Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants

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

AMICUS CURIAE BRIEF OF INTERNATIONAL ORGANIZATIONS AND LAWYERS IN SUPPORT OF PLAINTIFFS'-APPELLEES' PETITION FOR REHEARING *EN BANC*

FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29-2

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IDENTITY AND INTEREST OF *AMICI*

Amici submit this *amicus curiae* brief, consented to by all Parties, pursuant to Fed. R. App. P. 29. *Amici* Amnesty International USA, Center for International Environmental Law (CIEL), and Environmental Law Alliance Worldwide (ELAW) are nonprofit corporations that use the rule of law to protect the environment and human rights. Amnesty International USA is a non-partisan, non-profit organization that, together with more than 70 national and territorial counterparts, makes up Amnesty International. Amnesty International is the world's largest grassroots human rights organization, comprising a global support base of more than eight million individual members, supporters, and activists in more than 150 countries and territories. Since 1989, CIEL has been a leader in the development of environmental and human rights law, including with respect to climate change's impacts on fundamental rights. ELAW serves as Secretariat of a global network of public interest environmental lawyers that among other things promotes a human rights-based approach to environmental protection. The New York University School of Law's Global Justice Clinic utilizes domestic and international legal frameworks to challenge human rights violations and hold accountable those responsible.

Additional *amici* are global legal professionals who are experts in international law. These are: Dave Inder Comar, Business and Human Rights

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Amici promote legal approaches to protect fundamental rights, including the right to a stable climate system. *Amici's* interests and mission to protect human rights and the progressive development of the rule of law are directly affected by the Majority decision that no judicial remedy is available for the damage to the youth Plaintiffs' constitutional rights due to climate change. The jurisprudence of numerous countries support the proposition that claims against governments for taking affirmative actions that contribute to climate change, as well as failing to take actions to abate climate change are justiciable. Accordingly, *amici* respectfully request that the Ninth Circuit Court of Appeals accepts this petition for hearing *en banc,* uphold the District Court's decision, and allow the youth Plaintiffs to litigate their claims.

INTRODUCTION

In the face of unrelenting evidence that global climate change will reshape humanity's future in detrimental ways, the District Court of Oregon agreed that the youth Plaintiffs should be permitted the chance to prove that the Defendants' substantial contributions to climate change threaten their "right to a climate system capable of sustaining human life, [which] is fundamental to a free and ordered society." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). In a split decision, a panel of the Ninth Circuit Court of Appeals reversed the District Court decision, finding Plaintiffs' claims were not justiciable. Plaintiffs now seek an *en banc* reversal of the Panel decision, and the *amici* hereby support them.

ARGUMENT

Amici believe that the Majority unnecessarily and inappropriately abdicated its judicial authority to remedy the systemic and serious violations of Plaintiffs' constitutional rights. And as shown below, a growing number of foreign courts faced with similar cases have ruled that the review of national law and policies that contribute to climate change through government action (or inaction) is an appropriate and necessary role for the judiciary. Amidst this global trend where judiciaries are reviewing the conduct of governments on the climate crisis, the Majority's decision makes the federal courts of the Ninth Circuit Court of Appeals

among the least willing to protect the fundamental rights to life and liberty of young people from government-created harm.

I. CASES FROM FOREIGN JURISDICTIONS AFFIRM THAT JUDICIAL REVIEW OF NATIONAL ENERGY AND CLIMATE CHANGE POLICIES IS APPROPRIATE

Virtually all foreign courts that have addressed the justiciability of challenges to national climate change policies have found the issues appropriate for judicial review. For example, the Supreme Court of the Netherlands recently rejected the position that judicial review of the Dutch climate policy was a political question, concluding that "[i]t is up to the courts to decide whether, in availing themselves of this discretion [to set climate policy] the government and parliament have remained within the limits of the law to which they are bound." *The State of the Netherlands v. Urgenda Foundation,* H.R. 20 December 2019, No. 19/00135, ECLI:NL:HR:2029:2006, ¶ 8.3.2 (Netherlands/Urgenda) [hereinafter *Urgenda,* H.R.].

Similarly, the High Court of New Zealand after reviewing similar cases in several countries affirmed that judicial review of climate change policies is appropriate:

> [T]hese cases illustrate that it may be appropriate for domestic courts to play a role in Government decision making about climate change policy. … The courts have not considered the entire subject matter is a "no go", whether because the state had entered into international obligations, or because the problem is a global one ..., or because the Government's response involves

> the weighing of social, economic and political factors, or because of the complexity of the science. The courts have recognized the significance of the issue for the planet and its inhabitants and that those within the court's jurisdiction are necessarily amongst all who are affected by inadequate efforts to respond to climate change.

Thomson v. Minister for Climate Change Issues, CIV 2015-485-919 [2017] NZHC 733, at [132] [hereinafter *Thomson*, NZHC].

Indeed, courts from all over the world have determined, over objections from their respective governments, that the courts have the authority and obligation to review national climate change-related policies for compliance with relevant legal obligations. Examples include the **Colombia Supreme Court**, in *Barragán, et al. v. Presidencia de la República et al.,* Corte Suprema de Justicia [C.S.J.], 5 abril 201, MP Luis Armando Tolosa Villabona, STC4360-2018, at 48 (Colom.)(ordering, *inter alia,* the government to "formulate a short-, medium-, and long-term action plan within the next four (4) months ... to counteract the deforestation rate in the Amazon, tackling climate change impacts") [hereinafter *Barragán,* C.S.J.]; the **German Administrative Court,** in *Family Farmers and Greenpeace Germany v. Germany,* Verwaltungsgericht [VG] [German Adm. Ct.], Oct. 31, 2019 VG 10K 412.18 (31 October 2019) (upholding Germany's climate plan calling for 32% GHG reductions) [hereinafter *Greenpeace Germany,* V.G.]; **the National Green Tribunal of India**, in *India Council for Enviro-Legal Action v. Ministry of Environment, Forest, and Climate Change*, Nat'l Green Trib., App.

No. 170 of 2014 (requiring the Ministries to take *some* action to curb the emissions of HFC-23, because of its impact on climate change) [hereinafter *India Council for Enviro-Legal Action,* N.G.T.]; the **High Court of Ireland,** in *Friends of the Irish Environment v. Ireland,* [2019] IEHC 747, at ¶89 (explicitly affirming that it is the judiciary's role to review climate policies for compatibility with constitutional obligations); the **Seventh Collegiate Tribunal of the First Circuit of Mexico City,** in *Public Version of Feb. 20, 2020 Resolution, Derived from the Appeal/Complaint 3/2020*, Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito, con residencia en la Ciudad de México [TCC], Mar. 4, 2020, p. 16 (Mex.) (reversing dismissal of youth plaintiff's climate challenge for lack of standing and finding that the "the superior interest of [children] should be attended"); **the Lahore High Court in Pakistan,** *Leghari v. Pakistan*, (2015) WP No. 25501/201 (Punjab) (ordering establishment of a Climate Change Commission to monitor implementation of the climate change framework); and the **United Kingdom Supreme Court,** in *Client Earth v. Secretary of State for the Environment, Food and Rural Affairs*, [2015] UKSC 28 (requiring the Secretary of State to prepare plans for controlling the greenhouse gas nitrogen dioxide based on public health impacts).

While these cases reflect slightly different approaches to the separation of political from judicial functions, and endorse various standards of judicial review

(i.e., reasonableness, arbitrariness, or no evidentiary basis), they all confirm that judicial review of climate change policies does not infringe the separation of powers and that climate change claims are justiciable.

II. THE JURISPRUDENCE OF FOREIGN COURTS SUPPORTS THE REDRESSABILITY OF PLAINTIFFS' CLAIMS

The Majority erred in finding that Plaintiffs' challenge to the U.S. government's conduct with respect to carbon emissions was not justiciable, based on their view of the redressability of the harms. Majority, at 20. Establishing redressability requires showing that the relief sought by Plaintiffs is "both (1) substantially likely to redress their injuries; and (2) within the [...] court's power to award." *M.S. v. Brown,* 902 F.3d 1076, 1083 (9th Cir. 2018). In other words, for a harm to be redressable, the judiciary must be able to shape an effective remedy and have the authority to do so without overstepping the separation of powers.

A. Foreign Climate Change Cases Support the Finding that Judicial Review will be Effective in Redressing These Plaintiffs' Injuries

Many foreign courts have specifically considered and rejected the argument that taking steps in one country to curb climate change is ineffective as a remedy for their citizens' climate-based harms—even in countries that contribute far less to climate change than does the United States. In *Urgenda,* the Netherlands Supreme

Court found that the global nature of the problem did not excuse the Dutch government's malfeasance:

> 5.7.7. … Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale be accepted as a defense. ...
>
> 5.7.8. *[E]ach reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget.* The defence that a duty to reduce greenhouse gas emissions on the part of the [country]…does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.

Urgenda, H.R., at ¶¶ 5.7.7-5.7.8 (emphasis added).

Other courts reinforce the conclusion that even small amounts of reductions are effective and necessary for redressing climate change injuries. *See Thomson,* NZHC, at ¶ 132 (courts have not denied justiciability on the grounds that "one country's efforts alone cannot prevent harm to that country's people and environment"); *Friends of the Irish Environment,* at ¶ 5 (although "no one country ... can tackle the problem on its own," that "does not lessen the requirement to do what is necessary to achieve scientifically advised targets").

As suggested by these cases, the Court should recognize that if the United States reduces its ongoing emissions, the risk, timing and scale of harm to

Plaintiffs will be reduced. Furthermore, given the United States' global influence, such reductions would encourage further reductions in other countries.

B. Foreign Jurisprudence Supports the Conclusion that the Specific Remedies Sought by the Plaintiffs Are Within the Authority of the Judiciary

Although the standard of review may vary, several foreign courts have held that the judiciary can review the adequacy of a country's national policies and conduct relating to climate change. In *Urgenda,* the Supreme Court of the Netherlands found that the government's existing climate policy was inadequate to protect Plaintiff's fundamental rights and required the Netherlands to increase its national emissions reduction goal from 23% to at least 25% of 1990 levels by 2030. *Urgenda,* H.R. ¶ at 7.5.1. The Court recognized the government retained discretion as to how exactly it should meet the strengthened goal.

Where the country has no plan, courts have mandated the government to take at least *some* action, even while being careful not to prescribe what, exactly, ought to be done. In *Indian Council for Enviro-Legal Action,* N.G.T., at ¶ 29, the court refrained from specifying the policy required but ordered the Defendant Ministries "to examine the entire regulatory regime in relation to HFC-23, a by-product of HFC-22 [two potent greenhouse gases], and issue appropriate guidelines on all aspects thereof." Similarly, the Colombian Supreme Court in *Barragán,*

ordered the government to issue "short-, medium, and long-term plans for combatting the climate impacts of deforestation in the Amazon" and to "adopt measures aimed at achieving zero deforestation and zero greenhouse gas emissions." *Barragán,* at 48-49. In *ClientEarth v. Secretary of State for the Environment, Food and Rural Affairs*, [2015] UKSC 28, the United Kingdom Supreme Court issued a mandatory order requiring the Secretary of State to prepare compliant air quality plans for the greenhouse gas nitrogen dioxide (primarily for public health reasons)—and to deliver the plans to the European Commission within a set timeframe. *Id*. at ¶ 25.

In other cases, the courts have closely monitored the government's implementation of the climate plan. The Lahore High Court in Pakistan did not address the substance of the government's policy but took active steps to monitor implementation of the framework. Climate Change Order, *Leghari v. Pakistan,* (2015) WP No. 25501/201 (Punjab) at ¶¶ 13, 19, 25 (Pak.). The Court first established a Climate Change Commission to assist in monitoring implementation of the government's policy framework. *Id.* In what the Lahore High Court called a "continuing mandamus," it held periodic hearings on the status of implementation over the course of three years. In 2018, the Court noted that the government had implemented nearly two-thirds of the Framework's actions and thus replaced the initial Commission with a smaller Standing Committee, to serve as an ongoing link

between the Executive and Judicial branches. Judgment, WP No. 25501/2015 (2018). *See also Metropolitan Manila Development Authority v. Concerned Citizens of Manila Bay,* G.R. Nos. 171947-48 (S.C., Feb. 15, 2011) (Phil.) (issuing a "continuing mandamus" over the Philippine's environmental and waste management agencies to report quarterly on their progress in implementing measures to clean up Manila Bay).

III. FOREIGN JURISPRUDENCE SUPPORTS THE CONCLUSION THAT JUDICIAL REVIEW OF NATIONAL CLIMATE POLICIES CAN BE BASED ON OBJECTIVE, SCIENTIFIC STANDARDS

The extent to which a certain concentration of greenhouse gases causes climate change is no more a political question than the extent to which a certain concentration of a hazardous chemical substance causes cancer. Foreign courts have affirmed that this is a question for experts, not politicians, and thus provides an objective basis for the courts to evaluate the legal compliance of government action. In summarizing several decisions from other countries, the New Zealand court in *Thomson* confirmed that scientific evidence forms the factual basis for judicial review of climate change policies. *Thomson,* NZHC at ¶ 132. The New Zealand Court conducted a thorough review of the government's national climate policies as measured against the science presented to it, before upholding the policy. In *Urgenda,* the Supreme Court of the Netherlands similarly reviewed the Dutch reductions for greenhouse gas emissions in light of the science provided to

the court, before ordering that the government strengthen its target to meet its legal obligations. *Urgenda,* H.R. at ¶ 7.5.1. The Supreme Court of Colombia reviewed the scientific evidence regarding the climate impacts from deforestation in Colombia's Amazon as part of the justification for ordering the government to take action to protect youth plaintiffs. *Barragán,* C.S.J. at ¶ 11.1.

IV. LIKE ITS FOREIGN COUNTERPARTS, THE U.S. JUDICIARY HAS THE POWER TO GRANT RELIEF IN THIS CASE

Remedying constitutional harms is the essence of the judicial function in countries around the world. As the Supreme Court recently stated in *Obergefell v. Hodges,* 135 S. Ct. 2584, 2605 (2015), "[w]hen the rights of persons are violated, the Constitution requires redress by the Courts, notwithstanding the more general value of democratic decision making." In carrying out this function, courts regularly rule on the constitutionality of legislative and executive action. For example, courts have ruled on the constitutionality of electronic surveillance, *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011); detention of undocumented immigrants, *Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989); and international funding for birth control and abortion, *Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 656 (2d Cir. 1988).

As the *Juliana* dissent noted, the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955) ordered the desegregation of

school systems with "all deliberate speed." In *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court upheld the order directing the State to reduce the prison population to 137.5% of design capacity, due to overcrowding and lack of medical care. Having first declared the legal violation, courts remained vigilant and active in ensuring compliance with the Constitution. Both state and federal courts have exercised their injunctive powers to require constitutional compliance over time in other cases, including: *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (right to minimum standards of treatment to institutionalized persons with mental illness); *Edgewood Independent School District v. Kirby*, 777 S.W. 2d 391 (Tex. 1989) (setting a deadline for legislative reform of educational financing); *Campaign for Fiscal Equity, et al. v. State of New York, et al.,* 100 N.Y.2d 893, 919, 769 N.Y.S.2d 106, 801 N.E.2d 326 (2003) (ordering the State to prepare and implement a public school financing system that complies with the state constitution); *Gannon v. Kansas,* 306 Kan. 1170, 402 P.3d 513 (2017) (requiring additional reform of education financing after initial steps ruled inadequate). It is the same kind of analysis that foreign courts around the world are adopting in climate change cases, and this Court should do the same.

CONCLUSION

Foreign jurisprudence provides persuasive precedent of the justiciability of Plaintiffs' claims that the government's ongoing actions are creating a climate

system incapable of sustaining human life, and infringing on their lives, liberties and rights of equal protection of the law. This conclusion is consistent with the U.S. judiciary's historical role in remedying systemic constitutional harms. Accordingly, the Ninth Circuit panel decision should be reversed *en banc*, and the District Court decision should be affirmed.

DATED: March 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of Times New Roman that is of 14 points or more, and contains 2986 words (not including FRAP 32 exclusions and based on the word processing program used to prepare the brief).

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No party's counsel contributed to writing this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person other than *amici,* their members or their counsel contributed money intended to fund preparation or submission of this brief.

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I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief in Support of Plaintiffs-Appellees with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 12, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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