

No. 17-71692

# United States Court of Appeals

FOR THE

## Ninth Circuit

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

v.

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

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

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

### **UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS* *CURIAE* SIERRA CLUB**

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Pursuant to Federal Rule of Appellate Procedure 27 and 29(a) and Ninth Circuit Rule 29-3, by and through undersigned counsel, Sierra Club respectfully moves for leave to file the concurrently submitted *amicus* brief in support of Defendant United States District Court for the District of Oregon, Eugene Division and Real Parties in Interest Kelsey Cascadia Rose Juliana, et al.

Sierra Club is the nation's oldest and largest grassroots environmental organization. Founded in 1892, Sierra Club now has over three million members and supporters and over 60 chapters nationwide. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

For three decades, Sierra Club has devoted a major proportion of its resources advocating for federal action to combat climate change and currently operating multiple campaigns to achieve that end. Despite the strenuous efforts of Sierra Club and all those who share its goals, meaningful federal action on climate change has been continually stymied in the legislative and executive branches, and any progress made is continually under threat of reversal.

Sierra Club's interests are directly affected by the District Court's holdings recognizing a federal constitutional right to a climate system capable of sustaining

human life and a federal public trust duty to protect the atmosphere from greenhouse gas pollution. Sierra Club's brief describes how the District Court's holdings will provide an essential means of overcoming the political gridlock that has thus far prevented necessary federal action on climate change.

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-3, counsel for Sierra Club has contacted counsel for Petitioners and Real Parties in Interest, who have consented to the filing of its *amicus* brief. The Circuit Advisory Committee Note to Circuit Rule 29-3 states that a motion for leave to file is not necessary when all parties consent. Because Circuit Rule 29-3 does not explicitly reference mandamus proceedings, Sierra Club, in an abundance of caution, files this unopposed motion for leave to file the concurrently submitted brief.

Dated: September 5, 2017

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Unopposed Motion for Leave to File Brief as *Amicus Curiae* in Opposition to Petition for Writ of Mandamus with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 5, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 5, 2017

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## **CORPORATE DISCLOSURE AND RULE 29 STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Sierra Club respectfully submits the following disclosures:

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment. Sierra Club has no parent companies and no publicly held company has a 10% or greater ownership interest in Sierra Club.

No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than Sierra Club has made a monetary contribution intended to fund its preparation or submission.

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## STATEMENT OF INTEREST AND INTRODUCTION

Founded in 1892, Sierra Club is the nation's oldest and largest grassroots environmental organization, with over three million members and supporters.

Sierra Club fully supports the district court's decision in this case, and respectfully submits this *amicus* brief to explain, in practical terms, why the time has come for federal courts to recognize a fundamental right to a life-sustaining climate system and a federal public trust duty to protect the atmosphere for ourselves and our posterity. Because the district court correctly applied the law, this important case should be allowed to proceed to trial.

For decades, Sierra Club has used the traditional tools of advocacy – organizing, lobbying, litigation, and public outreach – to push for policies that limit our nation's dependence on polluting fossil fuels and promote clean, renewable energy.<sup>1</sup> Sierra Club first created a Global Warming Program in 1989 and has greatly expanded that work since then, using every means at its disposal at the federal, state, and local levels to protect the climate through such policies.<sup>2</sup>

Sierra Club has not been alone in this effort: scores of national, regional, and local groups and dozens of states and cities can tell similar stories of their work to

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<sup>1</sup> See, e.g., Tom Turner, *Sierra Club: 100 Years of Protecting Nature* 204-07 (1991) (describing Sierra Club efforts to promote energy efficiency and renewable energy and curtail U.S. reliance on fossil fuels during the Nixon, Ford, and Carter administrations).

<sup>2</sup> See, e.g., Sierra Club, *Moving Beyond Fossil Fuels*, <http://www.sierraclub.org/beyond-fossil-fuels> (last visited Sept. 3, 2017).

combat climate change. Yet those collective efforts have so far come up short, even as atmospheric greenhouse gas levels, global temperatures, and sea levels climb.

States and cities can make substantial progress toward curbing greenhouse gases, but given the interstate nature of air pollution and the global nature of climate change, only the federal government is equipped to develop comprehensive nationwide and international solutions. Yet despite an array of statutory obligations and regulatory options for addressing the climate crisis, the federal government's response has been grossly inadequate. While defendants' activities are a primary cause of climate change, the federal actions designed to address this problem have been too modest, and many of those are easily undone by later administrations. Neither the plaintiffs nor the planet can afford this glacial pace of progress on climate change while glaciers melt into the rising seas.

## **ARGUMENT**

### **I. The District Court Correctly Applied the Law, Especially in Light of the Federal Government's Contribution to, and Failure to Address, this Existential Threat.**

The district court's pioneering decision recognizing a fundamental right to "a climate system capable of sustaining human life," Dist. Ct. Dkt. 83 at 32, is fully

consonant with constitutional precepts.<sup>3</sup> Because the rights to life, liberty, and property depend on a habitable climate, that right is necessarily both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (internal quotations and emphasis omitted); *see* App. Ct. Dkt. 14 at 35-39. Courts have not previously had occasion to identify a fundamental right to a life-sustaining climate system, but “new insight” now points to a new threat to our liberty. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). It is “now manifest,” *id.* at 2602, that burning fossil fuels causes a dramatic increase in atmospheric greenhouse gas concentrations and its life-threatening consequences.<sup>4</sup>

Petitioners’ argument that there is no due process right to “a particular climate system,” App. Ct. Dkt. 1 at 22, diminishes the gravity of plaintiffs’ claims and ignores the district court’s “careful description of the asserted right,” *Reno v. Flores*, 507 U.S. 292, 302 (1993). The district court held that

where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage

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<sup>3</sup> Sierra Club focuses here on plaintiffs’ substantive due process claims but also supports plaintiffs’ public trust claims, which are discussed in detail in the brief of *amicus curiae* Niskanen Center.

<sup>4</sup> U.S. Research Program on Glob. Change, *The Third National Climate Assessment: Highlights of Climate Change Impacts in the United States: Highlights* 12-14 (2014), [http://www.globalchange.gov/sites/globalchange/files/NCA3\\_Highlights\\_LowRes-small-FINAL\\_posting.pdf](http://www.globalchange.gov/sites/globalchange/files/NCA3_Highlights_LowRes-small-FINAL_posting.pdf); *see also* Dist. Ct. Dkt. 98 ¶¶ 5,7,8,10.

to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation.

Dist. Ct. Dkt. 83 at 33. Plaintiffs seek to preserve a habitable climate; they are not frivolously demanding that the federal sovereign, like King Arthur in Camelot, idyllically decree: "The climate must be perfect all the year."<sup>5</sup>

The district court also correctly concluded that "plaintiffs have adequately alleged a danger creation claim." *Id.* at 35. United States' carbon dioxide emissions constitute over a quarter of cumulative global emissions from 1850 to 2013—more than double that of the next highest country—and the U.S. remains the second largest emitter in the world.<sup>6</sup> A substantial portion of those emissions are the direct result of fossil fuels extracted from federally-owned lands.<sup>7</sup> And the vast majority of U.S. emissions come from sources over which defendants exercise sweeping regulatory authority.<sup>8</sup> Yet even though federal actions and federally-authorized

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<sup>5</sup> *Camelot* lyrics, All Musicals, <https://www.allmusicals.com/lyrics/camelot/camelot.htm> (last visited Sept. 5, 2017).

<sup>6</sup> Dist. Ct. Dkt. 98 ¶7; *see also*, World Resources Inst., CAIT Climate Data Explorer: Historical Emissions, <http://cait.wri.org/historical/> (interactive tool depicting historical emission levels by country) (last visited Sept. 4, 2017).

<sup>7</sup> *See, e.g.*, 81 Fed. Reg. 17,720, 17,224 (Mar. 30, 2016) (noting that coal mined on federal lands accounts for about 41 percent of all coal produced in the United States and about 10 percent of total domestic greenhouse gas emissions when combusted); *see generally* Stockholm Environment Institute, *How would phasing out U.S. federal leases for fossil fuel extraction affect CO<sub>2</sub> emissions and 2°C goals?* (May 2016), <https://www.sei-international.org/mediamanager/documents/Publications/Climate/SEI-WP-2016-02-US-fossilfuel-leases.pdf>.

<sup>8</sup> *See* EPA, *Inventory of Greenhouse Gas Emissions and Sinks: 1990–2015*, Table ES-2 (Apr. 2017), <https://www.epa.gov/sites/production/files/2017->



activities have played a central role in creating this perilous situation, defendants, indifferent to the pleas of its citizens and dozens of state and local governments, have failed for decades to curtail these emissions. That failure is a primary cause of our imbalanced climate system.

Political dysfunction is impeding a meaningful federal response to this looming catastrophe. The federal government alone has the requisite tools to comprehensively address climate change. Air pollution is “heedless of state boundaries.” *EPA v. EME Homer City Gen., L.P.*, 134 S. Ct. 1584, 1593 (2014). And greenhouse gases are global pollutants.<sup>9</sup> While states and cities can reduce emissions within their borders (or otherwise attributable to their residents),<sup>10</sup> only the federal government can take nationwide actions and enter international agreements on behalf of the whole country.

Time is of the essence in curtailing greenhouse gas pollution, but recalcitrance and competing priorities at the federal level have led to fruitless

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[02/documents/2017\\_complete\\_report.pdf](#). Approximately 75 percent or more of U.S. emissions come from mobile or stationary sources over which EPA already has regulatory authority to limit greenhouse gas emissions, and the agency could assert such authority over many of the remaining sources without the need for additional legislation. *See also* Dist. Ct. Dkt. 98.

<sup>9</sup> 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009) (greenhouse gas endangerment finding).

<sup>10</sup> *See, e.g.*, 2017 Cal. Legis. Serv. Ch. 135 (A.B. 398), amending and expanding A.B. 32, the California Global Warming Solutions Act of 2006; *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1094 (9th Cir. 2013) (holding that A.B. 32’s Fuel Standard did not violate the dormant Commerce Clause).

efforts, endless delays, and backtracking. Every comprehensive legislative proposal to tackle climate change since the United States ratified the United Nations Framework Convention on Climate Change (“UNFCCC”) has died in Congress.<sup>11</sup> As for the executive branch, since global warming was first identified as a threat decades ago, only one administration has taken any meaningful steps to mitigate its effects.<sup>12</sup> And even the promises of the Obama administration, if fully implemented, would not have been enough to enable the United States to meet its international commitments.<sup>13</sup> Now, the current administration is taking a giant leap backwards, attempting to dismantle those modest regulations that would limit our dependence on fossil fuels, with deliberate indifference to the effect of federal action on climate change. *See infra* at 7-17. In short, the legislative and executive branches have proven time and again that they will not rise above the political fray and mitigate this existential threat.

Our Constitution was designed to address this circumstance. “The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political

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<sup>11</sup> *See, e.g.*, H.R. 2454, 111th Cong. (2009); S. 2191, 110th Cong. (2007).

<sup>12</sup> *See* The President’s Climate Action Plan, Exec. Office of the President (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27climateactionplan.pdf> (last visited Sept. 2, 2017).

<sup>13</sup> Jeffrey Greenblatt and Max Wei, Assessment of the climate commitments and additional mitigation policies of the United States, 6 *Nature Climate Change* 1090 (2016), <http://www.nature.com/nclimate/journal/v6/n12/full/nclimate3125.html?foxtrotcallback=true> (last visited 9/2/2017).

controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”” *Obergefell*, 135 S. Ct. at 2605-06 (quoting *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Judicial recognition of the fundamental right to a life-sustaining climate is needed to overcome the political branches’ shocking indifference to the climate crisis. Similarly, a federal public trust obligation to protect the atmosphere is necessary to guide federal decision-making.

## **II. In the Climate Context, Justice Delayed Is Justice Denied.**

Below, we provide a brief history of the federal government’s action in four critical areas: emissions from the two largest greenhouse gas sources (vehicles and power plants), emissions from federal coal leases, federal oil and gas leasing and regulation, and creation of a metric for calculating the impacts of greenhouse gas emissions. These are but a few examples of defendants’ endless denials, delays, false starts, modest gains, and backsliding on climate action, demonstrating the need for the court to recognize these doctrines.

### ***A. Power Plants and Motor Vehicles***

Fossil fuel-fired power plants and vehicles account for the majority of U.S. greenhouse gas emissions.<sup>14</sup> The long history of efforts to impose federal emission

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<sup>14</sup> EPA, *supra* n. 8, at ES-2 (in 2015, electric power and transportation sectors accounted for 67 percent of U.S. carbon dioxide emissions and 55 percent of total greenhouse gas emissions).

limits on those sources is intertwined, with disappointing results. A quarter-century after President George H.W. Bush signed and the Senate ratified the United Nations Framework Convention on Climate Change, with the objective of achieving “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,”<sup>15</sup> no federal standards are in effect to limit carbon pollution from our nation’s vast fleet of existing coal, oil, and gas plants. Vehicles did finally become subject to federal greenhouse gas standards a dozen years after environmental and business groups petitioned the Environmental Protection Agency (“EPA”), but overall emissions from the sector have not declined and the current administration now plans to reconsider those standards.<sup>16</sup>

In 1998, the Clinton EPA concluded that greenhouse gases were subject to the Clean Air Act, yet declined to regulate those emissions.<sup>17</sup> Numerous organizations petitioned EPA to set greenhouse gas standards for vehicles in 1999,

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<sup>15</sup> United Nations Framework Convention on Climate Change art. 2, June 12, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

<sup>16</sup> See EPA, Sources of Greenhouse Gas Emissions, Transportation, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#transportation> (last visited Sept. 3, 2017).

<sup>17</sup> See Memorandum from Jonathan Cannon to Administrator Carol Browner on EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998); see also *Massachusetts v. EPA*, 549 U.S. 497, 510-11 (2007) (discussing Cannon memo).

and when EPA failed to respond, Sierra Club and others sued.<sup>18</sup> By this time, under the management of the George W. Bush Administration, EPA backtracked, denying the petition and disavowing its statutory authority.<sup>19</sup> Following years of litigation, in 2007 the Supreme Court decided *Massachusetts v. EPA*, affirming EPA's authority and responsibility under the Clean Air Act to address greenhouse gas emissions. 549 U.S. at 528-29, 532-33. After another change in administrations, the Obama EPA finally made a formal determination that greenhouse gases endanger health and welfare of current and future generations, and subsequently set and later strengthened standards for light-duty vehicles.<sup>20</sup> The Trump EPA has now announced that it intends to reconsider those standards.<sup>21</sup>

In parallel with the vehicles litigation, many states and environmental groups sought Clean Air Act standards for power plant carbon dioxide pollution. In 2002, Sierra Club and others sent a notice of intent and in 2003 filed a lawsuit seeking to force EPA to update the power plant performance standards to include carbon

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<sup>18</sup> *Int'l Ctr. for Tech. Assessment v. Whitman*, No. 02-cv-02376-RBW (D.D.C. Dec. 5, 2002).

<sup>19</sup> 68 Fed. Reg. 52,922, 52,925 (Sep. 8, 2003) (denying petition for rulemaking).

<sup>20</sup> 74 Fed. Reg. at 66,496; 75 Fed. Reg. 25,324 (May 7, 2010) (light-duty vehicle fuel economy and greenhouse gas standards for model years 2012 through 2016); 77 Fed. Reg. 62, 624 (Oct. 15, 2012) (light-duty vehicle fuel economy and greenhouse gas standards for model years 2017 through 2022).

<sup>21</sup> 82 Fed. Reg. 14,671 (Mar. 22, 2017) (notice of intent to reconsider EPA's mid-term review determination).

dioxide.<sup>22</sup> EPA issued a final rule but refused to include carbon dioxide standards.<sup>23</sup> That refusal necessitated a second lawsuit, this time challenging the final rule, which the D.C. Circuit remanded to EPA for “further proceedings in light of *Massachusetts*.”<sup>24</sup>

After three more years passed in which EPA failed to act, states and environmental groups yet again demanded that EPA comply with the remand and set carbon dioxide standards for power plants. In the resulting settlement, EPA agreed to propose regulations and take final action by May 2012.<sup>25</sup> EPA missed that deadline. Over three years later, it finally promulgated the Clean Power Plan, a regulatory program to reduce emissions from existing power plants starting in 2022—twenty years after Sierra Club first sent its notice of intent to sue.<sup>26</sup> But that is not the end of the delays: after states and industry challenged the final rule, the Supreme Court issued a stay pending litigation.<sup>27</sup> That litigation is currently held in abeyance in the D.C. Circuit while EPA Administrator Pruitt—who denies that

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<sup>22</sup> *Save Our Children’s Earth Found. v. EPA*, No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003); Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 65,699 (Nov. 21, 2003); Consent Decree, *Save Our Children’s Earth Found.*, No. 03-cv-00770-CW (Feb. 9, 2004).

<sup>23</sup> 71 Fed. Reg. 9866, 9,869 (Feb. 27, 2006).

<sup>24</sup> Order, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007).

<sup>25</sup> 75 Fed. Reg. 82,392 (Dec. 30, 2010) (proposed settlement agreement).

<sup>26</sup> 80 Fed. Reg. 64,662 (Oct. 23, 2015) (final Clean Power Plan).

<sup>27</sup> Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (2016).

anthropogenic emissions are endangering the climate<sup>28</sup> and was Attorney General of a state challenging the rule—reconsiders whether and how to regulate power plant carbon dioxide emissions.<sup>29</sup>

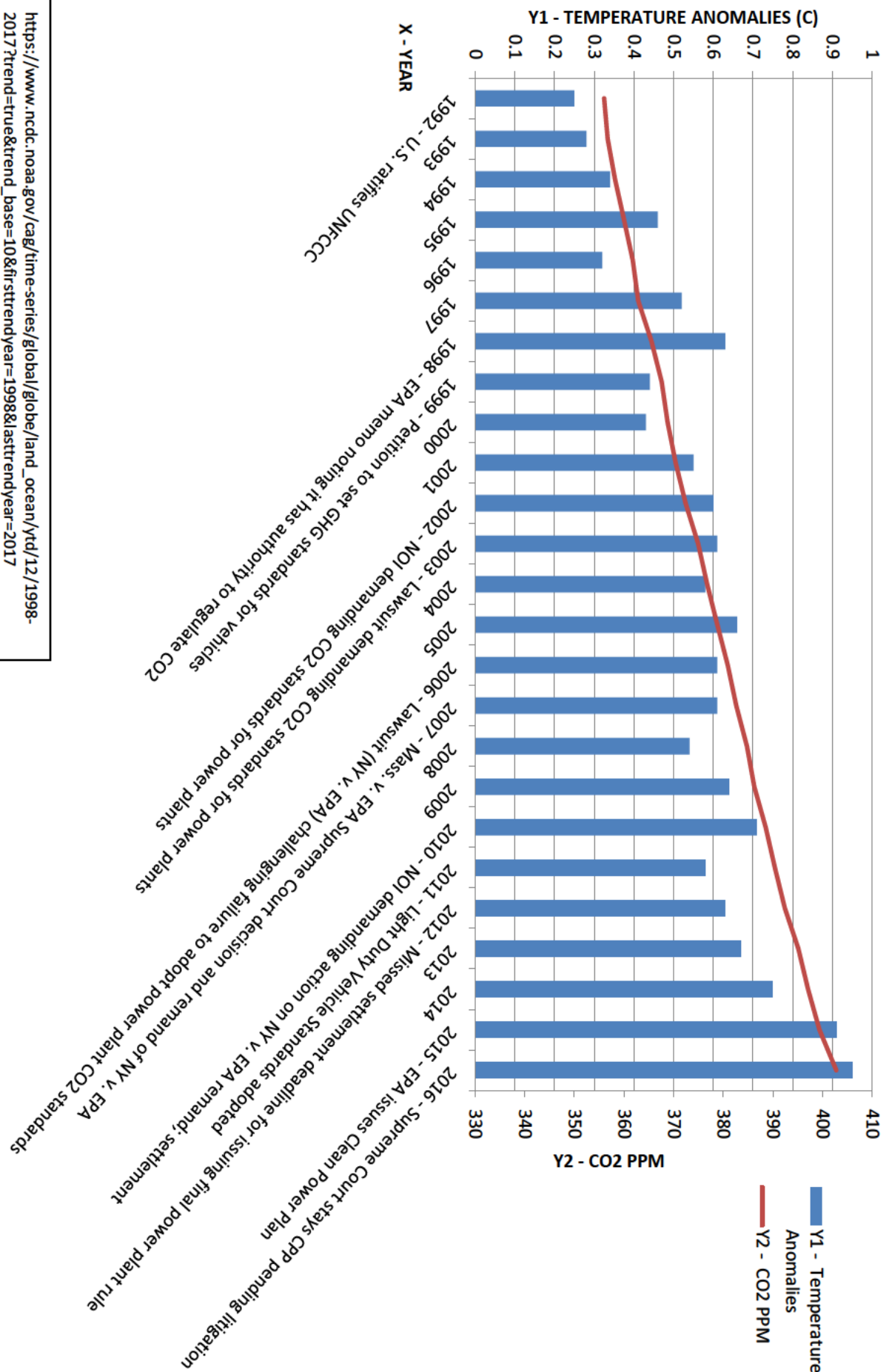
Millennials, such as some of the plaintiffs in this lawsuit, have grown to adulthood during the pursuit of greenhouse gas limits on these sources while the planet keeps getting hotter. This dramatic trend is depicted in the chart below:

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<sup>28</sup> *Squawk Box* (CNBC television broadcast Mar. 9, 2017) (national television interview in which Administrator Pruitt stated that he “would not agree that [carbon dioxide is] a primary contributor to the global warming that we see”).

<sup>29</sup> EPA Status Report, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. July 31, 2017).

# Atmospheric CO2 and Temperature Trends in Relation to US Climate Policy



Note: Global anomalies are with respect to the 20<sup>th</sup> century average.

[https://www.ncdc.noaa.gov/cag/time-series/global/globe/land\\_ocean/yt/d/12/1998-2017?trend=true&trend\\_base=10&fitstrendyear=1998&lasttrendyear=2017](https://www.ncdc.noaa.gov/cag/time-series/global/globe/land_ocean/yt/d/12/1998-2017?trend=true&trend_base=10&fitstrendyear=1998&lasttrendyear=2017)  
[ftp://afjp.cmdl.noaa.gov/products/trends/co2/co2\\_annmean\\_gl.txt](ftp://afjp.cmdl.noaa.gov/products/trends/co2/co2_annmean_gl.txt)



### ***B. Coal Mining on Federal Lands***

The Bureau of Land Management (“BLM”) permits fossil fuel extraction on federal lands and oversees the federal coal program, which leases coal on approximately 570 million acres of the federal mineral estate.<sup>30</sup> In recent years, approximately 41 percent of U.S. coal production occurred on federal lands, mostly in the Powder River Basin, contributing roughly 10 percent of domestic greenhouse gas emissions.<sup>31</sup>

In April 2013, after a surge in proposals that would have permitted the mining of 3.5 billion tons of federally-owned Powder River Basin coal, Sierra Club and others urged the Secretary of the Interior to establish a moratorium on new coal leasing and to perform a comprehensive review of the federal coal leasing program.<sup>32</sup> At the time, that program was also subject to government investigations over outdated royalty payment rates and loopholes.<sup>33</sup> In January 2016, the Interior Department finally granted the request, agreeing to prepare a discretionary programmatic environmental impact statement to analyze potential leasing and

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<sup>30</sup> 81 Fed. Reg. at 17,721.

<sup>31</sup> *Id.* at 17,724.

<sup>32</sup> Letter from Sierra Club, *et al.*, to Sally Jewell, U.S. Secretary of the Interior (Apr. 15, 2013) at 1 (on file with authors).

<sup>33</sup> Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016) at 1.

management reforms, and establishing a moratorium on most new coal leasing activities until the review was complete.<sup>34</sup>

That victory proved short-lived. On March 29, 2017, the new Secretary of the Interior, Ryan Zinke, revoked the moratorium and terminated the environmental review, directing BLM to process coal lease applications in accordance with regulations in place before Secretarial Order 3338, *i.e.*, regulations last significantly updated almost 40 years ago.<sup>35</sup>

### ***C. Oil and Gas Development***

As the climate draws nearer to a critical tipping point, oil and gas development in the United States has increased dramatically. Between 2006 and 2015, domestic natural gas production increased by over 50 percent and domestic oil production by nearly 90 percent, with federal lands providing 21 percent of oil and 16 percent of natural gas in 2015.<sup>36</sup> Federal offshore oil drilling in the Gulf of Mexico in 2016 was the highest level since at least 1980.<sup>37</sup> Between 2006 and

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<sup>34</sup> *Id.* at 1, 8.

<sup>35</sup> Secretarial Order No. 3348, Concerning the Federal Coal Moratorium (Mar. 29, 2017) at 1-2.

<sup>36</sup> Cong. Research Serv., *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas* 3–4 (June 22, 2016), <https://fas.org/sgp/crs/misc/R42432.pdf>.

<sup>37</sup> U.S. Energy Info. Admin., *Federal Offshore—Gulf of Mexico Field Production of Crude Oil*, <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFP3FM2&f=M> (last visited Sept. 4, 2017).

2015, federal onshore oil production increased from 262,000 barrels per day to 455,000 barrels per day.<sup>38</sup>

In addition to the carbon dioxide released when oil and gas are combusted, the extraction and transportation of these fuels emits enormous quantities of methane, a greenhouse gas that is over 80 times more powerful at disrupting the climate than carbon dioxide over a twenty-year time horizon.<sup>39</sup> In 2015, the U.S. oil and gas sector emitted approximately 30 percent of total U.S. methane emissions.<sup>40</sup> After repeated pleas by states and environmental groups over years, in 2016 BLM and EPA adopted regulations to limit methane emissions from oil and gas production.<sup>41</sup> Consistent with its other actions, the Trump administration announced plans to amend or rescind both rules and has attempted to delay their implementation.<sup>42</sup> The D.C. Circuit recently struck down EPA's preliminary 90-day stay of its rule as unlawful under the Clean Air Act, *Clean Air Council v. EPA*,

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<sup>38</sup> Cong. Research Serv., *supra* n. 36 at 3.

<sup>39</sup> Int'l Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, Ch. 8, 714 (2013).

<sup>40</sup> EPA, *supra* n. 8.

<sup>41</sup> 81 Fed. Reg. 35,824 (June 3, 2016) (EPA rule); 81 Fed. Reg. 83,008 (Nov. 18, 2016) (BLM rule).

<sup>42</sup> Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth § 7, 82 Fed. Reg. 16,093 (Mar. 28, 2017); 82 Fed. Reg. 25,730 (June 5, 2017) (90-day stay of EPA rule provisions); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017) (proposed two-year stay of same provisions); 82 Fed. Reg. 27,430 (June 15, 2017) (indefinite stay of BLM rule provisions).

862 F.3d 1, 4–9 (D.C. Cir. 2017), and a coalition of environmental groups have challenged BLM’s stay in federal court.<sup>43</sup>

#### ***D. Social Cost of Carbon***

Although it had known for decades that carbon dioxide emissions harm society, the federal government lacked a consistent, scientifically-grounded method to quantify this harm until 2010, when an interagency working group developed a formal estimate of the social cost of carbon (“SCC”).<sup>44</sup> This action was the result of a Ninth Circuit decision holding that the National Highway Traffic Safety Administration acted unlawfully by failing to monetize the costs of the carbon dioxide emissions associated with its fuel economy standards for automobiles. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008). The working group has updated its estimates to reflect the latest research and modeling improvements.<sup>45</sup> While Sierra Club and others have described this metric as significantly underestimating the true social cost of carbon for a number of reasons—for instance, by undervaluing the

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<sup>43</sup> *Sierra Club v. Zinke*, No. 3:17-cv-03885-EDL (N.D. Cal. July 10, 2017).

<sup>44</sup> Interagency Working Group on Social Cost of Carbon (“IWG”), United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (Feb. 2010).

<sup>45</sup> IWG, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (Aug. 2016).

interests of future generations—it remains the best tool of its kind developed thus far in the United States.

Federal agencies have used the federal social cost of carbon estimates in over 80 regulatory proceedings and environmental impact analyses,<sup>46</sup> and multiple court decisions have affirmed it as a valuable—or, some cases, legally mandatory—tool for those actions.<sup>47</sup> Despite these holdings, this important tool is apparently “no longer representative of governmental policy”: in March, President Trump summarily disbanded the working group and withdrew all documents it had issued, indicating that even the working group’s modest estimates of the social cost of carbon imposed too great of a burden on the administration’s plans to aggressively promote fossil fuel development.<sup>48</sup>

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<sup>46</sup> Peter Howard and Jason Schwartz, *Think Global: International Reciprocity As Justification for A Global Social Cost of Carbon*, 42 Colum. J. Envtl. L. 203, App. A (2017).

<sup>47</sup> See, e.g., *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (upholding Department of Energy’s use of SCC in rulemaking proceeding against industry challenge); *Sierra Club v. Fed. Energy Regulatory Comm’n*, \_\_\_ F.3d \_\_\_, No. 16-1329, 2017 WL 3597014, Slip Copy at 27 (D.C. Cir. Aug. 22, 2017) (remanding EIS to FERC for failure to quantify downstream greenhouse gas impacts of pipeline project and requiring FERC to adequately justify any decision not to use federal SCC protocol in revised EIS); *Montana Envt’l Info. Ctr. v. U.S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 3480262, at \*12-15, 19 (D. Mont. Aug. 14, 2017) (rejecting agency’s Environmental Assessment for failure to incorporate the federal SCC estimates into its cost-benefit analysis of a proposed mine expansion).

<sup>48</sup> Exec. Order No. 13,783 § 5, 82 Fed. Reg. at 16,096.

### **III. Recognizing a Fundamental Right to a Life-Sustaining Climate and Federal Public Trust Duty to Protect the Atmosphere Is Necessary to Guide Federal Decision-Making on Climate.**

Judicial recognition of constitutional rights, to redress threats to those inalienable rights, has led to fundamental changes in the machinery of government at different points in our history. As courts have identified constitutional rights related to criminal justice, marriage, equal education, interstate travel, and voting, to name a few examples, government institutions have adapted to those norms. For instance, the Court's recognition of the right to marriage transformed state statutes and enabled mechanisms for the development of new laws and agency practices. *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (invalidating interracial marriage bans in 16 states); *Obergefell*, 135 S.Ct. at 2591 (holding that same-sex couples may now exercise the fundamental right to marry in all states). In addition, federal and state law enforcement authorities have incorporated myriad procedural protections for criminal defendants into their practices. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444-445 (1966) (requiring safeguards against self-incrimination); *Douglas v. California*, 372 U.S. 353, 356 (1963) (upholding right to counsel); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding racially-motivated preemptory challenges in jury selection unconstitutional).

The same would be true in the climate context. Recognizing a fundamental constitutional right to a climate system capable of sustaining human life, along

with a federal public trust duty to protect the atmosphere for current and future generations, would guide federal action to address climate change. Federal agencies can and must adapt to protect this right and fulfill their sovereign duty. They must use the authority they already possess in the service of protecting our climate, interpreting and implementing their governing statutes in light of that obligation. They must overcome political pressure to delay or weaken safeguards and to value short-term interests over the long-term survival of our society.

The current administration, like most of its predecessors, is doing none of these things, to the enormous detriment of the plaintiffs – and all of us. This case should proceed to trial.

### **CONCLUSION**

The Court should deny the Petition.

Dated: September 5, 2017

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## CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rules 21-2(c), 32-3(2), the foregoing Brief of *Amicus Curiae* Sierra Club in Opposition to Petition for Writ of Mandamus contains 4,153 words, as counted by counsel's Microsoft Word processing program.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* Sierra Club in Opposition to Petition for Writ of Mandamus with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 5, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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