

Case No. 18-36082

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA, *et al.*,  
*Defendants-Appellants*.

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Appeal from the United States District Court  
For the District of Oregon (6:15-cv-01517-TC-AA)

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**AMICI CURIAE BRIEF OF SEN. JEFF MERKLEY, SEN. CORY A.  
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**CIRCUIT RULE 29-2(a) STATEMENT**

All parties have consented to the filing of this Brief of Sen. Jeff Merkley, Sen. Cory A. Booker, Sen. Tom Carper, Sen. Edward J. Markey, Sen. Brian Schatz, Sen. Chris Van Hollen, Sen. Sheldon Whitehouse, Sen. Ron Wyden, Rep. Jan Schakowsky, Rep. Earl Blumenauer, Rep. Yvette D. Clarke, Rep. Judy Chu, Rep. Danny K. Davis, Rep. Peter DeFazio, Rep. Nanette Diaz Barragán, Rep. Adriano Espaillat, Rep. Raúl Grijalva, Rep. Debra Haaland, Rep. Jared Huffman, Rep. Sheila Jackson Lee, Rep. Barbara Lee, Rep. Jackie Speier, Rep. Rashida Tlaib, and Rep. Debbie Wasserman Schultz as *Amicus Curiae* in Support of Plaintiffs-Appellees.

**AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING  
EN BANC**

**I. IDENTITY AND INTEREST OF AMICI CURIAE**

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

- Senators. Jeff Merkley of Oregon, Cory A. Booker of New Jersey, Tom Carper of Delaware, Edward J. Markey of Massachusetts, Brian Schatz of Hawaii, Chris Van Hollen of Maryland, Sheldon Whitehouse of Rhode Island, and Ron Wyden of Oregon
- Representatives. Jan Schakowsky of Illinois, Earl Blumenauer of Oregon, Yvette D. Clarke of New York, Judy Chu of California, Danny K. Davis of Illinois, Peter DeFazio of Oregon, Nanette Diaz Barragán of California, Adriano Espaillat of New York, Raúl Grijalva of Arizona, Debra Haaland of New Mexico, Jared Huffman of California, Sheila Jackson Lee of Texas, Barbara Lee of California, Jackie Speier of California, Rashida Tlaib of Michigan, and Debbie Wasserman Schultz of Florida

As members of Congress, we serve the citizens of the United States. U.S. Const. Art. I, Sec. 1. These Youth Plaintiffs are among the youngest generation and the most vulnerable citizens of our country, and since they cannot vote, depend upon each branch of government to act in their best interests when exercising authority.

Each branch of our Nation’s government has a role to play in protecting our most vulnerable citizens and the generation that will be born to them in the face of the climate crisis. *Amici* 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 affirm the duties of the federal judiciary to assess the constitutionality of the conduct of its coequal branches and provide appropriate redress, and the vital role that our system of checks and balances plays in the healthy functioning of our democracy, ensuring each branch respects the fundamental rights of the people. *Amici* recognize the Youth Plaintiffs’ fundamental rights and respectfully ask this Court to grant these children 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, believe that these Youth Plaintiffs’ fundamental rights to life, liberty, and property, and the access to the essential resources they need to survive are being stripped 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*, No. 18-36082, 2020 WL 254149 (9th Cir. Jan. 17, 2020), App. 20. The Court must exercise its duty as a neutral arbiter, not influenced by majoritarian 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. All three branches of government have “more than just a nebulous ‘moral responsibility’ to preserve the Nation.” *Juliana*, No. 18-36082, 2020 WL 254149, App. 36. Not only does the Court have the power to provide declaratory relief and to order Defendants to develop a plan to curb greenhouse gas emissions to combat climate change, the judiciary as a whole has the duty to remedy the Youth Plaintiffs’ constitutional injuries despite the inappropriate politicization of climate change.

### **III. ARGUMENT**

#### **A. 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 to suggest that climate change is a grave impending threat and that the United States is a significant contributor of harmful greenhouse gas emissions. *See Juliana*, No. 18-36082, 2020 WL 254149, App. 20, 29, 31. Given the overwhelming evidence in the record that Defendants’ conduct perpetuates the present climate change crisis, App. 20, the Court has a duty to assess the constitutionality of the government’s conduct. *See Marbury v. Madison*, 5 U.S. 137, 163, 177 (1803). 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*, 135 S. Ct. 2584, 2605 (2015). History

shows that, left to their own devices, the political branches have become entrenched and incapable of devising a plan to respond to the current consequences and future threat caused by climate change. If the Court fails to fulfill its duty to interpret the law, these American children will be left with an uncertain future marked with loss and destruction.

It is the “province and duty” of the federal judiciary to “say what the law is” in cases alleging constitutional violations by the executive and legislative branches and to remedy those violations when identified. *Marbury*, 5. U.S. at 177. Expecting the judiciary to “close its 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 in cases, like this one, alleging systemic constitutional deprivations. *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). In such cases, the judiciary’s power to declare fault is particularly important. *See e.g., Marbury*, 5. U.S. 137; *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).



The majority does not question the gravity of the Youth Plaintiffs’ injuries or that the government’s affirmative acts to support the national fossil fuel system are a substantial factor in causing these injuries. In light of such government-sanctioned misfeasance, the Court must wield its constitutional authority to provide Youth Plaintiffs’ a remedy. *See Marbury*, 5 U.S. at 163. As the majority acknowledges that a significant portion of greenhouse gas emissions are attributable to the Defendants’ affirmative actions, an appropriate remedy is a declaration that such conduct violates Youth Plaintiffs’ constitutional rights, so that future executive and legislative actions will be constrained accordingly. As the dissent correctly observes, it is completely within the purview of the judiciary, as a coequal branch, to curb the government’s unlawful conduct. *See App.* 50–51 (dissent).

**B. The Court has authority to require Youth Plaintiffs’ injuries to be remedied despite the inappropriate politicization of climate change**

Politics have inappropriately plagued the fight against climate change for decades. Because of this, the majority incorrectly entangled the standing and political question doctrines when assessing the redressability of the Youth Plaintiffs’ injuries. Even though the Youth Plaintiffs’ injuries are caused by climate change, a politically charged issue in this country, it is wholly within the purview of the Court’s authority to utilize scientific evidence to identify and redress violations of the Youth Plaintiffs’ fundamental rights. *See Marbury*, 5 U.S. at 177–78. The

majority opinion's confusion as to what legal standard to apply to hear and decide Youth Plaintiffs' constitutional claims emphasizes the need for both parties to present evidence on this issue at trial. *Brown*, 563 U.S. at 540-41. While the ultimate task of formulating a concrete plan to combat the Defendants' contribution to climate change is undoubtedly complex, the Defendants have the delegated authority and expertise to meet this challenge. *See, e.g., Juliana First Amended Complaint* at ¶¶ 98-130.

What the Defendants *lack* under our constitutional system of government is the ability to say whether any plan they construct meets the Constitution's demands to protect and promote the life and liberty of Youth Plaintiffs and to avoid destroying the Nation. The Court cannot shy away from its duty to interpret the Constitution and protect the Youth Plaintiffs from the irreversible and catastrophic harms of climate change that continue to strip them of their constitutionally-protected rights, particularly when the uncontested evidence shows these Defendants have had a substantial role in causing, and can develop and implement a plan to redress, the constitutional violation.

As decades of evidence in the record show, the political branches predominantly choose short-term economic gains rather than face the difficult task of solving the issue of climate change head-on. As a result, the problem has gotten exponentially worse. The judiciary should assess the Youth Plaintiffs' claims in an

impartial manner based solely on the evidence. 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**

From extreme cold to heat waves, flooding to droughts and horrific wildfires, climate change is no longer a potential threat. It is the current reality and presents a substantial crisis. As the climate crisis worsens, our Nation's youth and future generations will suffer disproportionately from these impacts. For decades, the Defendants have known the risks of fossil fuel use and increasing carbon dioxide emissions and have failed to take action to curb those risks. Instead, they continue to take affirmative actions to compound those risks. Our Nation's youth, the group *most* impacted by the climate crisis, is powerless to elect officials and has no voice in the political branches. Because these branches, unaccountable to the Nation's youth, have failed in their responsibility to curtail the effects of the climate crisis, the Court must step in and assess the constitutionality of the conduct of its coequal branches and protect these children's rights to life, liberty, and property.

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*Amici* support the protection of the Youth Plaintiffs' fundamental rights under the Constitution. We respectfully ask the Court to uphold its duty under the United States Constitution and grant these Youth Plaintiffs an opportunity to present their evidence, to secure their constitutional rights, and to save their Nation.

Respectfully submitted this 12<sup>th</sup> day of March, 2020.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Ninth Circuit Rule 29-2, I certify that this brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) and contains 1644 words. The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

Dated: March 12, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 12, 2020, I electronically filed the foregoing **AMICI CURIAE BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF PLAINTIFFS-APPELLEES** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: March 12, 2020

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