No. 19-35708

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, a nonprofit organization; et al.,
Plaintiffs–Appellants,

v.

UNITED STATES OF AMERICA; et al.,
Defendants–Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
D.C. Case No. 6:18-cv-01860-MC
Hon. Michael J. McShane

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. Introduction

Plaintiffs ask the court to end defendants' destruction of federal lands by enabling three commercial uses with the largest carbon footprint: fossil fuel development and extraction, logging of old growth forests, and animal agriculture. By compelling defendants to comply with such an order, the court would force defendants to leave the wilderness alone to exist in a self-sustaining state, eventually completing a natural restoration process to defend against climate change.

In other words, plaintiffs ask the court to compel the government to enable a *natural* restoration of federal wild lands to fight climate change and to ensure the preservation of wilderness. Through such court relief, plaintiffs will be free to express and exercise their constitutional right "to be let alone." While defendants attempt to paint this remedial request as radical, it is defendants' efforts to proceed with "business as usual" that is the more extreme position given the clear and catastrophic consequences.

According to defendants, federal courts must redress all or nothing. Federal agencies cannot be compelled under court order to end *any* harmful and exploitative activities permitted on federal lands unless such order fully addresses the release of *all* carbon emissions impacting plaintiffs' right to use and enjoy the wilderness free of harm. Recognizing their immoderate position, defendants

eventually concede, because they must, that the requested declaratory relief herein would provide at least partial redress to the specific injuries alleged in the Complaint.

Contrary to centuries of established thought, precedent, and practice regarding our primordial ties to nature, now largely confined to federally protected lands, defendants next argue that Americans' right to wilderness merits neither express recognition by the courts nor protection under the Constitution. According to defendants, Americans' right to use and enjoy the wilderness, which serves as a precondition to the right to be let alone, lacks sufficiently deep roots in American history and tradition.

According to defendants, a judgment by a federal court that declares plaintiffs' Fifth Amendment substantive due process rights and compels federal agencies to cease permitting specific environmental harms on federal lands cannot be issued or enforced as said declaration automatically would invoke "political questions" reserved for executive authority. Despite distinguished precedents establishing the authority of federal courts to protect fundamental individual rights and impose limitations on executive overreach and "state-created danger," the cognizable injuries suffered by plaintiffs through federal agency actions on federally protected lands merit no relief.

None of these arguments by defendants—agencies of the United States of America—withstand scrutiny.

This court held in *Juliana* that the type of injuries alleged by plaintiffs in this Complaint, which directly result from federal activities allowing for the extraction and release of carbon on federal lands, can be concrete and particularized and are sufficient to confer standing. Unlike in *Juliana*, plaintiffs here are requesting a narrower form of relief readily available to the district court. Rather than seek a "stable climate system" as alleged in *Juliana*, plaintiffs seek a court-ordered moratorium on the willful destruction of federal lands through fossil fuel extraction, logging of old-growth forests, and animal agriculture.

Moreover, plaintiffs here have pled sufficient facts to establish their substantive due process right "to be let alone" through the protection of wilderness found on public lands. Accordingly, the district court decision should be reversed and remanded, and the individual Constitutional rights of plaintiffs should be recognized and granted.

II. Argument

A. Plaintiffs' right to wilderness passes the *Glucksberg* test.

The right to wilderness, as articulated by plaintiffs, is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (internal citations omitted). Plaintiffs provide a detailed account of "concrete

examples" in support of the right, including a 150 years' long legislative commitment to providing reasonable access to wilderness for future generations, as well as evidence of the ways in which the right to wilderness is necessary to meaningfully exercise the longstanding right to liberty and autonomy. While courts have yet to explicitly recognize the fundamental right to wilderness, the existential threat posed to wilderness by climate change, as enabled and exacerbated by defendants' actions and omissions, now necessitate such a formal recognition, lest our American Wilderness Heritage be lost forever.[1]

1. Plaintiffs clearly articulate the fundamental right to wilderness.

Plaintiffs define the fundamental right to wilderness as "[the] right of each American to have reasonable access to publicly owned wild lands maintained at a minimum baseline of natural, self-sustaining vitality." Opening Brief at 30. Plaintiffs do not allege a right to wilderness "in [p]laintiffs' preferred setting, wherever and whatever that may be," Answering Brief at 28, but rather a right to safely access public wild lands in their natural character. Opening Brief at 48.

[1] Because this case comes to the court at the motion to dismiss stage, the court must accept as true plaintiffs' allegations in the Complaint that the threat to wilderness posed by defendants' impact on the release of carbon on public lands and resulting climate change is an existential one. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011).

Defendants ignore plaintiffs' clear articulation of their right[2] and misleadingly conflate the right with different ways in which it may be exercised. Answering Brief at 28. Defendants point to no case law for the proposition that individuals must make use of their fundamental rights identically. *Id.* That some plaintiffs may seek to exercise the right to wilderness by hiking with friends while others access wilderness alone both reasonably fall within the scope of the asserted fundamental right of access to federal wild lands.

Defendants also misrepresent plaintiffs' articulation of a right to public lands that are both "wild" and "maintained at a minimum baseline of natural, self-sustaining vitality" as "contradictory." Answering Brief at 27. As plaintiffs make clear, the right to wilderness includes access to public lands of "*self-sustaining* vitality," and therefore do not argue that defendants have an obligation to protect wilderness from its own "wildness." Opening Brief at 30. Rather, in keeping with the right to wilderness, the government's role in "maintaining" the lands is limited

[2] *Amicus curiae* Our Children's Trust also ignores plaintiffs' careful articulation of their fundamental right to wilderness in a brief that appears to serve no other purpose than to relitigate their case before this court and distinguish their claims from those of the ALDF plaintiffs. Brief for Summary Affirmance, *Animal Legal Defense Fund v. United States*, No. 19-35708 (9th Cir. Sept. 03, 2021), ECF No. 44. On this we agree. Unlike the broad collective relief sought by OCT in seeking a "remedial plan" designed to achieve a "stable climate system," plaintiffs' claims are more narrowly focused on protecting each individual's right to be let alone through court-mandated cessation of the willful destruction of federal wild lands. *Id*. at 9.

to ceasing the authorization and promotion of industrial polluters on those lands, whose activities threaten to destroy that "wild" character. By the same token, plaintiffs do not ask defendants to manage the public lands themselves, but instead restrict those industries whose ongoing impact on climate change degrades our wilderness.

Defendants similarly misapprehend plaintiffs' assertion that the right to wilderness includes "safe" access. Plaintiffs do not allege that the right to wilderness requires defendants to prevent natural dangers that may arise in wilderness, but rather that defendants must cease promoting and authorizing those activities whose climate change impacts on wilderness are such as to render them unsafe. In other words, if climate change were not "anthropogenic," then no violation of the right to wilderness would lie.

Additionally, plaintiffs refer to "wilderness" as inclusive of public lands other than designated wilderness areas, because the fundamental right to wilderness is antecedent to, and exists independent of, the right to wilderness articulated under the Wilderness Act. ER-97. The broader standard for wilderness to be applied here is the one anticipated and declared by Congress through over a century of legislative enactments in accordance with the Founder's commitment to preserving a "state of nature." Opening Brief at 48.

2. A right to wilderness is deeply rooted in this Nation's history and tradition.

Far from "[v]ague references to philosophical principles," Answering Brief at 36, plaintiffs detail a lengthy, historical record of "concrete examples" in support of the right to wilderness and its deep roots in this Nation's history and tradition. Opening Brief at 36-42. For over 150 years, a national consensus in favor of wilderness preservation has developed through legislative enactments, Presidential proclamations, agency policies, state constitutional provisions, and case law, all founded in the recognition that wilderness is a core ingredient of our national heritage, to which all Americans, present and future, have a right of reasonable access.

For example, plaintiffs point to the establishment of Yosemite National Park and Mariposa Grove in 1864 and the more than 150 National Forests and Grasslands that Congress has designated since 1891. *See* Opening Brief at 37. In addition, the 1916 National Park Service Organic Act, which created the National Park Service ("NPS"), states that "the fundamental purpose" the Act is to conserve federal wild lands "by such means as will leave them unimpaired *for the enjoyment of future generations*." 16 U.S.C. § 1, *repealed by* National Park Service and Related Programs, 113 Pub. L. 287, 128 Stat. 3094, § 100101(a) (emphasis added). Resolving to provide future generations with a "glimpse of the world as it was in the beginning," the United States was the first country to officially designate land

as "wilderness," declaring the purpose of the Wilderness Act is to preserve wilderness "for the permanent good of the whole people." 150 Cong. Rec. S9774 (daily ed. Sept. 28, 2004) (statement of Sen. Harry Reid) (quoting President Johnson during a commemoration of the fortieth anniversary of the Wilderness Act); *see also* 16 U.S.C. § 1131(a). The first subsection further provides that "it is hereby declared to be the policy of the Congress to secure for the American people of present and *future generations* the benefits of an enduring resource of wilderness." *Id.* (emphasis added). The passage of the Wilderness Act itself, "was rooted in long-standing concerns for conservation and preservation." JAMES TURNER, THE P OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964, at 18 (2013).

Implicitly recognizing the threat to fundamental rights implicated by the permanent destruction of our national wilderness heritage, courts have shown special solicitude to protect Wilderness Act-designated areas by "employ[ing] a more exacting standard of judicial review" to Wilderness Act cases "than may be expected based on the stated standard of review." Peter Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 98 (2010) [hereinafter *Wilderness and the Courts*]. Between 1964 and 2010, when agencies defended decisions that "arguably threaten[ed] wilderness protection against challenges by environmental organizations," the agencies only won about 44% of the time. *Id.* at 66. When

agencies defended their actions against challenges that they were protecting wilderness "too stringently," they prevailed in approximately 88% of their cases. *Id.* at 66-67. According to Peter Appel, a professor of law at the University of Georgia, this reflects a two-fold difference in success rates depending on the type of challenge and indicates a "significant difference in how courts approach wilderness decisions." *Id.* at 67. Indeed, "One may describe it as a one-way judicial ratchet in favor of wilderness protection." *Id.*

Additional "concrete examples," in support of the fundamental right to access federal wildlands in their natural and vital state, are described in the Opening Brief at 39, fn. 7.

In the face of these "concrete examples" of the deeply rooted nature of the right to wilderness in the Nation's history, defendants cite no authority indicating that this type of detailed historical overview of legislative enactments is insufficient. Rather, defendants argue that plaintiffs have pointed to "[s]tatutory benefits," rather than constitutional rights. Answering Brief at 37. Defendants ignore the fact that evidence of fundamental rights is indeed found in "the usual repositories of our freedoms," prominent among them "statutory provisions." *Williams v. AG of Ala.*, 378 F.3d 1232, 1244 (11th Cir. 2004). Moreover, while a single statutory benefit may not create a fundamental right, plaintiffs described a 150 years' long historical, statutory commitment to wilderness preservation for

future generations. These cited statutory enactments do not represent a fleeting commitment to protecting wilderness access, either; no national park unit established on account of its exceptional ecological character ever has been removed from federal protection. Opening Brief at 43-44.

In conjunction with detailing the Nation's 150 years' long legislative commitment to wilderness, plaintiffs also describe Presidential proclamations extolling the importance of wilderness preservation. That multiple U.S. Presidents acting over more than one-hundred years have specifically identified the value of wilderness as a "heritage" that must be "preserved for future generations" constitutes further concrete evidence that the right to wilderness is deeply rooted in the Nation's history. *See* Opening Brief at 39; *see also* Proclamation No. 9482, 81 Fed. Reg. 61,979 (Aug. 31, 2016) (in which President Barack Obama describes American wilderness as "our vast and vibrant natural heritage" such that we must "preserve its splendors for all who will follow in our footsteps.") Since 1964, every President has also approved legislation adding land to the National Wilderness Preservation System. *Wilderness and the Courts*, at 65.

Even the United States Department of Agriculture's own survey found that "[p]reserving the ability to have a wilderness experience on forests and grasslands"

is a broadly recognized important objective.[3] The Forest Service itself has acknowledged that agency decision making should reflect special care for the deeply rooted nature of the Nation's historical commitment to wilderness, wilderness being "a value which, once lost, can never be replaced." *Wilderness and the Courts*, at 72 n.30 (quoting the Forest Service regulatory enforcement instructions for its officers).

Defendants hope this court will treat plaintiffs' right to wilderness as the Supreme Court treated the right to assisted suicide in *Glucksberg.* In *Glucksberg*, the Supreme Court declared that the right to assisted suicide is not deeply rooted in the Nation's history and tradition because "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The Court concluded that the plaintiffs had failed to allege "concrete examples" in support of a fundamental right to assisted suicide, noting that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to

[3] Deborah J. Shields et al., U.S. Department Of Agriculture (USDA), *Survey Results Of The American Public's Values, Objectives, Beliefs, And Attitudes Regarding Forests And Grasslands: A Technical Document Supporting The 2000 USDA Forest Service RPA Assessment* 25 (2002), https://www.fs.fed.us/rm/pubs/rmrs_gtr095.pdf; *see also* Carl Brown, *See America First: Public Opinion and National Parks*, Roper Center, https://ropercenter.cornell.edu/see-america-first-public-opinion-and-national-parks (last visited Oct. 18, 2021).

assist a suicide." *Id.* at 710. Here, by contrast, legislators and courts have taken special care to protect the right to wilderness access, and several states have enshrined the right to access wild, natural lands in their state constitutions.[4]

The fact that some legislative enactments cited by plaintiffs specifically anticipate "multiple uses" of federal lands is entirely consistent with plaintiffs'

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[4] FLA. CONST. art II, § 7(a) ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty."); HAW. CONST. art. XI, § 1 (The state "shall conserve and protect Hawaii's natural beauty and all natural resources"); ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."); LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved . . . "); MASS. CONST. art. XCVII, *repealed by* MASS. CONST. amend. art. XLIX ("The people shall have the right to . . . natural, scenic, historic, and esthetic qualities of their environment."); MICH. CONST. art. IV, § 52 ("The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern."); MONT. CONST. art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); N.M. CONST. art. XX, § 21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest."); N.Y. CONST. art. XIV, § 4 ("The policy of the state shall be to conserve and protect its natural resources and scenic beauty."); N.C. CONST. art. XIV, § 5 ("It shall be the policy of this State . . . to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty."); PA. CONST. art. 1, § 27 ("Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."); R.I. CONST. art. I, § 17 (The people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values"); UTAH CONST. art. XVIII, § 1 ("The Legislature shall enact laws to prevent the destruction of and to preserve the Forests on the lands of the State."); VA. CONST. art. XI, § 1 ("[T]he people have . . . the use and enjoyment for recreation of adequate public lands, waters, and other natural resources").

articulation of a fundamental right to wilderness as deeply rooted in the Nation's history and traditions. Answering Brief at 38-39. Congress' near universal requirement that one of those "multiple uses" for federal lands include recreation and personal enjoyment preserved for future generations provides yet further support for the deeply rooted nature of the right. Ariel Strauss, *An Enduring American Heritage: A Substantive Due Process Right to Public Wild Lands*, 51 ENVTL. L. REP. 10026, 10032 (2021). Even these multiple-used statutes assume reasonable access to wild lands, and it is defendants' failure to ensure plaintiffs' right of access that makes this court's recognition of the fundamental right to wilderness all the more urgent. *See* Opening Brief 42-46.

3. The right to wilderness is implicit in our scheme of ordered liberty.

The right to wilderness predates even the Constitution, with the Framers having relied heavily on John Locke's theory of social contract, which required a state of nature—or wilderness—to exist so that persons might meaningfully consent to the social contract. Jeffrey S. Koehlinger, Note, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 732-33 (1990). Given that wilderness is a key component of the social contract on which the nation was founded, it is clear that the right to wilderness is a precondition to exercising the right to be let alone, and is "implicit in the concept of ordered liberty, such that neither liberty nor justice

would exist if [that heritage] were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citation omitted).

Far from asserting a "general" constitutional right "to be let alone by other people," Answering Brief at 33, or an "interest in avoiding unwanted communication[,]" *Hill v. Colorado*, 530 U.S. 703, 716 (2000), plaintiffs assert a right to be free from government intrusion in particular, and specifically those government actions and omissions that promote carbon-emitting industries, exacerbate the climate crisis, and destroy the national wilderness heritage, leaving plaintiffs no means by which they may meaningfully and safely consent to the social contract. Opening Brief at 6. Nor do plaintiffs claim a right to a "specific type of environment," but rather, a right to the continued existence of a self-sustaining wilderness in which they may safely exercise their fundamental right to be left alone. Answering Brief at 29.

Defendants argue that plaintiffs cannot rely on the fundamental right to be let alone "because no such right exists." Answering Brief at 32. Yet in *United States v. Munoz*, this court specifically acknowledged such a right, and furthermore, that "one of the primary purposes of our national parks" is to allow the expression of that "fundamental right to be left alone." *United States v. Munoz*, 701 F.2d 1293, 1298 (9th Cir. 1983). Contrary to the plain language used by this court, defendants claim this court's reference to the "fundamental right to be left

alone" was merely a stand-in for an "expectation of privacy." Answering Brief at 34-35. But this court's specific allusions to rights-based language in support of the right to be left alone, including Justice Douglas's essay "Wilderness and Human Rights,"[5] only further demonstrate that the court's use of the term of art "fundamental right" was intended to mean just that.

Similarly, defendants dismiss Justice Brandeis's declaration in *Olmstead v. United States*, that the Framers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," on the basis that Justice Brandeis did not opine as to whether the wire tap at issue in the case had violated such a fundamental right. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). But the answer to that question has no bearing on whether or not this "most comprehensive of rights" exists, with Brandeis having clearly concluded in the affirmative on that count.

Defendants' reliance on *Picou v. Gillum* for the proposition that "there is no broad legal or constitutional 'right to be let alone' by government" is also

[5]*Munoz*, 701 F.2d at 1298 n.10 (quoting JUSTICE WILLIAM DOUGLAS, WILDERNESS AND HUMAN RIGHTS, WILDERNESS: AMERICA'S LIVING HERITAGE 15 (D. Brower ed. 1961) ("Those Human Rights include the right to put one's face in clear, pure water, to discover the wonders of sphagnum moss, and to hear the song of whippoorwills at dawn in a forest where the wilderness bowl is unbroken.").

misplaced, as the plaintiff in that case claimed a right to be free from governmental regulation, whereas plaintiffs here seek a right to be free from government-sanctioned, catastrophic climate change impact upon wilderness, as enabled in large part by a *lack of government regulation. Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989); Opening Brief at 46. In *Picou*, the plaintiff challenged the constitutionality of a motorcycle helmet law, seeking to evade compliance with the law under the guise of asserting a right to be left alone. *Picou*, 874 F.2d at 1521. Plaintiffs, on the other hand, aim to hold the government accountable for its own failure to comply with the law through its promotion of carbon-emitting industries and destruction of the American wilderness heritage.

Contrary to defendants' claims, the federal government has affirmatively exacerbated the catastrophic climate change impacts on wilderness through their subsidization, promotion, and encouragement of fossil fuel development, animal agriculture, and commercial logging on federal lands. That defendants continue to pursue exploitative policies that impose an existential threat upon the national wilderness heritage is enough to shock the conscience. Plaintiffs require wilderness for the meaningful expression of their rights to individual liberty and autonomy and have suffered injuries as a result of defendants' actions and inactions, which have failed to mitigate the impacts of climate change on wilderness.

B. Plaintiffs have not forfeited the state-created danger argument.

Whether the state-created danger doctrine applies to the facts of the case is not a jurisdictional question. The lower court did not address the application of the doctrine to the facts of this case for that reason. Yet defendants argue that plaintiffs have forfeited the state-created danger argument, erroneously citing to *Indep. Towers of Wash. v. Washington*, a case that came to this court on appeal at the motion for summary judgment stage, with the district court having already made a ruling on the merits of the issue in question. *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). Here, no such ruling on the merits concerning the necessity of affirmative government action has occurred here; accordingly, the plaintiffs waived nothing when they did not raise the state-created danger exception in the opening brief. If the plaintiffs prevail on this appeal, they have a right to raise the state-created danger exception on remand.

Should the court nonetheless decide to take up the state-created danger exception at this juncture, the exception readily applies to the facts of the case. Plaintiffs adequately allege that defendants acted with deliberate indifference in authorizing, subsidizing, permitting, and promoting fossil fuel development, animal agriculture, and commercial logging of old-growth forests on federal land, which have exacerbated climate change impacts to such a degree as to increase the danger faced by plaintiffs when they exercise their right to be let alone on federally protected wild land. ER-182-94. This court has held government officials liable,

"*in a variety of circumstances*, for their roles in creating or exposing individuals to danger they otherwise would not have faced." *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1062 (9th Cir. 2006) (emphasis added). As for defendants' contention that the "danger creation" exception lies only when that danger involves "a specific person known to that official," once again, their position only finds support in a *dissenting* opinion. *Pauluk v. Savage*, 836 F.3d 1117, 1129-30 (Murguia, J., concurring in part and dissenting in part). The majority view is that whether "the danger-creation theory extend[s] to threats to the general public," remains an open question. *Huffman v. Cty. of Los Angeles,* 147 F.3d 1054, 1061 (9th Cir. 1998); *Doe v. Round Valley Unified Sch. Dist.,* 873 F. Supp. 2d 1124, 1135 (D. Ariz. 2012).

Conveniently, defendants ignore the most analogous danger-creation case in its motion. In *Juliana v. United States,* Judge Aiken refused to dismiss the plaintiffs' state-created danger claim because they adequately alleged that the government played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that the defendants failed to correct or mitigate the harms they helped create. *See, Juliana v. United States,* 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) [hereinafter *Juliana I*]. The Complaint at issue in this case alleges sufficient facts to establish these factors also. ER-197-233.

C. Plaintiffs pled sufficient facts to demonstrate they have standing to pursue redress of their constitutional injuries.

This court reviews the district court's dismissal of plaintiffs' complaint for lack of jurisdiction *de novo*. *Southcentral Found v. Alaska Native Tribal Health Consortium,* 983 F.3d 411, 416-417 (9th Cir. 2020). In considering a motion to dismiss, a reviewing court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Critically, "general allegations of fact" are sufficient at the pleading stage because each allegation is presumed to "embrace those specific facts that are necessary to support the claim." *Id*. (internal citations omitted). Under this standard, plaintiffs' complaint sufficiently articulated the concrete and particularized injuries they suffered and will continue to suffer, ER 182-94, due to the government's efforts to hasten and worsen the climate crisis, ER 198-200, 214, 221, 225-26, and defendants provide no meaningful rebuttal on this point. *See* Answering Brief at 7-9.

The court is now presented with two questions of law: first, whether it is possible for any American to suffer a non-generalized injury because of the climate crisis; and second, whether plaintiffs must identify remedies that comprehensively and completely reverse the climate crisis to obtain judicial relief for their constitutional injuries.

1. Defendants' actions to hasten and worsen the climate crisis harm plaintiffs in concrete and particularized ways.

In *Juliana v. United States*, this court held, "It does not matter how many persons have been injured if the plaintiffs' [climate-related] injuries are concrete and personal. The fact that a harm is widely shared does not necessarily render it a generalized grievance." *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020) (internal citations omitted) [hereinafter *Juliana II*]. The district court's pre-*Juliana II* decision erroneously deemed it impossible for an individual plaintiff to establish a concrete and particularized injury caused by the climate crisis. ER-5 ("Because the harm Plaintiffs seek to redress is a diffuse, global phenomenon that affects every citizen of the world, Plaintiffs' harm is not individualized [*sic*] and they lack standing").

Defendants agree that the *Juliana II* decision is controlling precedent on this issue and therefore make no effort to distinguish this court's holding in *Juliana II* from the district court's decision in this case. Answering Brief at 8 (conceding "the [c]ourt need only consider whether [p]laintiffs' alleged harms are redressable."). Rather, the government focuses its brief on the second question before this court, whether plaintiffs' injuries are redressable. *Id.*

2. At a minimum, the requested remedies would partially redress plaintiffs' injuries.

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*." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis added). The Supreme Court has addressed the role of partial redressability in the context of climate change. In *Massachusetts v. EPA,* the Supreme Court reversed the lower court's decision to dismiss the State's challenge to the Environmental Protection Agency's denial of a rulemaking petition for lack of standing. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007). Writing for the majority, Justice John Paul Stevens found that Massachusetts had standing to seek judicial review of the agency's denial. *Id.* at 517. The State's injury-in-fact was the potential loss of its coastal lands to rising sea levels. *Id.* at 518-23. In dissent, Chief Justice John Roberts protested that Massachusetts had failed the redressability test. *Id.* at 541-46 (Roberts, C.J., dissenting). The State had not demonstrated that the proposed regulation of new motor vehicle emissions in the United States would redress Massachusetts' claimed injury, the loss of coastal lands. *Id.* Eighty percent of greenhouse gas emissions already originate outside the United States, the Chief Justice noted; thus, almost mirroring defendants' position in this case, Justice Roberts argued that Massachusetts' injury was too conjectural and too contingent on the behavior of third parties to satisfy the redressability prong of Article III. *Id.*

at 545-46. According to Justice Roberts, oceans would still rise, and Massachusetts would still lose coastal land, even if the EPA granted the rulemaking petition. *Id.*

That might be true, responded Justice Stevens, but the state would not lose *as much* land as it otherwise would. *Id.* at 525-26 (majority opinion). According to the majority, when it comes to climate change, redressability must be viewed as a matter of degree rather than an all-or-nothing proposition. Rather than ask whether a proposed remedy is likely to reverse the process of climate change completely, Justice Stevens asked whether the remedy was likely to lead to some diminution or slowing of climate change. *Id.* at 526. ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."). Even if a reduction in domestic emissions only caused a modest slowing in the process of climate change, that would also bring a small decrease in the risk that any coastal lands would be lost. That, in turn, would constitute redress—however partial.

Defendants ask the court to ignore this precedent by requiring plaintiffs to identify comprehensive remedial measures that would completely reverse the climate crisis to meet Article III's test for redressability. **Nothing in the history of American jurisprudence requires such an extreme test.** To be sure, if black students in Topeka, Kansas had been required to demonstrate that school

integration would reverse systemic racism entirely, surely they would have lost. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

At the same time defendants articulate such an extreme test, they ultimately concede that the discrete remedies plaintiffs seek would at least partially redress plaintiffs' injuries. Answering Brief at 12 ("Plaintiffs' requested remedy will slow or reduce emissions in some unspecified and unpredictable amount."). Defendants' position illustrates why this case must be remanded to the district court for a full investigation of plaintiffs' claims, as the parties agree that the remedies plaintiffs seek will slow or reduce greenhouse gas emissions to some extent, and plaintiffs allege that this reduction would alleviate their injuries. ER-230.

In this circumstance, plaintiffs are entitled to a full vetting of their evidence at trial to demonstrate with specificity and predictability how their demand for an end to government-funded, exploitative, carbon-producing activities on federal lands will not only reduce the impacts of climate change but also potentially restore wild lands to their full natural potential as carbon sinks. Dismissal was inappropriate.

D. This court has subject matter jurisdiction over plaintiffs' claims, which present a federal question ripe for judicial review.

The Supreme Court has articulated several "justiciability" doctrines emanating from Article III that restrict when federal courts will adjudicate "cases and controversies," such as standing, ripeness, mootness, and the prohibition

against issue advisory opinions. *See Allen v. Write,* 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.") (quoting *Vander Jagt. v. O'Neill,* 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). These "justiciability" doctrines are rooted in both constitutional and prudential considerations and evince respect for separation of powers, including the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). The district court and defendants invoked the standing and political question doctrines to support dismissal of plaintiffs' constitutional claims on justiciability grounds. Having addressed plaintiffs' right to standing above, we address the political question doctrine below.[6]

When considered in the aggregate, defendants argue that plaintiffs cannot challenge government conduct if the challenge involves hard political questions

[6] The district court articulated the test for the political question doctrine and then applied it to dismiss plaintiffs' claims. ER-10. Defendants acknowledge this fact but also push the court to uphold the dismissal on jurisdictional grounds using an indiscernible and imprecise test that asks the same questions posed in *Baker v. Carr,* 369 U.S. 186 (1962). Answering Brief at 22-24.

about policy implementation. But it is important to distinguish the political question doctrine of nonjusticiability from cases presenting political issues. **Courts adjudicate controversies with political ramifications on a regular basis.**[7] For example, the Supreme Court has held that certain electoral processes deny citizens the right to vote based on their skin color, *Terry v. Adams*, 345 U.S. 461, 470 (1953), and has upheld a subpoena directed against the President of the United States. *U.S. v. Nixon*, 418 U.S. 683, 716 (1974). Both decisions necessarily had political consequences. Instead, the concept of separation of powers applies to issues that courts determine are best resolved within the politically accountable branches of government—Congress or the Executive Branch. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

Upon examination of plaintiffs' discrete remedial requests, defendants' concerns about executive overreach fall apart. Under current law and within the context of enforceable Congressional policy, the Executive Branch has authority and power to implement the remedies plaintiffs seek. Indeed, when plaintiffs first filed their lawsuit in 2018, they directly challenged the constitutionality of then-

[7] Internationally, foreign countries are far ahead of the United States in mastering this nuance. *See* HR 20 December 2019, ECLI:NL:HR:2019:2007 (Urgenda Foundation/State of Netherlands); BVerfG, Beschluss des Ersten Senats [Order of the First Senate] Mar. 24, 2021, 1 BvR 2656/18, paras. 1-270 (Ger.); Friends of the Irish Env. v. Gov't of Ireland, et al. [2020] IESC 49 (Ir.); Tribunal de Première Instance [Civ.] [Tribunal of First Instance] 4th Chamber, June 17, 2021, 2015/4585/A (Belg.); and CE July 1, 2021, No. 427301 (Fr.).

President Trump's Executive Order 13783, which promoted "energy independence" and "economic growth" by ordering United States executive departments and agencies to immediately review existing regulations that "potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources." Exec. Order No. 13783 (2017). President Trump's cabinet acted swiftly and effectively to open the Nation's federal lands and coastal waters to an unprecedented expansion of fossil fuel development and extraction.

The current administration can end these harmful, climate-damaging policies through similar executive acts. Notably, President Biden has already issued an executive order rescinding Executive Order 13783 and separately directing the U.S. Department of the Interior to halt new oil and natural gas leases on public lands and waters. Exec. Order Nos. 13990 (2021), 14005 (2021).

Defendants' apparent concerns about commercial logging companies and ranchers is similarly misplaced, as the U.S. Departments of Agriculture and Interior could issue rules protecting old-growth forests and high desert ecosystems from harmful practices within months of a court-order directing them to do so. While it is true that the USDA's Forest Service must comply with The Multiple Use-Sustained Yield Act of 1960, nothing in the Act *requires* that the Forest

Service permit the logging of old growth forests. 16 U.S.C. §§ 528-531. Similarly, the Federal Land Management Policy Act ("FLMPA") does not mandate that the Bureau of Land Management ("BLM") destroy natural ecosystems each year to facilitate the conversion of native deserts into *new* rangeland for cattle. 43 U.S.C. §§ 1701-1787. To the contrary, FLMPA requires that permits and leases for domestic livestock grazing on public lands expire every ten years and authorizes the BLM to retire licenses permanently in accord with a valid range management plan. 43 U.S.C. § 1752. In addition, no court has ever elevated the interests of private permit holders over the constitutional rights of American citizens, as defendants ask this court to do here.

The district court has the power to review defendants' actions to determine whether they have intentionally or negligently worsened the climate crisis. The district court also has authority to enjoin defendants to end fossil fuel development, commercial logging of old-growth forests, and animal agriculture on federal lands. Plaintiffs are entitled to a full vetting of their claims, so they can prove that defendants can and must do better to "best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). The court should reverse the district court and find that plaintiffs pled a justiciable case or controversy within the court's power to adjudicate.

III. Conclusion

Based on the foregoing, plaintiffs respectfully request that the court reverse the district court's judgment dismissing plaintiffs' claims with prejudice and remand for further litigation.

Respectfully submitted this 19th day of October 2021,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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