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

BRIEF OF LEAGUE OF WOMEN VOTERS OF THE U.S., LEAGUE OF WOMEN VOTERS OF OREGON, AND NATIONAL CHILDREN'S CAMPAIGN AS AMICI CURIAE IN SUPPORT OF APPELLEES'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, amici curiae League of Women Voters of the United States, League of Women Voters of Oregon, and National Children's Campaign each states that it is a nonprofit corporation and does not have a parent corporation, and that no publicly held companies hold 10% or more of its stock.

STATEMENT PURSUANT TO FED. R. APP. P. 29

Amici have received the consent of all parties to file 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.

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IDENTITY AND INTEREST OF AMICI CURIAE

The League of Women Voters of the United States ("LWVUS") is a grassroots, nonpartisan, nonprofit organization that encourages informed, active, and inclusive participation in government in order to promote political responsibility and to forward democratic principles of *all* peoples of the United States, including underrepresented groups.

LWVUS believes that climate change is the greatest environmental challenge of our generation and that averting the damaging effects of climate change requires actions from both individuals and governments at local, state, regional, national and international levels. LWVUS supports legislative solutions and strong executive branch action and works to build support for action on climate change nationally, at the state and local levels, and internationally to avoid irrevocable damage to our planet.

The League of Women Voters of Oregon ("LWVOR") is also a grassroots, nonpartisan, nonprofit organization. LWVOR shares LWVUS's primary mission and focus of ensuring effective representative government through voter registration, education, and mobilization, and works to ensure that the voices and interests of all individuals, particularly those underrepresented in government, are spoken and accounted for in political decision-making. LWVOR also works to advocate for sound environmental policy. Since the 1950s, LWVOR has been at

the forefront of efforts to protect air, land, and water resources. LWVOR's Social Policy directs members to secure equal rights and equal opportunity for all, as well as promote social and economic justice and the health and safety of all Americans. LWVOR believes that climate change is one of the most serious threats to the environment, health, and economy of our nation.

The direct impact that climate change has on the physical well-being of some of our most underserved communities is often times unspoken. This means that children are among the most impacted by the effects of climate change. LWVUS and LWVOR ("the Leagues") are working to address the practices that are harming our communities by creating policies that protect public health for all people no matter their race, age, or socioeconomic background.

Focused as they are on engaging citizens to participate in the democratic process to ensure that the interests of *all* Americans are represented in a transparent, participatory, and politically accountable government, and respecting the proper role of each branch of government, the Leagues direct their limited efforts at effectuating change primarily though the legislative and executive branches. However, where appropriate in certain limited circumstances, the Leagues recognize that judicial involvement is necessary to safeguard the fundamental rights of underrepresented individuals when the other branches of government have failed them. In limited circumstances such as those presented in

this action, amici participate in litigation to ensure that the interests of representative democracy are served.

Amicus curiae National Children's Campaign is a national, nonpartisan, nonprofit organization that serves as a catalyst to inspire and empower America to make children a priority by promoting health, education, safety, economic and environmental security through the power of media, grassroots, internet partnerships, business and community leaders, celebrities and subject matter experts.

Amici believe that this case is exceptionally important and warrants *en banc* review to clarify the proper role of the courts to redress the injuries the government is causing these young Americans. FRAP 35(a)(2).

ARGUMENT

Amici Curiae respectfully request this Court accept *en banc* review to correct the redressability analysis of the majority decision, which contravenes longstanding precedent and abdicates the judiciary's duty to safeguard fundamental rights, particularly those of children without voting power.

The youth plaintiffs assert that, with longstanding knowledge of the dangers, the federal government has affirmatively and substantially contributed to the climate crisis by perpetuating a fossil fuel energy system, endangering the youth plaintiffs in violation of their constitutional rights. Given the age of many of the

youth plaintiffs and the political branches' historic and ongoing conduct with respect to climate change, these children cannot rely on the representational political process to safeguard their fundamental rights. The youth plaintiffs' only redress is through the judiciary. In concluding that the courts can offer no relief to these children, the majority decision effectively denies the youth plaintiffs of *any* redress of their injuries.

The courts can and should redress claims asserted by the politically powerless regarding infringement of their fundamental rights. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As explained by Dr. James Hansen,[1] "[i]mminent action is required to preserve and restore the climate system such as we have known it in order for the planet as we have known it to be able to continue adequately to support the lives and prospects of young people and future generations." *Juliana v. United States*, No. 6:15-cv-01517-AA, Dkt. 274-1, 50 (D. Or June 28, 2018) (Expert Report of James Hansen). Given the evidence before the court of the urgency of the climate crisis, telling these children who cannot vote

[1] Dr. Hansen is the former Director of the NASA Goddard Institute for Space Studies and current Adjunct Professor at Columbia University's Earth Institute, where he directs the University's Climate Science Program.

that their only recourse is with the very political branches responsible for their endangerment is itself a violation of the separation of powers.

I. The Separation of Powers Requires the Courts to Redress Violations of Children's Fundamental Rights Caused by the Political Branches.

The Constitution protects the fundamental rights of children as much as it does the rights of adults. Where the legislative and executive branches have, as here, actively infringed upon those rights, the separation of powers concerns mandate that the judiciary fulfill its role to serve as a check and balance to protect the rights of these individuals. *Marbury*, 5 U.S. (1 Cranch) at 163 ("every right, when withheld, must have a remedy, and every injury its proper redress."). The majority's decision fails to square the fundamental rights at issue here with the courts' role to protect those rights consistent with the separation of powers in our government.

The Constitution articulates three separate branches of our government, but "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST NO. 48 (James Madison). The separation of powers requires that each department be independent from the others, but each must also "by their mutual relations, be the means of keeping each other in their proper

places." THE FEDERALIST NO. 51. "The declared purpose of separating and dividing the powers of government, of course, was to diffuse power, the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (internal quotations omitted). Rather than sheltering the executive and legislature, the system was "deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Id.* at 722.

Here, the political branches are alleged to be violating the youth plaintiffs' fundamental rights. The Constitution secures freedom in the right "not to be injured by the unlawful exercise of governmental power." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). The majority's decision improperly narrows the courts' role to act as a check on the unlawful exercise of governmental power.

Further, the majority tells these children they must seek relief from the very branches of government that are causing their injury. Yet the U.S. Supreme Court has long held that "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Obergefell*, 135 S. Ct. at 2606 (quoting same). Fundamentally, the separation of powers demands that "the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to

invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979).[2]

Redress properly lies with the judiciary not only because the political branches are the source of plaintiffs' constitutional violations, but also because the youth have no voice in representational government: they cannot vote. Children's voices in representational government are diminished and as a result, they must be protected by the courts from the impositions of the majority. *See* John Edward Davidson, *Tomorrow's Standing Today*, 28 COLUM. J. ENVTL. L. 185, 215 (2003) (arguing that youth without a vote are akin to a political minority, unable to pursue their goals through the political process). *See also*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 27 SUFFOLK U. L. REV. 881, 895 (1983) (framing standing as requiring a plaintiff to establish a "basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection," justifying judicial intervention).

The executive and legislative branches of the federal government are continuing to make decisions today that the evidence shows discount the future and exploit future generations. Yet elected representatives are not accountable to youth who did not elect them. Consistent with their duties under the system of separated

[2] The Supreme Court recently reviewed *Davis* and confirmed this holding remains good law as it relates to equitable relief—as opposed to damages—for constitutional violations. *See Hernandez v. Mesa*, __ S. Ct. ___ (Feb. 25, 2020).

powers, our nation's courts have provided redress to protect the right to vote. The political franchise of voting is "regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Without the ability to vote, many of these youth plaintiffs' rights are more often and more easily violated when the political branches make decisions about climate change. Judicial redress is all the more appropriate here where youth lack any voting power to protect themselves from the political branches' ongoing role in the destruction of the climate system, the stability of which is likewise "preservative of all rights."

Not only are the political branches unaccountable to children who cannot vote, they are apparently unwilling to act in the interest of preserving the youth plaintiffs' constitutional rights. As noted by Magistrate Coffin below, the separation of powers calls upon the court to decide the merits of this case:

> [T]he intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.

SER 552 (Findings & Recommendation on Mots. for Leave to Appeal, Judge Thomas M. Coffin (April 8, 2016)).

The fact that youth plaintiffs collectively have diminished voice and power in the political process, and the systemic nature of the alleged violations of their

rights do not prevent the judiciary from reviewing their claims, rather they call on the judiciary to exercise jurisdiction. *See Baker v. Carr*, 369 U.S. 186 (1962) (systemic disenfranchisement of voters); *Brown v. Plata*, 563 U.S. 493 (2011) (systemic conditions across state prison system); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (systemic racial injustice in schools).

The separation of powers requires the courts to "say what the law is" for the protection of individual liberty. *Nat'l Labor Relations Board v. Canning*, 573 U.S. 513, 572 (2014) ("policing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court.") (Scalia, A., concurring) (internal quotations omitted). Because "the constitutional structure of our government is designed first and foremost . . . to protect individual liberty" (*id*. at 571) the courts must exercise jurisdiction to protect the youth plaintiffs' fundamental rights.

II. The Majority Opinion Contradicts Precedent Affording Declaratory Relief to Redress Violations of the Fundamental Rights of Children.

Youth plaintiff's claims for constitutional protection are redressable by the courts. "A child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion). A declaration of the children's rights in this case will provide relief, rendering the claims redressable by this court. The Supreme Court has held that children have

the right to notice and counsel under the Equal Protection Clause of the Fourteenth Amendment. *See In re Gault*, 387 U.S. 1, 41 (1967). Students, both in and out of school, have First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (declaring rights of children while expressing "no opinion as to the form of relief which should be granted" *Id.* at 514). Children may not be deprived of certain property interests without due process. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975) (finding right to a public education is a property interest, protected by the Due Process Clause).

Often, the issues presented in cases regarding the fundamental rights of children are ones of ongoing political debate and evolving societal standards. For example, in 2005 the Supreme Court concluded that minors are entitled to protections under the Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). In ruling that execution of persons under the age of eighteen would be cruel and unusual punishment, the Court reviewed the history of society's changing impressions of the death penalty. *Id*. at 561-68. Noting the "evolving standards of decency that mark the progress of a maturing society" at issue (*id*. at 561), the Court declared the constitutional rights of children under the Eight Amendment.

The question of children's rights in schools and the requirement to salute the flag provides another example of the redressability of injury to fundamental rights of children, even where a complex policy issue is involved. In 1940, the Supreme Court declined to declare the compulsory flag salute an infringement of the Fourteenth Amendment, finding that "the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy . . . . That authority has not been given to this Court, nor should we assume it." *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 598 (1940), *overruled by W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Just three years later the Court overruled *Gobitis*, noting that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. The Court explained the judiciary's duty to apply fundamental rights in the modern context:

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. . . . These changed conditions often deprive precedents of reliability and cast us more

> than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40. Here, the majority improperly relied on doubt of its competence in climate science to withhold the judgment on the youth plaintiffs' liberties.

"A court declaration delineates important rights and responsibilities and can be 'a message not only to the parties but also to the public and has significant educational and lasting importance.'" *Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992) (quoting *Bilbrey v. Brown,* 738 F.2d 1462, 1471 (9th Cir. 1984)). *Bilbrey* addressed the constitutionality of searches of elementary school students. The Court found the declaration of the students' rights to be free from unreasonable search would provide redress, even though the plaintiffs-students had already gone on to high school and the defendant was no longer employed as the principal of the school, because "a declaration will serve to delineate important rights and responsibilities." 738 F.2d at 1471. Similarly, here a declaration of the parties' rights and duties will have significant importance as a first step in remedying the constitutional violations alleged. *See* Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1248-49 (1977) (explaining based on a survey of the Supreme Court's systemic constitutional cases that the courts' "first step should be to issue a form of declaratory judgment, placing the

defendants on notice of the constitutional violation" and retaining jurisdiction to determine whether defendants have remedied the violation).

Given that, at this stage in the litigation, the youth plaintiffs' burden is "relatively modest" to demonstrate redressability, the majority in this case too quickly dismissed the value of delineating rights and responsibilities that a declaration of a constitutional violation would afford to the parties. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997)). Courts may assume that "executive and congressional officials would abide by an authoritative interpretation" of the Constitution by the judiciary. *Utah v. Evans*, 536 U.S. 452, 464 (2002) (internal quotations omitted). This is particularly true where, as here, the youth plaintiffs allege a violation of their fundamental rights and where, as here, many of the children have no effective means of relief other than the judiciary for protection of their justiciable constitutional rights. As a check on the legislative and executive branches, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. At this stage in the proceedings, at minimum declarative relief is enough to meet the redressability prong of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

III. The Majority Opinion Narrows the Courts' Equitable Authority to Redress Violations of the Fundamental Rights of Children.

In finding that courts cannot fashion equitable relief for the injuries of these youth plaintiffs, the majority moved away from existing precedent of this circuit and the Supreme Court. "[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

"Children have a very special place in life which the law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The "Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State." *Bellotti*, 443 U.S. at 634. These youth plaintiffs are vulnerable to deprivations of liberty by the government because they must rely on others to advocate for them, and at the same time are directly impacted by the government's decisions and actions in furthering and responding to climate change.

Courts have long recognized actions seeking injunctive relief for violations of the Constitution, even where there is no express statutory authority for such relief. *Ex Parte Young*, 209 U.S. 123 (1908). *See also Davis v. Passman*, 442 U.S. at 242; *Bell v. Hood*, 327 U.S. at 684. As discussed above, courts can provide declaratory relief and that relief would be sufficient to satisfy the standard of redressability at this summary judgment stage. *Baker*, 369 U.S. at 198 ("[I]t is improper now to consider what remedy would be most appropriate if [plaintiffs] prevail at the trial.").

The equitable powers of the federal district courts include "a practical flexibility" in shaping remedies. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). In *Brown I*, the Supreme Court issued declaratory relief as the first step before remanding for formulation of injunctive relief. 347 U.S. at 495. After further argument on the question of relief the Court noted that "implementation of these constitutional principles may require solution of varied local school problems." *Brown II*, 349 U.S. at 299. Despite challenges in moving schools to nondiscriminatory systems, the Court concluded "giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start" towards full compliance with the declaration of the children's constitutional rights. *Id.* at 300. The majority in the present case contradicts this

clear precedent for crafting equitable relief to protect the fundamental rights of children.

Equity's flexibility also allows the courts to respond to unforeseen circumstances—that is, new threats like severe climatic changes caused by federal policy and actions that were neither contemplated nor predicted by the drafters of the Constitution. *See* Davidson, *supra* at 199-200; WILLIAM BLACKSTONE, 1 COMMENTARIES at 34 (Bernard C. Gavit ed., 1941). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15 (1971).

The majority in this case moved away from these precedents, instead relying on cases involving political gerrymandering to determine that any plan to reduce greenhouse gas emissions developed by defendants would be unreviewable by the courts. By analogizing the scientific facts of climate change to the political motivations of gerrymandering, the majority opinion incorrectly concludes there are no judicially discernable and manageable standards to manage injunctive relief. Plaintiffs' claims and requests for relief are based in science. Unlike gerrymandering cases, where courts are asked to determine the political motivations for apportionment and whether those actions are excessively partisan (*see Vieth v. Jubelirer*, 541 U.S. 267 (2003); *Rucho v. Common Cause*, 139 S. Ct.

2484 (2019)), the question presented here is one of scientific evidence. Through trial, the district court can review the scientific evidence regarding atmospheric levels of greenhouse gases.

In fashioning a remedy, the district court will of course be bound to stay within its remedial powers. The methods employed to achieve a stable climate (based on the facts established at trial) would be left to the political branches. But determining the scope of an injunctive remedy does not exceed the judiciary's role and duty to serve as a check on the other branches of government whose actions violate the rights of individuals without power. "[T]he scope of the remedy is to be determined by the nature and extent of the constitutional violation," *Milliken v. Bradley*, 418 U.S. 717, 753 (1974).

CONCLUSION

The courts have a duty to safeguard individuals' rights where the other branches have exercised their power in a manner that infringes on life and liberty. To conclude that the sole remedy for children alleging constitutional violations lies with the political branches deprives these plaintiffs of any protection of their rights. Given the urgency of climate change and the disproportionate harms that children will suffer from it, the courts should act to fulfill this vital function to safeguard individual liberties from abuses of government power, and allow the merits of these important issues to be developed and decided through the trial process. "The

nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell*, 135 S. Ct. at 2598. Climate change presents one of those injustices, and the youth plaintiffs assert a claim to liberty that is redressable by the courts. Amici respectfully request that this Court accept *en banc* review.

Dated: March 12th, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number 18-36082

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