Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Oregon
(No. 6:15-cv-01517-AA)

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES PETITION FOR REHEARING *EN BANC*

FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Fed. R. App. P. 26.1, *Amici Curiae* EarthRights International, Center for Biological Diversity, Defenders of Wildlife, Union of Concerned Scientists, Sierra Club, Food and Water Watch, and Friends of the Earth-USA certify that they have no parent corporations and that no publicly held corporation owns more than 10% of the *Amici Curiae*.

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* certify that their counsel authored this brief in its entirety. No person—other than the *Amici Curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

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INTRODUCTION

On interlocutory appeal, a divided Panel of the Ninth Circuit reversed the district court's holding that Plaintiffs have standing to bring suit against the federal government alleging climate-related injuries caused by the federal government's actions. The Panel agreed with the district court that Plaintiffs meet the first two prongs of standing: injury-in-fact and traceability of the injuries to the defendants' actions. App. 18-21 (majority), 44 (dissent). However, the Majority held Plaintiffs have not demonstrated they meet the third prong—redressability of their injuries—because the Majority believed separation of power concerns precluded one of the remedies sought by Plaintiffs: an order enjoining the government from permitting, authorizing, and subsidizing fossil fuel use and directing the government to create and implement a remedial plan to draw down emissions. App. 21-32.

While the Panel's holdings that Plaintiffs have demonstrated injury-in-fact and traceability are fully supported by the extensive evidentiary record and controlling case law, the Majority departed from established Supreme Court and Ninth Circuit precedent in two ways: (1) despite concluding that this case is not a political question, App. 31, n. 9, it infused political question principles into redressability analysis, even though Supreme Court and Ninth Circuit precedent treat redressability and political question as distinct inquires; and (2) it failed to recognize that partial redressability is sufficient to establish standing.

Amici Curiae EarthRights International, Center for Biological Diversity, Defenders of Wildlife, Union of Concerned Scientists, Sierra Club, Food and Water Watch, and Friends of the Earth-USA ("*Amici*") are non-profit organizations that engage in advocacy, including litigation, to hold polluters and the government accountable for environmental and climate harms that injure the organizations and their members. They submit this brief to address obstacles the Panel Majority's decision erects to their ability to seek redress for these harms in federal court. *Amici* respectfully ask the Panel or the Court *en banc* to reverse the Majority's holding on redressability and clarify that partial relief supports Plaintiffs' standing. If the Court has concerns about the political question doctrine, *Amici* request that the Court look to the district court's thorough analysis employing the Supreme Court's familiar *Baker* framework. ER 68-79 (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

ARGUMENT

I. The Panel Correctly Held that Plaintiffs Demonstrated Injury-In-Fact and Causation.

As the Panel recognized, "[t]he record leaves little basis for denying that climate change is occurring at an increasingly rapid pace" and "[c]opious expert evidence establishes that this unprecedented rise [in atmospheric carbon concentration] stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked." App. 14. Indeed, Plaintiffs submitted 21

declarations identifying concrete and serious injuries from climate change, including: harm to their homes, personal security, economic security, and physical health due to extreme weather and flooding; harms to health, especially for children with asthma and allergies, due to extreme heat, drought, and decreased air quality; impairment and scarcity of water resources due to decreased snow and ice; damage to property, livelihoods and recreational interests due to ocean warming, acidification, and sea level rise; impacts to wildlife, domesticated animals, and plants on which they depend for food, livelihood and personal enjoyment; and injuries to spiritual, cultural, and/or indigenous practices and values. ER 330-36. Addressing Plaintiffs' standing to bring suit, the Panel appropriately held that "[a]t least some plaintiffs claim concrete and particularized injuries . . . [that] are not simply 'conjectural' or 'hypothetical;' . . . plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked." App. 18-19.

The Panel acknowledged that "the government's contribution to climate change is not simply a result of inaction" but results from the affirmative promotion of fossil fuel "in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land." *Id.* at 15-16.

Plaintiffs also submitted 18 expert declarations compiling the best and most recent scientific evidence linking Plaintiffs' injuries to carbon emissions from fossil fuel use and documenting the United States' considerable contribution to those emissions. ER 337-354; 244-314. After reviewing this evidence, the Panel correctly held that the causal chain linking these harms to the government's actions is sufficiently established. App. 19-20. The Panel's holdings on injury and causation are squarely in line with Ninth Circuit and Supreme Court standing precedent. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014).

II. The Majority Conflated the Political Question Doctrine with the Redressability Prong of Standing Analysis.

When considering whether there is a remedy available to redress Plaintiffs' harms, the Panel raised concerns about the possibility that one of the requested remedies would intrude into legislative and executive arenas.[1] It is true that the Constitution's separation of powers prevents courts from issuing remedies that direct the outcome of the legislative or administrative process. *Lujan*, 504 U.S. at 559-60. However, an order requiring Defendants to develop and implement a

[1] *Amici* note that, in the district court, only Intervenors raised a political question defense, which the district court rejected. ER 3-4, 26, 60, 68. Defendants did not appeal the district court's ruling that Plaintiffs' claims do not raise a nonjusticiable political question. ER 162.

remedial plan to reduce fossil fuel emissions in order to stabilize the climate system does not require such judicial predetermination of legislative or administrative processes. In addition, partial relief can be fashioned which, as discussed in Section IV, below, would be sufficient redress for standing purposes.

Supreme Court and Ninth Circuit precedent treat redressability and political question as distinct inquires.

> [W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.

Flast v. Cohen, 392 U.S. 83, 99-100 (1968). *See also Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199-1200 (9th Cir. 2017) (denying standing because a treaty provision could not be enforced by federal courts and finding claims nonjusticiable political questions under the *Baker* factors).

The case on which the Majority principally relies—*Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)—does not prevent the court from awarding appropriate relief in this case. The Majority relied on *Rucho* for the proposition that "redressability questions implicate the separation of powers," App. 28, and without standards to guide the court, "allocation of political power and influence" is outside of the court's constitutional power. *Id.* But *Rucho*, a case in which voters in North Carolina and Maryland challenged their states' congressional

districting maps as unconstitutional partisan gerrymanders, did not address standing. *Id.* at 2492. Indeed, as the Court noted, while the *Rucho* appeal was pending the Court established the requirements for standing in a parallel partisan gerrymandering case, *Gill v. Whitford.* *See Rucho*, 138 S. Ct. at 2492 (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018)). Before deciding *Rucho*, the Court remanded to the district court for consideration of its holding in *Gill.* *Id.* The district court held that the *Rucho* plaintiffs had standing under *Gill*, and the Court did not overturn the district court's standing decision. *Id*. Instead, the question at issue in *Rucho* was the political question doctrine: "whether [partisan gerrymandering] claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." *Id.* at 2494.

In answering that question, the *Rucho* court applied the familiar political question standard laid out in *Baker v. Carr*, which requires a court to decline to adjudicate a claim if the court lacks "judicially discoverable and manageable standards for resolving" it. *Rucho*, 138 S. Ct. at 2494 (quoting *Baker v. Carr*, 369 U.S. at 217). *See also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95, (2012) (a controversy "involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards

for resolving it."); App. 51-52 (dissent). It is in this context that the *Rucho* court held that federal courts "have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority." *Rucho*, 138 S. Ct. at 2508.

The political question analysis in *Rucho* addressed whether there were legal standards available to adjudicate the plaintiff's *claim*. The Majority improperly relied on this analysis to conclude that general separation of powers concerns prevented it from granting Plaintiffs a particular *remedy*. *See* App. 28. By conflating the standing and political question analyses, the Majority entered political question terrain in its standing analysis despite concluding that the case does not present political question. App. 31, n. 9 ("we do not find this to be a political question"). This grafting of the political question analysis onto the redressability prong of the standing inquiry could raise the bar for standing and circumvent the long-established standard for political question analysis as laid out in *Baker v. Carr*.

III. Courts Have Found Injury-In-Fact and Traceability but Not Redressability in Rare, Fact-Specific Cases Inapplicable Here.

To establish redressability, plaintiffs must show that a favorable decision is (1) substantially likely to redress their injuries, *Lujan*, 504 U.S. at 560; and (2) within the court's power to award. App. 21 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)), 44-45 (dissent). Cases in which a court has found that a

plaintiff established injury-in-fact that is traceable to the defendant's conduct, but nonetheless denied standing due to a lack of redressability are rare and limited to particular factual situations that prevented the court from fashioning effective relief, none of which is present here, for example:

(1) Redress of plaintiffs' injuries relied on intervening third party actions that were not guaranteed to occur. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976) (repealing IRS tax benefits to hospitals would not necessarily restore treatment to indigents where philanthropy financing and hospital funding behavior is speculative); *Warth v. Seldin*, 422 U.S. 490, 506-07 (1975) (ending town's exclusionary zoning practices would not necessarily allow plaintiffs to live there because of external market forces); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980) (invalidation of international executive agreement will not redress injury because act of foreign sovereign necessary for relief).

(2) Redress was moot. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105-09 (1998) (assuming plaintiffs' informational injury based on defendant's failure to provide information about toxic releases in a timely fashion, but holding court could not provide relief because a declaratory judgment of the acknowledged violation would not provide the information sought, civil penalties would go to the Treasury, and plaintiffs did not claim ongoing or future

violations); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267-68 (9th Cir. 1982) (plaintiff's request for an order requiring funds to be spent on water quality planning would not redress injury because two-year planning period had expired and the funds has already been spent).

(3) Relief would worsen plaintiff's position. *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979) (requested relief would actually worsen the plaintiff's position because challenge to block grant recipient's eligibility, if successful, would prevent grant from being implemented at all in plaintiff's city).

(4) The court could not require the government to take any action. *M.S. v. Brown*, 902 F.3d at 1085 (court could not issue order requiring state agency to comply with bill that was not enacted into law); *Mayfield v. United States*, 599 F.3d 964, 972-73 (9th Cir. 2010) (declaratory judgment that Patriot Act violated Fourth Amendment privacy rights of arrestee would not redress injury, which arose out of government's continued retention of derivative material collected by covert surveillance and searches because government would not be required to destroy or otherwise abandon the materials); *Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1380-84 (9th Cir. 1979) (rescission of administrative interpretive notice would not redress injury because rescission would not later bind court).

The Majority relies on *M.S. v. Brown* in support of its holding that the separation of powers prevents the court from ordering the relief that Plaintiffs seek

because a judicial decision would not redress Plaintiffs' injuries. App. 25-30. However, the unique facts in *Brown* distinguish it from this case.

The plaintiffs in *Brown* brought a civil rights action under 42 U.S.C. § 1983 against various Oregon state officials who are responsible for the issuance of Oregon driver's licenses. 902 F.3d at 1080-82. The Oregon Constitution grants the people of Oregon the power of referendum to approve or reject bills passed by the Oregon Legislature before they become law. *Id.* In 2014, the people exercised this power by rejecting a bill that would have afforded Oregon residents access to driving privileges through the issuance of driver cards without requiring proof of their legal presence in the United States. *Id.* The plaintiffs in *Brown* alleged that the voters' rejection of the bill was motivated by discriminatory animus, and that the state officials' consequent refusal to issue driver cards violated their Fourteenth Amendment rights to equal protection and due process. *Id.* The plaintiffs sought: (1) a declaration that the ballot measure violated their constitutional rights and was therefore void and unenforceable; (2) a declaration that the Governor is authorized and required to issue alternative driver cards; and (3) an injunction to enforce the declarations. *Id.* at 1084.

This Court held that the plaintiffs lacked standing because it could not award plaintiffs relief. *Id.* at 1083-85. The bill granting driving privileges never became law, and even declaring the ballot measure unconstitutional could not give effect to

a bill that voters did not pass. *Id.* Thus, relief was expressly precluded.

No such bar to relief exists here. First, as explained in Section IV, below, courts are to presume that the executive branch will "abide by an authoritative interpretation of the constitution[]" through a declaratory judgment. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Second, if the district court finds such relief appropriate, an order directing Defendants to develop and implement a remedial plan to draw down excess emissions need not intrude into the authority given to Congress under the Constitution or the authority delegated to Executive Branch agencies. Ordering the agencies to develop a plan for ensuring their actions avoid violating a constitutional right leaves intact the policymaking role entrusted to the legislative and executive branches of government. *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985) ("[T]he executive branch has no discretion with which to violate constitutional rights").

Redressability analysis is fact-specific, and as discussed below, on these facts, the court has the power to award relief. If the Court has lingering concerns that this is a political question better left to the political branches of government, we ask that it look to the district court's analysis under the Supreme Court's familiar *Baker* framework, and preserve existing standing precedent, which holds that redressability is a fact-based inquiry.

IV. The Majority Overlooks that Partial Redressability Is Sufficient for Standing.

The Majority suggests that Plaintiffs' requested remedy, including a declaratory judgment and an injunction to stop permitting, authorizing, and subsidizing fossil fuel use and create a plan to draw down harmful emissions, would not redress Plaintiffs' injuries. App. 22-25. The Majority found that "psychic satisfaction" of a declaration was not an acceptable Article III remedy. App. 22. And it was "skeptical" that an injunction would "suffice to stop catastrophic climate change or even ameliorate their injuries"; that the "total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth"; or that the elimination of programs would "by itself prevent further injury to the plaintiffs." App. 22-25. However, the Majority disregards longstanding case law holding that a declaration of constitutional rights or partial relief of Plaintiffs' injuries is sufficient redress.

First, a declaration of constitutional rights would do more than give Plaintiffs "psychic satisfaction." It would force the Government to consider Plaintiffs' constitutional rights in discharging its responsibilities and is likely to change the Government's conduct, thereby redressing some of the harm to Plaintiffs. *Franklin*, 505 U.S. at 803 ("[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by

the District Court, even though they would not be directly bound by such a determination."). Plaintiffs' first prayer for relief is for the Court to "[d]eclare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO_2 in the atmosphere." ER 614. It is the province of the courts to declare what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also*, *Baker*, 369 U.S. at 204-08 (finding standing where plaintiffs sought a declaration that a state apportionment statute was unconstitutional); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72-82 (1978) (upholding standing where plaintiffs sought a declaration that a statute limiting liability of nuclear accidents was unconstitutional and plaintiffs demonstrated injury and causation). At a minimum, a declaration of constitutional rights would provide sufficient remedy for standing.

Second, the redressability prong of the standing analysis does not require that the remedy resolve the entire problem. Mitigating the harm caused is sufficient. *See*, *e.g.*, *Massachusetts v. EPA*, 549 U.S. at 525 ("While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty

to take steps to slow or reduce it.")[2]; *Larson*, 456 U.S. 228, 244 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."); *Meese v. Keene*, 481 U.S. 465, 476–77 (1987) ("Partial relief . . . would qualify as redress for standing purposes.").

In finding that an injunction would not cure Plaintiffs' injuries, the Majority relied on testimony from Plaintiffs' experts that "reducing the global consequences of climate change demands much more than the cessation of the government's promotion of fossil fuels"; that it "calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world"; and that it "can be achieved only through a comprehensive plan for nearly

[2] The Majority distinguished *Massachusetts* on the ground that the standards for causation and redressability in that case were relaxed because the plaintiffs asserted procedural rights, whereas here Plaintiffs' claims involve substantive rights. App. 24. Under the relaxed standards for procedural harms, the plaintiffs in *Massachusetts* were the proper parties to bring the claim even though the relief (compliance with the procedure) would not necessarily redress the harm. 549 U.S. at 517-18 (citing *Lujan*, 504 U.S. at 572 n.7). However, independent of this holding, the Court in *Massachusetts* held that mitigation of the harm is sufficient to meet the redressability prong of the standing analysis. *Id.* at 525 (citing *Larson*, 456 U.S. at 244 n.15). The *Massachusetts* Court's relaxation of the redressability standard to allow plaintiffs to enforce procedural rights does not alter the proposition—applicable to both procedural rights and substantive rights—that partial remedy is sufficient to confer standing.

complete decarbonization that includes both an unprecedently rapid build out of renewable energy and a sustained commitment to infrastructure transformation over decades." App. 23-24 (quotations omitted). These experts were communicating the importance, urgency, and scale at which climate change must be addressed. By submitting this testimony, Plaintiffs in no way conceded that ending the government's promotion of fossil fuels would not ameliorate climate change impacts to some degree.

In citing this testimony, the Majority suggests that awarding relief would only partially redress Plaintiffs' injuries, which is enough to support standing. And as discussed above, where injury-in-fact and traceability have already been established, the Supreme Court and the Ninth Circuit deny standing for lack of redressability in rare, fact-specific circumstances that do not apply here. The federal government is responsible for contributing a substantial amount of greenhouse gases that contribute to climate change. Plaintiffs have presented evidence showing that the risks associated with climate change increase as atmospheric concentrations of CO_2 increase. ER 284-295, 296-314. Thus, any action the court could take that would result in fewer emissions would mitigate the harm to Plaintiffs. This is sufficient for standing.

CONCLUSION

The Majority opinion states that the political question doctrine is not

implicated in this case, but nonetheless relies on political question analysis in concluding that Plaintiffs lack standing. This approach unnecessarily raises the bar for plaintiffs to establish standing and circumvents the Supreme Court's well-established standard for political question analysis as laid out in *Baker v. Carr*. *Amici* respectfully ask the Panel or the Court *en banc* to reverse its holding on redressability and clarify that partial relief supports Plaintiffs' standing.

Dated: March 12, 2020

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *Amici Curiae* EarthRights International, *et al.* state that they are unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G) and Ninth Circuit Rule 29-2(c)(2), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3,575 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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