶ 26. The oppressive heat causes
13 Maryam A. to have eczema and headaches. Compl. ¶ 32. As she ages into her full
14 practice of Islam, the increasing heat will interfere with her ability to fast for
15 Ramadan, wear a hijab, and participate in the Hajj pilgrimage. *Id.* Noah was forced
16 to relocate from their home after being evacuated on three separate occasions
17 because of increasing wildfires, harming their mental health, and leading to the
18 development of asthma from smoke exposure. Noah is also sensitive to heat from a
19 medication they take to treat ADHD and cannot safely be outside with increasing
20 temperatures. Compl. ¶¶ 50–54. Both heat and smoke harm Noah physically and
21 prevent them from being in nature, which is the single most important treatment for
22 their mental health challenges. Compl. ¶¶ 50–59.

23 Plaintiffs’ injuries are no surprise to EPA, which has known for decades about
24 the detrimental effects on Children of the climate pollution it permits and their
25 unique vulnerability, which differs from adults. Compl. ¶¶ 162, 168, 171, 175, 178–
26 81, 222, 234, 237, 249–50. EPA’s experts and its own reports verify the cause of
27 these harms. *See* Compl. ¶¶ 142–70. Extreme heat driven by climate pollution puts
28

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

13 EPA has exclusive delegated federal authority to regulate air pollution. Compl.
14 ¶ 114. That statutory authority mandates EPA to systemically control pollution of all
15 stationary sources of pollution, all mobile sources of pollution, fuels, locomotives,
16 ocean-going vessels and large ships with marine diesel engines, and aircraft. Compl.
17 ¶ 124. EPA monitors carbon emissions and has continued to authorize levels of
18 climate pollution that are unsafe for Children. Compl. ¶ 262. Between 1751 and
19 2021, under EPA’s control since 1970, the U.S. emitted approximately 25% of the
20 world’s cumulative CO₂ pollution to the air; with some fluctuations in the past three
21 decades, U.S. climate pollution is still close to what it was in 1990. Compl. ¶¶ 257,
22 259. Under its regulatory control and permitting of climate pollution, EPA is
23 responsible for intentionally allowing approximately 422,000 million metric tons
24 (“MMT”) of CO₂ pollution in the Nation’s air. Compl. ¶ 261. EPA’s discriminatory
25 conduct prioritizes the interests of the fossil fuel industry and corporations over
26 Children’s health and welfare. Compl. ¶ 250.

1 EPA also knowingly harms Children by disregarding the best available
 2 science. Defendants know 350 parts per million (“ppm”) CO₂ is the uppermost level
 3 of climate pollution that will protect human health and welfare and the climate is
 4 already above that danger zone, currently at 419 ppm. Even with this knowledge,
 5 EPA continues allowing life-threatening amounts of climate pollution. Compl. ¶¶
 6 311–24. Every added ton of climate pollution to the air today exacerbates current
 7 harm to Children. Compl. ¶ 320.

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

17 STANDARD OF REVIEW

18 **Article III Case or Controversy Standing:** In deciding standing on a motion
 19 to dismiss under Fed. R. Civ. P. 12(b)(1), the Court must “accept as true all material
 20 allegations” and “construe the complaint in favor of the complaining party.” *Maya*
 21 *v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). At the pleading stage, courts
 22 “presum[e] that general allegations embrace those specific facts that are necessary
 23 to support the claim.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990). To
 24 establish standing, only one plaintiff need allege: (1) an injury in fact; (2) fairly
 25
 26
 27
 28

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

3 **Declaratory Judgment Act:** “[T]he fundamental test is whether the plaintiff
4 seeks merely advice or whether a real question of conflicting legal interests is
5 presented for judicial determination.” *Gillette Co. v. ‘42’ Prod. Ltd.*, 435 F.2d 1114,
6 1118–19 (9th Cir. 1970). A complaint sufficiently alleges a “controversy” under the
7 Declaratory Judgment Act if “the facts alleged, under all the circumstances, show
8 that there is a substantial controversy, between parties having adverse legal interests,
9 of sufficient immediacy and reality to warrant the issuance of a declaratory
10 judgment.” *Id.* at 1118 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S.
11 270, 273 (1941)).

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

20
21
22 ¹ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), which
23 Defendants invoke, is irrelevant here. The burden Defendants reference in *Kokkonen*
24 pertains to establishing *ancillary jurisdiction* (in a diversity jurisdiction case) after
25 stipulated dismissal of the case with prejudice where the district court did not retain
26 jurisdiction to enforce a settlement agreement, but could have, and thus, enforcement
27 became a contract dispute in state court. *Id.* at 378, 381–82. There is no heightened
28 burden to establish this Court’s jurisdiction beyond the traditional Article III test for
case or controversy in a federal question case such as this.

LEGAL ARGUMENT

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

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

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

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

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

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

10 **B. Declaratory Judgment Satisfies the Redressability Prong of**
 11 **Standing**

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

20 The Supreme Court has held that in constitutional cases declaratory judgment
 21 alone can redress an ongoing injury for purposes of Article III standing. *See, e.g.,*
 22 *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 77–78 (1978);
 23 *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Ninth Circuit precedent
 24

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

1 conforms to the principle that declaratory judgments sufficiently redress *ongoing or*
2 *impending* injuries for purposes of standing. *Cornett v. Donovan* held that a
3 declaratory judgment on the constitutionality of the state’s conduct toward
4 institutionalized persons sufficiently redressed the ongoing injuries of plaintiffs who
5 remained institutionalized. 51 F.3d 894, 897 (9th Cir. 1995); *see also Ass’n des*
6 *Éleveurs de Canards et d’Oies du Quebec v. Bonta*, 33 F.4th 1107, 1120 (9th Cir.
7 2022) (declaratory judgment clarifying the constitutionality of California’s foie gras
8 ban could redress ongoing injuries). The Ninth Circuit only finds declaratory
9 judgments insufficient to redress an ongoing injury in situations when the injury is
10 not cognizable, or when the ongoing injury was caused exclusively by the
11 defendant’s past conduct. *See, e.g., Arakaki v. Lingle*, 477 F.3d 1048, 1064 (9th Cir.
12 2007); *Mayfield v. United States*, 599 F.3d 964, 972–73 (9th Cir. 2010). Those
13 conditions are not present here because Plaintiffs seek declaratory relief to redress
14 cognizable ongoing and impending injuries caused by Defendants’ *ongoing* conduct.
15 *See* Compl. Prayer ¶¶ 1–7; *Id.* ¶¶ 260, 264, 266, 272, 279–81, 283–90, 303–05, 316,
16 324.

17 All eleven of the Ninth Circuit’s sister circuits that have addressed this issue
18 have either expressly held, or implied, that declaratory judgments are sufficient to
19 satisfy the redressability prong for ongoing or impending injuries. *Efreom v. McKee*,
20 46 F.4th 9, 21 (1st Cir. 2022); *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 390 (2d Cir.
21 2015); *Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th
22 770 (4th Cir. 2023); *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019); *Kareem*
23 *v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1027 (6th Cir. 2024); *Fulani v.*
24 *Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990); *Frost v. Sioux City, Iowa*, 920 F.3d
25 1158, 1162 (8th Cir. 2019); *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 906
26 (10th Cir. 2012); *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347
27 (11th Cir. 1999); *Am. Clinical Lab’y Ass’n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir.
28

1 2022); *Apotex, Inc. v. Daiichi Sankyo, Inc.*, 781 F.3d 1356, 1371 (Fed. Cir. 2015).
2 Some of these decisions note that declaratory judgments are the corollary of nominal
3 damages: whereas nominal damages may redress a completed past injury,
4 declaratory judgments may redress an ongoing or impending injury. *See, e.g.*,
5 *Kareem*, 95 F.4th at 1027.

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

20 The *sole case* Defendants cite in support of their contrary view, *Juliana v.*
21 *United States*, is unavailing for several reasons. 947 F.3d 1159, 1170 (9th Cir. 2020).
22 The dispositive issue on redressability in *Juliana* was plaintiffs’ request for specific
23 injunctive relief, 947 F.3d at 1170–75 (“The crux of the plaintiffs’ requested remedy
24 [was] an injunction.”). Because the *Juliana* plaintiffs’ claims for *injunctive* relief
25 were found unredressable for reasons not relevant here, *Juliana*’s redressability
26 analysis is not controlling. While *Juliana* summarily discussed declaratory relief in
27 *dicta, id.* at 1170, the Ninth Circuit did not cite or analyze the Declaratory Judgment
28

1 Act and did not cite any precedents binding on this Court addressing declaratory
2 judgments' ability to redress ongoing or impending injuries. *Id.* Instead, *Juliana*
3 cited only an out-of-circuit district court case holding declaratory judgment could
4 not redress a *past* injury, and a Supreme Court case holding that an injunction
5 requiring a defendant to pay civil penalties cannot redress injuries from “*purely past*
6 violations.” *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 249 (E.D. Pa.
7 2019); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 107 (1998) (emphasis
8 added). *Juliana's* discussion, in what can only be considered *dicta* regarding
9 declaratory relief with respect to *past* injuries, is irrelevant to the ability of
10 declaratory relief to redress these Plaintiffs' *ongoing and impending* injuries.

11 This Court faces nothing close to a binary choice of either totally solving
12 climate change or refusing to act as a check on unconstitutional conduct of
13 Defendants continuing towards the “eve of destruction.” *See Juliana*, 947 F.3d at
14 1164. Such a red herring argument would have prevented the Supreme Court's vital
15 opinions in *Brown v. Board* as well. Rather, Plaintiffs ask this Court to resolve an
16 active constitutional controversy, where Defendants are causing physical harm to
17 Children and discriminating against them, based on a full evidentiary record. In
18 response to a declaratory judgment, Plaintiffs allege that Defendants would conform
19 their conduct to control climate pollution consistent with the Court's findings and
20 judgment and that there are a range of choices EPA would have to adjust its
21 affirmative conduct in ways that would at least partially mitigate Plaintiffs' injuries.
22 *See Compl.* ¶¶ 327–30, 332, 334 (EPA's numerous methods for complying with a
23 declaratory judgment in this case, include, but are not limited to, ending its
24 discriminatory discounting practices; issuing national ambient air quality standards;
25 prescribing science-based standards for mobile and stationary sources of climate
26 pollution; denying discretionary permits for more climate pollution). Because every
27 ton of fossil-fuel-sourced pollution added to the air exacerbates Plaintiffs' injuries,

1 Compl. ¶ 320, and because even localized declines in fossil fuel pollution have an
2 immediate effect on improving local air quality and health, apart from climate
3 change, and can prevent 10,200 premature deaths in California each year, Compl. ¶
4 325, EPA’s compliance with a declaratory judgment would reduce Plaintiffs’ injuries.
5 Such partial relief satisfies the redressability requirement. *Larson v. Valente*, 456
6 U.S. 228, 243 n.15 (1982).

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

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

1 **C. No Other Justiciability Doctrine Bars the Children’s Case**

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

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

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

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

5 Accepting Defendants’ argument that the judiciary is without power to assess
6 the constitutionality of large-scale government policies and practices would have
7 been the downfall of cases addressing desegregation, prison reform, education
8 reform, foster care, interracial and same-sex marriage, and the rights of women to
9 serve on juries and have access to contraception. The canon of our Nation’s most
10 celebrated cases is replete with decisions approving equitable relief to remedy
11 systemic constitutional violations like those at issue here. *See, e.g., Brown*, 349 U.S.
12 294; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284
13 (1976); *Brown v. Plata*, 563 U.S. 493 (2011); *Loving v. Virginia*, 388 U.S. 1 (1967);
14 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

23 At its essence, Defendants’ argument is that this Court should decline to take
24 this case because the problem of climate change is just too big. Yet, the judiciary is
25 the branch tasked with interpreting and applying the law to controversies properly
26 before it, irrespective of whether the problems implicated by those controversies are
27

1 small or big. *See* U.S. Const. art. III; *Marbury*, 5 U.S. at 177.⁴ Because Plaintiffs’
 2 declaratory judgment complaint satisfies all three prongs of Article III standing and
 3 does not ask this Court to adjudicate a matter dedicated exclusively to the other
 4 branches of government, this Court has jurisdiction—and a duty—to hear Plaintiffs’
 5 case. Defendants’ 12(b)(1) motion to dismiss should be denied.

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

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

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

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

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

1 classic tiers of scrutiny in equal protection cases. “In other words, the Supreme Court
2 has neither decided if children as a class should be deemed ‘suspect’ or ‘quasi-
3 suspect’ nor explicitly provided an alternative doctrinal route to determine when
4 state action runs afoul of young people’s rights.” Catherine E. Smith, *Brown’s*
5 *Children’s Rights Jurisprudence and How it Was Lost*, 102 B.U. L. Rev. 2297, 2300
6 (2022). Nonetheless, there is a line of Supreme Court precedent in Children’s cases
7 to guide this Court’s *sui generis* analysis. In the last 70 years, the Supreme Court has
8 factored the unique qualities, characteristics, and needs of young people into its
9 constitutional calculus. Plaintiffs’ *sui generis* child-centered equal protection claim
10 rests on this line of children’s rights cases that provide an “area of special
11 constitutional sensitivity” mandating closer scrutiny of laws that impose a lifetime
12 of hardship on young people for matters beyond their control. *See Plyler v. Doe*, 457
13 U.S. 202, 226 (1982).

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

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

27 Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 Duke L.J. 75,
28 84, 88–89 (2021) [hereinafter Dailey & Rosenbury]. Young people were also used

1 to fill the ranks of indentured servants. Steven Mintz, *Huck's Raft, A History of*
2 *American Childhood* 38 (2004). Enslaved children of African descent were treated
3 as “commodit[ies] rather than as the child of a family, community, and nation.” *See*
4 *id.* at 41; Dailey & Rosenbury at 90. As post-Civil War ideologies of the ownership
5 and control of other human beings shifted, so too did concepts of race and gender
6 equality. Dailey & Rosenbury at 90–94. But Children’s rights remained stifled under
7 the regime of child coverture in both state and federal law. Dailey & Rosenbury at
8 90; *see also* Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*,
9 64 Ala. L. Rev. 533, 540 (2013).

10 It took the civil rights movement and the Supreme Court’s decision in *Brown*
11 *v. Board* to catalyze Children’s equal protection rights. *Brown*, 347 U.S. at 493–95;
12 Smith, *Brown’s Children’s Rights Jurisprudence* at 2300.⁵ While *Brown* is a
13 landmark racial discrimination case, it is also a bedrock Children’s rights decision,
14 striking down segregated education and its lifelong injury to the youth plaintiffs
15 because they were Black and young.⁶ The Court explained that “[education] is a
16 principal instrument in awakening the child to cultural values, in preparing him for
17 later professional training, and in helping him to adjust normally to his
18 environment.” *Brown*, 347 U.S. at 493. Denying Children the tools needed to
19 advance in society provided by that educational opportunity, affected their success
20 in life. *Id.* at 492. The Court recounted the district court’s factual findings that
21 segregation exacted a psychological toll on children because separating Black
22 children from their peers “generates a feeling of inferiority as to their status in the
23

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

28 ⁶ Smith, *Brown’s Children’s Rights Jurisprudence* at 2308–09.

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

5 *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety*
 6 *Co.*, 406 U.S. 164 (1972), powerfully developed Children’s rights precepts as part
 7 of equal protection law. These cases struck down state laws denying wrongful death
 8 and worker’s compensation claims of children of unwed parents. In *Levy*, the Court
 9 started “from the premise that . . . children . . . are humans, live, and have their being.
 10 They are clearly ‘persons’ within the meaning of the Equal Protection Clause of the
 11 Fourteenth Amendment.” *Levy*, 391 U.S. at 70. In *Weber*, the Court objected to the
 12 long history of moral condemnation of children of unmarried parents: “visiting this
 13 condemnation on the head of an infant is illogical and unjust. Moreover, imposing
 14 disabilities on the illegitimate child is contrary to the basic concept of our system
 15 that legal burdens should bear some relationship to individual responsibility or
 16 wrongdoing. Obviously, no child is responsible for his birth” *Weber*, 406 U.S.
 17 at 175. *Levy* and *Weber* recognized that less deference is accorded legislative
 18 decisions in order to protect Children’s rights.⁷ *See Pickett v. Brown*, 462 U.S. 1, 7
 19 (1983) (“Our consideration of these cases has been animated by a special concern
 20 for discrimination against illegitimate children.”).

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

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

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

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

16 *Levy*, *Weber*, and *Plyler* all signal a *sui generis* analysis by sparsely
17 referencing the classic indicia of “suspect” or “quasi-suspect” classifications rooted
18 in the classic *Carolene Products* test. *United States v. Carolene Prod. Co.*, 304 U.S.
19 144, 152 n.4 (1938). As explained in *Plyler*:

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

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

1 Children’s special sensitivities and exclusion from voting, while still being
 2 entitled to their constitutional rights as citizens and natural persons, creates a special
 3 constitutional obligation of judicial guardianship of Children’s rights. *See* Anne C.
 4 Dailey, *Developing Citizens*, 91 Iowa L. Rev. 431, 497 (2006). Moreover, it cannot
 5 be presumed that adult voters represent Children’s interests. Catherine E. Smith,
 6 “*Children’s Equality Law*” in the Age of Parents’ Rights, 71 Kan. L. Rev. 539, 545
 7 (2023).

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

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

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

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

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

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

6 In evaluating class status, courts evaluate whether the class (1) has endured a
7 history of discrimination, (2) has immutable characteristics, and (3) is politically
8 powerless. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Murgia*, 427 U.S. at 313–14.
9 Even under this adult-centric test, Children as a class satisfy the standard for
10 heightened scrutiny. Plaintiffs pled each of these factors in turn. Compl. ¶ 344. This
11 Court can rely upon a long line of cases interpreting the Constitution where the
12 Supreme Court has recognized both political and developmental vulnerabilities of
13 Children, affording special consideration to Children’s rights and wellbeing in nearly
14 every area of law, especially when the consideration of the right at issue might result
15 in grave consequences on the child’s life or liberty. *See, e.g., Roper v. Simmons*, 543
16 U.S. 551, 575 (2005) (holding capital punishment of a child under the age of 18, as
17 opposed to an adult, violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S.
18 460, 489 (2012) (holding mandatory life-without-parole sentences for Children is
19 cruel and unusual punishment, unlike adults); *Safford Unified Sch. Dist. No. 1 v.*
20 *Redding*, 557 U.S. 364, 376–77, 379 (2009) (holding a strip search of a middle
21 school student violated the student’s Fourth Amendment right of privacy); *New*
22 *Jersey v. T.L.O.*, 469 U.S. 325, 336–38 (1985) (holding Fourth Amendment protects
23 minors from unreasonable searches and seizures by public school officials); *Goss v.*
24 *Lopez*, 419 U.S. 565, 576 (1975) (holding school officials could not impose a 10-
25 day suspension on students without due process); *Breed v. Jones*, 421 U.S. 519, 528–
26 31, 541 (1975) (holding prosecuting a minor in adult court, after adjudication in
27 Juvenile Court violated the Fifth Amendment); *In re Winship*, 397 U.S. 358, 368

1 (1970) (holding due process requires a minor’s case to be proved beyond a
2 reasonable doubt); *In re Gault*, 387 U.S. at 33–34, 41, 55 (holding Children are
3 guaranteed rights under the Due Process Clause and Bill of Rights in juvenile
4 adjudication proceedings).

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

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

22 Finally, the Court could decide that Children warrant suspect or quasi-suspect
23 classification when facing lifetime injuries from state conduct on this factor alone—
24 Children are politically and economically powerless in our constitutional democracy
25 and cannot meaningfully participate in and influence the policy decisions that cause
26 the climate crisis, discriminate against them, and irreversibly harm them for the
27 remainder of their lives. They have no vote—the most important right of citizenship
28

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

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

16 **C. EPA’s Use of a Discount Rate in Regulatory Decisions Affecting**
 17 **Climate Pollution and Children’s Health Is Facially and**
 18 **Intentionally Discriminatory Toward Children**

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

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

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

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

5 Here, Plaintiffs alleged EPA’s longstanding economic analyses are
 6 intentionally discriminatory in the context of allowing climate pollution. The effects
 7 of climate pollution are long-lasting and cumulatively worse over time. Compl. ¶
 8 285. Thus, the discount rate purposely devalues the long-term harm of climate
 9 pollution on Children and the benefit of controlling and abating that pollution for
 10 Children, which biases public decision-making against Children. Compl. ¶¶ 285,
 11 289.

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

18 **D. In the Alternative, Plaintiffs Sufficiently Alleged EPA’s Actions**
 19 **Fail to Survive Rational Basis Scrutiny**

20 Even without protected status or a *sui generis* analysis, Plaintiffs’ equal
 21 protection claims should not be dismissed because they have also alleged sufficient
 22 facts to meet even the rational basis threshold that the challenged government
 23 conduct bears no “rational relation to some legitimate end.” *Romer v. Evans*, 517
 24 U.S. 620, 631 (1996). Not meeting one of these prongs is sufficient to fail rational
 25 basis scrutiny. *See Quinn v. Millsap*, 491 U.S. 95, 106–09 (1989); *Plyler*, 457 U.S.
 26 202; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Challenged
 27 conduct serves a legitimate end when it serves some identifiable purpose, and its

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

4 **A. Plaintiffs Sufficiently Allege EPA’s Conduct Infringes the**
5 **Fundamental Right to Life**

6 EPA has “of course, important, delicate, and highly discretionary functions,
7 but none that they may not perform within the limits of the Bill of Rights.” *Barnette*,
8 319 U.S. at 637 (calling for “scrupulous protection of Constitutional freedoms” of
9 Children to not “strangle the free mind at its source”). Despite Defendant’s attempts
10 to mischaracterize Plaintiffs’ claims as asserting a positive right,¹⁰ Plaintiffs claim a
11 deprivation of their Fifth Amendment right to life by Defendants’ *affirmative*
12 conduct that allows life-threatening amounts of air pollution. Compl. ¶¶ 357–66.
13 Notably, Defendants do not dispute Plaintiffs have a constitutional right to life, or
14 EPA has exclusive federal authority and control over the pollution that enters the
15 Nation’s air, and is thus, legally responsible for the pollution. Compl. ¶¶ 109–26;
16 *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423, 428 (2011) (“Congress
17 designated an expert agency, here, EPA, as best suited to serve as primary regulator
18 of greenhouse gas emissions.”). EPA has served as controller, regulator, and
19 permitter of climate pollution (greenhouse gas emissions) since 1970. Compl. ¶¶
20 102–04, 114, 116, 118–24.

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

- 23 • “Between 1970 and 2021, the United States, under EPA’s regulatory
24 control and permitting of climate pollution, has been responsible for
25 intentionally allowing approximately 422,000 million metric tons

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

1 (“MMT”) CO₂ pollution to enter the nation’s air from within its
2 territories[.]” ¶ 261.

- 3 • “Based on its own data, EPA has continued to authorize high levels of
4 climate pollution in the past thirty years, resulting in a sustained annual
5 rate of climate pollution[.]” ¶ 262.
- 6 • “Cumulatively, under EPA’s control and authority, the United States has
7 been responsible for about 271,922 MMT of CO₂ from 1970 to 2021,
8 which is 1.85 times more CO₂ than the U.S. emitted cumulatively in the
9 169 years prior to the creation of the EPA (149,985 MMT of CO₂ from
10 1800 to 1969).” ¶ 269.
- 11 • “EIA projects climate pollution will continue at current levels in the
12 United States in 2024. The EIA also projects continued climate
13 pollution through 2050, with 2050 pollution being about 81% of 2022
14 pollution.” ¶ 272.

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

- 17 • “Extreme heat places young Children at higher risk of kidney and
18 respiratory disease as well as fever and electrolyte imbalance. Heat
19 illness is also a leading cause of death and illness in high school athletes
20 with nearly 10,000 episodes occurring annually. Plaintiffs Huck, Dean,
21 and Emma have experienced physical injury from heat exposure during
22 athletics and Emma’s recent diagnosis of exercise-induced asthma is
23 exacerbated by heat.” ¶ 186.
- 24 • “Hotter temperatures lead to more emergency department visits for
25 Children with heat-related illnesses, bacterial enteritis, otitis media and
26 externa, infectious and parasitic diseases, nervous system diseases, and
27 other medical issues. Emergency department visits for Children in the
28 West have been increasing with higher ambient temperatures. Plaintiff
Noah is extremely sensitive to heat, which has caused severe discomfort
and has led to hospitalization.” ¶ 187.

1 “Defendants have infringed Plaintiffs’ rights to life through their systemic
2 control over and management of sources of climate pollution, and by intentionally
3 allowing levels of climate pollution that have diminished Children’s health and
4 safety, exposed them to increased adverse childhood experiences with harmful
5 lifelong consequences, are shortening their average lifespan, increasing their risk of
6 death and additional physical injury, and causing loss of enjoyment of life.” *Id.* ¶
7 361; *see Harris By & Through Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988)
8 (Whether under the Due Process Clause or the Eighth Amendment, “[w]here one’s
9 very right to life is at stake, and where prison officials control the conditions of
10 confinement, thereby reducing the prisoner’s ability to protect himself, it takes no
11 great acumen to determine that, constitutionally, prison officials may not exercise
12 their responsibility with wanton or obdurate disregard for or deliberate indifference
13 to the preservation of the life in their care.”); Compl. ¶¶ 98–99 (Plaintiffs cannot
14 escape the conditions of confinement to the climate system and air pollution
15 Defendants have created and control).

16 Cases involving bodily integrity, risk of permanent injury and premature
17 death, intrusions into personal security, health and safety, and even an inmate’s
18 exposure to smoky conditions that posed a “risk of serious damage to his future
19 health” have been regularly decided by federal courts. *Helling v. McKinney*, 509 U.S.
20 25, 33, 35 (1993); *see also Rochin v. California*, 342 U.S. 165 (1952); *Ingraham v.*
21 *Wright*, 430 U.S. 651, 673 (1977); *Youngberg v. Romeo*, 457 U.S. 307, 315, 318
22 (1982); *Winston v. Lee*, 470 U.S. 753, 761 (1985); *Washington v. Harper*, 494 U.S.
23 210, 237 (1990) (Stevens, J., concurring). These Children also state valid
24 constitutional claims for relief.

25 The Fifth Amendment “forbids the government to infringe” fundamental
26 rights “no matter what process is provided, unless the infringement is narrowly
27 tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 293, 299,
28

1 302 (1993). Plaintiffs have sufficiently alleged a deprivation of their enumerated
2 right to life caused by Defendants’ affirmative conduct and are entitled to prove their
3 case at trial. Likewise, Defendants can attempt to show a compelling state interest
4 and narrowly tailored conduct. There is a live constitutional controversy over these
5 Children’s right to life that requires adjudication.

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

8 The Fifth Amendment also incorporates unenumerated rights applicable
9 against the federal government. *See Bolling*, 347 U.S. 497. A fundamental right to a
10 life-sustaining climate system is “deeply rooted in this Nation’s history and
11 tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*,
12 521 U.S. 702, 721 (1997). Much like the right to vote, the perpetuity of the Republic
13 occupies a central role in our constitutional structure as a “guardian of all other
14 rights.” *Plyler*, 457 U.S. at 217 n.15. “[T]he Union of these States is perpetual[,]”
15 because “[p]erpetuity is implied, if not expressed, in the fundamental law of all
16 national governments.” Abraham Lincoln, First Inaugural Address and Message to
17 the Special Session of the 37th Congress (1861). Preserving “the existence of the
18 Union” underlies the text and structure of the Constitution. The Federalist No. 1, at
19 11 (Alexander Hamilton) (E. H. Scott ed., 1898). The Union may only exist if there
20 is a livable atmosphere and climate in which humans may thrive. As articulated by
21 James Madison: “Animals, including man, and plants may be regarded as the most
22 important part of the terrestrial creation. . . . To all of them, the atmosphere is the
23 breath of life. Deprived of it, they all equally perish. But it answers this purpose by
24 virtue of its appropriate constitution and character.” James Madison, Address to the
25 Agricultural Society of Albemarle (May 12, 1818). Madison recognized in the
26 infancy of our country that the nature of the atmosphere was crucial to human rights.

1 Courts have recognized rights to a life-sustaining climate system, as part of
 2 the body of fundamental constitutional and human rights. *Juliana v. United States*,
 3 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) reversed on other grounds and assuming
 4 the right existed, 947 F.3d 1159, 1169–70 (9th Cir. 2020); *Matter of Hawai‘i Elec.*
 5 *Light Co., Inc.*, 526 P.2d 329, 337 (Haw. 2023) (recognizing implicit right);
 6 *Navahine v. Hawai‘i Dep’t of Transp.*, No. 1CCV-22-0000631, Order Denying Defs.’
 7 MTD at 5 (Haw. 1st Circ. Ct. Apr. 19, 2023) (same); *Held v. Montana*, CDV-2020-
 8 307, Findings of Fact, Conclusions of Law, and Order at 102 (Mont. 1st Jud. Dist.
 9 Ct. Aug. 14, 2023) (fundamental constitutional right “includes climate as part of the
 10 environmental life-support system”); *Stichting Urgenda v. The State of the*
 11 *Netherlands*, No. 19/00135 Judgment ¶ 5.7.9 (Sup. Ct. Neth. Dec. 20, 2019)
 12 (“Climate change threatens human rights”); *Leghari v. Fed’n of Pakistan*, W.P. No.
 13 25501/2015, Order ¶ 6 (Lahore High Court of Lahore, Pak. Sep. 4, 2015) (“On a
 14 legal and constitutional plane [climate change] is clarion call for the protection of
 15 fundamental rights of the citizens”); Inter-Am Ct. H.R. (ser. A) No. 23, The
 16 Environment and Human Rights, Advisory Opinion OC-23/17, ¶ 54 (Nov. 15, 2017)
 17 (“[C]limate change has a wide range of implications for the effective enjoyment of
 18 human rights, including the rights to life, health, food, water, housing and self-
 19 determination”); Inter-Am Ct. H.R. (ser. C) No. 511, *Inhabitants of La Oroya v. Peru*
 20 (Preliminary Exceptions, Merits, Reparations and Costs) Judgment, ¶143 (Nov. 27,
 21 2023) (“States have a heightened duty to protect children and actions against risks
 22 to their health produced by the emission of polluting gases that contribute to climate
 23 change.”) (unofficial translation).¹¹ A full factual and historical record will establish
 24

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

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

3 **IV. EPA’S CONDUCT VIOLATES THE CONSTITUTIONAL** 4 **SEPARATION OF POWERS**

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

13 Both the Ninth Circuit and the Supreme Court found constitutional causes of
14 action exist when the executive “exceeds his or her statutory authority, and in doing
15 so, *also* violates a specific constitutional prohibition.” *Id.* at 890. Federal courts have
16 repeatedly found a cause of action exists for private parties to enforce constitutional
17 separation-of-powers principles. *Bond v. United States*, 564 U.S. 211, 222–23 (2011)
18 (recognizing injured person’s standing to sue when they have “sustain[ed] discrete,
19 justiciable injury from actions that transgress separation-of-powers limitations”);
20 *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (Separation of powers doctrine is
21 “designed to preserve the liberty of all the people” and so “whenever a separation-
22 of-powers violation occurs, any aggrieved party with standing may file a
23 constitutional challenge.”); *United States v. McIntosh*, 833 F.3d 1163, 1174–75 (9th
24 Cir. 2016) (cause of action based on Appropriations Clause); *NLRB*, 573 U.S. at 556–
25 57 (cause of action based on Recess Appointments Clause); *Clinton v. City of New*
26 *York*, 524 U.S. 417, 434–36 (1998) (cause of action based on Presentment Clause);
27 *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020)

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

3 Plaintiffs sufficiently pled a violation of separation of powers principles
 4 premised on the major questions doctrine. Compl. ¶¶ 377–86. The major questions
 5 doctrine is founded on “both separation of powers principles and a practical
 6 understanding of legislative intent.” *West Virginia v. EPA*, 597 U.S. 697, 723 (2022);
 7 *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (exercise of agency
 8 authority far beyond scope of statutory authority Congress could reasonably have
 9 been understood to grant “would deal a severe blow to the Constitution’s separation
 10 of powers”). Since 1970, Congress has consolidated and delegated exclusive
 11 authority to EPA to protect the Nation’s air and prevent pollution that endangers
 12 human health and welfare from entering or accumulating in the air. *See* 42 U.S.C. §
 13 7401(b)(1); Compl. ¶¶ 116–25. Plaintiffs allege EPA has instead “intentionally
 14 allowed an accumulation of climate pollution that EPA’s own documents and the best
 15 available scientific information show is harmful to the health and welfare of
 16 Children,” Compl. ¶ 103, and has “systematically ignored or rejected citizen requests
 17 to control climate pollution.” Compl. ¶ 169; *see also id.*, ¶¶ 159–60, 163–67. There
 18 is no statutory language in the Clean Air Act that explicitly or implicitly gives EPA
 19 the authority to allow pollution at levels that degrades Children’s public health and
 20 welfare, decreases the productive capacity of the population, and which
 21 discriminates against and injures Children. Likewise, EPA has been delegated no
 22 authority by Congress to discount the lives of Children when it exercises its authority
 23 to control air pollution.¹² As Congress “does not usually hide elephants in
 24 mouseholes,” the Clean Air Act cannot reasonably be read to authorize EPA’s

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

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

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

22 ¹³ This Court should reject Defendants’ reliance on *Mississippi v. Johnson*, 71 U.S.
23 (4 Wall.) 475 (1866) to argue that the Take Care Clause is entirely non-justiciable.
24 MTD at 20. An identical argument was rejected in *Citizens for Responsibility &*
25 *Ethics in Washington v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018), where the court
26 read *Johnson* as addressing “limitations on the ability of federal courts to issue an
27 *injunction* against the President,” and clarified that *Johnson* “does not so clearly
28 foreclose” the issuance of a “declaratory judgment order . . . for a Take Care Clause
violation.” 302 F. Supp. 3d at 138–139 (emphasis original).

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

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

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

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

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

21 The Supreme Court has held substantive due process and equal protection
22 rights are self-executing because the power to enforce the safeguards within the Bill
23 of Rights is a judicial, not legislative, power. *The Civil Rights Cases*, 109 U.S. 3, 20
24 (1883) (“[T]he Fourteenth [Amendment] is undoubtedly self-executing without any
25 ancillary legislation”); *see also City of Boerne v. Flores*, 521 U.S. 507, 523 (1997);
26 *Hills*, 425 U.S. at 289 (case brought directly under the Fifth Amendment). The Due
27 Process Clause serves “as a limitation on the State’s power to act,” and is thus
28 negative in character. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S.

1 189, 195 (1989). It is an imperative feature of the separation of powers doctrine that
 2 the courts, not the legislature, remain able to enforce provisions in the Bill of Rights
 3 and interpret the Constitution. *City of Boerne*, 521 U.S. at 524 (“The power to
 4 interpret the Constitution in a case or controversy remains in the Judiciary.”). Under
 5 the common law, courts have long recognized that non-monetary claims under the
 6 Fifth Amendment do not require a waiver of sovereign immunity. *See, e.g., Ex parte*
 7 *Young*, 209 U.S. 123, 143 (1908). Defendants know this, and in recent briefing to
 8 the Supreme Court conceded that sovereign immunity does not apply to Fifth
 9 Amendment claims in equity: “As this Court has explained, an individual’s ‘ability
 10 to sue to enjoin unconstitutional actions by state and federal officers’ is a ‘creation
 11 of courts of equity,’ reflecting ‘a long history of judicial review of illegal executive
 12 action.’” Brief for the United States as Amicus Curiae Supporting the Respondent at
 13 8, *Devillier v. Texas*, No. 22-913 (Dec. 12, 2023) (cleaned up). Defendants have zero
 14 claim to sovereign immunity for this Fifth Amendment declaratory judgment action
 15 brought by Children.

16 **B. Sovereign Immunity Is Also Explicitly Waived Under 5 U.S.C.**
 17 **§ 702**

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

25 _____
 26 ¹⁴ U.S. Dep’t of Just., Just. Manual, Civil Resource Manual § 36,
 27 [https://www.justice.gov/jm/civil-resource-manual-36-declaratory-judgment-act-
 28 and-ada](https://www.justice.gov/jm/civil-resource-manual-36-declaratory-judgment-act-and-ada)

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

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

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

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

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

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

1 Plaintiffs do not contend any single EPA action is causing their asserted
2 injuries. They seek review of the cumulative climate pollution allowed by EPA and
3 its systematic discrimination against Children in the process, which infringes their
4 fundamental rights. These claims *can only be brought* under the U.S. Constitution,
5 not the Clean Air Act. The judicial review framework Congress provided in the
6 Clean Air Act provides for challenges to discrete agency actions and imposes in
7 instances a 60-day statute of limitations, both of which foreclose Children from
8 seeking redress for past, present, and ongoing cumulative harm to their constitutional
9 rights. Congress did not preclude or displace the type of systemic claims Plaintiffs
10 bring here directly under the Constitution and that are regularly brought to our
11 federal courts. *See Jeremiah M. v. Crum*, No. 3:22-CV-00129, 2023 WL 6316631, at
12 *1 (D. Alaska Sept. 28, 2023) (denying motion to dismiss in Children’s case
13 challenging structural issues in child welfare system as violative of constitutional
14 rights).

15 CONCLUSION

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

24 If this Court finds facial deficiencies with Plaintiffs’ standing allegations or
25 finds the Complaint fails to state a claim in any respect, Plaintiffs respectfully
26 request leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052
27 (9th Cir. 2003); *see Foman v. Davis*, 371 U.S. 178, 182 (1962).

1 DATED this 8th day of April, 2024.
2

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