Life, Liberty, and a Stable Climate: The Potential of the State-Created Danger Doctrine in Climate Change Litigation

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LIFE, LIBERTY, AND A STABLE CLIMATE: THE POTENTIAL OF THE STATE-CREATED DANGER DOCTRINE IN CLIMATE CHANGE LITIGATION

ANDREW JOHNSON*

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INTRODUCTION

Fossil fuel emissions have led to unprecedented amounts of carbon dioxide in the atmosphere, resulting in human-made climate change. The consequences of climate change, including sea level rise, severe drought, high temperatures, and poor air quality pose real threats to the livelihoods of United States citizens. Rising sea levels displace citizens from their homes through flooding; drought and high temperatures cause wild fires which destroy property and livelihoods; and poor air quality causes lung-related illnesses, shortening lifespans. Yet, those who have suffered harm from the effects of climate change lack a consistent legal pathway through which to seek a remedy.

1. See Donald Wuebbles, How Will Climate Change Affect the United States in Decades to Come? EOS, Nov. 3, 2017 (finding that human-made emissions of carbon dioxide will lead to the highest concentrations seen in hundreds of millions of years).
2. See id. (explaining that climate change will lead to an increase in intensity and frequency of extreme weather events).
3. See id. (describing that extreme weather events will threaten human safety, infrastructure, agricultural production, water quality, and natural ecosystems).
Generally, courts have recognized that substantive due process rights grounded in the Fifth and Fourteenth Amendments proscribes the government from limiting a person’s right to life, liberty, and property. For example, the state-created danger doctrine is one legal pathway that can hold a state or federal government liable for violating a citizen’s substantive due process rights.

The Supreme Court has not yet taken a case that addresses the state-created danger doctrine. Moreover, court courts have not used a uniform test to determine when the government is liable under the doctrine. To further muddy the waters, Juliana v. United States was the first case to argue that the state-created danger doctrine applied in a case regarding climate change.

Juliana opened the door to a new climate change litigation strategy. In Juliana, a group of youth activists brought a suit against the federal government in the District Court of Oregon. First, the plaintiffs claimed that the federal government violated their constitutional right to an environment capable of sustaining human life. Second, the plaintiffs used the exception of the state-created danger doctrine to argue that the government violated their substantive due process rights by failing to

5. See DeShaney v. Winnebago Cty. Dep’t Soc. Servs., 489 U.S. 189, 195 (1989) (asserting that courts recognized the Fourteenth Amendment limits the power to act in contravention to life, liberty, and property, but the Fourteenth Amendment does not guarantee a minimal level of safety and security from third-party harm).

6. See id. at 195 (holding that nothing in the Due Process Clause of the 14th Amendment requires the government to protect against harm by private actors).

7. See Chris Pehrson, Issues in the Third Circuit: Bright v. Westmoreland County: Putting the Kibosh on State-Created Danger Claims Alleging State Inaction, 52 VILL. L. REV. 1043, 1048 (2007) (noting that DeShaney v. Winnebago County Department of Social Services was the closest case to a state-created danger claim).

8. See id. at 1069 (discussing the differences in the 3rd and 9th Circuit state-created danger tests and the likelihood of a continued split between the circuits).


10. See Berliner, supra note 4 at 340 (expressing Juliana v. United States’ potential for changing the way the plaintiffs use public trust doctrine in climate change litigation).

11. See Juliana, 217 F. Supp. 3d at 1234 (reasoning that for purposes of a motion to dismiss, plaintiffs alleged a Due Process Clause violation because the plaintiffs only needed to allege a failure to act that created an imminent harm and deliberate indifference to the threat of harm).

12. See id. at 1250 (acknowledging plaintiffs’ argument that the Supreme Court’s decision in Obergefell v. Hodges allowed for courts to recognize new, unenumerated rights).
implement policies that adequately curb the effects of climate change.\textsuperscript{13}

According to the United States District Court for the District of Oregon, under the state-created danger doctrine, plaintiffs may claim that a federal or state government violated the Due Process Clause of Fifth and Fourteenth Amendments by failing to effectively curb the effects of climate change.\textsuperscript{14} Part II of this comment will discuss the recognition of new, unenumerated constitutional rights, the development of the state-created danger doctrine, and the constitutional violation under the state-created danger doctrine the plaintiffs asserted in \textit{Juliana}.\textsuperscript{15} Part III argues that there is a constitutional right to an environment capable of sustaining human life and that the state-created danger doctrine is a viable pathway to bring a climate change suit against a state or federal government.\textsuperscript{16} Finally, Part IV suggests that courts should recognize a new constitutional right to an environment capable of sustaining human life and adopt the state-created danger doctrine as a valid test for climate change lawsuits.\textsuperscript{17}

\section{II. BACKGROUND}

\textbf{A. Recognizing New, Unenumerated Constitutional Rights}

The Fifth and Fourteenth Amendments together guarantee the substantive right to life, liberty, and property.\textsuperscript{18} The Supreme Court has recognized that the Due Process Clause of both the Fifth and Fourteenth Amendments protects unenumerated rights not explicitly stated in the Constitution.\textsuperscript{19} In

\begin{itemize}
\item \textsuperscript{13} See \textit{id.} at 1272 (recognizing that plaintiffs alleged the state took action through subsidies and regulations that created massive carbon dioxide emissions).
\item \textsuperscript{14} See \textit{id.} at 1271 (explaining that plaintiffs must claim that the state created a danger and acted with deliberate indifference in creating the danger to show a violation of substantive due process rights).
\item \textsuperscript{15} See \textit{infra} Part II at 7 (discussing unenumerated constitutional rights, the state-created danger doctrine, and the \textit{Juliana} case).
\item \textsuperscript{16} See \textit{infra} Part III at 21, 36 (arguing for a constitutional right to an environment capable of sustaining human life and the viability of the state-created danger doctrine in climate change litigation).
\item \textsuperscript{17} See \textit{infra} Part IV at 56 (recommendating that courts recognize a constitutional right to an environment capable of sustaining human life and adopt the state-created danger doctrine as a pathway for litigants to bring climate change lawsuits).
\item \textsuperscript{18} See U.S. Const. amend. V; see also U.S. Const. amend. XIV.
\item \textsuperscript{19} See \textit{Obergefell} v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that same-sex couples have a fundamental right to marry); see also \textit{Roe} v. Wade, 410 U.S. 113, 154 (1973) (finding that the right to privacy encompasses a woman’s right to choose whether or not to terminate her pregnancy); see also \textit{Cruzan} v. Mo. Dep’t Health, 497 U.S. 261, 262 (1990) (recognizing a right to refuse life-sustaining medical treatment).
\end{itemize}
Washington v. Glucksberg, the Supreme Court delineated the standard to recognize unenumerated rights. The Supreme Court found that unenumerated rights must be deeply rooted in the nation’s history and fundamental to the scheme of ordered liberty. In Obergefell, the Supreme Court expanded the standard for unenumerated rights outside the historical parameters the Supreme Court used in Glucksberg. The Supreme Court in Obergefell found it could use reasoned judgment to take into account contemporary ideologies to recognize unenumerated rights as well.

However, despite the expansion, the Supreme Court still incorporated the standard in Glucksberg to guide decisions on recognizing new unenumerated rights. The Supreme Court found that an unenumerated right is rooted in the nation’s history because it is fundamentally rooted in societal or legal traditions. In Glucksberg, the Supreme Court did not find that a right to physician-assisted suicide existed because the states have an interest in protecting citizens’ lives. Moreover, the Court found that one’s decision to commit suicide has never received legal protections similar to other established unenumerated rights. In contrast, the Supreme Court in Skinner recognized the right to procreation because the ability to have children is a basic civil right. The Court recognized that the right to procreate was fundamental to societal traditions.

The Supreme Court recognized that an unenumerated right is fundamental

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21. See id at 721 (describing primary features of fundamental rights as rooted in the traditions and conscience of the people and implicit in the concept of ordered liberty).
22. See Obergefell, 135 S. Ct. at 2598 (asserting that history and tradition guide courts in recognizing unenumerated rights, but history and tradition do not set the outer boundaries).
23. See id. (noting that reasoned judgment allows courts to identify interests so fundamental to citizens that the state must afford them respect).
24. See id. (detailing that history and tradition guide the inquiry into a new unenumerated right but they do not set the outer boundaries).
25. See Glucksberg, 521 U.S. at 721 (showing that history and tradition provide crucial guideposts for responsible decisions to recognize un-enumerated rights).
26. See id. at 723 (explaining that if the Court were to recognize a right to physician-assisted suicide, the court would reverse years of legal tradition and practice).
27. See id. at 725 (recognizing that most states outlawed the right to physician-assisted suicide).
28. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a law that sterilized repeat felons because it violated the Fourteenth Amendment).
29. See id. (finding that procreation is fundamental to the existence and survival of humanity).
to the scheme of ordered liberty if it is necessary for the pursuit of other rights the Due Process Clause protects.\(^{30}\) In Obergefell, the Supreme Court found marriage to be fundamental to the scheme of ordered liberty.\(^{31}\) Marriage was the linchpin in the effective enjoyment of rights, even though the Constitution did not express the right.\(^{32}\) In Loving v. Virginia, the Supreme Court recognized the right to marriage because it was essential to the enjoyment of liberty protected by the Due Process Clause.\(^{33}\) Additionally, the Court recognized marriage as a fundamental right because marriage was essential to the survival of civilization.\(^{34}\) Similarly, in Obergefell, the Court recognized the right to marriage for same-sex couples because it was fundamental for the enjoyment of rights protected by the Due Process Clause, such as establishing a family and raising children.\(^{35}\)

While history and ordered liberty are relevant considerations in recognizing an unenumerated right, some courts have found that they are not dispositive.\(^{36}\) In Obergefell, the Court rested much of its decision on the historical and societal traditions of marriage.\(^{37}\) The Court was also aware that prior marriage jurisprudence construed the right to marry as being between a man and a woman.\(^{38}\) However, the Court used its reasoned judgment to find that the federal government did not have a justification to exclude same-sex couples from the right to marry.\(^{39}\) The Court found that

\(^{30}\) See Obergefell v. Hodges, 135 S. Ct. 2584, 2599-2601 (2015) (holding that marriage plays an important role in the effective enjoyment of individual autonomy, economic opportunity, and family).

\(^{31}\) See id. at 2601 (explaining that marriage is essential to civilization and progress and therefore it is fundamental to the ordered pursuit of liberty).

\(^{32}\) See id. (citing Maynard v. Hill, 125 U.S. 190, 211 (1888)) (proclaiming that marriage was the foundation of society and progress).

\(^{33}\) See Loving v. Virginia, 388 U.S. 1, 12 (1967) (asserting that ban on interracial marriage was unconstitutional because marriage was a fundamental right).

\(^{34}\) See id. at 8 (rejecting the state’s argument that it could treat interracial marriages differently because some doubted the scientific evidence that interracial marriage would not lead to some devolution of society).

\(^{35}\) See Obergefell, 135 S. Ct. at 2601 (stipulating that other courts should not construe the right to marriage as only for those desiring families because there are also economic liberties that marriage also encompasses).

\(^{36}\) See, e.g. id. at 2598 (explaining that history and tradition may also be considerations when courts exercise reasoned judgment, but the courts cannot presume to know the extent of rights in the future).

\(^{37}\) See id. at 2594 (describing that marriage arose from the most basic human needs and that it is essential to human hopes and aspirations).

\(^{38}\) See id. (acknowledging that in the respondent’s view, the very nature of marriage is a gender-differentiated union).

\(^{39}\) See id. at 2603-04 (recognizing that new insights and societal understandings
same-sex couples deserved the same economic, personal, and societal liberties that accompanied the right to marriage.\footnote{See id. (noting that same sex couples are entitled to the same liberties as non-same sex couples regarding the right to marriage).}

**B. The Development of the State-Created Danger Doctrine**

When a federal or state government deprives a person of their substantive due process rights, the victim can bring a suit against the government under 42 U.S.C. § 1983.\footnote{See 42 U.S.C. § 1983 (2012); see also Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989) (explaining that the plaintiff must prove that the person who committed the violation acted under state authority and they violated a constitutional right).} To bring a § 1983 claim, a plaintiff must show that the defendant acted under the state or federal government’s authority and deprived her of a Constitutional or statutory right.\footnote{See Wood, 879 F.2d at 596 (finding that the plaintiff could bring a § 1983 claim because the plaintiff raised a genuine factual issue that the police officer acted in his official duty on behalf of the state and the officer deprived the plaintiff of her right to bodily integrity).} However, in *DeShaney*, the Supreme Court held that the government cannot be held liable under § 1983 for third-party harm because the government did not help create the harm.\footnote{See DeShaney v. Winnebago Cty. Soc. Servs., 489 U.S. 189, 201-02 (1989) (noting that if the state social services agency voluntarily undertakes to protect the plaintiff, then it may be liable for failing to protect).}

However, the state-created danger doctrine can hold a federal or state government liable for third-party harm if a plaintiff proves the government created the danger, knew of the danger, and acted with deliberate indifference to the plaintiff’s safety.\footnote{See Kennedy v. Ridgefield City, 439 F.3d 1055, 1063 (9th Cir. 2006) (finding that the defendant created a danger when he failed to patrol the plaintiff’s neighborhood after he notified a violent sex offender of the charges they brought against him).} Some courts have held that a plaintiff can use the state-created danger doctrine to bring a claim under § 1983 because the government’s affirmative conduct in creating a danger violated a plaintiff’s substantive due process rights.\footnote{See Kneipp v. Tedder, 95 F.3d 1199, 1201 (3rd Cir. 1996) (adopting the state-created danger doctrine to address a claim that police officers violated the plaintiff’s right to bodily integrity).}

In *Wood v. Ostrander*, the Ninth Circuit laid out its version of the state-created danger doctrine.\footnote{See Wood, 879 F.2d at 596 (holding that the officer created a danger when he deliberately abandoned the plaintiff in a high-crime area at night, and a third-party then
the defendant affirmatively created the danger, acted with knowledge of the
danger, and acted with deliberate indifference to the victim’s safety.47 The
Court held that a police officer was liable for violating the victim’s right to
bodily integrity under the Due Process Clause because a third-party actor
raped the victim as a consequence of the officer’s actions.48 The Court found
that the officer created a danger to the victim because the officer arrested the
person driving the victim, refused to give the victim a ride, and forced her to
walk home alone at night in a high crime area.49

The first element a plaintiff must prove to hold the government liable
under the state-created danger doctrine is affirmative conduct.50 In Pauluk
v. Savage, the Ninth Circuit found that the state of Nevada’s failure to
prevent toxic mold from growing in an agency’s office created a danger to
the victim.51 The Clark County Health District (CCDH) in Nevada
transferred the victim to the office with toxic mold and failed to correct the
mold problem, despite the victim’s multiple complaints.52 The Court found
that the CCDH’s transfer order and failure to clean up the mold constituted
affirmative conduct that created a danger and violated the victim’s right to a
clean work environment under the Due Process Clause.53

To meet the second element of the state-created danger doctrine, a plaintiff
must show that the federal or state government knew of the danger that it
created.54 In Benzman v. Whitman, the plaintiffs, responders at the World

47. See id. at 590 (explaining that the officer created the danger by taking away
plaintiff’s transportation and leaving her alone; that the defendant knew, through police
reports that the area was a crime-area area; and the defendant acted with deliberate
indifference to plaintiff’s security).

48. See id. (describing that the officer triggered a duty to protect the victim because
the officer’s actions distinguished the victim from the general public).

49. See id. (noting the plaintiff’s assertion that the officer acted with deliberate
indifference to the victim’s constitutional right to physical security).

50. See Pauluk v. Savage, 836 F.3d 1117, 1124-25 (9th Cir. 2016) (reasoning that
the plaintiff need not show more than a failure to maintain a safe work environment, but
rather the plaintiff must show the state agency affirmatively placed him in the position
of danger).

51. See id. at 1125 (finding that the agency’s order to transfer also constituted
affirmative conduct).

52. See id. (stating that the plaintiff opposed the transfer to the office in question
because he feared the mold would make him ill, but the agency transferred him anyway).

53. See id. at 1126 (holding that the CCDH violated plaintiff’s constitutional right to
clean work environment but granting qualified immunity because the defendants did not
know of the right at the time of the violation).

54. See Benzman v. Whitman, 523 F.3d 119, 129 (2nd Cir. 2008) (holding that the
Trade Center attacks, argued that the Environmental Protection Agency (EPA) violated their substantive due process rights because it knowingly issued false reports declaring the air quality safe. The Second Circuit found that the head of the EPA did not have knowledge of the danger, and thus the agency was not liable for harms to the plaintiffs.

To meet the final element of the state-created danger doctrine, a plaintiff must prove the federal or state government acted with deliberate indifference. In , the plaintiffs claimed that the city of Philadelphia affirmatively created a danger because it failed to adequately train its police officers and it failed to change policies regarding police interactions with intoxicated individuals in custody. Although the Court did not rule on whether the policies amounted to affirmative conduct in this case, it found that policies amount to affirmative conduct if they are created or ignored with deliberate indifference.

C. The Juliana Case

In , the plaintiffs claimed a new unenumerated right to an environment capable of sustaining human life. The United States District Court for the District of Oregon used its reasoned judgment to recognize this new right because it found that an environment capable of sustaining human life was essential to ordered liberty. However, courts disagree on whether there is a right to a stable climate, and litigants will likely continue to contest the issue in the future.

head of the EPA did not know the data on the air quality after the 9/11 attack).

55. See id. (asserting that a poor choice by an agency official is not deliberately indifferent just because people were harmed).

56. See id. (noting that the plaintiffs needed to show supporting facts to prove that the head of the EPA made knowingly false statements).

57. See City of Canton v. Harris, 489 U.S. 378, 396 (1989) (O’Connor, J., concurring) (stating that the plaintiff must show a need to train police forces for the city’s policies to amount to deliberate indifference).

58. See v. , 95 F.3d 1199, 1211 (noting plaintiffs’ argument that the city of Philadelphia acted with deliberate indifference so as to shock the conscience).

59. See id. (remanding to the district court to apply the appropriate standard of deliberate indifference to evaluate the city of Philadelphia’s liability for the policies it created).

60. See v. United States, 217 F. Supp. 3d 1224, 1250 (Dist. Ct. Or. 2016) (explaining that plaintiffs do not claim freedom from all pollution but only the catastrophic effects of climate change).

61. See id. (noting that an environment capable of sustaining human life is essential for civilization and progress).

The plaintiffs in Juliana used the exception of the state-created danger doctrine to hold the federal government liable for policies that contribute to climate change.\textsuperscript{63} The district court found that the plaintiffs alleged sufficient facts at the pre-trial phase to hold the federal government liable under the state-created danger doctrine.\textsuperscript{64}

### III. ANALYSIS

#### A. There Is a Right to an Environment Capable of Sustaining Human Life Because it Is Deeply Rooted in the Nation’s History, it Is Fundamental to the Scheme of Ordered Liberty, and Recognized Through Reasoned Judgment

1. **There Is a Constitutional Right to an Environment Capable of Sustaining Human Life Because it Is Essential to the Pursuit of Other Vital Liberties and the Preservation of Society**

   In Juliana, the United States District Court for the District of Oregon found that an environment capable of sustaining human life satisfies the Supreme Court’s requirement that a fundamental right be essential to the scheme of ordered liberty.\textsuperscript{65} An environment capable of sustaining human life is similar to the right to marriage because both rights are essential to the enjoyment and pursuit of other rights protected by the Due Process Clause.\textsuperscript{66} Establishing a family, receiving economic benefits, and exercising individual autonomy are some of the liberties that the right to marriage and the right to a climate capable of sustaining human life have in common.\textsuperscript{67} Although the plaintiffs in Juliana allege much different types of harms than Wash. Aug. 14, 2018 (holding that there is no constitutional right to a stable climate).

\textsuperscript{63} See Juliana, 217 F. Supp.3d at 1264 (noting that plaintiffs do not challenge a specific government agency’s actions, but rather call for government-wide action to curb climate change).

\textsuperscript{64} See id. at 1251-52 (stating that although many different actors have contributed to climate change, the federal government has a higher degree of responsibility).

\textsuperscript{65} See id. at 1250 (finding that a right to a climate capable of sustaining human life was fundamental to the scheme of ordered liberty).

\textsuperscript{66} Compare Juliana, 217 F. Supp. 3d at 1250 (noting that plaintiffs echo the reasoning in Obergefell because they claim that a stable climate is a necessary condition to enjoy life, liberty, and property) with Obergefell, 135 S. Ct. 2584, 2590 (2015) (holding that rights implicit in liberty may rest on different precepts, but each may be instructive as to the meaning and reach of the other).

\textsuperscript{67} See Obergefell, 135 S. Ct. at 2598 (reasoning that defining the right to marry also meant identifying the essential attributes of the right in history, tradition, and other constitutional liberties).
a ban on gay marriage, both harms violate the plaintiffs’ constitutional rights. Harms like floods, food shortages, destruction of property, and species’ extinction infringe upon the same protected liberties of family, economic prosperity, and individual autonomy.

The harm a person suffers whose orchard undergoes a decreased crop yield because of unstable temperatures is analogous to the economic harm same-sex couples suffered when they could not receive the economic benefits of marriage. Moreover, when floods or fires destroy a plaintiff’s home, a court cannot deny that the plaintiffs have suffered a harm to the family domain or the choice of residency similar to the harm partners suffered when they could not establish a family or choose to marry.

Additionally, in Obergefell, the Court considered life, liberty, property, and marriage a unified whole because each right was contingent on the effective enjoyment of the other. Similarly, in Juliana, the Court found that it could not separate the guarantees of life, liberty, property, and an environment capable of sustaining human life from each other. Thus, the Court considered the enjoyment of substantive due process rights and a stable climate as a unified whole.

In Aji P. v. Washington, the plaintiffs also relied on the holding in

68. Compare Juliana, 217 F. Supp. 3d at 1250 (finding that by violating the right to an environment capable of sustaining human life, the government violates the plaintiff’s property livelihoods), with Obergefell, 135 S. Ct. at 2601-02 (holding that the government’s ban on gay marriage infringed upon property and life).

69. See Juliana at 1234 (explaining that plaintiffs alleged harms to their health, personal safety, property, and occupation, among many others).

70. See id. at 1244 (finding even though climate change is a global crisis, the plaintiffs suffered an individual economic harm); see also Obergefell, 135 S. Ct. at 2601 (asserting that the exclusion from the right to marry causes economic instability that most would find intolerable).

71. See Juliana, 217 F. Supp. 3d at 1242 (providing that plaintiffs have sufficiently pled personal, economic, and aesthetic injuries to move past the motion to dismiss stage); see also Obergefell, 135 S. Ct. at 2590 (proclaiming that the choice to marry is implicit in the right of individual autonomy and that excluding same-sex couples from the institution of marriage made the establishment of a family more difficult and uncertain).

72. See Obergefell at 2600 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)) (asserting that the right to marry, establish a family, and bring up children is a central part of liberty).

73. See Juliana, 217 F. Supp. 3d at 1250 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)) (stating that an environment capable of sustaining human life is the foundation of society).

74. See id. (finding that an environment capable of sustaining human life protects life, health, property, and other vital liberties the Due Process Clause protects).
Obergefell to argue that courts can recognize new unenumerated rights.75 However, the Court refused to compare the right to a stable climate with the right to marriage.76 It considered a stable climate as something to strive towards, but not integral to life, liberty, and property.77 Had the Court in Aji P. exercised its reasoned judgment consistent with the reasoning in Obergefell, it may have found that a stable climate was an individual right fundamental to the scheme of ordered liberty and the enjoyment of substantive due process rights.78 Unlike the court in Juliana, the court in Aji P. did not exercise its reasoned judgment to determine a new fundamental right.79 Climate change has affected and will continue to affect the plaintiffs’ lives, health, and economic livelihoods.80 These dangers implicate the plaintiffs’ substantive due process rights, and thus warrants constitutional protection.81

2. There Is a Constitutional Right to an Environment Capable of Sustaining Human Life Because it Is Deeply Rooted in Legal and Societal Traditions

Because state and federal governments have an interest in preserving the well-being of its citizens, an environment capable of sustaining human life is grounded in legal and societal traditions.82 In Glucksberg, the Supreme


76. See id. at *3 (describing that the right to marriage is a fundamental, individual freedom).

77. See id. (comparing that the goal of a stable climate is more similar to achieving world peace or economic prosperity).

78. See Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015) (stating that the courts must use reasoned judgment to identify interests so fundamental the state must afford them respect).

79. Compare Aji P., 2018 WL 3978310 at *7-8 (noting and rejecting the holding in Juliana v. United States), with Juliana, 217 F. Supp. 3d 1224, 1249-50 (Dist. Ct. Or. 2016) (exercising reasoned judgment to determine there was a fundamental right to an environment capable of sustaining human life).

80. See Aji P., 2018 WL 3978310 at *1 (noting that the defendants did not dispute the fact that climate change posed a threat to plaintiffs).

81. See Juliana, 217 F. Supp. 3d at 1250 (stating that a stable climate was a necessary condition to exercising life, liberty, and property).

82. See Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (explaining that almost all societies demonstrate their commitment to life by treating homicide as a serious crime); see also Juliana, 217 F. Supp. 3d at 1250 (reasoning that failing to recognize a right to a clean environment would allow the federal government to poison the air and water without consequence).
Court did not recognize an unenumerated right to a physician-assisted suicide because the Court found that states have always sought to protect its citizens. The Court reasoned that an expansive right to assisted suicide would harm the most vulnerable people in society, rather than protect them. The Court found that physician-assisted suicide could violate vulnerable citizens’ right to life and bodily integrity. In Juliana, the Court recognized the right to an environment capable of sustaining human life to protect a similar group of vulnerable people—those whom climate change will affect the most. The Court recognized the concern that massive carbon dioxide emissions shorten lifespans and cause illness, violating the plaintiffs’ same right to life and bodily integrity as in Glucksberg.

Furthermore, the right to an environment capable of sustaining human life is rooted in the societal tradition of furthering civilization. The basic traditions of society are the pursuits of life, liberty, and property, and humans cannot achieve those fundamental values without a climate capable of sustaining human life. The guarantees of life, liberty, and property protect the rights to health and bodily integrity, and those rights are contingent on an environment capable of sustaining human life.

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83. See Glucksberg, 521 U.S. at 714 (quoting Martin v. Commonwealth, 184 Va. 1009, 1018-19 (1946)) (explaining that there is an inalienable right to life and personal security).

84. See id. at 731 (finding that the state has an interest in protecting the most vulnerable groups like the poor, elderly, and disabled).

85. See id. at 732 (employing a slippery-slope argument that physician-assisted suicide could lead to voluntary, and even involuntary, euthanasia).

86. Compare Juliana, 217 F. Supp. 3d at 1250 (acknowledging that plaintiffs do not ask for freedom from all pollution, but only for a remedy from the catastrophic effects of climate change), with Glucksberg, 521 U.S. at 732 (explaining that recognizing a right to physician-assisted suicide would pose a serious risk to those who are ill and vulnerable).

87. See Juliana, 217 F. Supp. 3d at 1250 (finding that the federal government’s actions will impede the plaintiffs’ ability to lead long, healthy lives).

88. See id. (recognizing that a climate capable of sustaining human life is “quite literally” the foundation of society).

89. See id. (using the same reasoning as the Supreme Court in Obergefell, concluding that a climate capable of sustaining human life is essential to enjoying the other vital liberties protected by the Due Process Clause); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (noting that it is not surprising the institution of marriage has lasted over centuries because it is central to the human condition).

90. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a statute authorizing the sterilization of convicted felons because it violated basic civil liberties); see also Juliana, 217 F. Supp. 3d at 1250 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)) (acknowledging that without a climate capable of sustaining human life, there
In *Skinner v. Oklahoma*, the Supreme Court recognized an unenumerated right to procreate because it was fundamental to the basic liberties of civilization.91 The Court found that an Oklahoma statute authorizing sterilization would have had widespread and devastating effects on the rights to health and bodily integrity, and thus would have ultimately harmed societal development.92 In *Juliana*, the plaintiffs alleged injuries like aggravated asthma and flooded houses.93 Injuries like asthma and severe flooding implicate the plaintiffs’ rights to bodily integrity and health because they can lead to long-term physical damage.94 Similarly, in *Skinner*, the Supreme Court recognized that forced sterilization would hinder societal growth because citizens would not have full enjoyment of the rights protected under the Due Process Clause.95 Thus, recognizing a right to a climate capable of sustaining human life is consistent with the reasoning in *Skinner* because the federal government’s policies that permit the continued emission of fossil fuels has widespread and devastating effects on life, liberty, property, and societal development.96

Moreover, an environment capable of sustaining human life is rooted in the societal traditions of the development of civilization.97 In *Obergefell*, the Supreme Court found the right to marriage was rooted in societal traditions fundamental to the furtherance of civilization.98 Society understood that the right to marriage was essential to the development of civilization because it was a way to pursue the liberties protected by the Due Process Clause.99 A

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91. *See Skinner*, 316 U.S. at 541 (finding that the right to procreation is fundamental to the survival and existence of civilization).

92. *See id.* (holding that the sterilization statute would cause the plaintiff’s permanent and irreversible deprivation of basic liberties).

93. *See Juliana*, 217 F. Supp. 3d at 1242 (asserting that extreme weather conditions like wild fires and floods concretely harm plaintiffs’ personal interests).

94. *See id.* at 1234 (acknowledging that fossil fuel emissions are currently destabilizing the climate in a way that endangers citizens’ health).

95. *See Skinner*, 316 U.S. at 541 (recognizing that the power to sterilize involves the basic civil rights of humans, which could have far-reaching and devastating effects).

96. *See Juliana*, 217 F. Supp. 3d at 1250 (finding that the federal government’s action is substantially altering the ecosystem in a way that will harm vital liberties protected by the Due Process Clause).

97. *See id.* at 1249 (comparing the right to an environment capable of sustaining human life to the right to marriage in *Obergefell* because it underlies and supports other life, liberty, and property).


99. *See id.* at 2601 (noting that marriage remains a building block of society, and
right to an environment capable of sustaining human life is also a way to pursue the liberties protected by the Due Process Clause because it protects property and livelihoods.\textsuperscript{100}

3. Using Reasoned Judgment, There Is a Right to an Environment Capable of Sustaining Human Life Because it Comports With Contemporary Societal Ideologies

The right to an environment capable of sustaining human life is consistent with the modern notion of constitutional rights.\textsuperscript{101} While history and tradition are relevant considerations that courts take into account to recognize an unenumerated right, they do not set the boundaries for unenumerated rights.\textsuperscript{102} In Obergefell, the Supreme Court found that marriage was fundamental to the scheme of ordered liberty, and therefore, recognized a right for same-sex couples to marry.\textsuperscript{103} However, the Court recognized that society has expanded its interpretation of constitutional rights, and thus, the Court found no justification to exclude same-sex couples from the right to marry.\textsuperscript{104} Moreover, the Court recognized that modern reasons to marry did not exclude same-sex couples from the right to marry.\textsuperscript{105} The Court found that same-sex couples could start a family through adoption or artificial insemination, the same as different-sex couples.\textsuperscript{106} Furthermore, the Court found that same-sex couples also had the right to receive the same economic benefits that marriage offered to different-sex couples.\textsuperscript{107}

therefore, it superseded previous barriers like parental consent, gender, and race).

\textsuperscript{100} See Juliana, 217 F. Supp. 3d at 1251 (stating that plaintiffs allege injuries to bodily integrity, property, and access to clean air and water).

\textsuperscript{101} See id. at 1249 (asserting that when new insights reveal gaps in constitutional protections, the court must address claims to liberty).

\textsuperscript{102} See Obergefell, 135 S. Ct. at 2595 (explaining that the right to marriage developed alongside women’s rights, which expanded the institution of marriage in ways that were not originally foreseeable).

\textsuperscript{103} See id. at 2598 (finding that marriage was one of the vital personal rights essential to the orderly pursuit of happiness).

\textsuperscript{104} See id. at 2602 (describing that rights do not only come from ancient sources; they arise from a more informed understanding of the constitutional interpretations consistent with modern thought).

\textsuperscript{105} See id. at 2601 (stating that same-sex couples seek the same rights as different-sex couples, and to deny same-sex couples the right to marry would also deny them their personhood).

\textsuperscript{106} See id. (asserting that the ability or desire to procreate is not a prerequisite for marriage in the United States).

\textsuperscript{107} See id. (reasoning that the government made marriage the basis for expanding rights and benefits).
Society’s better understanding of the need to take immediate action to curb climate change informed the district court’s decision in *Juliana*.108 Thus, the reasoned judgment the court used in *Juliana* is consistent with the Supreme Court’s reasoned judgment in *Obergefell* because the climate crisis has better informed society of the constitutional needs to address the gaps in the law.109

B. **The State-Created Danger Doctrine Is the Proper Mechanism to Bring a Claim Regarding Climate Change Because the State Affirmatively Created the Danger of Climate Change, it Knew of the Danger, and it Acted With Deliberate Indifference to the Victims’ Safety**

The state-created danger doctrine is a proper legal pathway to bring a claim regarding climate change because the state affirmatively created the danger of climate change, it knew of the danger, and it acted with deliberate indifference to the victims’ safety. According to the court in *Juliana*, plaintiffs can bring a claim against the federal government under 42 U.S.C. § 1983 when the government fails to enact measures to effectively curb climate change.110 The district court in *Juliana* found that plaintiffs may use the state-created danger doctrine to show that the state violated their right to a climate capable of sustaining human life and their substantive due process rights.111 Thus, the state-created danger doctrine is a viable path to bring a climate change lawsuit.112

Therefore, plaintiffs can hold the federal government liable for the violation of substantive due process rights under the state-created danger doctrine when the federal government affirmatively acts to create the danger of climate change through its inaction.113

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108. *See* *Juliana* v. United States, 217 F. Supp. 3d 1224, 1244 (Dist. Ct. Or. 2016) (showing that the United States is now in a period of carbon overshoot that threatens to seriously harm citizens if the federal government does not take action immediately).

109. *See id.* at 1250 (exercising reasoned judgment, the court found that a right to an environment capable of sustaining human life is fundamental to a free and ordered society).

110. *See id.* at 1251 (finding the government acted affirmatively, with knowledge, and with deliberate indifference). *But see* Residents Against Floodings, et al. v. Zone No. Seventeen, et al., 260 F. Supp. 3d 738, 774 (Dist. Ct. Tex. 2017) (holding that the plaintiffs did not prove that the city of Houston acted affirmatively, with knowledge, and with deliberate indifference when it failed to protect certain neighborhoods from flooding).

111. *See* *Juliana*, 217 F. Supp. 3d at 1250 (finding that government policies that failed to curb climate change violated their substantive due process rights).

112. *See id.* at 1252 (holding the plaintiffs pled a sufficient state-created danger claim at the motion to dismiss stage).

113. *See id.* at 1250-51 (explaining that plaintiffs have a valid claim against the federal
The federal government affirmatively placed citizens in a position of danger by failing to curb the harmful effects of climate change.\textsuperscript{114} The plaintiffs in Juliana claimed that federal government extracted, subsidized, transported, and permitted the emissions of fossil fuels, which substantially increased the harmful effects of climate change.\textsuperscript{115} The policies that allow the continued emission of fossil fuels are similar to the affirmative conduct in Wood because in both cases a government actor placed the plaintiffs in a dangerous position.\textsuperscript{116} In Wood, the officer arrested the person driving the victim, impounded the car, and abandoned the victim in a high crime area.\textsuperscript{117} In Juliana, the Court found that extreme weather, like floods and wild fires, endangered plaintiffs’ substantive due process rights.\textsuperscript{118} The plaintiffs’ claim that these floods and wild fires place them in a danger that violates their right to personal security.\textsuperscript{119} Though the federal governments’ actions regarding fossil fuel emissions are different from the officer’s actions, the effect of the government’s actions is the same because the conduct places those most affected by climate change in a dangerous position.\textsuperscript{120}

Moreover, in Juliana, the Court found that the federal government’s inaction in curbing the effects of climate change constitutes affirmative conduct because the inaction led to the danger that harmed the plaintiffs.\textsuperscript{121}

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  \item government for contributing to a state-created danger).
  \item \textsuperscript{114} See id. at 1233 (acknowledging the plaintiffs’ argument that the federal government had ultimate control over these actions because it has sovereign authority over the country’s atmosphere and fossil fuel resources).
  \item \textsuperscript{115} See id. (noting that fossil fuel emissions escalated atmospheric carbon dioxide concentrations to unprecedented levels never before seen on Earth).
  \item \textsuperscript{116} See id. (recognizing that many actors contribute to climate change, but the federal government bears a higher degree of responsibility because it has a duty to protect United States citizens); see also Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989) (holding that a police officer had triggered a duty to affirmatively protect the victim because the officer created dangerous conditions that distinguished the victim from the general public).
  \item \textsuperscript{117} See Wood, 879 F.2d at 588 (explaining that a reasonable officer would not assume that the victim had possible means of transport without help, and therefore abandoning her in the area placed her in a position of danger).
  \item \textsuperscript{118} See Juliana, 217 F. Supp. 3d at 1234 (finding that the federal government’s fossil fuel policies were a direct causal link to the creation of floods and wild fires that injured the plaintiffs).
  \item \textsuperscript{119} See id. at 1251 (acknowledging the plaintiffs’ argument that the federal government knowingly created climate change by permitting private actors to continue to produce fossil fuels).
  \item \textsuperscript{120} See id. at 1244 (explaining that plaintiffs suffered harm to their personal, economic, and aesthetic interests).
  \item \textsuperscript{121} See id. at 1248 (noting plaintiff’s argument that the federal government violated
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In *Kennedy v. Ridgefield City*, the Ninth Circuit found that the officer’s inaction in protecting the victims constituted affirmative conduct because it led to the danger that harmed the victims.122 The officer promised the victims that he would patrol the neighborhood after threats arose from a violent sex offender, but the officer failed to patrol the neighborhood, thus affirmatively exposing the victims to a danger.123 Like the inaction in *Kennedy*, the federal government has failed to reduce fossil fuel emissions, thus polluting the air and creating extreme weather conditions that endanger the plaintiffs.124 By not acting to effectively reduce emissions and curb the effects of climate change, the federal government is affirmatively creating a danger, violating the same rights to life and personal security that the officer’s inaction violated in *Kennedy*.125 Thus, holding that the federal government’s inaction amounts to affirmative conduct under the state-created danger test is consistent with the reasoning in *Kennedy*.126

Furthermore, the federal government’s failure to reduce fossil fuel emissions constitutes affirmative conduct because the inaction places the victims in a worse position by reducing the overall life expectancy of citizens.127 In *Juliana*, the plaintiffs argued that the federal government’s failure to enact measures to mitigate climate change affirmatively reduces their life expectancies.128 The government’s affirmative conduct in *Juliana*,

the plaintiffs’ substantive due process rights by not acting to reduce fossil fuel emissions which cause climate change).

122. See *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1061 (9th Cir. 2006) (explaining that the officer acted affirmatively by failing to protect the victims because the officer placed them in a position of danger they would not have otherwise faced).

123. See id. at 1063 (finding the officer’s misrepresentations about the levels of protection to the victims were an aggravating factor making them more vulnerable to the danger).

124. See *Juliana*, 217 F. Supp. 3d at 1240 (recognizing that plaintiffs ask the court to ensure the federal government complies with international climate change commitments to reduce emissions, among other measures).

125. Compare id. at 1250 (stating the federal government affirmatively created the danger of climate change that violated plaintiffs’ personal security and bodily integrity), with *Kennedy*, 439 F.3d at 1061 (asserting the officer created a danger that violated the victim’s right to bodily security).

126. See *Juliana*, 217 F. Supp. 3d at 1261 (noting the federal government’s inaction has so profoundly damaged the planet that they violate the plaintiffs’ substantive due process rights).

127. See id. at 1251 (citing Pauluk v. Savage, 836 F.3d 1117, 1125 (9th Cir. 2016)) (explaining that the affirmative conduct in *Pauluk* left the victim in a worse position).

128. See id. at 1243 (rejecting the federal government’s argument that the injuries are not particular to the plaintiffs because it is not abstract or indefinite despite being widely shared).
reducing the plaintiffs’ lifespan, is comparable to the affirmative conduct in Pauluk, which also dramatically reduced the victim’s lifespan.\textsuperscript{129} In Pauluk, the CCDH failed to fix the officer’s toxic mold problem even though the victim complained that it made him sick on several occasions.\textsuperscript{130} The CCDH’s failure amounted to affirmative conduct because the toxic mold substantially shortened the victim’s lifespan, just as the toxic amount of carbon dioxide in the atmosphere is shortening the plaintiffs’ lifespans in Juliana.\textsuperscript{131}


According to the Court in Juliana, a plaintiff can prove the second element of the state-created danger doctrine by establishing that the government acted with knowledge of the dangers climate change posed to citizens.\textsuperscript{132} The federal government has known the dangers that climate change poses to citizens because citizens have brought climate change suits against the federal government in the past.\textsuperscript{133} These prior actions demonstrate the government was aware that climate change continues to harm citizens, yet it failed to properly curb the harmful effects.\textsuperscript{134} In Pauluk, the Ninth Circuit found that the victim’s previous complaints of a toxic mold problem put the

\textsuperscript{129} See id. at 1251 (comparing the government’s permission of fossil fuel emissions to poisoning the air and water); see also Pauluk, 836 F.3d at 1134 (finding Pauluk died from inhaling poisonous air).

\textsuperscript{130} See Pauluk, 836 F.3d at 1119 (stating that the doctor’s testimonies corroborated that Pauluk was ill and that the toxic mold caused his illness).

\textsuperscript{131} Compare id. at 1125 (noting the victim opposed the office transfer due to his fear of health problems related to the toxic mold), with Juliana, 217 F. Supp. 3d at 1250 (recognizing that if the federal government’s actions continue unchecked, the toxic mold will permanently and irreversibly damage the plaintiff’s health).

\textsuperscript{132} See Pauluk, 836 F.3d at 1125 (holding the danger to the victim was known and obvious because the agency had multiple buildings that experienced a pervasive mold problem); see also Juliana, 217 F. Supp. 3d at 1251 (noting the federal government acted with full appreciation of the consequences of its actions on the lives of its citizens).

\textsuperscript{133} See Juliana, 217 F. Supp. 3d at 1244-46 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); see generally WildEarth Guardians v. Dep’t of Agric., 795 F.3d 1148 (9th Cir. 2016); see also Massachusetts v. EPA, 549 U.S. 497, 535 (2007) (holding the EPA had the statutory mandate to regulate new motor vehicles because fossil fuel emissions were substantially contributing to climate change).

\textsuperscript{134} See Juliana, 217 F. Supp. 3d at 1234 (acknowledging the federal government does not dispute climate change itself or the role of humans in exacerbating climate change’s effects).
agency’s supervisors on notice of a danger that was known and obvious.\textsuperscript{135} Thus, the Court found that when the agency failed to fix the mold problem, the agency acted with knowledge of the danger.\textsuperscript{136}

Climate change suits have put the federal government on notice of the harmful effects of climate change, similar to the victim’s complaints to the CCDH put the agency’s supervisors on notice of the harmful effects of toxic mold.\textsuperscript{137} The federal government continued to permit fossil fuel emissions, even though the harmful effects of climate change were a known and obvious danger, and thus the federal government acted with knowledge when it failed to properly curb the effects of climate change.\textsuperscript{138}

Furthermore, in \textit{Kennedy}, the Ninth Circuit found that the officer knew of the danger because he knew of previous instances where the attacker posed a danger to citizens in the town.\textsuperscript{139} The Court found that the officer’s decision to notify the attacker of the charges before ensuring the family’s safety, despite the officer’s knowledge of the attacker’s violent tendencies, led to the creation of a danger to the victims’ safety.\textsuperscript{140} Similar to \textit{Kennedy}, the federal government knew of prior instances where climate change harmed its citizens.\textsuperscript{141} With the knowledge that fossil fuel emissions contribute substantially to the creation of extreme weather patterns, the federal government continued to permit fossil fuel emissions even though it posed serious harms to its citizens.\textsuperscript{142}

\textsuperscript{135} See \textit{Pauluk}, 836 F.3d at 1125 (explaining that at least one other employee at the CCDH suffered harmful health effects from exposure to toxic mold, thus further demonstrating the obviousness of the known danger).

\textsuperscript{136} See \textit{id.} (finding that the harm to the victim was foreseeable because the building had a long history of a pervasive mold problem, and thus the agency acted with knowledge when it failed to protect the victim from toxic mold).

\textsuperscript{137} See \textit{Julianna}, 217 F. Supp. 3d at 1245 (noting the court’s knowledge of climate change is developing at a breakneck rate).

\textsuperscript{138} See \textit{id.} at 1233 (acknowledging plaintiffs’ argument that the federal government has known for more than fifty years that fossil fuel emissions were destabilizing the climate system in a way that would endanger plaintiffs).

\textsuperscript{139} See \textit{Kennedy} v. Ridgefield City, 439 F.3d 1055, 1058 (9th Cir. 2006) (noting the officer knew of several violent incidents between the attacker and the attacker’s mother and that the attacker previously sent death threats to others).

\textsuperscript{140} See \textit{id.} at 1065 (describing that the officer argued that notifying the attacker first was more convenient, even though he knew the attacker’s violent propensity).

\textsuperscript{141} See \textit{Julianna}, 217 F. Supp. 3d at 1251 (asserting that the federal government knew that policies that encouraged fossil fuel production would lead to higher greenhouse gas levels, thus exacerbating the effects of climate change).

\textsuperscript{142} See \textit{id.} at 1252 (finding the federal government continued to permit fossil fuel emissions despite knowing the consequences would ultimately harm the plaintiffs’ lives, health, and property).
Plaintiffs can prove that the federal government acted with knowledge by showing that federal agencies had access to scientific data and reports that detailed the harmful effects of climate change.\textsuperscript{143} In Benzman, the EPA knew of reports and data that the air quality in downtown Manhattan was unsafe to inhale after the World Trade Center attack.\textsuperscript{144} However, the head of the EPA made statements that the air quality was safe to breathe to encourage responders to continue to work.\textsuperscript{145} The Second Circuit found that the head of the EPA did not have full knowledge of the health risks, and thus was not liable for the harm to the plaintiffs; however, the Court stated that the head of the EPA should have known of the risk given the data at her disposal.\textsuperscript{146} Benzman is distinguishable from Juliana because in Benzman, the EPA collected the data and released the reports quickly to make sure that responders returned to work at the sites.\textsuperscript{147} However, in Juliana, the federal government has had access to climate data for years, and the timeline to reduce fossil fuel emissions is more protracted than the need to release air quality reports after a terrorist attack.\textsuperscript{148}

Additionally, in Wood, the Ninth Circuit found that the police officer acted with knowledge of a known danger because the officer abandoned the victim that he had previously taken into custody in a high-crime area late at night, and a third-party raped the victim.\textsuperscript{149} The Court found that the officer knew that he placed the victim in a dangerous position because he had reports and statistics which put him on notice that the victim was in a high-crime area.\textsuperscript{150}

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\item \textsuperscript{143} See Aji P. v. Washington, No. 18-2-04448-1 2018 WL 3978310 *1, *1 (Wash. Super. Aug. 14, 2018) (citing a report that 2018 was the fourth-hottest year on record and that heat-related deaths in the U.S. will increase fivefold by 2080).
\item \textsuperscript{144} See Benzman v. Whitman, 523 F.3d 119, 129 (2nd Cir. 2008) (acknowledging plaintiff’s argument that several employees at the EPA had data on the health risks of the air quality, but finding that the head of the EPA did not know of the data).
\item \textsuperscript{145} See id. at 128-29 (finding a factual dispute as to whether the head of the EPA made false statements, but finding no liability to the plaintiffs because the conduct was not deliberately indifferent, even if she made false statements).
\item \textsuperscript{146} See id. at 129 (explaining that mismanaging an organization is not a constitutional tort despite her not receiving the full scope of information from her employees).
\item \textsuperscript{147} See id. at 128 (noting that a poor choice does not amount to deliberately indifferent conduct even when the agency’s overall performance was indifferent).
\item \textsuperscript{148} See Juliana v. United States, 217 F. Supp. 3d 1224, 1251 (Dist. Ct. Or. 2016) (finding the federal government has had longstanding and actual knowledge of the serious risks posed by climate change).
\item \textsuperscript{149} See Wood v. Ostrander, 879 F.3d 583, 590 (9th Cir. 1989) (stating the inherent danger of leaving someone alone at night in a high crime area is a matter of common sense; however, finding that the reports put the officer on notice of the danger).
\item \textsuperscript{150} See id. (noting the officer had been on the police force since 1981 and often
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The federal government also has access to statistics detailing climate change projections and its harmful effects, putting it on notice that climate change poses a danger. The decision to continue to permit fossil fuel emissions, despite reports and statistics indicating that the emissions are creating a danger, violates the same due process rights as the officer in *Wood* by infringing upon life and health. Thus, the federal government acted with knowledge of a known and obvious danger.


   According to the Court in *Juliana*, plaintiffs can prove the third element of the state-created danger doctrine by demonstrating that the federal government acted with deliberate indifference to the safety of its citizens. In *Wood*, the Ninth Circuit found that the police officer, despite knowing the threats of the area, acted with deliberate indifference because he forced the victim to walk home alone. The Court found that the officer had patrolled the area for years and knew statistics of the crime rate in the area. Therefore, the officer ignored the present dangers and acted with deliberate indifference to the personal security of the victim. In regards to climate

patrolled the area; thus, the officer should have known of the danger in the area).

151. *See Juliana*, 217 F. Supp. 3d at 1246 (acknowledging plaintiffs allege that power plants and transportation account for two-thirds of fossil fuel emissions in the United States and noting that the Department of Transportation and EPA have broad regulatory power over those emissions).

152. Compare *Juliana*, 217 F. Supp. 3d at 1250 (finding the federal government created a danger that violated plaintiffs’ bodily integrity under the Due Process Clause), with *Wood*, 879 F.3d at 590 (finding the officer created a danger that violated the victim’s bodily integrity under the Due Process Clause).

153. *See Juliana*, 217 F. Supp. 3d at 1250 (explaining that the federal government acted with full appreciation of the danger that climate change posed to plaintiffs and future generations).

154. *See id.* at 1234 (acknowledging plaintiffs’ argument that the federal government deliberately allowed oil refineries to emit fossil fuels at alarming rates despite knowing that climate change posed a serious threat to citizens’ lives).

155. *See Wood*, 879 F.3d at 588 (noting that deliberate indifference was more than mere negligence, like mislaying a pillow on prison stairs or misplacing an inmate’s property).

156. *See id.* at 590 (finding the officer ignored the victim when she asked for a ride home, or at least help in getting home).

157. *See id.* at 589 (finding the officer violated the victim’s substantive due process rights when he acted with callous disregard for the victim’s physical security).
change, the federal government knows the dangers of climate change, and chose to disregard the threats at the expense of its citizens.\footnote{Compare Juliana, 217 F. Supp. 3d at 1234 (stating the federal government knew for decades that transporting, extracting, refining, and emitting fossil fuels posed a serious threat to the lives of United States citizens, yet continued with policies that permitted the behavior), with Wood, 879 F.3d at 588 (noting the officer disregarded the threats to the victim despite having access to crime statistics and reports about the area that indicated it was a high-crime area).} The federal government ignored the plaintiffs’ requests for help, just as the officer in Wood disregarded the victim’s request for a ride home.\footnote{See Massachusetts v. EPA, 549 U.S. 497, 533 (2007) (finding the EPA has the ability to regulate fossil fuel emissions, which contribute substantially to climate change); see also Juliana, 217 F. Supp. 3d at 1234 (acknowledging plaintiffs’ argument that the federal government has not adequately reduced fossil fuel emissions to curb the effects of climate change).}

Furthermore, in Pauluk, the Ninth Circuit found that the CCDH acted with deliberate indifference because it ignored the dangers that toxic mold posed to the employees, exposing them to the health-risks in the office.\footnote{See Pauluk v. Savage, 836 F.3d 1117, 1119 (9th Cir. 2016) (noting the victim suffered from serious health effects such as chronic exhaustion, headaches, and dehydration).} The CCDH had received previous complaints regarding the pervasive mold problem, but ignored those complaints and transferred the victim into the office regardless of the danger.\footnote{See id. at 1119 (noting the victim requested to test the mold in the ceiling above his desk, and acknowledging that the agency supervisors tried to cover up the mold problem).}

Similar to Pauluk, in Juliana, the federal government ignored the dangers climate change posed, and the government exposed its citizens to the effects of climate change by permitting the continued emission of fossil fuels.\footnote{See Juliana, 217 F. Supp. 3d at 1251 (acknowledging the plaintiffs’ allegation that the government deliberately exposed them to the dangers of climate change because they knew of the danger and did not take necessary steps to curb the effects).} In Pauluk, the agency could have cleaned the toxic mold or not transferred the victim to the office, but it ignored these options.\footnote{See Pauluk, 836 F.3d at 1125 (noting plaintiffs’ evidence of the agency supervisors actively trying to conceal the toxic mold problem rather than correcting it).} Similar to the inaction in Pauluk, the federal government could have implemented policies to reduce fossil fuel emissions, but because it ignored options to mitigate the danger, finding that the federal government acted with deliberate indifference is consistent with the reasoning in Pauluk.\footnote{See Juliana, 217 F. Supp. 3d at 1246 (acknowledging plaintiffs’ allegation that the federal government failed to reduce fossil fuel emissions to amounts that could be harmful).}
Moreover, in *Kennedy*, the Ninth Circuit found that the officer acted with deliberate indifference because he ignored the victims’ request to patrol the neighborhood after he put them in a dangerous situation.\(^{165}\) The officer deliberately ignored his duty to protect the victims by failing to patrol the neighborhood.\(^{166}\) In the context of climate change, the federal government similarly ignored its duty to reduce fossil fuel emissions, even though it created policies that endangered its citizens.\(^{167}\) Thus, the federal government acted with deliberate indifference to prevent a danger that was an obvious consequence of the federal government’s actions.\(^{168}\)

The federal government created policies permitting the continued emission of fossil fuels with deliberate indifference to the safety of citizens.\(^{169}\) In *Kneipp*, the Third Circuit found that the city of Philadelphia could be held liable if the city created policies that led to deliberately indifferent conduct.\(^{170}\) The plaintiff argued that the city’s policy of not enforcing proper procedures caused the officers to violate the victim’s substantive due process rights, and the officers would not have acted with deliberate indifference had the city enforced proper procedures.\(^{171}\)

In *Juliana*, the Court found that the federal government created policies encouraging fossil fuel production, which substantially contributed to climate change’s harmful effects and the plaintiffs’ injuries.\(^{172}\) Fossil fuel

effectively curb climate change).

165. *See* Kennedy v. Ridgefield City, 439 F.3d 1055, 1064 (9th Cir. 2006) (noting that deliberate indifference is a stringent standard, requiring the actor to disregard an obvious consequence of the actor’s conduct).

166. *See id.* at 1065 (finding that the officer acted with deliberate indifference when he notified the attacker before ensuring the family’s safety, despite knowing the attacker posed a danger to the victims).

167. *See Juliana*, 217 F. Supp. 3d at 1251-52 (explaining that the federal government played a unique role in the danger the climate change poses to the plaintiffs).

168. *See id.* (noting the federal government has a special duty of care to reduce fossil fuel emissions due to its statutory and regulatory authority implicating their role in creating the current climate crisis).

169. *See id.* at 1234 (reasoning that the federal government created policies that permitted and encouraged the exploitation, production, and combustion of fossil fuels, thus deliberately releasing carbon dioxide into the atmosphere).

170. *See Kneipp* v. Tedder, 95 F.3d 1199, 1213 (3rd Cir. 1996) (deciding not to rule whether the city of Philadelphia had created policies with deliberate indifference because the plaintiff did not raise the issue on appeal).

171. *See id.* (establishing that the plaintiff must prove that the policy was the proximate cause of the injuries suffered).

172. *See Juliana*, 217 F. Supp. 3d at 1246 (explaining the causal chain does not break just because there are several links).
production accounts for the vast majority of greenhouse gas emissions in the United States; thus, policies that fail to effectively reduce emissions lead to deliberately indifferent permission of continued emissions, which proximately cause plaintiffs’ injuries. The federal government’s policies are similar to the policies in Kneipp because the government created the policies with deliberate indifference, and thus violated the plaintiffs’ due process rights.

IV. POLICY RECOMMENDATION

Courts should recognize the right to an environment capable of sustaining human life, and allow plaintiffs to bring climate change suits under the state-created danger doctrine to address the current gap in legal protection.

The effects of climate change will continue to harm United States citizens in the future. Citizens who are most affected by climate change will not be able to receive an adequate remedy for their injuries because there is not a consistent legal pathway through which to bring grievances. This gap in legal protection underscores the importance of Juliana and the right to an environment capable of sustaining human life. Recognizing a right to an environment capable of sustaining human life and allowing plaintiffs to bring climate change lawsuits under the state-created danger doctrine will correct the current disconnect between the law and its remedies.

To address the current gap in legal protection, courts should recognize a right to an environment capable of sustaining human life. The right to an

173. See id. (finding the federal government can increase or decrease fossil fuel emissions, and it used its power to cause and promote higher levels of fossil fuel emissions).

174. Compare id. (acknowledging plaintiffs’ claim that the federal government leased public lands for fossil fuel production, undercharged lease royalties, and gave tax breaks to encourage fossil fuel development), with Kneipp, 95 F.3d at 1209 (finding the officers used their authority to put the victim in a dangerous situation with deliberate indifference for her safety).

175. See Wuebbles et al., supra note 1 (explaining that the only way to mitigate climate change’s harmful effects is to substantially reduce greenhouse gas emissions).


177. See Juliana, 217 F. Supp. 3d at 1250 (explaining the question in the case was not the existence of climate change, but whether the federal government could be held liable).

178. See generally Caleb Hall, A Right Most Dear: The Case for Constitutional Environmental Right, 30 TUL. ENVTL. L. J. 85, 88 (2018) (arguing that the environmental statutory scheme has not offered enough protection to United States citizens; thus, it is
environment capable of sustaining human life would protect citizens who climate change affects the most.  

However, the right would also guard against every environmental tort claim becoming a constitutional violation. Thus, the right would offer the legal protection that citizens need, but not expand government liability to every type of pollution.

Furthermore, courts should adopt the state-created danger doctrine as a legal pathway to bring climate change lawsuits alleging the violation of a right to an environment capable of sustaining human life. The legal doctrine delineates a strict test that would protect against frivolous lawsuits. However, the doctrine allows plaintiffs who have suffered from the affirmative action of a state or federal government to seek a remedy for their injuries.

CONCLUSION

Although the outcome of the plaintiff’s argument in Juliana is uncertain, plaintiffs bringing climate change suits appear to have gained a new legal pathway to seek a remedy. Climate change litigants can bring suits under § 1983 by showing that the federal government violated a constitutional right to an environment capable of sustaining human life.

Moreover, climate change litigants can explain that the federal government had a duty to protect citizens under the state-created danger necessary to consider a constitutional environmental right).

179. See Juliana, 217 F. Supp. 3d at 1251 (explaining the right to an environment capable of sustaining human life protects citizens who suffer catastrophic effects of climate change).
180. See id. (noting the plaintiffs do not claim freedom from all forms of pollution; only on the severe effects of climate change).
181. See id. (noting the government is not liable for small or even moderate changes in temperature).
182. See id. at 1252 (finding the plaintiffs had stated sufficient facts to bring a claim under the state-created danger doctrine at the pre-trial stage).
183. See id. (stating the plaintiffs need rigorous proof that the federal government affirmatively caused the plaintiffs’ climate change related injuries to prevail at trial).
184. See id. (noting the plaintiffs’ argument that the federal government acted affirmatively and with full appreciation of the dangers climate change posed to the plaintiffs).
185. See Berliner, supra note 4, at 340 (stating the plaintiffs’ arguments in Juliana could lead to broad changes in the way that parties litigate climate change lawsuits).
186. See Juliana, 217 F. Supp. 3d at 1250 (noting the state-created danger doctrine is a strict test and will require the plaintiffs to offer more proof than what they put forward at the pre-trial stage).
Litigants will need to show that an environment capable of sustaining human life is rooted in the nation’s history and fundamental to the scheme of ordered liberty. Furthermore, litigants need to show that the federal government acted affirmatively to place United States citizens in a position of danger because it failed to effectively curb the harmful effects of climate change. Litigants will need to establish that the federal government knew the dangers that climate change posed to citizens, and thus had a duty to protect under the state-created danger doctrine. Finally, litigants need to prove that the government acted with deliberate indifference to the safety of its citizens because it ignored the threats that climate change posed. Given the devastating effects that fossil fuel emissions have on the environment, those most affected by climate change have a legal avenue under the state-created danger doctrine.

187. See id. (rejecting the federal government’s argument that § 1983 claims are inapplicable because the federal government could not cite a case that justified limiting § 1983 claims).

188. See id. at 1250 (explaining that reasoned judgment finds the right to an environment capable of sustaining human life is essential to guarantee the liberties protected by the Due Process Clause).

189. See id. at 1251 (finding the federal government created policies that permitted the emission of fossil fuels and failed to effectively mitigate the effects of climate change).

190. See id. (acknowledging that the federal government knowingly continued to permit fossil fuel emissions with full appreciation of the consequences of its actions).

191. See id. (stating the government acted with deliberate indifference to the safety of the plaintiffs because it ignored the harmful effects of climate change on its citizens).

192. See id. at 1252 (explaining that the plaintiffs could proceed with the substantive due process challenge against the defendants for the defendants’ failure to reduce fossil fuel emissions).
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