

To: Timothy Ballo, Senior Attorney of Earthjustice

From: Victoria Westerman, Trial Attorney of Earthjustice

Re: Climate Change and the application of the Due Process Clause

November 21st, 2023

Question Presented:

The question this memo is tasked with answering is whether the due process clause of the U.S. Constitution can be used to address the harms associated with climate change.

Brief Answer:

The Due Process Clause of the U.S. Constitution can be used to address the harms associated with climate change. The purpose of this clause is to protect citizens from being deprived of “life, liberty, or property, without due process of law”.¹ The danger of climate change presents a plethora of concerns for citizens, many of which threaten these core principles. Examples such as increased respiratory diseases linked to air pollution or relocation of the plaintiff’s home due to water scarcity, all threaten their due process rights to life, liberty, and property.

¹ U.S. Const. art. V

Background/Statement of Facts:

On April 28th, 1788, the United States Constitution was ratified, but it wasn't until over a year later on December 15th, 1791, that the Bill of Rights was added to the founding document.² These ten amendments act as the foundation of rights and liberties that are guaranteed to all citizens of the United States of America. Within these ten amendments is the Fifth amendment, which states that no person shall be “deprived of life, liberty, or property, without due process of law”.³

On June 13th, 1866, the United States Congress also amended the Constitution to include the Fourteenth amendment which similarly articulates that no state shall “deprive any person of life, liberty, or property, without due process of law”.⁴ Both of these amendments include substantive due process, which Erwin Chemerinsky defines as “ask[ing] the question of whether the government’s deprivation of a person’s life, liberty, or property is justified by a sufficient purpose”.⁵

Throughout the history of the United States, the rights that were considered to be protected under the Fifth and Fourteenth amendment have changed. Regarding abortions, prior to the Supreme Court case of *Roe v. Wade*, they were not thought to be protected. In this case, “the court ha[d] recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution,”⁶ while also concluding that “the right to personal privacy includes the abortion decision”.⁷ Almost fifty years later, the high court issued the

² National Archives, The Bill of Rights, How Did it Happen?, (Apr. 27th, 2023), <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen>

³ U.S. Const. art. V

⁴ U.S. Const. art XIV, §1

⁵ Chemerinsky, Erwin, *Substantive Due Process*, Vol. 15, Touro Law, 1501, (1999)

⁶ *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (Jan. 22nd, 1973)

⁷ *Id.*

majority opinion in *Dobbs v. Jackson Women's Health Organization* which explained that because the Constitution does not explicitly make a statement concerning an abortion, that this is not a guaranteed right under the due process clause and must be decided by individual states.⁸

Another example of the changing views of protected rights under the due process clause throughout the nation's history is the view of marriage. Two major cases, *Loving v. Virginia*⁹ and *Obergefell v. Hodges*,¹⁰ changed what groups and individuals were included in the "fundamental right to marry".¹¹ Despite the US Constitution never explicitly referencing interracial or same-sex marriage, these are rights that are considered to be protected under the Fifth and Fourteenth amendments. As written in the majority by Justice Kennedy "the right to marry is a fundamental right inherent in the liberty of the person,"¹² therefore deserving qualification under the Due Process Clause. This is all to say that the rights thought to be protected under the Due Process clause are dynamic and continue to change, as has the interpretation of what should or should not be included within the clause.

Whether a right to be free from harms associated with climate change has been one of the latest areas of Due Process Clause litigation. In recent years, the effects of anthropogenic climate change have become increasingly clear. From the unprecedented rate of melting sea ice to the raging fires that continue to engulf the Western United States, the everyday experience of Americans and the confirmed evidence provided by scientific communities further proves the crisis that the nation is currently facing.

⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, (June 24th, 2022)

⁹ *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct., 1817, (June 12th, 1967)

¹⁰ *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, (June 26th, 2015)

¹¹ *Id.*

¹² *Id.*

In November of 1965, the American Association for the Advancement of Science published a report informing President Lyndon B. Johnson of the risks associated with the continued use of fossil fuels.¹³ Despite this, President Johnson, as well as the presidential predecessors to come after him, have continued to lease federal lands for the purpose of extracting fossil fuels. These facts, as well as the overwhelming evidence provided by the scientific community in the past 50 years lay the foundation for the issue at hand.

Applicable Statutes/Regulations:

*Fifth Amendment of the United States Constitution*¹⁴

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Section 1 of the Fourteenth Amendment of the United States Constitution*¹⁵

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹³ Dana Nuccitelli, *Scientists warned the US President about global warming 50 years ago today*, The Guardian, Nov. 5th, 2015, <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/nov/05/scientists-warned-the-president-about-global-warming-50-years-ago-today>

¹⁴ U.S. Const. art. V

¹⁵ U.S. Const. art XIV, §1

Analysis and Discussion:

Standing:

In order to discuss the constitutionality of this usage of the Due Process Clause, plaintiffs must be able to prove that they meet the Article III requirements for standing: injury, traceability, and redressability. Without meeting these requirements, plaintiffs will never receive their day in court, which is why it is important to briefly discuss.

In *Juliana v. United States*, the Article III standing requirement was the Plaintiffs' Achilles heel. As both the Oregon District Court and the Ninth Circuit court agreed, the injury and traceability requirements had been met. As discussed previously, threats to respiratory systems from air pollution and relocation due to water scarcity, among many other sources, qualified as an injury. Concerning traceability, the courts had found that the U.S. government's decision to continue the leasing of federal land for fossil fuel usage had a direct impact on the Plaintiffs. Where the District and Circuit Court differed was the issue of redressability. The District court had decided that the injuries alleged by the Plaintiffs could be remediated by the federal government. Opposingly, the circuit court had said "reluctantly," that the redress the Plaintiffs seek "is beyond our Constitutional power".¹⁶

It is important to note that there was a dissenting opinion among the three circuit judges from Judge Staton. In her dissent, Staton wrote "My colleagues throw up their hands, concluding that this case presents nothing fit for the judiciary," but she explains that just because "this suit cannot alone halt climate change does not mean that it presents no suitable claim for judicial

¹⁶ *Juliana V. United States*, 947 F.3d 1159, (Jan. 17th, 2020)

resolution”. This dissenting opinion seems to ring similarly to that from Justice Stevens in *Massachusetts v. EPA*, where he “stresses that redressability does not require that the problem of climate change be solved ‘in one regulatory fell swoop’”.¹⁷ Although the main topic of concern here is the due process clause, it is important to note that the requirement of standing can pose threats to litigation.

Historical Changes:

As explained in the background section of this memo, the Due Process Clause has been used to clarify the rights that fall under the umbrella of “life, liberty, or property.”¹⁸ In *Komor v. United States*, the Plaintiffs explain that “the rights to life, liberty, and property have evolved and continue to evolve as technological advances pose new threats to these fundamental rights and as new insights reveal discord between the Constitution’s central protections and the conduct of government”.¹⁹ The high court has upheld this belief in landmark cases such as *Loving v. Virginia*, *Obergefell v. Hodges*, *Roe v. Wade*, *Dobbs v. Jackson Women’s Health Center*, and countless others throughout the nation’s history.

Juliana v. United States:

In *Juliana v. United States*, the Ninth Circuit Court of Appeals was faced with deciding whether the rights granted under the due process clause were violated by the United States Federal Government. Here the group of young Plaintiffs alleged that the U.S. government had violated their due process rights to life, liberty, and property by continually leasing federal land for the use of fossil fuel extraction, as well as refusing to mitigate the impacts of anthropogenic

¹⁷ Robert Percival, *Environmental Regulation: Law, Science, and Policy*, pg 125, 9th ed., (2021)

¹⁸ U.S. Const. art. V

¹⁹ *Komor v. United States*, U.S. Court of Appeals Ninth Circ., (July 3rd, 2023).

climate change. Within this case, both the Plaintiffs and the Defendants have several arguments, including the interpretation of the historical usage of the Due Process Clause. In one of the Defendant's reply briefs, the United States government states that the "Plaintiffs do not come close to identifying 'concrete examples involving fundamental rights found to be deeply rooted in our legal tradition'".²⁰ Here and throughout several other briefs, the Defendant seems to make the argument that the Due Process Clause only protects rights that were recognized by the Founders.

But as the UCLA Journal of Environmental Law and Policy explained in a case study of *Juliana v. United States*, "the U.S. government maintains that the unenumerated rights stemming from the Due Process Clause are limited to what rights were recognized at the time of the Court of Westminster".²¹ To explain this thinking further, the authors of the journal reference rights such as women's suffrage and protections against discrimination by race that would not be recognized if we were to "freeze" those rights afforded to us. Given the current state of many current policies, this simply is not possible.

Explicit Statements:

One conflicting argument with the usage of the Due Process Clause in relation to climate change is that there is no explicit mention of it. Oftentimes, this can anchor on whether the court follows more of a textualist or functional approach to the law. Many legal textualists argue that in order for a right to be protected under the Due Process Clause, it must be explicitly defined. Comparatively, a functionalist court may argue that the purpose of the due process clause was to

²⁰ *Juliana v. United States* Appellants Reply Brief, pg 24, (March 8th, 2019)

²¹ James R. May, Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.)*, Vol. 39, UCLA Journ. of Env. Law and Policy, pg 39, (2021)

provide enhanced protections for the people. Either way, it is important to take into consideration the makeup of the court when forming arguments concerning the topic of explicit statements.

Held v. Montana:

Similarly to *Juliana v. United States*, a group of young Plaintiffs argued that the State of Montana had violated their due process rights by prioritizing fossil fuels over the health of their citizens and their environment. Here the court was tasked with deciding if the state was in violation of the Constitution and if they indeed violated their due process rights as well, and the court ruled in favor of the Plaintiffs.

One of the contending differences in *Juliana v. United States* and *Held v. Montana* is the language of each Constitution. Article IX, Section 1 of Montana's state Constitution clearly states that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations".²² This clear and distinct language made it nearly impossible for the Defendant to argue against the claims made by the Plaintiffs.

Conclusion:

Based on the extensive factors discussed above, it can be concluded that the Due Process Clause can be used in reference to the issue of climate change. Despite the complicated path concerning Article III standing and climate change, as Judge Staton explains, just because this judicial action cannot entirely solve the issue before the court, "does not mean that it presents no suitable claim for judicial resolution".²³

²² State of Montana Constitution, art IX, §1

²³ *Juliana V. United States*, 947 F.3d 1159, (Jan. 17th, 2020)

Furthermore, the application of due process to other topics such as the right to interracial and same-sex marriage have been monumental in proving that the same can also be done for climate change. As it was mentioned in *Komor v. United States*, rights protected under the Due Process Clause have dynamically changed throughout the nation's history. As this threat to the environment becomes increasingly prevalent for everyday Americans, it stands to reason that the right to a clean environment is one worthy of protection.

Additionally, depending on the legal approach taken, functional or textual, the explicit wording must also be taken into consideration. The composition of the court will influence the future precedence of cases surrounding this matter, and those impacts must be examined.

It is undeniable that climate change will continue to worsen before the turn of the century. As more cases like *Juliana v. United States* and *Held v. Montana* are litigated, the precedent and case law surrounding the topic of due process and climate change continue to grow. After all, Due Process Clause cases have already begun appearing in states like Florida, Hawai'i, Utah, and Virginia. With this trend continuing to grow, it is vital to consider the historical usage of due process, as well as the implications of it to accurately assess the future path of this topic.