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, *et al*.,
Defendants-Appellants.

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

MOTION TO STAY THE MANDATE PENDING FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI OF PLAINTIFFS-APPELLEES

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401

PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS
(OSB No. 041029)
Our Children's Trust
3026 NW Esplanade
Seattle, WA 98117

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellee Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Pursuant to 28 U.S.C. § 2101(f) and Federal Rule of Appellate Procedure 41(d)(2), Plaintiffs-Appellees hereby move this Court for an order staying issuance of the mandate in this appeal pending filing and disposition of a petition for a writ of certiorari with the Supreme Court of the United States and, if the petition is granted, pending the Supreme Court's final disposition. Plaintiffs have 150 days from the date (February 10, 2021) of denial of their petition for rehearing *en banc* to file a petition for a writ of certiorari with the United States Supreme Court. March 19, 2020 Order extending deadline in Supreme Court Rule 13.1. This Court should stay the mandate because the certiorari petition will present a substantial question and there is good cause for a stay. *See* Fed. R. App. P. 41(d)(2)(A). The certiorari petition will not be frivolous and will not be filed for purposes of delay.[1]

This case involves important questions of federal courts' Article III authority to adjudicate constitutional controversies involving government wrongdoing and children's rights to access the judiciary and obtain a declaration of their rights in the face of ongoing harm from the challenged government conduct. The panel opinion wrongly, albeit "reluctantly," believes if infringement of these children's rights to

[1] In response to a request for the position of Defendants-Appellants ("Defendants") on this Motion, on February 12, 2021, counsel for Defendants responded that they oppose the Motion. Declaration of Philip Gregory in Support of Plaintiffs' Motion to Stay the Mandate Pending Filing and Disposition of a Petition for a Writ of Certiorari of Plaintiffs-Appellees ("Gregory Decl.") ¶ 2.

life, liberty, and equal protection of the law are found, the Court would be impotent to provide these children any meaningful relief. The Court should not have accepted interlocutory appeal in the first instance because standing is a fact-intensive inquiry that the district court had not fully resolved. Having done so, this Court should have ruled, at the denial of summary judgment stage, that Plaintiffs presented enough evidence to establish an actual and ongoing case or controversy with Defendants for which they could obtain at least declaratory relief under 28 U.S.C. § 2201, a sufficient demonstration for Article III standing warranting a remand of the case to the district court for trial.

BACKGROUND

This constitutional case of great national and public importance involving children's rights to life and liberty, came to this Court on interlocutory appeal of denials of motions to dismiss, for judgment on the pleadings, and for summary judgment. There has been no trial. Plaintiffs have been wading through the federal judiciary for over five years to get to the merits of their case. Three federal judges ruled in their favor on standing; two ruled against them. Two Ninth Circuit judges ruled that interlocutory appeal was appropriate; one disagreed. Numerous legal scholars and amici have weighed in on the side of the youth on the issues decided by this Court. This case presents substantial questions of significant controversy that should be resolved by the Supreme Court.

Good cause exists for staying the mandate of this interlocutory appeal. The substantial issues raised in this interlocutory appeal have been briefed by the parties multiple times in the district court, ECF 27-1, 195, 207, in this Court on four prior petitions for writ of mandamus, Ct. App. I Doc. 1-1, Ct. App. II Doc. 1-2, Ct. App. III Doc. 1-2, Ct. App. IV Doc. 1-2, on this interlocutory appeal, Ct. App. VI Doc. 37, and three times before the United States Supreme Court, S. Ct. App. I. Doc. 1, S. Ct. App. II. Doc. 1, S. Ct. Pet. Doc. 1.[2] Plaintiffs should not be prejudiced with dismissal of their case before the Supreme Court has its final opportunity to resolve the important question of justiciability and the Biden-Harris administration has an

[2] Plaintiffs reference the District Court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "ECF"; the docket for Defendants' First Petition, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; the docket for Defendants' Second Petition, *In re United States*, No. 18-71928 (9th Cir.), as "Ct. App. II. Doc."; the docket for Defendants' Third Petition, *In re United States*, No. 18-72776 (9th Cir.), as "Ct. App. III Doc."; the docket for Defendants' Fourth Petition, *In re United States*, No. 18-73014 (9th Cir.), as "Ct. App. IV Doc."; the docket for Defendants' Fifth Petition, *Juliana v. United States*, 18-80176 (9th Cir.), as "Ct. App. V Doc."; the docket for the instant proceedings under 28 U.S.C. §1292(b) as "Ct. App. VI Doc."; the docket for Defendants' first application for stay to the Supreme Court, *U.S. v. U.S. Dist. Ct.*, No. 18A65, as "S. Ct. App. I Doc."; the docket for Defendants' second application for stay to the Supreme Court, *In re United States*, No. 18A410, as "S. Ct. App. II. Doc."; and the docket for Defendants' Petition for Mandamus to the Supreme Court, *In re United States*, No. 18-505, as "S. Ct. Pet. Doc."

opportunity to evaluate its position as new defendants in the case and whether it will enter settlement negotiations with Plaintiffs.[3]

Over five years have passed since the Complaint was filed. ECF 7. Over four years have passed since the district court denied Defendants' motion to dismiss. ECF 83. Defendants brought numerous motions resulting in years of delay in resolving this case and forays into the Supreme Court's shadow docket,[4] while continuing their unconstitutional fossil fuel energy system that is harming Plaintiffs. Ct. App. IV Doc. 5 at 3-13 (depicting Defendants' numerous unsuccessful, duplicative motions and attempts at early appeal in this case and numerous applications for stays); *see also* Ct. App. V Doc. 8-2 at 3 n.1 (J. Friedland, dissenting) (noting Defendants' "repeated efforts to bypass normal litigation procedures . . . ha[ve] wasted judicial resources in this case").

On November 21, 2018, in response to this Court's November 8 Order directing the district court to "promptly resolve [Defendants'] motion to reconsider the denial of the request to certify orders for interlocutory review," Ct. App. IV Doc. 3 at 2, the district court *sua sponte* certified four of its prior orders for interlocutory appeal. ECF 444 at 6. On November 30, 2018, Defendants petitioned for permission

[3] On January 20, 2021, Plaintiffs requested Defendants entertain settlement discussions. Defendants have not yet taken a position due to the political transition and new appointments still underway. Gregory Decl., ¶ 3.

[4] Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

to appeal pursuant to 28 U.S.C. § 1292(b). Ct. App. V Doc. 1-1. In a split decision, this Court granted permission for interlocutory appeal on December 26, 2018. Ct. App. V Doc. 8-1.

On January 17, 2020, in a split decision, this Court reversed and vacated the four prior orders of the district court and remanded to dismiss the action. Ct. App. VI Doc. 153-1. On March 2, 2020, Plaintiffs filed a timely petition for rehearing *en banc*. Ct. App. VI Doc. 156. There were 10 briefs filed as *amicus curiae* supporting Plaintiffs' rehearing petition. On February 10, 2021, this Court filed an order denying Plaintiffs' petition. Ct. App. VI Doc. 200.

In accordance with Federal Rule of Appellate Procedure 41(b), the mandate is currently scheduled to issue on February 18, 2021. A petition for writ of certiorari to the Supreme Court of the United States will be due on July 12, 2021. March 19, 2020 Order; S. Ct. R. 13. Plaintiffs intend to file a petition for writ of certiorari to the Supreme Court seeking review of this Court's decision.

LEGAL STANDARD

Under Federal Rule of Appellate Procedure 41(d)(1), the mandate of this Court may be stayed "pending the filing of a petition for a writ of certiorari in the Supreme Court" when the certiorari petition "present[s] a substantial question and . . . there is good cause for a stay." "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989);

Campbell v. Wood, 20 F.3d 1050, 1052 (9th Cir. 1994) (Reinhardt, J., Browning, J., and Tang, J., dissenting) ("[U]nless a claim is frivolous or made merely for the purpose of delay, it is ordinarily our obligation to grant a stay."). Rather, a stay is merited unless "the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. App. P. 41-1.

REASONS FOR GRANTING A STAY

I. Plaintiffs' Certiorari Petition Will Present Substantial Questions Meriting Supreme Court Review

Plaintiffs' certiorari petition will involve substantial questions because there is "a reasonable probability that four justices will vote to grant certiorari and a reasonable possibility or 'fair prospect' that five justices will vote to reverse the circuit court's judgment.'" 21 Hon. George C. Pratt, *Moore's Federal Practice* § 341.14[2] (2017).

Plaintiffs plan to file a petition for certiorari presenting the exceptionally important questions of whether the opinion of a sharply divided panel of this Court, denying children Article III standing solely on redressability grounds, threatens the very basis of federal jurisdiction. Applying the relevant standards here, a stay of the mandate is warranted. This standing question is "substantial" under any understanding of the term. *See* Fed. R. App. P. 41(d)(1). That question has engendered serious debate among scholars and federal judges.

In reviewing the order denying summary judgment, the panel agreed the children presented "copious expert evidence" to establish Defendants are a substantial cause of Plaintiffs' particularized and actual injuries, satisfying the first two prongs of standing. App. 14. However, the majority "reluctantly concluded" "the specific relief they seek is [not] within the power of an Article III court" and is thus not redressable. App. 25, 32. Consequently, the majority directed the children—*who cannot vote*—to plead their Fifth Amendment rights "to the political branches or to the electorate at large . . . through the ballot box." App. 32.

The majority made significant errors of law irreconcilable with the Constitution, the Declaratory Judgment Act, and decisions of the Supreme Court, this Court, and sister Circuits. First, the majority erroneously concluded declaratory relief is insufficient to establish redressability for purposes of standing. Second, the majority improperly rejected partial redress as sufficient to establish standing. Third, the majority contradicted long-standing Supreme Court and Circuit precedent that Article III courts lack power to order remedial plans to remedy ongoing constitutional violations. Finally, the majority created a new redressability test improperly infused with political question analysis. If not remedied, these errors will debilitate Article III courts in deciding constitutional cases and controversies on the evidence at trial, thereby denigrating fundamental rights of life and liberty to constitutional *suggestions*—subject to the tyranny of the majority.

First, the panel decision erred in finding declaratory relief insufficient for standing, contrary to precedent of the Supreme Court and this Circuit, which confirms the important role of declaratory judgments in similar constitutional cases where an actual controversy will persist until the court declares the challenged conduct unconstitutional. *Evers v. Dwyer*, 358 U.S. 202, 203 (1958). Here, a declaratory judgment would resolve the controversy of whether the government's decades-long and ongoing conduct in causing "carbon emissions from fossil fuel production, extraction, and transportation," and therefore these children's injuries, is a constitutional violation. App. 20.

In a single paragraph, the majority denounces declaratory relief as insufficient redress, stating "a declaration that the government is violating the Constitution" is "not substantially likely to mitigate the plaintiffs' asserted concrete injuries." App. 22. However, the Supreme Court has long acknowledged the important role of declaratory relief in resolving persisting constitutional controversies. *Evers*, 358 U.S. at 202-04 (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (declaratory relief changes the legal status of the challenged conduct, sufficient for redressability); *Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (a federal court "has the duty to decide the appropriateness and the merits of [a] declaratory request irrespective of its conclusion as to the propriety of the issuance of [an]

injunction."). In *Brown v. Board of Education*, "the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education." 347 U.S. 483, 495 (1954).

Our federal "[c]ourts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government . . . ." *United States v. Lee*, 106 U.S. 196, 220 (1882). To abandon the judiciary's role as interpreter of laws, especially the Constitution, "would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). By abandoning Constitutional interpretation and the possibility of declaratory relief here, telling non-voting-aged children to turn to the polls and to Congress, the majority favored the strong, popular interests that maintain the status quo, denying children the protections afforded by the Fifth Amendment.

Even as a freestanding remedy, a declaratory judgment carries an expectation that even non-defendant government officials "would abide by an authoritative interpretation of the . . . constitution[.]" *Evans*, 536 U.S. at 463-64 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)); *accord Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (assuming non-party legislature would abide by judicial determination, making it "likely that the

alleged injury would be to some extent ameliorated"); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("a declaratory judgment is a real judgment, not just a bit of friendly advice"); *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1082-83 (2d Cir. 1982) (declaratory relief alone suffices to satisfy justiciability concerns regarding whether an appropriate judicial remedy can be molded).

In terms of relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA"), *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), affirms that statutory terms are to be interpreted by ordinary meaning, further demonstrating the irreconcilability of the panel majority's decision regarding the sufficiency of relief under the DJA with Supreme Court precedent. Ct. App. VI Doc. 156 at 8-14. "[W]hen the meaning of the statute's terms is plain, [the Court's] job is at an end," as "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. The DJA states courts "may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201(a) (emphasis added); *see Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (a redressability analysis requires a determination of what appropriate relief is available, a "context dependent" decision). To hold, as the majority has, that where plaintiffs demonstrated injury-in-fact and causation, the

court cannot "declare the rights and other legal relations" of the parties renders meaningless the plain terms of the DJA. The possibility of a declaratory judgment shows this constitutional controversy is amenable to judicial resolution.

To assess standing, Plaintiffs believe the Supreme Court will evaluate what the majority did not: "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The government's position that its ongoing conduct neither infringes the children's fundamental rights nor denies them equal protection presents a live controversy in need of judicial resolution.

Second, the majority rejected partial redress of the children's injuries as insufficient for standing, overstating Plaintiffs' redressability burden by requiring Plaintiffs to seek a remedy that would "stop catastrophic climate change" or completely "ameliorate their injuries," App. 23, contrary to precedent of the Supreme Court and every Circuit, which requires a court order be "likely" to provide "redress," even if it does not remedy Plaintiffs' every injury. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *Ibrahim v. Dept. of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012). The majority's strawman remedy of fully stopping climate change,

App. 23, *cf.* ER 614-15, improperly ignores, for purposes of summary judgment, genuine disputed issues of material fact raised both by Plaintiffs' experts and by Defendants' documents that the government could substantially reduce emissions to minimize the risk of worsening these children's injuries, issues requiring a trial. The evidence shows Defendants have systems for tracking emissions and sequestration and for reporting to the court on Defendants' progress in reducing emissions. SER 431-433.

Contrary to precedent of the Supreme Court and this Circuit, the majority created a heightened redressability burden, requiring *full* resolution of Plaintiffs' injuries to establish standing. As the amicus brief of Plaintiffs' experts details, Ct. App. VI Doc. 166, the majority erred in inquiring whether there was expert evidence that a favorable decision can "stabilize the global climate," App. 28-29, or "stop catastrophic climate change," App. 23, rather than "minimize the risk" of further harm to Plaintiffs, which is all that is needed for standing. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010); *Doe v. Nestle, S.A.*, 929 F.3d 623, 625 (9th Cir. 2018), *certiorari granted* 2020 WL 3578678 (July 2, 2020) (children's claims redressable where order would "minimize the risk that the harm-causing conduct will be repeated").

The majority also contradicts harmonious precedent of sister Circuits on this issue, disrupting the national uniformity of the redressability analysis. *See, e.g.*,

Antilles Cement Corp. v. Fortuno, 670 F.3d 310 (1st Cir. 2012); *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2020); *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 716 (6th Cir. 2015); *Planned Parenthood Ass'n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1120 (7th Cir. 1983); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 200 (8th Cir. 1974); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 903 (10th Cir. 2012) ("[E]ven if [plaintiffs] would not be out of the woods, a favorable decision would relieve their problem 'to some extent,' which is all the law requires.").

The degree to which Plaintiffs' injuries can be minimized, and the scope of remedy necessary to achieve that mitigation, involve disputed issues of material fact to be resolved on a full record after trial, not on interlocutory appeal of denial of summary judgment, where the evidence must be viewed in the light most favorable to these children. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Plaintiffs were not required to establish standing on summary judgment, but only to raise "a genuine factual dispute," including whether a remedy (declaratory relief in the first instance) could reduce the possibility of further injury, a standard the majority applied in its causation analysis, but abandoned for redressability. *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 947 (9th Cir. 2002); *Cf.* App. 20 (finding genuine factual dispute on causation).

As demonstrated by two recent Executive Orders of the Biden Administration, and contrary to the majority's redressability analysis, Defendants dominate the U.S. energy system and therefore control the feasibility of redress of Plaintiffs' injuries. *See* Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021), and Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021) ("Climate Crisis EO"). The overwhelming importance of whether children have standing to seek declaratory relief under 28 U.S.C. § 2201 for infringement of their constitutional rights is supported by admissions in these orders that the "profound climate crisis" has harmed "the health, safety, and security of the American people and [ ] increased the urgency for combatting climate change . . . ." Climate Crisis EO; EO 13990, Sec. 6(c). Both Orders support Plaintiffs' request that "best available science" inform resolution of the constitutional controversy. Climate Crisis EO, Sec. 210; see also EO 13990, Sec. 5 (b)(ii)(D) and (E). The Climate Crisis EO illustrates the feasibility of Plaintiffs' requested relief that Defendants reduce national climate pollution commensurate with scientific requirements of redressing their ongoing constitutional violations by directing the named defendants in the instant case to use existing authorities and comprehensive planning to "combat the climate crisis" with "a Government-wide approach." Sec. 201-211.

Viewing the evidence in the light most favorable to Plaintiffs, there is a factual dispute as to whether Defendants could swiftly reduce emissions within their control if their existing policies were declared unconstitutional, and that risk of harm to Plaintiffs could be minimized. In its own rendering of the facts, App. 23-26, the majority ignored this evidence and improperly resolved disputed factual issues in favor of the moving party, the government. *Tolan v. Cotton*, 572 U.S. 650, 657-58 (2014). However, on summary judgment review, "[t]his court does not weigh the evidence." *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999) (*en banc*). After presenting "more than a scintilla" of evidence, as the district court determined they had, these children are "entitled to a bench trial and specific findings of fact by the district court . . . ." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541-42 (9th Cir. 2004) (internal citations omitted).

The majority's reasoning would lead to disastrous results for children where a complete remedy is impossible. Courts cannot wholly eliminate child sexual abuse imagery online, but declare it illegal where found, just as courts cannot wholly eliminate racism against children in schools, but declare government-sanctioned discrimination unconstitutional where found. The majority insulates unconstitutional government conduct from Article III review, in circumstances where the government is one, indeed the largest, among many perpetrators causing

harm to children. The dissent correctly states a court order could do something to help Plaintiffs, "[a]nd 'something' is all that standing requires." App. 46.

Third, the majority contravened Supreme Court precedent in holding it is "beyond the power of an Article III court to order . . . the plaintiffs' requested remedial plan." App. 25. "Plaintiffs' request for a 'plan' is neither novel nor judicially incognizable," but "consistent with [] historical [remedial] practices," where the government's policies and programs infringe individual constitutional rights. App. 60 (dissent); *Hills v. Gautreaux*, 425 U.S. 284 (1976). The majority's analysis negates decades of remedial plans like those ordered and overseen by various circuits to enforce the declaratory judgment of *Brown v. Board of Education*, 347 U.S. 483 (1954). Government systems of segregation were no less complex to remedy than the government system of promoting fossil fuels, both of which harm America's children. *Id.* at 495 (finding "formulation of decrees in these cases presents problems of considerable complexity."). The evidence shows material factual issues as to the viability of a remedial plan to redress Plaintiffs' injuries, facts which would be determined utilizing expert evidence at trial. As the dissent notes, "[w]e must not get ahead of ourselves." App. 57.

Ignoring Plaintiffs' requests for declaratory, injunctive, and "such other relief" as may be "just and proper," ER 614-15, the majority determined Plaintiffs could not "surmount" the second prong of its redressability analysis due to "doubt"

as to the judiciary's power to order, supervise, or enforce a remedial plan of Defendants' own devising; a remedy that may not ultimately be ordered in the case since it is presumed that Defendants would comply with any declaratory relief that is ordered. App. 25-29. Nonetheless, in concluding the district court cannot order the government to prepare a remedial plan, the majority contradicts longstanding Supreme Court precedent. *See, e.g.*, *Hills*, 425 U.S. at 290, 306 (approving order for a "comprehensive plan to remedy" unconstitutional public housing system).

The majority also expressed "doubt that any such [remedial] plan can be supervised or enforced by an Article III court." App. 29. This position is belied by the progeny of *Brown v. Board* and countless district court and Court of Appeals decisions upholding remedial plans designed and implemented by government to remedy systemic constitutional violations. *See, e.g.*, *Wyatt v. Aderholdt*, 503 F.2d 1305 (5th Cir. 1974). Contrary to the majority's skepticism, Plaintiffs' evidence, which must be accepted in the light most favorable to these children, shows the government already has the ability to engage in "a government-wide approach" to climate change mitigation and energy planning, has systems for tracking annual emissions and sequestration in place, and could readily report to the court on Defendants' progress if so ordered. SER 431-433; Climate Crisis EO § 201-211.

Fourth, even though the panel found the children's claims not to implicate a political question, App. 31, n.9, the majority created a new redressability test infused

with the political question analysis, extrapolating from *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The panel decision thus contravened Supreme Court and Circuit precedent, which establishes separate and distinct tests for whether a *claim* is barred by the political question doctrine under the factors in *Baker v. Carr*, 369 U.S. 186 (1962), and standing, which examines "whether the person . . . is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). "The Article III standing inquiry serves a single purpose: to maintain the limited role of courts by ensuring they protect against only concrete, non-speculative injuries." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (2020).

The majority's redressability analysis conflates and eviscerates any meaningful distinction between the standing and political question doctrines. The majority relied heavily on the political question analysis in *Rucho*, in which the Supreme Court held, *after trial*, that *partisan* gerrymandering claims are nonjusticiable. 139 S. Ct. 2484 (2019). Contrary to the majority's analysis, the standing and political question doctrines are "distinct and separate limitation[s]," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974), and "separate aspects of justiciability" with distinct foci. *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988); *accord Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-38 (1976). Indeed, *Rucho* affirms

the distinct nature of the inquiries: prior to its political question analysis, the Supreme Court recounted its holding that plaintiffs can establish standing in partisan gerrymandering claims. 139 S. Ct. at 2492 (discussing *Gill v. Whitford*, 138 S. Ct. 1916 (2018)). Here, on appeal, Defendants did not contest the district court's thorough political question analysis under *Baker v. Carr*, and the panel did not reverse it. Nevertheless, relying on political question considerations articulated in *Rucho* to determine the redressability element of standing, the majority eviscerated any meaningful distinction between the discrete doctrines, contravening clear precedent.

II. Good Cause Exists to Stay the Mandate

"[T]here is good cause for a stay" of the mandate. Fed. R. App. P. 41(d)(1). In considering whether there is good cause to stay the mandate, courts "balance the equities" by evaluating "the harm to each party if a stay is granted." *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers). The irreparable harm to Plaintiffs if a stay is not granted is obvious: issuance of the mandate would result in the district court dismissing this case. The issuance of the mandate dismissing the case would also harm the parties' ability to engage in settlement discussions with the assistance of the court-sponsored programs of the Ninth Circuit and the district court.

By contrast, a stay of the mandate will not prejudice Defendants at all. If the mandate is stayed and the Supreme Court ultimately denies review (or grants review and affirms this Court's judgment), Defendants will be in essentially the same position as they are now, as the case will be dismissed. The equities thus weigh in favor of Plaintiffs. Finally, for the foregoing reasons, the Court should not require a bond or other security as a condition to granting a stay of the mandate.

CONCLUSION

A stay to allow the Supreme Court to act on a petition for certiorari, and the parties to explore settlement discussions, is amply warranted. For these reasons, Plaintiffs respectfully request this Court stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States and, if the petition is granted, pending the Supreme Court's final disposition of the case.

DATED this 17th day of February, 2021, at Eugene, OR.

Respectfully submitted,

s/ Philip L. Gregory
PHILIP L. GREGORY
JULIA A. OLSON
ANDREA K. RODGERS

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Circuit Rule 40-1, this Motion to Stay the Mandate Pending Filing and Disposition of a Petition for a Writ of Certiorari of Plaintiffs-Appellees is proportionately spaced, has a typeface of 14 points or more, and contains 5,087 words.

DATED: February 17, 2021

s/ Philip L. Gregory
PHILIP L. GREGORY

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing Motion to Stay the Mandate Pending Filing and Disposition of a Petition for a Writ of Certiorari of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: February 17, 2021

s/ Philip L. Gregory
PHILIP L. GREGORY