Case No. 24-684

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Defendants,
v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE,
Respondent,
and

KELSEY CASCADIA ROSE JULIANA, et al.,
Real Parties in Interest.

On Petition for a Writ of Mandamus in No. 6:15-cv-1517-AA

AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS IN SUPPORT OF REAL PARTIES IN INTEREST

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***AMICI CURIAE* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST**

I. IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

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

- Senators. Jeff Merkley of Oregon, Cory A. Booker of New Jersey, Edward J. Markey of Massachusetts, Bernard Sanders of Vermont, Chris Van Hollen of Maryland, Sheldon Whitehouse of Rhode Island, and Ron Wyden of Oregon.
- Representatives. Jan Schakowsky of Illinois, Nanette Diaz Barragán of California, Earl Blumenauer of Oregon, Jamaal Bowman of New York, Julia Brownley of California, Cori Bush of Missouri, André Carson of Indiana, Steve Cohen of Tennessee, Adriano Espaillat of New York, Raul Grijalva of Arizona, Eleanor Holmes Norton of the District of Columbia, Jared Huffman of California, Ro Khanna of California, Barbara Lee of California, Summer Lee of Pennsylvania, Betty McCollum of Minnesota, Delia Ramirez of Illinois, Mary Gay Scanlon of Pennsylvania, Rashida Tlaib of Michigan, Nydia M. Velázquez of New York, Bonnie Watson Coleman of New Jersey, Frederica Wilson of Florida, and Alexandria Ocasio-Cortez of New York.

[1] All parties consented via email to the filing of this brief. No party's counsel authored this brief, and no party, party's counsel, or other person contributed money for the preparation or filing of this brief.

As members of Congress, we serve the citizens of the United States. U.S. Const. art. I, § 1. These Youth Plaintiffs are among the youngest generation and the most vulnerable citizens of our country, and since they cannot vote, depend upon each branch of government to act in their best interests when exercising authority. Sadly, at this time each branch is failing to uphold this intergenerational trust in the face of the climate crisis. *Amici*, therefore, have a strong interest in ensuring that all three branches of the federal government comply with the unique and vital roles each plays in upholding the United States Constitution under our divided system of government. We affirm the duties of the federal judiciary to assess the constitutionality of the conduct of its coequal branches to provide appropriate redress, including declaratory relief, and the vital role that our system of checks and balances plays in the healthy functioning of our democracy, ensuring each branch respects the fundamental rights of the people. *Amici* recognize the Youth Plaintiffs' fundamental rights and respectfully ask this Court to grant these children a trial to present their case and secure their constitutional rights to life, liberty, property, and public trust resources.

II. SUMMARY OF ARGUMENT

We, members of Congress, believe that these Youth Plaintiffs' fundamental rights to life, liberty, and property, and the access to the essential resources they need to survive are being stripped by a man-made climate crisis caused, in large

part, by our nation's perpetuation of "carbon emissions from fossil fuel production, extraction, and transportation." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020). All three branches of government have "more than just a nebulous 'moral responsibility' to preserve the Nation." *Id.* at 1177 (Stanton, J., dissenting).

The executive branch's duty is to marshal at trial what evidence it can to counter the overwhelming record that has already led this Court to conclude that the government's actions are causing injury to the Youth Plaintiffs, rather than use procedural tactics to avoid this task. The executive branch should cease its extraordinary and oppressive efforts, examined below, to silence Youth Plaintiffs efforts to vindicate their Constitutional rights.

This Court, as the relevant representative of the judicial branch, should deny the government's petition for writ of mandamus, an "extraordinary remedy, which should only be used in exceptional circumstances,"[2] that would halt the case from proceeding to trial. Such denial would allow the trial court to exercise its duty as a neutral arbiter, not influenced by majoritarian politics, to assess the conduct of its coequal branches and evaluate the constitutionality of the conduct that violates the fundamental rights of these children and future generations.

We, as members of the legislative branch, will continue to play our role in creating more powerful tools to combat climate change.

[2] U.S. Dep't of Just., Just. Manual, Civil Resource Manual § 215.

III. ARGUMENT

A. The executive branch's effort to protect the United States government has prevented Youth Plaintiffs' from their day in court and their access to a livable future.

In this case, the executive branch has filed seven petitions for writ of mandamus,[3] an unprecedented measure that has delayed Youth Plaintiffs access to the courts so that a court can hear Plaintiffs' claims. This effort is unique among the more than 40,000 cases the Department of Justice ("DOJ") is defending. The Congressional Research Service confirmed that the government filed more petitions in this case than in any case of public record.[4]

What's more, the record reflects that this oppressive motion practice was intended to deny plaintiffs access to federal courts. Then Deputy Assistant Attorney General Eric Grant, who argued on December 11, 2017, in front of a Ninth Circuit panel on Defendants' first petition for writ of mandamus, later stated:

> "My number one priority from Day One was to kill Juliana v. United States."

Climate Change Litigation for Kids: Juliana v. United States, The Federalist Society, at 5:26-5:33 (Dec. 6, 2022),

[3] Petition for a Writ of Mandamus and Opposed Motion for a Stay of Proceedings, *United States v. U.S. Dist. Ct.* (No. 24-684), DktEntry 1.1.
[4] Congressional Research Service Memorandum to Representative DeGette (Apr. 20, 2022). Congressional Research Service email to Representative Casten (Jan. 26, 2024).

https://www.youtube.com/watch?v=gAw1Uvcq9zk. Acknowledging the unprecedented number of petitions he stated "[T]he 9th Circuit's opinion, 2018 opinion, denying mandamus goes through some of the statistics to **show how rare that kind of relief is**." *Id.* at 23:16-23:26 (emphasis supplied). He concluded, "[F]or us to have to file four [petitions] in the Court of Appeals and one in the U.S. Supreme Court, **yeah, that's crazy, that's not normal**." *Id*. at 23:27-23:38 (emphasis supplied). Sadly, the current DOJ is continuing, rather than changing, this highly unusual motion practice.

For the government to argue, as it does now, that mandamus is appropriate because of costs to the government is ironic given it is the government's strategy that has imposed the costs in time and resources of which the government complains. Joseph Stiglitz, Nobel laureate economist and Columbia University professor notes that the argument that the DOJ (or even the federal government) is somehow "'**irreparably harmed**'" is a "**ludicrous argument.**"[5] (emphasis supplied)

Professor Stiglitz explains that the government's litigation costs are minor compared to its $20.5 billion subsidy to the fossil fuel industry and is feather-light

[5] Declaration of Joseph E. Stiglitz, Ph.D., in Support of Response Brief of Real Parties in Interest to Motion for a Stay of Proceedings, DktEntry 7.3.

on justice's scales when weighed against the costs that the government's tactics have imposed on Youth Plaintiffs and their generation:

> **[T]he true irreparable harm is the approximate cost of climate disasters or other climate economic harm** since this case began and even since the first trial in this case was stopped in October 2018 and through the end of 2023, along with any **projections of the range of harm going forward . . . .** The cost of delay to these young Plaintiffs and the public interest is enormously high. (emphasis supplied)

In sum, the executive branch's proper course is to proceed to trial.

B. The Court must exercise its duty as neutral arbiter to assess the constitutionality of the conduct that violates the Youth Plaintiffs' fundamental rights to life, liberty, and property

The Youth Plaintiffs have presented compelling evidence to suggest that climate change is a grave impending threat and that the United States is a significant contributor of harmful greenhouse gas emissions. *See Juliana*, 947 F.3d at 1169. Given the overwhelming evidence in the record that Defendants' conduct perpetuates the present climate change crisis, the Court has a duty to assess the constitutionality of the government's conduct. *See Marbury v. Madison*, 5 U.S. 137, 163, 177 (1803).

When the conduct of the political branches is at issue, the Court cannot defer to those branches to redress the Youth Plaintiffs' injuries. *See Obergefell v. Hodges*, 576 U.S. 644, 676-77 (2015). It is the "province and duty" of the federal judiciary to "say what the law is" in cases alleging constitutional violations by the executive

and legislative branches and to remedy those violations when identified. *Marbury*, 5 U.S. at 177.

History shows that, left to their own devices, the political branches have become entrenched and incapable of devising a plan to respond to the current consequences and future threat caused by climate change. If the Court fails to fulfill its duty to interpret the law, these American children will be left with an uncertain future marked with loss and destruction. Moreover, expecting the judiciary to "close their eyes" to constitutional violations by the political branches would give those branches a "practical and real omnipotence" that upsets our deep-rooted system of checks and balances. *Id.* at 178.

The judiciary's vested role in remedying an imbalance of power has been especially significant in cases, like this one, alleging systemic constitutional deprivations. *See e.g.*, *Brown v. Bd. of. Educ.*, 349 U.S. 294 (1955); *Brown v. Plata*, 563 U.S. 493 (2011); *Hills v. Gautreaux*, 425 U.S. 284 (1976). In such cases, the judiciary's power to declare fault is particularly important. *See e.g.*, *Marbury*, 5 U.S. 137; *Brown v. Bd. of Educ.*, 349 U.S. 294. The availability of such declaratory relief is sufficient to invoke the Court's duty to decide constitutional claims. *See Franklin v. Massachusetts*, 505 U. S. 788, 803 (1992).

As decades of evidence in the record show, the political branches predominantly choose short-term economic gains rather than face the difficult task

of solving the issue of climate change head-on. As a result, the problem has exponentially worsened. The judiciary should assess the Youth Plaintiffs' claims in an impartial manner based solely on the evidence. As one of the three coequal branches, the judiciary has the duty to maintain the balance of power and protect our Nation's youth when the other branches infringe their constitutional rights.

IV. CONCLUSION

Judge Stanton, dissenting in an earlier round of litigation before this Court queried, "Where is the hope in today's decision?" *Juliana,* 947 F.3d at 1191 (Stanton, J., dissenting). With remarkable prescience she further asked "[w]hen the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?" *Id.*

Four years after this dissent, extreme cold and heat waves, flooding and droughts and horrific wildfires—climate change's scourge—are no longer a potential threat. They are the current reality and present a substantial crisis. As the climate crisis worsens, our Nation's youth and future generations will suffer disproportionately from these impacts. For decades, the Defendants have known the risks of fossil fuel use and increasing carbon dioxide emissions and have failed to take action to curb those risks. Instead, they continue to take affirmative actions to compound those risks.

Our Nation's youth, the group *most* impacted by the climate crisis, is powerless to elect officials and has no voice in the political branches. Because these branches, unaccountable to the Nation's youth, have failed in their responsibility to curtail the effects of the climate crisis, the Court must step in and assess the constitutionality of the conduct of its coequal branches and protect these children's rights to life, liberty, and property.

Amici supports the protection of the Youth Plaintiffs' fundamental rights under the Constitution. We respectfully ask the Court to deny the government's seventh petition for mandamus. Such action by this Court would grant these Youth Plaintiffs an opportunity to present their evidence, to secure their constitutional rights, and to save their Nation.

Respectfully submitted this 28th day of March, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) No. 24-682 and No. 6:15-cv-1517-AA

I am the attorney or self-represented party.

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Signature *s/Eric Laschever* **Date** March 28, 2024
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system. Participants in the case who are registered users will be served by the appellate ACMS system.

Date: March 28, 2024

/s/ Eric Laschever
Eric Laschever