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,
Defendants-Appellants.

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

***AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES**

FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Fed. R. App. P. 26.1, *Amici Curiae* EarthRights International, Center for Biological Diversity, Defenders of Wildlife, and Union of Concerned Scientists certify that they have no parent corporations and that no publicly held corporation owns more than 10% of the *Amici Curiae*.

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* certify that their counsel authored this brief in its entirety. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

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INTRODUCTION

The Government is urging this Court to adopt unprecedented new doctrines that would dramatically restrict the jurisdiction of federal courts to hear challenges to federal actions that cause or contribute to climate change or that systemically violate constitutional rights. The government asks this Court to rule categorically that any challenge to actions that cause or contribute to climate change is necessarily too generalized and abstract to be heard in federal court. It also asks the Court to bar constitutional challenges to federal actions or inactions unless they are brought pursuant to the Administrative Procedure Act. Finally, it offers a vague separation of powers barrier, untethered to any precedent, to hearing claims that ask a court to rule on the constitutionality of Executive Branch programs and systemic practices. Each of these expansive arguments asks this Court to go beyond the controlling jurisprudence and severely constrain access to courts and the power of the judiciary to declare and remedy violations of constitutional rights and the public trust that cause pervasive harm.

Not only are the substantive rights at issue in this case constitutional, but so are the requested justiciability rulings, which stem from Article III. The Supreme Court has admonished courts to avoid ruling on constitutional issues unless required to do so. *See Bond v. United States*, 572 U.S. 844, 855 (2014) ("[I]t is a well-established principle governing the prudent exercise of this Court's

jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (*citing Escambia Cnty v. McMillan*, 466 U.S. 48, 51 (1984)); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Given the preliminary posture of this case—an interlocutory appeal of the district court's denial of the government's motions for dismissal, judgment on the pleadings, and summary judgment—ruling on the novel constitutional questions at issue, as the government urges, is avoidable and inadvisable.

STATEMENT OF INTEREST

Amici are non-profit organizations that engage in advocacy, including litigation, to hold polluters and the government accountable for environmental and climate harms that injure the organizations and their members. *Amici* all seek to mitigate the unprecedented hazards of climate change. They pursue enforcement actions under citizen suit provisions in federal environmental statutes, as well as administrative, common law and constitutional causes of action, to seek justice through the federal courts.

As frequent civil litigants in the federal courts, these organizations strongly oppose—and would be harmed by judicial acceptance of—the Government's effort to foreclose litigation to redress climate harms, create a novel and unsupported legal barrier to constitutional and public trust claims against government agencies,

and bar judicial review of Executive Branch programs that violate fundamental rights.

EarthRights International is a non-profit organization dedicated to representing individuals and communities suffering human rights abuses, particularly where those abuses arise out of the destruction or exploitation of the environment. For over 20 years, EarthRights has litigated cases under state, federal, and international law in U.S. federal courts—including cases in which individuals have suffered harm due to major environmental catastrophes, where their injuries are shared by large numbers of people—and therefore has a substantial interest in the proper application of standing under Article III of the Constitution.

The **Center for Biological Diversity** ("CBD") is a non-profit corporation with offices in Oregon, California, and throughout the United States. CBD works to protect wild places and their inhabitants and believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation and policy advocacy, CBD is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and for the spiritual welfare of generations to come.

CBD's Climate Law Institute is an internal institution with the primary mission of curbing global warming, and sharply limiting its damaging effects on endangered species, the habitats on which they depend, and the health of all of us who depend on clean air, a safe climate, and a healthy web of life. CBD works on behalf of its members, who rely upon the organization to advocate for their interests in front of state, local and federal entities, including federal government agencies and the courts. The Center currently has approximately 61,000 members and over one million activist supporters.

Defenders of Wildlife ("Defenders") is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., with 11 field offices across the U.S. and Mexico. Defenders supports more than 372,000 active members and nearly 1.2 million members, donors, and online activists. Defenders is dedicated to the protection of wild animals and plants in their ecological roles within the natural environment. Defenders accomplishes its goals with partners at local, state, regional, and national scales through on-the-ground conservation, research, policy development, advocacy, and litigation.

The **Union of Concerned Scientists** ("UCS"), an organization of more than a half-million citizens and scientists, is the leading non-profit group in the United States dedicated to putting rigorous, independent science into action for a healthier

planet and a safer world. Tackling global warming has been a priority for UCS for over twenty years. UCS has pushed the federal government to take strong action to reduce the emissions of heat-trapping gases that cause climate change, including supporting legislation to create a national cap-and-trade program, legislation and regulations to make our passenger cars and trucks more fuel efficient, legislation and regulations to boost renewable energy and energy efficiency, and other policies.

Amici have received the consent of all parties to file this brief.

ARGUMENT

Despite the district court's identification of pervasive issues of fact that preclude summary judgment and necessitate a trial, this case is before this Court on interlocutory review before the trial that would find facts, provide context, and narrow the legal issues. Rather than adhere to ordinary judicial process and avoid sweeping constitutional justiciability rulings, the federal defendants ask this Court to use this interlocutory appeal to overturn the district court's denial of their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), their motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and their motion for summary judgment pursuant to Fed. R. Civ. P. 56. Doing so would establish far-reaching constitutional precedent that may be unnecessary if the case were permitted to run its course.

This early procedural posture appropriately shaped the district court's orders. *See, e.g.*, Excerpts of Record ("ER") 114 (Op. and Order Den. Mot. to Dismiss) ("This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss."); ER 29-30 (Op. and Order Resolving Mots. for J. on the Pleadings and for Summ. J.). The court accepted the facts pled in the complaint as true, noting that "[q]uestions about difficulty of proof . . . must be left for another day." ER 98. Disputed material facts prevented the court from entering summary judgment. ER 41, 45. Thus, this Court is asked to review plaintiffs' claims midstream, when questions of fact, and mixed questions of fact and law remain and before the benefit of full explication at trial.

Clearly, the Government seeks to avoid trial in this case, yet trial is how courts resolve disputed issues of fact underlying standing. *See, e.g., Duke Power Co. v. Carolina Env't. Study Grp, Inc.*, 438 U.S. 59 (1978). "A district court's determination that the evidence presented by the parties raises genuine factual disputes is not reviewable on interlocutory appeal." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1291 (9th Cir. 1999) (*citing Johnson v. Jones*, 515 U.S. 304, 307, 319–20 (1995)). This Court should afford the district court "deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 49 U.S. 368, 374 (1981). It

should avoid factual determinations that have not yet been resolved by the district court, and limit review to whether the district court correctly applied the burden of proof appropriate to Rule 12 and Rule 56 motions. As Justice Stewart noted, "the proper place for the trial is in the trial court, not here." *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Stewart, J., concurring).

I. The District Court Applied Controlling Standing Precedent and Properly Determined that Plaintiffs Demonstrated Standing to Survive Motions to Dismiss and for Summary Judgment and Proceed to Trial.

Plaintiffs bear the burden of establishing that they have standing to sue, but the extent of that burden varies with the "the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To survive a motion to dismiss for lack of standing, a complaint must state a plausible claim that the plaintiff has suffered an injury-in-fact, fairly traceable to the actions of the defendant, that is likely to be redressed by a favorable decision on the merits. *Id.* at 560. In this posture, the court must accept the factual allegations of the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

While plaintiffs "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'" to carry their burden on summary judgment, *Lujan*, 504 U.S. at 561 (citation omitted), plaintiffs need not establish that they in fact have standing. They need only show that there is a genuine question of material fact as to the standing elements. *Cent. Delta Water*

Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002). Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 339 (1986).

The district court applied well-settled standing case law to determine that the complaint presented allegations sufficient to show standing on a motion to dismiss and that genuine issues of material fact exist, precluding summary judgment. It broke no new legal ground. Its preliminary ruling recognized that the plaintiffs would have to prove the alleged facts to demonstrate standing at trial. ER 88 (the "spectre of difficulty down the road does not inform [the] justiciability determination at this early stage of the proceedings." (citation omitted)); ER 41 ("A final ruling on this issue will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties.").

The government is seeking to replace the district court's parsing of the submitted evidence with a blanket prohibition against climate standing. And it does so without confronting the evidence before the district court. This approach is at odds with controlling precedent and proper judicial process.

A. Federal Defendants Argue for a Blanket Ban on Standing to Redress Climate Harms That is Divorced from Longstanding Injury-in-fact Precedent.

To demonstrate standing, plaintiffs must show that they suffered an injury-in-fact that is concrete, particularized, and actual or imminent. *Lujan*, 504 U.S. at

560. The plaintiffs presented ample evidence of a range of specific personal injuries caused by climate change, including damage to property from flooding and wildfires; harms to health due to asthma, allergies, and smoke inhalation from wildfires; and harms to recreational interests due to damage to corral reefs, freshwater lakes, rivers and forests. *See* Plaintiff-Appellees' Answering Brief (Pls. Br.) at 10-12 (describing unique ways in which plaintiffs' injuries vary according to their particular locations, interests, and circumstances).

The Government does not contest that "climate change is happening [and] human activity is driving it," ER 66, or that plaintiffs have suffered injuries from climate change that directly impact them, ER 81-82. *See also* Pls. Br. at 12 ("On summary judgment and in their pre-trial memo, Defendants *conceded* that Plaintiffs made a *prima facie* case of injury-in-fact. Supplemental Excerpts of Record 6-7 (conceding 'physical, emotional, and property-related injuries' as 'cognizable under Article III')."). Indeed, the Government never engages with the voluminous and detailed evidence plaintiffs present of these particular harms.

Instead, focusing on the "particularized" prong of the injury-in-fact requirement, the Government argues that plaintiffs' injuries, or any injuries from climate change for that matter, can never be the basis for standing because they "arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world." Defendant-

Appellants' Opening Brief (Gov't Br.) at 13. This argument runs counter to both the case law and the specific nature of the injuries that plaintiffs describe.

Injuries shared by many are sufficient to confer standing as long as plaintiffs can demonstrate they themselves are injured. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process" as long as "the party seeking review be himself among the injured."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (citation omitted). In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, environmental groups challenged government action related to railway freight surcharges that was "applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country." 412 U.S. 669, 687 (1973). Although "all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups," *id.,* the Supreme Court nonetheless held:

> standing is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 687-88.

The Government ignores this line of cases, instead relying on Chief Justice Roberts' dissent in *Massachusetts v. EPA*, to advocate for a categorical prohibition against standing for climate-related harms. *See* Gov't Br. at 13-14. Of course, Chief Justice Roberts' dissent is not the controlling precedent. The majority in *Massachusetts v. EPA* upheld standing to pursue judicial relief from concrete climate harms resulting from greenhouse gas emissions, despite arguments that those harms were "widely shared." *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007). "EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree." *Id*. at 517. The Court made this pronouncement based on longstanding precedent and before turning to whether Massachusetts had standing in its sovereign capacity to represent the interests of its citizens. Rather than adopt an ironclad rule that harms from climate change can never give rise to standing, the Court applied the age-old, three-part, standing test, as did this Court in *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013), the Second Circuit in *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011), and the D.C. Circuit in *Ctr. for Biological Diversity v. U.S. Dep't of Interior,*563 F.3d 466 (D.C. Cir. 2009).

In applying the Supreme Court's standing cases, the nature of the

particularized injuries alleged and the evidentiary support submitted have shaped the courts' analysis. In *Bellon,* 732 F.3d at 1140-41, this Court reviewed the substantial evidence submitted by plaintiffs of their injuries from climate change, including reduced skiing and snowshoeing opportunities, increased risk of forest fires affecting property, increased flooding and reduced water availability affecting property, and exacerbation of asthma. The defendants never challenged the legal sufficiency of these injuries, and this Court described them as providing "'specific facts,' of immediate and concrete injuries." 732 F.3d at 1141. Based on extensive standing case law and without reference to *Massachusetts v. EPA,* this Court held that "Plaintiffs have therefore satisfied the first prong under *Lujan*." 732 F.3d 1131, 1141 (9th Cir. 2013);[1] *see also Comer v. Murphy Oil USA*, 585 F.3d 855, 863 (5th Cir. 2009)[2] (finding standing to pursue state law tort claims for climate change harms where plaintiffs alleged "sustained actual, concrete injury in fact to their particular lands and property").

Center for Biological Diversity likewise applied controlling standing precedent without adopting a special rule prohibiting standing for climate harms.

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[1] The plaintiffs in *Bellon* faltered on causation, but as discussed below, the causation analysis in *Bellon* is distinguishable on the facts.

[2] The panel opinion in *Comer* was vacated by a grant of rehearing *en banc*, 598 F.3d 208 (5th Cir. 2010), but the appeal was subsequently dismissed due to a loss of quorum, 607 F.3d 1049, 1053-55 (5th Cir. 2010). The original panel opinion was never replaced by an *en banc* opinion and thus remains persuasive.

563 F.3d 466. The D.C. Circuit found that the plaintiff environmental groups' injuries lacked imminence and specificity because they consisted only of the possibility of general harm to the environment, rather than harm to themselves. "Standing analysis does not examine whether the environment in general has suffered an injury. . . . And yet Petitioners' substantive argument focuses on just this type of injury: that climate change might occur in the Arctic environment if the Leasing Program is allowed to proceed." *Id.* at 478. Unlike the plaintiffs in *Center for Biological Diversity*, plaintiffs here assert personal harms to themselves that have already occurred.

Finally, the Government argues that the claim in *Massachusetts* turned on interpretation of a federal statute, which is "eminently suitable to resolution in federal court," whereas plaintiffs in this case "seek functionally legislative determinations regarding energy, transportation, public lands and pollution control policies." Gov't Br. at 17. However, the constitutional and public trust questions at the heart of plaintiffs' claims are equally the purview of the courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also United States v. Nixon*, 418 U.S. 683, 703 (1974) (noting that *Marbury's* pronouncement has been "unequivocally reaffirmed" in "many decisions" of the Supreme Court since it was first written).

B. It Would Be Inappropriate to Adopt an Absolute Bar on Tracing Harm from Climate Change to Governments' Actions When Traceability is Inherently a Fact-Based Inquiry.

In the Government's view, because of the "complex interaction of greenhouse gases in the global atmosphere," no plaintiff can ever show that an action or inaction contributes to climate-change induced harms. Gov't Br. at 17-18. No case has so held, and this categorical rule is not a logical extension of standing jurisprudence.

Bellon did not foreclose climate standing. 732 F.3d 1131. The court assumed that manmade sources of greenhouse gases are causally linked to detrimental climate change and indicated that the challenged actions need not be the sole source of the plaintiffs' injuries. 732 F.3d at 1141-42. Nonetheless, the contribution in *Bellon* was insufficient because the plaintiffs challenged Washington State's failure to regulate greenhouse gas emissions from five refineries with emissions constituting only 5.9% of Washington's total emissions and an even smaller percentage of U.S. and global emissions. *Id.* at 1143-44. The court held the effect of these emissions on global climate change to be "scientifically indiscernible." *Id.*

Whether emissions from challenged actions are scientifically discernible is inherently a fact-based inquiry. It depends on the magnitude of the emissions and the state of climate science, which has evolved at a rampant pace since *Bellon* was

decided. The plaintiffs here have introduced expert declarations applying state-of-the-art climate science to the emissions caused or worsened by the government programs at issue in this case. Whether that evidence proves that the challenged actions have a scientifically discernible effect is a factual question that should be decided at trial, rather than deemed legally irrelevant through establishment of a legal rule that climate change can never cause or contribute to a plaintiff's injuries.

Nonetheless, the emissions traceable to the Government's actions and inactions described in the complaint—including granting coal, oil, and gas leases on public lands, ER 579, ¶ 166-68; permitting drilling for oil and gas on federal lands, ER 580, ¶ 170; subsidizing fossil fuel production, ER 580, ¶ 171-76; funding coal power plants, liquefied natural gas facilities, and other fossil fuel projects, ER 581, ¶ 177; and setting regulatory standards for the power and transportation sectors, ER 562, ¶ 115, ER 568, ¶ 125—correlate to 25% of worldwide emissions. ER 86. This is larger than the contribution (6% of worldwide emissions) that the Supreme Court in *Massachusetts v. EPA*, ruled sufficient to support standing. 549 U.S. at 525. Plaintiffs presented substantial evidence supporting causation on summary judgment. *See* Pls. Br. at 17; ER 41.

In another attempt to obtain an absolute bar on climate standing, the Government contends, without any supporting cases, that multiple actions by defendants across various sectors that collectively contribute to plaintiffs' injuries

cannot be examined together in aggregate for purposes of Article III standing. Gov't Br. at 20. Indeed, there is no Article III prohibition on challenging multiple actions that collectively cause an actionable harm and courts have considered such actions in the aggregate when finding they caused plaintiffs' injuries. *See, e.g.*, *Brown v. Plata,* 563 U.S. 493, 505 n.3 (2011) (system-wide deficiencies in the provision of medical care, "taken as a whole," subject California prisoners to the "substantial risk of serious harm") (citations omitted); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-11, 114-15 (1979) (residents and potential homebuyers have standing to sue real estate firms for practice of steering African Americans into particular towns, which, in aggregate, manipulated the housing market and caused increased racial segregation); *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009) (plaintiffs have standing based on climate harms caused by aggregate actions of six electric power corporations that operated multiple power plants in twenty states), *rev'd on other grounds*, 564 U.S. 410 (2011).

Applying settled standing precedent, the district court held that genuine issues of material fact existed on crucial questions underlying causation—*i.e.*, what emissions are traceable to the challenged government's actions and inactions, and whether those traceable emissions make a scientifically discernible contribution to climate change and to plaintiffs' injuries. It appropriately decided that causation

cannot be resolved on summary judgment, but must await trial. This Court should reject the Government's invitation to adopt absolute rules that bar climate standing and depart from standing jurisprudence.

C. Partial Relief Is Sufficient to Redress Plaintiffs' Injuries and this Court Need Not Opine on All Relief That Might be Requested.

Peppered throughout the Government's brief are concerns about the implications of a prescriptive remedy. These separation of powers arguments are based on the precise and full extent of the remedy pled in the complaint despite the fact that the district court will fashion a remedy based on the specific legal violations found and cognizant of separation of powers concerns. ER 25 ("[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy.").

The redressability prong of the standing analysis does not require that the remedy resolve the entire problem. Mitigating the harm caused is sufficient. *See, e.g., Massachusetts v. EPA*, 549 U.S. at 525 ("While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it."); *Larson v. Valente*, 456 U.S. 228, 244, n. 15 (1982) ("[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.").

The plaintiffs' first prayer for relief is for the Court to "[d]eclare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO2 in the atmosphere." ER 614. Such a declaration would offend none of the asserted boundaries: it is certainly the province of the courts to declare what the law is. *Marbury*, 5 U.S. at 137, 177. Perhaps nothing more would be needed. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). Since the federal defendants have been acting without regard for the rights asserted in this case, a declaration of the rights would force the Government to consider them in discharging its responsibilities.

If further remedial relief proves necessary, there is no reason to believe the district court will intrude into executive authority. For example, an order requiring the Government to prepare a plan to reduce fossil fuel emissions using existing authorities would respect, not usurp, legislative or executive authority. The

Executive Branch would remain wholly in control of the specific policy determinations comprising such a plan. And the Court would retain authority to decide whether to approve the plan or to order implementation of any of its components.

Redressability is not a bar to plaintiffs' standing since some relief is available that could reduce plaintiffs' injuries. To the extent the Government asserts that the growing percentage of climate emissions generated by developing countries prevents the courts from redressing plaintiffs' injuries, Gov't Br. at 23, it is repackaging the argument made by EPA and rejected by the Court in *Massachusetts*. As the Court concluded:

> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.

549 U.S. at 524; *see also id.* at 525 (the fact that the requested remedy will not reverse global warming does not mean the court lacks jurisdiction to review agency action to slow or reduce it and reduce to some extent plaintiffs' injuries and risks). It would be grossly premature and improper for this Court to hold, as the Government urges, that no relief could reduce plaintiffs' injuries even "to some extent" when the courts, including the Supreme Court, have held that the government would abide by declarations of what the law and the Constitution in particular require.

II. The Administrative Procedure Act is not the Sole Vehicle for Courts to Remedy Constitutional and Public Trust Violations by Federal Agencies or Officials.

Throughout its petition, the Government argues for a draconian and unsupportable limitation on the ability to bring constitutional and public trust claims against federal actors. It contends that the Administrative Procedure Act (APA) provides the exclusive avenue for challenging the constitutionality of government action and inaction. No court has so held. Nor would such a ruling cohere with the equitable power of the courts to redress constitutional grievances.

It is well-settled that constitutional challenges to agency actions and inactions are not confined to the APA. *Webster v. Doe*, 486 U.S. 592 (1988), is illustrative. *Webster* held a CIA officer could not use the APA to challenge his discharge for being gay because discharge decisions were committed by statute to the CIA Director's discretion and therefore fell within an exception to the availability of APA review. *Id.* at 601. The Court held, however, that his parallel challenge to the discharge as violating his constitutional rights could proceed.[3] To deny a forum for colorable constitutional claims, the Court held, Congress must be clear, and the APA fell short. *Id.* at 603-04. *See also Franklin*, 505 U.S. at 801-02

[3] The government erroneously cites *Webster* in support of its statement that "[r]eview of such constitutional challenges to federal agency action, however, nevertheless must proceed 'under the APA.' *Webster*, 486 U.S. at 602." Gov't Br. at 34. However, the Government substitutes the Court's summary of the *Respondents'* position for the holding in the case.

(1992) (no cause of action under the APA, but constitutional challenge to apportionment determination is justiciable).

The structure of the APA confirms that it is a vehicle for obtaining judicial review of many federal agency actions and inactions, but is not the exclusive vehicle for obtaining such review. The APA waives sovereign immunity even for claims against the government that cannot be brought under the APA. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1167-73 (9th Cir. 2017); *Presbyterian Church (USA) v. United States*, 870 F.2d 518, 525 & n.9 (9th Cir. 1989). And it provides a cause of action where there is no other remedy at law. 5 U.S.C. § 704. The fact that Congress has provided for judicial review of agency actions, including of constitutional violations that occur in the course of the agency's administrative actions, is a far cry from reading into the APA a determination by Congress to bar challenges to federal actions that violate constitutional rights, but cannot be pigeonholed into APA challenges. No court has read Congress's grant of judicial review under the APA to amount to a bar on constitutional challenges to agency action. Indeed, such an argument would entail either that no constitutional challenges were permissible prior to the APA's enactment in 1946, or that the APA contains language that affirmatively precludes previously available constitutional actions. There is no support for either notion.

Armstrong v. Exceptional Child Ctr., Inc., 135 S.Ct. 1378 (2015), lends no support for the government's novel theory. In *Armstrong*, Medicaid providers sued the state of Idaho to obtain higher reimbursements for services, arguing that Idaho had violated the terms of Medicaid, which in turn violated the Supremacy Clause. *Id.* The majority held that the Supremacy Clause provides a rule of decision prohibiting courts from giving effect to state laws that conflict with federal ones, but it does not provide a private right of action to enforce federal laws against the states. *Id.*

The Court refused to allow the suit to proceed against Idaho in equity because the case sought relief for violations of *statutorily created rights* and Medicaid limited providers to the remedies provided in the statute establishing the legal obligations. *Id.* The Court distinguished statutorily created rights from constitutional ones, which courts can enforce against state officials not under the Supremacy Clause, but in equity: "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 1384.

As emblematic of the courts' equitable authority to enjoin state or federal officials from violating federal laws or the Constitution, the Court cited *Am. School of Magnetic Healing v. McAnnulty*. *Armstrong,* 135 S.Ct. at 1384 (citing 187 U.S.

94, 110 (1902)). In *McAnnulty*, the Court enjoined the Postmaster from acting beyond his jurisdiction by refusing to deliver mail for reasons not allowed by Congress. *Id.* This form of judicial review took place long before enactment of the APA and has continued long after. *McAnnulty* and its progeny reinforce the courts' equitable power to enjoin federal and state officers from exceeding their authority and from engaging in unconstitutional action or inaction: "[I]n case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." 187 U.S. at 108. *See also Free Enter. Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 491 n.2, 498 (2010) (plaintiffs have "a right to relief as a general matter" for claim that restrictions on removal of federal board members interfered with the President's "take care" duties and hence were "incompatible with the Constitution's separation of powers"); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (district court had authority to consider the legality of an executive order that could not be challenged under the APA because "courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command'").

Citing *Armstrong*, the Government argues that judicial review of government conduct is restricted to review of discrete "final agency actions" under the APA. However, unlike in *Armstrong*, the rights that plaintiffs seek to vindicate

are not statutorily created. They derive from the U.S. Constitution and the government's sovereign obligations to preserve the public trust for future generations. These rights constrain federal officials in how they exercise the authority delegated by statute.

The effect of the government's argument would be to require that people harmed by unconstitutional government actions bring piecemeal challenges against individual manifestations of the violations rather than challenging the systemic unconstitutional conduct. The Supreme Court rejected this approach in *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), upholding federal question jurisdiction over an action alleging a pattern and practice of procedural due process violations in the administration of an immigration amnesty program. The Court held that forcing the plaintiffs to challenge individual amnesty denials piecemeal under the statutory review provisions would foreclose meaningful judicial review of their claims. *Id.* at 483-84. *See also Johnson v. Robison*, 415 U.S. 361 (1974) (veterans could challenge denial of veterans educational benefits as violation of First and Fifth Amendments outside statutory review provisions; denying a forum would raise serious constitutional question).

Plaintiffs' constitutional claims are analogous. They claim that the Government has engaged in a systemic pattern of unconstitutional conduct by controlling, perpetuating, and promoting a national fossil fuel-based energy

system, despite longstanding knowledge of the resulting destruction of our environment and the profound harm to future generations, including the plaintiffs. Requiring the plaintiffs to challenge each discrete action related to the management of fossil fuels under the APA, when it is the aggregate nature of these actions that causes the harm, would foreclose meaningful review.

Nor is judicial review of agency actions that implicate the Government's public trust obligations limited to the APA. Governments have the sovereign duty to protect public trust resources for future generations. *See Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). If they give away public trust resources, the courts can step in and enjoin such actions. *Id.* at 459-60. The public trust is inherent in sovereign authority over trust resources and transcends and constrains administration of authority under statutes. *See Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.*, 33 Cal. 3d 419 (1983) (the state cannot give away the power to divert waters from navigable waters, which are subject to the public trust, if doing so would harm public trust interests; it had erred in giving Los Angeles diversion rights without considering "the effect of such diversions upon interests protected by the public trust, and attempt[ing], so far as feasible, to avoid or minimize any harm to those interests."); *Lake Mich. Fed'n v. U.S. Army Corps of Engineers*, 742 F. Supp. 441, 446 (D. Ill. 1990) ("The very purpose of the Public Trust Doctrine is to police the legislature's disposition of public lands."). If, as plaintiffs allege and

the district court concluded, such obligations must be taken into account and inform federal agencies' exercise of their statutory authority, this case can proceed outside the confines of review procedures created for violations of statutorily created rights.

III. The Government's Amorphous Case or Controversy Argument is Baseless.

The government argues that plaintiffs' action is not "categorically a case or controversy cognizable under Article III," Gov't Br. at 27, based on broad statements that separation of powers bars the court's jurisdiction. Gov't Br. at 24-27. In support, the Government quotes from numerous standing cases, but those cases apply the well-established three-prong standing analysis, which this brief applies above. Gov't Br. at 24-25 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding final disposition precluded retroactive application of a new statute); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citing *dicta* in *Coleman v. Miller*, 307 U.S. 443, 460 (1939) (Frankfurter, J, dissenting), denying standing in challenge to state legislation); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (denying taxpayers standing to challenge a state tax credit); *Lujan,* 504 U.S. at 560 (denying standing)).

Article III § 2 of the Constitution confines the jurisdiction of federal courts to the resolution of "cases" or "controversies." "The judicial Power shall extend to

all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . . to Controversies to which the United States shall be a Party . . . ." U.S. Const. art. III, § 2. Standing to sue is an aspect of the case or controversy requirement. *See, Lujan,* 504 U.S. at 560. So too are some elements of the doctrines of ripeness, mootness, and the prohibition against advisory opinions. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The political question doctrine ensures that the case or controversy before the court "arises under the Constitution and laws of the United States," *Baker,* 369 U.S. at 200 (citing U.S. Const. art. III, § 2), and is not "committed by the Constitution to another branch of government." *Id.* at 210-11.

The Government does not tether its case or controversy argument to any of these established elements of Art. III jurisprudence, but argues that separation of powers, as a free-standing concept, precludes courts from judging the constitutionality of the policies of other branches of government. Gov't Br. at 25 (The Constitution "commits to Congress the power to enact comprehensive government-wide measures" and "commits to the President the power to oversee the Executive Branch in its administration of existing law and . . . formulate policy proposals for changing that law.").

This argument sounds like a paraphrasing of the political question doctrine, *see, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427 (2012), yet

the Government never mentions nor applies the political question standard established in *Baker*. And for good reason. The argument that the political question doctrine bars judicial review lacks merit.

Based on a comprehensive application of the controlling standard, the district court unequivocally dismissed a political question defense raised by the Defendant-Intervenors, but not the Government. ER at 68-79 (applying the *Baker* factors, 369 U.S. at 217, to reject Defendant-Intervenors' political question argument). The district court held that this case does not present a political question because this is not one of the few instances, like impeachment or recognizing a foreign government, where the Constitution has textually committed the issue to a coordinate department, *see* ER 70-73, and plaintiffs raise constitutional claims that are amenable to judicial resolution according to well-established due process legal standards. ER 75. In addition, the court held that it could issue a remedy that would declare the existence and violation of constitutional rights, without making specific policy determinations entrusted to the federal agencies. ER 74, 79.

Moreover, the court's Article III powers specifically include cases in equity, U.S. Const. art. III, § 2. Yet in its argument against the court's equitable authority, the Government offers no precedent that overrides Article III's grant of judicial power to decide cases in equity and arising under the Constitution. Instead, it

offers only isolated quotes from cases that lend no support for its novel argument. *See* Gov't Br. at 26 (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945) (court's equitable powers are limited by state statutes of limitation when acting under diversity jurisdiction on matters of state law); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (affirming court's equitable power to issue a preliminary injunction to freeze assets); *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring) (concurring in judgment that district court exceeded equitable powers in directing the State of Missouri to increase teacher salaries and fund programs aimed at desegregation)).

The Government scatters vague separation of powers concerns throughout its brief while sidestepping the rigor demanded by and the elements established by the jurisdictional doctrines and case law. It does not even try to fit its argument into the political question doctrine, thereby conceding that it is a poor fit. And its resort to the case or controversy requirement is at odds with the role of the courts to declare what the law is, especially when that law is grounded in constitutional rights. Courts have long ruled on the constitutionality of the policies of other branches of government without violating separation of powers, even when those policies are politically sensitive. *See, e.g., Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) (electronic surveillance); *Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) (detention of undocumented immigrants); *Planned*

Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 656 (2d Cir. 1988) (international funding for birth control and abortion). Judicial review of the constitutionality of government actions and inactions related to climate change and energy policies does not fall outside of Article III's "case or controversy" requirement.

CONCLUSION

The Government has asked this Court to issue sweeping constitutional rulings that would dramatically restrict the jurisdiction of federal courts to hear challenges to federal actions that cause or contribute to climate change or that systematically violate constitutional rights. The district court applied well-settled standing case law to determine that the complaint presented allegations sufficient to show standing on a motion to dismiss and that genuine issues of material fact exist, precluding summary judgment. This Court should uphold those decisions and allow the case to proceed to trial for development of the factual context necessary for a well-considered decision on the merits.

Dated: March 1, 2019

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *Amici Curiae* EarthRights International, *et al.* state that they are unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing opening brief is proportionately spaced, has a typeface of 14 points, and contains 6,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that 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 CM/ECF system on March 1, 2019. 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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