Case No. 24-684

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Defendants,

v.

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

KELSEY CASCADIA ROSE JULIANA, et al.,
Real Parties in Interest—Plaintiffs.

On Motion for Reconsideration En Banc in No. 6:15-cv-1517-AA

AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS IN SUPPORT OF REAL PARTIES IN INTEREST—PLAINTIFFS

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AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS IN SUPPORT OF REAL PARTIES IN INTEREST—PLAINTIFFS

I. IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are members of the United States Senate and House of Representatives:

- Senators. Ron Wyden of Oregon, Cory Booker of New Jersey, Edward Markey of Massachusetts, Jeff Merkley of Oregon, Bernard Sanders of Vermont, Chris Van Hollen of Maryland, Sheldon Whitehouse of Rhode Island.
- Representatives. Jan Schakowsky of Illinois, Alma Adams of North Carolina, Nanette Barragán of California, Earl Blumenauer of Oregon, Julia Brownley of California, Tony Cárdenas of California, Steve Cohen of Tennessee, Danny Davis of Illinois, Mark DeSaulnier of California, Veronica Escobar of Texas, Adriano Espaillat of New York, Maxwell Frost of Florida, Jesús García of Illinois, Raúl Grijalva of Arizona, Val Hoyle of Oregon, Jared Huffman of California, Jonathan Jackson of Illinois, Pramila Jayapal of Washington, Ro Khanna of California, Barbara Lee of California, Summer Lee of Pennsylvania, Betty

[1] All parties consented via email to the filing of this brief. No party's counsel authored this brief, and no party, party's counsel, or other person contributed money for the preparation or filing of this brief.

McCollum of Minnesota, Jim McGovern of Massachusetts, Eleanor Holmes Norton of the District of Columbia, Alexandria Ocasio-Cortez of New York, Ilhan Omar of Minnesota, Mark Pocan of Wisconsin, Delia Ramirez of Illinois, Deborah Ross of North Carolina, Mary Gay Scanlon of Pennsylvania, Rashida Tlaib of Michigan, Jill Tokuda of Hawaii, Lori Trahan of Massachusetts, Nydia Velázquez of New York, Bonnie Watson Coleman of New Jersey, and Frederica Wilson of Florida.

As members of Congress, we serve the citizens of the United States. U.S. Const. art. I, § 1. These Youth Plaintiffs are among the youngest generation and most vulnerable citizens of our country. Since youth cannot vote, they depend upon each branch of government to act in their best interests when exercising authority. Sadly, at this time, each branch is betraying the intergenerational trust bestowed upon them for "our Posterity" in the face of the climate crisis. U.S. Const. pmbl. *Amici*, therefore, have a strong interest in ensuring that all three branches of the federal government comply with the unique and vital roles each plays in upholding the United States Constitution under our divided system of government.

We write to affirm the duty of the federal judiciary under Article III to assess the constitutionality of the conduct of its coequal branches, and to provide appropriate redress as warranted, including declaratory relief. We also write to emphasize the vital role that our system of checks and balances plays in the healthy

functioning of our democracy, ultimately ensuring each branch respects the fundamental rights of the people. *Amici* recognize the Youth Plaintiffs' fundamental rights, alleged to be violated in this case, and respectfully ask this Court to grant them (a) an en banc review - rehearing en banc or, in the alternative, reconsideration en banc - of the panel's May 1, 2024, order issuing a writ of mandamus against the district court and (b) a trial to present their case and secure their constitutional rights to life, liberty, property, and public trust resources.

II. SUMMARY OF ARGUMENT

We, members of Congress, maintain that the Youth Plaintiffs' fundamental rights to life, liberty, and property, including access to the essential resources they need to survive, are being violated by a man-made climate crisis caused, in large part, by our nation's perpetuation of "carbon emissions from fossil fuel production, extraction, and transportation." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020). In the face of this unprecedented crisis, all three branches of government have "more than just a nebulous 'moral responsibility' to preserve the Nation." *Id.* at 1177 (Staton, J., dissenting).

The executive branch's duty is to enforce the law, and to preserve, protect and defend the U.S. Constitution. U.S. Const. art. II, § 1. In this case, that means confronting *at trial* the overwhelming record that has already led this Court to conclude the government's actions are causing injury to the Youth Plaintiffs, rather

than using unprecedented procedural tactics to avoid defending the case. The executive branch should cease its extraordinary and oppressive efforts, examined below, to silence Youth Plaintiffs' efforts to vindicate their Constitutional rights.

This Court, as the relevant representative of the judicial branch, should grant an en banc review and deny the government's petition for writ of mandamus, an "extraordinary remedy, which should only be used in exceptional circumstances,"[2] which in this instance would prevent the case from proceeding to trial. Not only has the government failed to justify the extreme remedy of mandamus,[3] but denial of mandamus would allow the trial court to fulfill its role as a neutral arbiter, insulated from politics, to assess the conduct of its coequal branches and evaluate the constitutionality of the conduct that violates the fundamental rights of these children and future generations. The government could then appeal the trial court's decision if it so chooses, with full appellate rights preserved.

En banc review would remedy the panel's failure to give Youth Plaintiffs a full hearing on the government's mandamus petition. Ultimately denying the government's petition would give the Plaintiffs an opportunity at trial to develop a factual record, so this Court may evaluate the merit of their claims in the light of the evidence.

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[2] U.S. Dep't of Just., Just. Manual, Civil Resource Manual § 215.
[3] *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004); *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977).

As members of the legislative branch, we should continue to play our role in creating more powerful laws to combat climate change. For its part, the judiciary should play its role in resolving constitutional controversies lawfully brought before it.[4]

III. ARGUMENT

A. The stark difference between this Court's 2020 and 2024 decisions in tone and process warrants en banc review.

The two-judge majority Opinion ("2020 Opinion") began by quoting a 1960's protest anthem—the Eve of Destruction—finding that "plaintiffs . . . have presented compelling evidence that climate change has brought that eve nearer." *Juliana*, 947 F.3d at 1164. The majority further acknowledged the "substantial evidentiary record [that] documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse." *Id*.

In other words, the majority acknowledged the extreme seriousness of the injuries the Youth Plaintiffs face, even as it "reluctantly" concluded the Court could not grant the injunctive relief. *Id.* at 1175. The Youth Plaintiffs' second amended complaint specifically addressed this ruling by seeking only declaratory relief

[4] U.S. Const. art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Utah v. Evans*, 536 U.S. 452, 463–64 (2002).

focused on their fundamental rights to a safe climate.[5]

In contrast, the current panel's terse three-page Order ("2024 Order") dismissing the case lacks any such recognition of the Youth Plaintiffs' alleged injuries or the government's responsibility for causing such injuries. Put simply, the 2024 Order is dismissive in both tone and substance.

Substantively, the 2024 Order grossly simplifies the issues before it and fails to follow relevant precedent. Equally disheartening, the panel's dismissiveness is also procedural. The panel granted the government's extraordinary petition without so much as a hearing or an explanation as to why such an extreme step is justified. The stark difference between the tone, process, and thoroughness of the 2020 Opinion and 2024 Order illustrates the differences among Ninth Circuit judges as to their treatment of the *Juliana* case, which has been moving through the courts for nearly nine years, over three administrations. As members of Congress, we understand the broad range of views that may exist within a deliberative body. For this reason, having a full 11-judge panel of the Court carefully consider the question of mandamus, an extraordinary remedy, would be particularly valuable and appropriate in a case that has such far-reaching consequences.

[5] Second Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States* (No. 15-cv-01517), Doc. 542.

The Senators and Representatives signing this brief therefore urge the Court to grant Youth Plaintiffs' request for en banc review to give the Youth Plaintiffs' very real, and worsening, mental and physical injuries both the substantive care and procedural respect that they deserve in accordance with all relevant legal precedent. *Amici* further respectfully ask the Court to deny the government's extraordinary writ for mandamus review and deny its long-standing efforts to avoid defending this case on the merits.

B. A declaration of constitutional rights is well within the Article III authority of federal courts and the 1934 Declaratory Judgment Act passed by Congress[6], and declaratory relief suffices to establish redressability.

"Congress possess substantial authority to regulate how the federal courts exercise judicial power, albeit subject to certain constitutional limitations."[7] In this regard, Congress's enactment of the Declaratory Judgment Act filled an important gap in the avenues for relief for citizens of this country.

Youth Plaintiffs' alleged injuries, which the 2020 Opinion clearly recognized, meet and exceed the "important, **but not easily quantifiable,** nonpecuniary rights" that justify a remedy under the Supreme Court's decision in

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[6] *Evers v. Dwyer*, 358 U.S. 202, 202–04 (1958); *Utah v. Evans*, 536 U.S. 452, 463–64 (2002); *Powell v. McCormack*, 395 U.S. 486, 499 (1969).

[7] Constitution Annotated, *Art.III.S1.5.1 Overview of Congressional Control Over Judicial Power*, https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_00013528/ (last visited May 31, 2024).

Uzuegbunam v. Preczewski, 592 U.S. 279, 141 S. Ct. 792, 800 (2021) (emphasis supplied). Youth Plaintiffs' non-economic, nonpecuniary rights are not just important, but essential to leading healthy lives now and into the future. Yet, the 2024 Order treats these important rights as if they have no value. En banc review would allow this Court to more carefully consider and apply recent Supreme Court precedent clarifying declaratory relief to establish redressability.

C. The executive branch's effort to protect the United States government has prevented Youth Plaintiffs from their day in court and their access to a livable future.

The youth deserve their day in court, and we urge en banc review. Over the course of nearly nine years, the executive branch has filed seven petitions for writ of mandamus,[8] an unprecedented measure that has delayed Youth Plaintiffs access to the courts, where their claims may be heard. This effort is unique among the more than 40,000 cases the Department of Justice ("DOJ") is defending. The Congressional Research Service confirmed that the government has filed more mandamus petitions in this case than in any case of public record.[9]

What is more, the record reflects that this oppressive motions practice was intended to deny the Youth Plaintiffs access to court. Then-Deputy Assistant

[8] Petition for a Writ of Mandamus and Opposed Motion for a Stay of Proceedings, *United States v. U.S. Dist. Ct*. (No. 24-684), DktEntry 1.1.
[9] Congressional Research Service Memorandum to Representative DeGette (Apr. 20, 2022); Congressional Research Service Email to Representative Casten (Jan. 26, 2024).

Attorney General Eric Grant, who argued on December 11, 2017, in front of a Ninth Circuit panel on Defendants' first petition for writ of mandamus, later stated in a presentation to the Federalist Society: **"My number one priority from Day One was to kill *Juliana v. United States*."**[10] He concluded, "[F]or us to have to file four [petitions] in the Court of Appeals and one in the U.S. Supreme Court, yeah, **that's crazy, that's not normal**."[11] Sadly, the current DOJ continued, rather than changed, this highly unusual petition practice, contrary to DOJ's own internal manual.[12]

For the government to argue, as it did on February 2, 2024, that mandamus is appropriate because of costs to the government is ironic given it is the government's strategy that has imposed the costs in time and resources of which the government complains.[13] Joseph Stiglitz, Nobel laureate economist and Columbia University professor, has characterized as "ludicrous" the argument that the DOJ (or even the federal government) is somehow being "'irreparably

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[10] *Climate Change Litigation for Kids: Juliana v. United States*, The Federalist Society, at 5:26–5:33 (Dec. 6, 2022), https://www.youtube.com/watch?v=gAw1Uvcq9zk. (emphasis supplied).
[11] *Id*. at 23:27–23:38 (emphasis supplied).
[12] U.S. Dep't of Just., Just. Manual, Civil Resource Manual § 215.
[13] *Juliana v. United States*, 949 F.3d 1125, 1127 n.1 (9th Cir. 2018) (Friedland, J., dissenting) ("It is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts.").

harmed'" by this case.[14] Rather, "the true irreparable harm is the approximate cost of climate disasters or other climate economic harm since this case began . . . along with any projections of the range of harm going forward[.]"

In sum, the seriousness of the "true irreparable harm" to Youth Plaintiffs calls for en banc review.

D. The Court must exercise its duty as neutral arbiter to assess the constitutionality of the conduct that violates the Youth Plaintiffs' fundamental rights to life, liberty, and property.

The Youth Plaintiffs have presented compelling evidence that climate change is a grave crisis and continuing threat and that the United States is a significant contributor of harmful greenhouse gas emissions. *See Juliana*, 947 F.3d at 1169. Given overwhelming evidence in the record that Defendants' conduct perpetuates the present climate change crisis and injures the Youth Plaintiffs, the Court has a duty to assess the constitutionality of the conduct.[15]

When the conduct of the political branches is at issue, the Court cannot defer to those branches to redress the Youth Plaintiffs' injuries. *See Obergefell v. Hodges*, 576 U.S. 644, 676–77 (2015). It is the "province and duty" of the federal judiciary to "say what the law is" in cases alleging constitutional violations by the executive

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[14] Declaration of Joseph E. Stiglitz, Ph.D., in Support of Response Brief of Real Parties in Interest to Motion for a Stay of Proceedings, *United States v. U.S. Dist. Ct.* (No. 24-684), DktEntry 7.3.

[15] *See Marbury*, 5 U.S. at 163, 177.

and legislative branches and to remedy those violations when identified. *Marbury*, 5 U.S. at 177. If the Court fails to fulfill its duty to interpret the law, American children will be left with an uncertain future marked by further loss and destruction. Moreover, expecting the judiciary to "close their eyes" to constitutional violations by the political branches would give those branches a "practical and real omnipotence" that upsets our deep-rooted system of checks and balances. *Id*. at 178.

The judiciary's vested role in remedying an imbalance of power has been especially significant and helpful in cases, like this one, alleging systemic constitutional deprivations.[16] In such cases, the judiciary's power to declare fault is particularly important. *See, e.g.*, *Brown v. Bd. of Educ*., 349 U.S. 294. The availability of such declaratory relief is sufficient to invoke the Court's duty to decide constitutional claims, *see Franklin v. Massachusetts*, 505 U. S. 788, 803 (1992), "whether or not further relief is or could be sought." 28 U.S.C. § 2201. An esteemed senior district court judge, who did no more (and no less) than provide the Youth Plaintiffs with an opportunity to pursue declaratory relief, was improperly divested of discretion through the mandamus opinion.

[16] *See, e.g.*, *Brown v. Bd. of. Educ*., 349 U.S. 294 (1955); *Brown v. Plata*, 563 U.S. 493 (2011); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

As decades of evidence in the record show, the political branches predominantly choose short-term economic gains rather than face the difficult task of tackling the issue of climate change head-on. As a result, the problem has exponentially worsened. The judiciary should assess the Youth Plaintiffs' claims in an impartial manner, based solely on the evidence. A judicial declaration on the merits of the Youth Plaintiffs' claims would provide important information to the other two branches as they develop the policy solutions that can also help to address the climate crisis. As one of the three coequal branches, the judiciary has the duty to maintain the balance of power and protect our Nation's youth when the other branches infringe their constitutional rights.

IV. CONCLUSION

Judge Staton, dissenting in an earlier round of litigation before this Court queried, "Where is the hope in today's decision?" *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting). With remarkable prescience, she further asked "[w]hen the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?" *Id*.

Four years after this dissent, extreme cold and heat waves, flooding and droughts and horrific wildfires—climate change's scourge—are no longer a potential threat. They are the current reality and present a substantial crisis to these

Youth Plaintiffs and the communities in which they live. As the climate crisis worsens, our Nation's youth and future generations will suffer disproportionately from these impacts.

Against reality's tragic backdrop, this Court should grant Youth Plaintiffs' request for en banc review and thereafter, reject the government's extraordinary effort to deny Youth Plaintiffs the opportunity to present their case. Irrespective of political affiliation, it is important and urgent for the district court to have an opportunity to review the Youth Plaintiffs' claims on the merits, and to interpret vital constitutional questions about a livable present and future for all Americans.

In sum, *Amici* support protecting Youth Plaintiffs' fundamental rights under the Constitution. We respectfully ask the Court to grant en banc review of the panel's May 1, 2024 Order and allow these Youth Plaintiffs an opportunity to present their claims and evidence, to secure their constitutional rights and their future at trial.

Respectfully submitted this 27th day of June, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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