No. 18-36082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs/Appellees,

v.

UNITED STATES, et al.,
Defendants/Appellants.

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

APPELLANTS' OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Plaintiffs' petition for rehearing en banc should be denied because it does not satisfy the standard in Federal Rule of Appellate Procedure 35(a). The panel's holding that Plaintiffs have not satisfied the redressability requirement of Article III standing is consistent with Supreme Court and Ninth Circuit precedent, it resolves Plaintiffs' claims on the narrowest possible ground, and it involves no legal questions of exceptional importance.

Indeed, there is no remedy both capable of redressing Plaintiffs' harms and within a federal court's authority to award. Any effective remedy would require the judicial branch to make and enforce wide-ranging climate-change policy, taking the courts far beyond the limits of Article III. The fundamental problem with Plaintiffs' suit, as the panel properly recognized, is that it would make the federal courts the ultimate authority and policy-makers on climate change. Plaintiffs ultimately seek relief that only the political branches can provide.

The panel properly applied the law and arrived at the correct result. This case does not merit the attention of the en banc Court.

BACKGROUND

Plaintiffs brought this action in August 2015 against President Obama (for whom President Trump was later substituted) and numerous other Executive Branch defendants — including no fewer than eight Cabinet departments and agencies —

for allegedly violating their rights (under the Constitution and a purported federal public trust doctrine) to particular climate conditions. *See generally* 3 E.R. 516-615 (operative complaint). Among other further-reaching requests, Plaintiffs asked the district court to order the defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2." 3 E.R. 614, ¶ 7. The plan would be "enforceable" by the district court, which would also assess whether it was sufficient. Opinion at 26, 29.

The district court denied the government's motion to dismiss, concluding that Plaintiffs had standing and had stated a justiciable claim. *Id.* at 12. After further proceedings in this Court and the district court, the government applied to the Supreme Court for mandamus relief and a stay. Though denying the requested relief as premature, the Supreme Court "noted that the 'breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.* at 13 (quoting *United States v. U.S. District Court*, 139 S. Ct. 1 (2018)). The district court later largely denied the government's motion for summary judgment, albeit dismissing the President (without prejudice). *Id.* The district court eventually certified the case for interlocutory appeal, and this Court granted the government's petition for permission to appeal. *Id.*

On January 17, 2020, the panel ruled in the government's favor, holding that Plaintiffs' harms could not be redressed by an Article III court. *Id.* at 25-29. The

panel held that Plaintiffs were not required to proceed under the Administrative Procedure Act, *id.* at 16-18, and that Plaintiffs had established the first two prongs of standing, i.e., injury and causation, *id.* at 18-21. The panel expressed skepticism that the remedial plan Plaintiffs demanded would provide them with any meaningful relief, *id.* at 22-25, and it ultimately held that even if a plan *could* provide such relief, overseeing the implementation of and compliance with such a plan "is beyond the power of an Article III court," *id.* at 25. District Judge Staton dissented and would have held that Plaintiffs had standing. *Id.* at 32-64.

The panel remanded the case to the district court with instructions to dismiss for lack of standing. *Id.* at 32. Plaintiffs now petition for rehearing en banc.

ARGUMENT

Plaintiffs' petition should be denied. The panel correctly concluded that the district court lacks authority under Article III to order and oversee implementation of Plaintiffs' desired remedial plan. *Infra* Part I. Further, Plaintiffs identified no remedy likely to redress the injuries the panel held cognizable. *Infra* Part II. Finally, the opinion presents no legal questions of exceptional importance. *Infra* Part III.

I. The panel properly held that Plaintiffs identified no remedy within an Article III court's power to award.

As the panel explained, in order to "have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision." Opinion at

18 (citing, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

Redressability "requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017) (internal quotation marks omitted); *accord* Opinion at 25. That requirement is designed "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty International USA*, 568 U.S. 398, 408 (2013). Accordingly, a court's inquiry must be "especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Here, the panel properly held that the federal judiciary lacks authority to grant Plaintiffs' requested relief.[1]

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[1] The government assumes for present purposes that Plaintiffs satisfied the first two prongs of the three-pronged standing inquiry, but the government preserves its arguments that the panel's injury and causation analyses were incorrect. Plaintiffs identify a textbook generalized grievance — indeed, it is impossible to conceive of a grievance that is more universally shared — that cannot establish injury-in-fact. To pin their alleged harms on the government, moreover, Plaintiffs rely on the sort of attenuated chain of conjecture that this Court previously held insufficient to establish causation. *See Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1143-44 (9th Cir. 2013). If the case were reheard en banc, the government would argue that Plaintiffs' failure to satisfy the injury and causation prongs of standing (along with other arguments in the government's briefs) provide additional grounds for reversing the district court beyond the redressability ground adopted by the panel.

A. The panel properly concluded that Plaintiffs' remedy lies with Congress and not the courts.

According to Plaintiffs, one "central question[]" presented by their petition is "whether this Court will allow the political branches to arrogate to themselves the 'judicial Power' granted exclusively to the judiciary by Article III." Petition at 1. Quite the opposite: the central question is whether the panel concluded correctly that this action — which asks the *judiciary* to address an issue suited only for the *political branches* — transgresses the limits of Article III. The panel properly held that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan." Opinion at 25. After all, "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.*

The panel properly recognized that the principles animating its redressability analysis were at issue in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). There, voters in Maryland and North Carolina challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. *Id.* at 2491. But the Supreme Court ultimately declined to reach the merits of the voters' claims, holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. The Court recognized that it is "the province and duty of the judicial department to say what the law is," *id.* at 2494 (quoting

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)), but sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness — because the question is entrusted to one of the political branches," *id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion)). The "Framers gave Congress the power to do something about partisan gerrymandering," however, and that "avenue for reform . . . remains open." *Id.* at 2508.

Here, the panel made clear that it did not hold that Plaintiffs' case presented a political question, Opinion at 31 n.9, but it correctly found relevant *Rucho*'s discussion of Article III restraints. That is to say, *Rucho* simply "reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority." *Id.* at 28 (quoting *Rucho*, 139 S. Ct. at 2506-07, 2508). After all, the political question and standing doctrines "stem[] from the same separation-of-powers principle." *Id.* at 31 n.9 (quoting *Marshall Islands*, 865 F.3d at 1192).

Therefore, Plaintiffs' assertion that the panel "conflates and eviscerates any meaningful distinction between" political question and standing doctrines, Petition at 16; *accord id.* at 16-17, is flatly incorrect. The panel simply recognized that both doctrines enforce the same basic constitutional principle: that Article III does not authorize courts to decide claims that should be addressed to the political branches.

B. The panel properly held that it lacked authority to order and oversee the remedial plan that Plaintiffs demand.

Plaintiffs characterize their requested relief as a run-of-the-mill "remedial plan of Defendants' own devising," Petition at 14-15, similar to "decades of remedial plans . . . ordered and overseen" by courts in the past, *id.* at 3. That framing ignores reality. The remedial plan demanded by Plaintiffs is unlike any plan ordered and overseen in the past: the plan that they envision would require the fundamental restructuring of our entire national economy and energy infrastructure. The panel recognized that crucial fact and properly held that it lacked the authority to order such unprecedented relief. Order at 29.

Plaintiffs cite desegregation and institutional reform cases to argue that their "decarbonization" plan is a standard remedy within an Article III court's authority to order. Petition at 3, 14-16. These cases represent the high-water mark for the federal courts' traditional equitable authority, which the Supreme Court found sufficiently broad to address the constitutional claims at issue there. *See, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

Plaintiffs would have the Court believe that "Government systems of segregation were no less complex to remedy than the government system of promoting fossil fuels." Petition at 4. In reality, the relief awarded in the reform cases pales in comparison to relief requested by Plaintiffs here. The plaintiffs in those cases sought injunctions against particular school districts for particular

constitutional violations distinctly experienced by particular groups of individuals. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Or they sought injunctions to address racial segregation in a public housing systems in a particular metropolitan area, *Hills*, 425 U.S. at 286-87; or prison conditions within a particular state, *Brown v. Plata*, 563 U.S. 493, 499-500 (2011). The courts then directed the preparation of remedial plans with particular actions to satisfy defined standards. In stark contrast, Plaintiffs' decarbonization plan would require a total transformation of the national economy — wholly reordering the transportation, energy production, agricultural, and manufacturing sectors — all without any input from elected representatives. The plan that Plaintiffs envision would dwarf the remedial plans in *Swann*, *Hills*, or *Plata*.

Plaintiffs' continued reliance on *Brown v. Board of Education*, 347 U.S. 483 (1954), is similarly misguided. There, the Court acknowledged that formulation of the necessary remedial decrees "present[ed] problems of considerable complexity," *id.* at 495, and ultimately left it to lower courts across the country to implement its legal ruling in the context of particular schools and plaintiffs, *see Brown v. Board of Education*, 349 U.S. 294, 299-301 (1955). Here, on the other hand, Plaintiffs seek an order vesting in a single district court in Oregon the authority to oversee a nationwide remedial plan designed to address a global problem. The effects of that remedial plan would eventually be felt by everyone in the country, from natural gas

producers in West Virginia, to carmakers in Detroit, to individuals using gas lawn mowers in Florida, to farmers everywhere.

In short, the remedial scheme that Plaintiffs propose is a deluge that would swamp the prior high-water mark for judicial reach in desegregation and institutional reform cases, making the judicial administration of school districts, housing systems, and prisons appear modest by comparison. The panel correctly recognized that reality, explaining that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." Opinion at 25.

Likewise, although Plaintiffs suggest otherwise, Petition at 14-15, the panel did not ignore the fact that Plaintiffs expect the Executive Branch — and not the courts — to design the remedial plan. The panel acknowledged Plaintiffs' argument that "the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best" reduce fossil fuel emissions and atmospheric carbon dioxide. Opinion at 26. But the panel went on to explain cogently that "even under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking." *Id.* That is, the government could reasonably conclude that national security interests merit continuing in full

force a number of the unnamed policies and procedures with which Plaintiffs take issue. Without some concrete standard against which to judge the government's exercise of its discretionary authority, further judicial involvement — and further judicial policymaking — would undoubtedly be necessary.

II. Plaintiffs failed to show that the relief they seek is substantially likely to redress their injuries.

Plaintiffs bore the burden to demonstrate not only that their requested relief was within a district court's authority to award, but also that the relief is "substantially likely to redress their injuries." Opinion at 21. In other words, redress "must be more than 'merely speculative.' " *Id.* (quoting *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)). Although the panel ultimately assumed for purposes of its analysis that Plaintiffs had satisfied this element of the redressability test, *id.* at 25, it correctly expressed deep skepticism that the sweeping remedies demanded by Plaintiffs would provide even partial relief, *id.* at 22-25. It could easily have held that Plaintiffs failed to satisfy this element.[2]

[2] Notably, Plaintiffs' suit is one of several attempting to hold the federal government responsible for climate change. The other suits were properly dismissed for lack of standing. *See, e.g.*, *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019) (holding that plaintiffs satisfied no prong of the standing analysis); *Animal Legal Defense Fund v. United States*, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019) (holding that plaintiffs failed to identify a cognizable injury and failed to state a claim), *appeal docketed*, No. 19-35708 (9th Cir. Aug. 21, 2019).

A. The panel properly realized that declaratory relief alone would not redress Plaintiffs' harms.

Plaintiffs made clear in briefing and at oral argument that they sought an order instructing the government to "prepare a national energy plan that transitions the nation away from fossil fuels." Oral Argument 39:00-40:00; *see also* Answering Brief at 26 & n.17. They sought declaratory relief too, but they have consistently asserted that it would be only a "partial" remedy, *id.* at 24 n.15, and that a "wholesale structural remedy," *id.* at 27, would be necessary to redress their injuries. The panel agreed, concluding that a declaratory judgment alone would not provide adequate redress. Opinion at 22.

Plaintiffs now change their tune and for the first time say that a judicial declaration — standing alone — *would* be enough. They now contend that the panel "contravene[d] settled redressability precedent by holding declaratory relief insufficient in a fundamental rights case." Petition at 9 (capitalization altered). En banc petitions are not an opportunity to advance arguments not developed in prior proceedings, and Plaintiffs' argument fails for this reason alone. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009).

Plaintiffs' argument also lacks merit. The panel held that at least some of the Plaintiffs had suffered cognizable injuries because one plaintiff described being separated from her family and another described flooding events that diminished the value of his family home. Opinion at 18. The present question, therefore, is not

whether declaratory relief would provide Plaintiffs with some abstract redress; the question is whether it is likely to redress those specific injuries that the panel held cognizable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The panel correctly reasoned that it would not, recognizing that a "declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." Opinion at 22. After all, the Supreme Court has long held "that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998)).

Plaintiffs assert that a declaratory judgment would provide adequate redress because government actors would be expected to comply with the Court's interpretation of the Constitution. Petition at 9-10. But Plaintiffs ignore that declaratory relief cannot provide meaningful redress where "any prospective benefits depend on . . . independent actor[s]" that retain "legitimate discretion the courts cannot presume either to control or predict." *Mayfield v. United States*, 599 F.3d 964, 972 (9th Cir. 2010) (internal quotation marks omitted). Here, Plaintiffs challenge a vast array of unidentified agency actions undertaken by a large swath of the Executive Branch exercising discretionary authority granted by Congress. Without more, an order stating simply that some unidentified Executive Branch actions violate the Constitution will provide Plaintiffs with no meaningful relief.

Plaintiffs incorrectly suggest that this case is similar to a number of other cases "acknowledg[ing] the important role of declaratory relief in resolving persisting constitutional controversies." Petition at 9. For example, Plaintiffs again attempt to liken their case to *Brown*, asserting that there, "[l]ike here, . . . the 'consideration of appropriate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education.'" Petition at 9 (quoting *Brown*, 347 U.S. at 495). Plaintiffs ignore the fact that in *Brown*, the ultimate redressability of the plaintiffs' harms was never in question: a federal court plainly may order a particular school district within its jurisdiction to stop segregating its students based on race; the parties disagreed only as to the form and scope of the remedial decrees. *See Brown*, 347 U.S. at 495 & n.13 (requesting briefing on remedy). Here, the panel was concerned not about "appropriate relief," but rather about whether the courts have authority to redress Plaintiffs' harms at all — a jurisdictional question properly addressed at the threshold. Opinion at 25-29.

Plaintiffs ultimately seek an advisory opinion in its purest form: an opinion that admittedly cannot remedy Plaintiffs' injuries consistent with Article III but that nonetheless opines on their unprecedented legal theories. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Plaintiffs' petition confirms this: "Here, a declaratory judgment would resolve the controversy of whether the government's decades-long, *ongoing, and expanding* conduct" amounts to "a constitutional violation." Petition

at 2. But "resolv[ing] the controversy" solely by answering the legal question is just another way of saying that the Court should deliver an advisory opinion. That is particularly problematic here, given claims that the Supreme Court called "striking." As the panel recognized (p. 11), Plaintiffs would have the courts resolve one of the preeminent policy issues of our time — climate change and its planet-wide impact. The panel properly held that such an opinion is inconsistent with Article III.

B. The panel correctly observed that Plaintiffs' desired remedial plan would provide no meaningful relief.

Plaintiffs miscast the panel's decision when they argue that "the majority created a heightened redressability burden, requiring *full* resolution of Plaintiffs' injuries to establish standing." Petition at 10; *accord id.* at 10-14. But the panel required no such thing. Instead, it opined that Plaintiffs' harms were unlikely to be redressable because even an extreme remedy is unlikely to provide meaningful help. Opinion at 22-25. Viewing the evidence in the light most favorable to Plaintiffs, even Plaintiffs' own experts could "not show that even the total elimination of the challenged [government] programs would halt the growth of carbon dioxide levels in the atmosphere, *let alone decrease that growth*." Opinion at 23 (emphasis added); *see id.* (explaining that injunctive relief would not "even ameliorate their injuries").[3]

[3] Relatedly, Plaintiffs continue to suggest that disputed issues of material fact remain to be resolved at trial. *See, e.g.*, Petition at 12. They are mistaken: the panel accepted the relevant facts as alleged by Plaintiffs and decided that the district court lacked jurisdiction *as a matter of law*. No issues of fact remain to be decided.

Likewise, the panel properly rejected Plaintiffs' reliance on *Massachusetts v. EPA*, 549 U.S. 497 (2007), for the proposition that an order that would "slow or reduce emissions" would be sufficient redress. Opinion at 24. The panel correctly held *Massachusetts* inapplicable because (1) the Supreme Court recognized there that States are entitled to "special solicitude in [the] standing analysis"; and (2) the case involved the violation of a *procedural* right, triggering a relaxed redressability standard. *Id.* at 24 n.7 (quoting *Massachusetts*, 549 U.S. at 520). Here, Plaintiffs are entitled to no special solicitude; no State is a plaintiff. And they allege violations of only *substantive* rights. Indeed, Plaintiffs repeatedly rejected the suggestion that they could follow the path of *Massachusetts v. EPA* and seek to assert procedural rights offered by Congress to litigants in the Administrative Procedure Act or other statutes providing particular judicial review processes for particular agency actions.[4]

III. No question of exceptional importance warrants rehearing.

Plaintiffs are also mistaken that the panel's ruling presents a "question of exceptional importance" within the meaning of Appellate Rule 35. *See* Fed. R. App.

[4] For example, the Outer Continental Shelf Lands Act (OCSLA) sets forth a multi-step process that the Department of the Interior's Bureau of Ocean Energy Management must undertake "before allowing development of an offshore well, with each stage more specific than the last and more attentive to the potential benefits and costs of a particular drilling project." *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015). Rather than bring their constitutional claims pursuant to the highly reticulated, special judicial review mechanism established by OCSLA, *see* 43 U.S.C. § 1349(b)(1), Plaintiffs ignored the provision altogether.

P. 35(b)(1)(B) (noting that a case might present such a question if "it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"). The panel properly recognized that the "central issue" before it was an ordinary legal question — whether "an Article III court can provide the plaintiffs" with an "order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2.' " Opinion at 11. Resolution of that question might have precluded the panel from passing judgment on an exceptionally important *policy* issue, but it implicated no *legal* issues of exceptional importance.

Furthermore, Plaintiffs' ages do not transform the panel's decision into one of exceptional importance. The only question now before this Court is whether the panel's redressability analysis accords with precedent. Plaintiffs provide no credible support for the notion that, because most are young, en banc review of that analysis is proper. Plaintiffs refer to "twenty-two en banc petitions involving important children's rights over the past decade," Petition at 5, but the mere two that they cite establish no relevant trend. No court has held that merely alleging violations of a child's rights merits en banc review of a threshold jurisdictional determination.[5]

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[5] Plaintiffs' contention that the panel's decision renders their unique interests as children "subject to the tyranny of the majority," Petition at 2, is incorrect. Their interests are shared by people the world over: young and old, rich and poor, healthy and sick. The district court properly rejected Plaintiffs' argument that children are a "suspect class," and Plaintiffs did not appeal that rejection. *See* Opinion at 13 n.3.

The panel's decision will not, as Plaintiffs assert, "debilitate Article III courts in deciding constitutional cases." Petition at 2. To the contrary, the decision merely reaffirms the longstanding principle that plaintiffs seeking to vindicate constitutional claims — or any claims in an Article III court, for that matter — must first establish that their harms can be redressed by that court. The panel's narrow ruling bars only this case and others seeking sweeping relief that no federal court can provide.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Dated: March 24, 2020.

Respectfully submitted,

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Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

9th Cir. Case Number(s) 18-36082

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,137.

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Eric Grant

Date March 24, 2020