UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA, et al.,	)	
Plaintiffs,	)	
v.	)	No. 6:15-cv-01517-AA
THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

ORAL ARGUMENT

BEFORE THE HONORABLE ANN AIKEN

Friday

June 25, 2021

10:00 A.M.

APPEARANCES:

For Plaintiffs: Ms. Julia Olson

Mr. Philip Gregory

Ms. Andrea Rodgers

For Defendants: Mr. Sean Duffy

Mr. Frank Singer

REPORTED BY: Ms. Eleanor G. Knapp, RPR-CSR

JUNE 25, 2021

Friday

10:00 A.M.

THE CLERK: Now is the time set for Civil Case Number 15-1517, Juliana, et al., v. United States of America, et al., for oral argument. If you could please introduce yourselves for the record, beginning with Plaintiffs.

MS. OLSON: Good morning, Your Honor. This is Julia Olson on behalf of the plaintiffs.

MR. GREGORY: Good morning, Your Honor. This is Philip Gregory on behalf of the plaintiffs.

MS. RODGERS: And good morning, Your Honor. This is Andrea Rodgers on behalf of the plaintiffs.

MR. DUFFY: Good morning, Your Honor. This is Sean Duffy on behalf of the defendants.

MR. SINGER: Good morning, Your Honor. This is Frank Singer on behalf of the United States.

THE COURT: Thank you all. I believe that's all that I expect on this call. Is that correct, Cathy?

THE CLERK: Yes, that is everyone, Judge. Thank you.

THE COURT: Thank you. I have reviewed all the materials that have been submitted.

Ms. Olson, this is your motion to amend, so I'm happy to hear any additional argument you wish to make. Go ahead.

MS. OLSON: Thank you, Your Honor. Good morning. May it please the Court, this is Julia Olson on behalf of the plaintiffs, many of whom are on the public call-in line today. We want to thank Your Honor and the court staff for providing the plaintiffs and the public the ability to listen at a time when we cannot all gather at person at the courthouse.

I would like to reserve five to ten minutes for rebuttal with this Court's permission.

THE COURT: We don't stand on those kind of technical time limits. So if you want to respond, you'll be able to do that. Don't think it's confined to that period of time. All right?

MS. OLSON: Thank you, Your Honor.

Your Honor, how our nation's children and adults speak, move, love, vote, worship, assemble, learn, and behave in our world is a function of the rights we hold and those we are denied. For our rights to endure in the face of

government policy threats, they need to be declared.

Do children have a right to free speech on Snapchat when they aren't in school even if that speech is profane? On Wednesday, eight Supreme Court justices said yes, they do. The Supreme Court issued a declaration of constitutional law in Mahoney Area School District v. B.L.

THE COURT: May I interrupt for a second? I apologize. But if you're not speaking, would everyone else put their phone on mute. I started to hear people talking, and it's difficult enough to hear on these phone conference calls generally. For the court reporter, it's even more difficult. So again, please, everybody mute your phone if you're not speaking.

And I apologize, Ms. Olson, for interrupting. Please go ahead.

MS. OLSON: Thank you. That declaration in Mahoney of a student's constitutional rights isn't just about one 14-year-old cheerleader, who is now in college. It's about the First Amendment rights of children across the country. It's also about the line where government interests -- in that case, the public schools -- unjustly invade those constitutionally protected rights.

Only our courts can declare those constitutional rights and define those constitutional lines in a final judgment for all.

Nearly 80 years ago in West Virginia State Board of Education v. Barnette, the Supreme Court also protected children who were in school exercising their free speech and freedom of religious expression, and the Court declared their rights.

In 2005 in Roper v. Simmons, the Supreme Court invoked the Eighth Amendment rights of young people convicted of crimes and finally declared that children cannot be sentenced to death.

In 2012 in Miller v. Alabama, the Court said rarely should children be sentenced to life without the possibility of parole. Since that declaration of constitutional law in Miller, 31 states and the District of Columbia either banned life without parole for children or have no children serving that sentence. That declaration of rights had real life consequences, not just for Evan Miller, but many other children.

This term the Supreme Court clarified when life without parole for Evan Miller and other children may be permitted and when it deprives them

of fundamental rights under the Eighth Amendment. And that new constitutional declaration and clarification will also have profound consequences for convicted children around the country, affecting their entire life trajectory.

Only our courts can judge and declare those constitutional rights and define those constitutional lines. And those declaratory judgments of our courts matter immensely.

21 children and young people are here today to argue over whether they are entitled to file an amended complaint that seeks primarily an adjudication of whether they too have constitutionally protected rights that have been invaded by their government and where the line is of that invasion or deprivation.

While this Second Amended Complaint is not about First Amendment speech or Eighth Amendment cruel and unusual punishment, the rights of Kelsey, the eldest, and Levi, the youngest, and the 19 youth in between are located in and protected by the Fifth Amendment. And they are no less vital to their freedom and their pursuit of happiness, the rights to life and to personal security and to be free of government-imposed danger, the right to family

autonomy, the right to a climate system that sustains human life, the right to equal protection of the law, and the right to public trust resources are all at least as deeply rooted in the history of our nation, as fundamental to our liberty as the rights some people seek to own an AR-15 assault weapon.

But just this month in Miller v. Bonta, a federal judge in the Southern District of California declared unconstitutional policies banning children and adults from owning assault weapons.

Our federal courts allow people standing to assert their alleged fundamental rights when they have real injuries in order to challenge government policies that cause those injuries and then have those rights adjudicated.

A declaration of rights and constitutional limits on government policies very often have significant ramifications because it changes the legal relationship between all of us and our government. It affects how we live our lives, our dignity, and our physical security. Some people, Your Honor, want to protect the right of self-defense via alleged constitutional rights to

assault weapons, and they have standing to walk through the courthouse doors and receive a declaration on that issue.

These young people before you today want to protect their lives and personal security too. And they also have standing to receive a declaration of their rights and the constitutional limits on government policies when their government is actively threatening their self-preservation.

So while we are here on a routine motion to amend a prior complaint to correct a perceived defect that was found by the Ninth Circuit, the outcome of this routine motion has monumental implications for whether justice is served.

Here, where the law of the case is that the subject matter of Plaintiffs' complaint -- the nation's energy system policies and practices and the plaintiffs' Fifth Amendment claims against that system -- are not barred by the political question doctrine, it would be manifestly unjust and contrary to Article III and the nearly century-old act of Congress not to allow these children and youth to access our judiciary to seek a declaration of their constitutional rights and the line at which

those rights are infringed by their government.

That declaration alone, even if no further relief is available, will change the current legal status of these youth. And the plain text of the declaratory judgment allows for just that.

Even where no further relief may be available, this Court may issue declaratory judgment for or against the plaintiffs where they have demonstrated injury, causation, and a live case or controversy with their government. And nothing the Ninth Circuit said on interlocutory appeal changes this Court's obligation to say what the law is.

I want to turn now to the Rule 15(a) analysis. Your Honor, based on the briefing of the parties there are two primary issues for this Court to resolve in order to grant Plaintiffs' motion to amend.

First, this Court should find the Ninth Circuit dismissed the First Amended Complaint without prejudice.

Second, this Court should hold that the proposed Second Amended Complaint would not be futile in light of the Ninth Circuit interlocutory opinion and the law governing amendments because there has been no delay, no bad faith, and there

will be no prejudice to defendants. Plaintiffs' amendment should be granted in order to comply with the spirit of Federal Rule of Civil Procedure 15(a) to freely and liberally move meritorious cases to trial and a merits judgment.

There is a presumption in favor of amendment here that the Government has not rebutted. And Eminence Capital, the Ninth Circuit case at 1052, stands for that.

So turning to the issue of prejudice, the Ninth Circuit dismissal could only have been of one type, and that's without prejudice. When a court intends to dismiss a case with prejudice, it says so. The Ninth Circuit did not do that here. And most importantly, legally it could not have dismissed the First Amended Complaint with prejudice because it did not render a merits judgment. It did not award summary judgment to Defendants, and it did not find that no amendment could cure the purported standing deficiency. Instead, what the Ninth Circuit did on its face was dismiss the First Amended Complaint for lack of subject matter jurisdiction based on its view that Plaintiffs lacked standing.

Courts are not permitted to get to the

merits resolution of a case when they lack jurisdiction. The Government does not disagree that there was no merits resolution, and they agree that summary judgment was not awarded in their favor.

The circuit courts are unanimously in agreement on this. And the courts say consistently that it would actually be inappropriate for an appellate court to dismiss with prejudice for lack of standing. The Ninth Circuit case Fleck & Associates at 471 F.3d 1106 supports that.

Thus, in the mandate issued to this Court, the directions had to be to dismiss Plaintiffs' First Amended Complaint without prejudice.

That then brings us to the futility analysis. Before I address that question of futility and walk through the Ninth Circuit opinion, I think it's really important to talk about the procedural posture of the First Amended Complaint on interlocutory appeal. That procedural posture set the stage for the Ninth Circuit's opinion and what it did and did not do in that opinion.

Unlike most of the cases the Government relies upon for its futility analysis where Plaintiffs' complaints were dismissed by the

district court, in this case, as Your Honor well knows, Plaintiffs won Defendants' motion to dismiss and prevailed on every motion the Government made to dismiss the case. So at the time of the interlocutory appeal, there was no final judgment in this Court as to standing. There were no findings of fact. And the reason was, of course, that there were disputed issues of material fact that this Court needed a trial and finding of fact to resolve as is the ordinary course of litigation.

But the Government wanted premature review of those pretrial decisions. All they could take up to the Ninth Circuit were this Court's denials of their pretrial motions. And the Ninth Circuit was only in a position to resolve the arguments the Government put before them as to why the case should be prematurely dismissed.

And this is key. The Ninth Circuit focused its redressability analysis right where Defendants asked it to. They asked the Ninth Circuit to say that Plaintiffs' specific request for a court-ordered remedial plan was outside the jurisdiction of the courts and, for that reason, Plaintiffs could not seek their central relief which was injunctive. And therefore, the Ninth Circuit

said Plaintiffs had no standing.

The Government's opening brief on interlocutory appeal never once argued that Plaintiffs could not obtain declaratory relief nor that declaratory relief would not provide at least partial redress. They never made that argument in their opening or reply brief. Thus, it's not surprising that the Ninth Circuit did not analyze and conclusively address whether declaratory judgment sufficed for the redressability prong of Plaintiffs' Article III standing.

And that important back story of how we arrived at this moment dictates how this Court should also interpret the Ninth Circuit's ruling on the First Amended Complaint.

So going into futility, the law of the case right now on standing is crucial to look at at this juncture. And Plaintiffs believe the Court should take the Ninth Circuit at its word as to its three specific holdings. And these are quotes from the Ninth Circuit opinion.

First, quote, The district court correctly found the injury requirement met, at 1168.

Second, The district court correctly found the Article III causation requirement

satisfied for purposes of summary judgment, at 1169.

And third, quote, It is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan, at 1171.

That is the explicit law of the case that was fully analyzed and briefed on standing and resulted in the dismissal of the First Amended Complaint.

With respect to the issue of whether Plaintiffs could cure that deficiency, the Ninth Circuit was silent. It's interlocutory opinion did not address whether amendment would be futile, and that remains an open question for the discretion of this Court.

And importantly, Defendants suggest that the Ninth Circuit opinion should just be pasted on the Court's decision here. But that opinion was only with respect to the First Amended Complaint. That Court did not have Plaintiffs' proposed Second Amended Complaint before it which has new requests for relief and new factual allegations that must be taken as true.

And what those allegations taken as true --

THE COURT: I'm sorry. Ms. Olson, will you step back at the beginning again of that argument? I got -- you kind of cut in and out a little bit. Would you go back to that, right after you finished the three issues that were the holding and the law of the case. So just right at the end of that, would you start into that next argument? I apologize. I thought I caught it all, but I really want you to redo it for me.

MS. OLSON: Yes. Of course, Your Honor. No problem.

So with respect to amending the complaint and whether that would be futile or not, the Ninth Circuit was silent. Its interlocutory opinion did not address futility of amendment, and that remains an open question for this Court to decide and it's fully within this Court's discretion.

The Ninth Circuit's dismissal order also only applied to Plaintiffs' First Amended Complaint. And now that the Second Amended Complaint has a new request for relief and new factual allegations that must be taken as true, the order of the Court requiring dismissal of the First Amended Complaint does not automatically apply to

the Second Amended Complaint.

Specifically, Plaintiffs now allege for the first time in the Second Amended Complaint that if this Court declares the nation's energy system policies and practices unconstitutional, the Government will change those policies and practices to stop the constitutional violation. The constitutional controversy would then be resolved, and the legal status of the plaintiffs would be forever altered vis-a-vis their relationship with their government just as the legal status of children was altered in Brown v. Board of Education or in the Mahoney School District case with respect to the rights -- the free speech rights of children.

Some of the important paragraphs in the Second Amended Complaint are 95-A, 95-B, paragraph 12, 276-A, and paragraph 212. And these paragraphs tell the factual story that in addition to the plaintiffs being injured in all of the ways that have already been accepted as law of the case, the plaintiffs are being injured because their federal government continues to put them at greater risk of even more physical and mental health harm than they already experience. And that's caused by the policies and practices of the national energy

system that are continuing and ongoing.

And Plaintiffs allege that if that system is declared unconstitutional, Defendants thereafter will abide by this Court's declaratory judgment and reduce, to a meaningful extent, the cause of the harm. Plaintiffs allege that Defendants would abide by the decree of the Court and bring the energy system into constitutional compliance, redressing the substantial cause of these Plaintiffs' constitutional injuries.

The defendants want this Court to read into the interlocutory opinion an implied ruling that the Ninth Circuit has barred this Court from allowing the amended complaint or that the Ninth Circuit is barring this Court from issuing declaratory judgment. But that reading of the Ninth Circuit opinion, Your Honor, asks you to ignore what the Court explicitly said was the central issue before it. And that's a quote at page 1164 and -65 of the interlocutory opinion.

The central issue before the Court was whether an Article III court can provide the plaintiffs the redress they seek, an order requiring the Government to develop a plan to phase out fossil fuel emissions. So that central issue was

injunctive relief, and that is what the Court addressed. Declaratory judgment was not the issue that the defendants put before the Ninth Circuit, and it wasn't the issue the Ninth Circuit was focused on addressing.

This Court in Hampton v Steen explained that leave to amend should be denied only when it is clear that the complaint cannot be saved by any amendment and that a district court should not read into an appellate mandate language that is not there, particularly when doing so would result in a manifest injustice. This Court specifically wrote at page 2 of your opinion in Hampton, "When a court is presented with new law, new facts, or otherwise changed circumstances, it has discretion to rule afresh."

Here there is new law, there are new facts, and changed circumstances all present. And the combination of these factors justify allowing the Second Amended Complaint to proceed.

And importantly in this Rule 15(a) analysis, it's Defendants' burden to prove otherwise. So going to Defendants' burden on the law of the declaratory judgment, first Defendants must squarely address the law on whether declaratory

judgment as set forth in Plaintiffs' Second Amended Complaint is sufficient for Article III standing.

The burden to prove that declaratory judgment could not be awarded is theirs at this stage. Yet they do not grapple with the most pertinent case law in their brief. Defendants ignore the MedImmune case of the Supreme Court, which sets the case or controversy standard for obtaining a declaratory judgment. They never once argued that declaratory -- sorry, Your Honor.

THE COURT: You cut out. So again, can you start back in your argument? You just cut out.

MS. OLSON: Yes. I apologize, Your Honor.

THE COURT: No. That's the nature of doing these hearings remotely.

MS. OLSON: Yes. So on the point of whether declaratory judgment can be awarded in this constitutional rights case, it's Defendants' burden to show that declaratory judgment could never be awarded. And they don't grapple with the most pertinent case law on that issue.

For example, they ignore entirely the MedImmune case of the Supreme Court which sets the

case or controversy standard for obtaining a declaratory judgment under the Declaratory Judgment Act. Defendants never argue that declaratory judgment cannot suffice for standing. And they don't explain how the plain language of the Declaratory Judgment Act doesn't mean that even when no other relief is available, Plaintiffs can get a declaration of their rights and the wrongdoing of the Government as long as there is a live controversy between the parties and there is injury and causation.

The defendants also don't fully grapple with the analysis in the Uzuegbunam v. Preczewski case that was recently decided. That case clearly says that where there is an injury and where there is causation in a constitutional case, that even where the injury and causation no longer exist, that a nominal damage of one dollar is enough for the redressability prong of Article III standing because that one dollar acts as a form of declaratory relief.

They don't respond to the Supreme Court's clear ruling that at common law nominal damages acted as the equivalent of declaratory judgment before declaratory judgment acts existed.

THE COURT: May I interrupt? My understanding of your amendment is that you are asking for the declaratory relief along with the nominal damages. Am I correct about that?

MS. OLSON: Your Honor, we have not asked for nominal damages. We could amend the complaint to do that, but we think that in this case, because we have an ongoing and live controversy with the Government, that declaratory judgment is the appropriate remedy. A nominal damage remedy would only be appropriate here if the Government rescinded and corrected the energy policies that are causing the constitutional violation as the Government had done so in Uzuegbunam.

THE COURT: Because that intervening Supreme Court case changes somewhat the complexion of everything, I'm just suggesting that out of an abundance of analysis and saving, perhaps, future sets of motions, that you might want to have that in your complaint in the alternative -- and/or. You know, I'm just thinking of that Supreme Court case and wanting to make sure that we don't ignore sort of the direction the Supreme Court gave in that case. Just -- that's why I asked. I didn't see

that that was in your amended complaint.

Anyway, go ahead and with your argument.

MS. OLSON: Thank you, Your Honor. We think that paragraph 4 of the prayer for relief includes the ability of the Court to award nominal damages, but we can also amend that into the complaint expressly.

So in addition to not grappling with the clear law under the Declaratory Judgment Act and under Article III standing where there are abundant new cases from the Supreme Court this term, the defendants also don't address or meet their burden to prove futility with respect to the new factual allegations that are in the Second Amended Complaint.

They must argue that it is clear beyond doubt that declaratory judgment would not provide any redress of Plaintiffs' injuries, and the Ninth Circuit has held that in the Center for Biological Diversity v. Veneman case at page 1114.

The Government here does not contend that it will not change its energy policy and practices if the Court awards this (unintelligible) here, a declaration of their rights and a

declaration of the Government's constitutional violation in carrying out that system.

They also don't contest the new factual allegations that when the Government corrects its constitutional violations that significant risks of ongoing and worsening harm to Plaintiffs will abate. Their silence on these points does not meet their burden to prove up futility. And in fact, Defendants, throughout the course of these six years of litigation, have consistently sought to ignore the important redress of declaratory judgment in the constitutional controversy and in this case. They ignored it on interlocutory appeal, and they are trying to sidestep it here as well.

But Brown v. Board of Education is still good law. And in 1954 the Supreme Court said that the first and most important question was declaring the rights of the children to equal integrated education.

So the proper interpretation of any ambiguity in the Ninth Circuit interlocutory opinion must be one that is consistent with Article III, the Declaratory Judgment Act, and Supreme Court precedent interpreting and setting the law for how

the lower courts should view their obligations to hear cases.

The amended factual allegations. We allege that the Government will comply with the Court's order. And that's also backed up not just by the factual allegations but by the law of the Ninth Circuit and the Supreme Court in the Evans and Eu cases cited in our brief.

So just to be really clear, because I think the Ninth Circuit opinion and how it treats declaratory relief and, of course, predominantly injunctive relief is something that Your Honor has to wrestle with, and what the rule of mandate case has made clear is that this Court can decide any issue that the Ninth Circuit is silent on or did not lay to rest.

The dismissal by the Ninth Circuit was not a blanket dismissal. It did not -- that Court did not address every aspect of this Court's prior order. It was limited to the reasons it stated. And on this motion to amend, we don't need to argue whether the Ninth Circuit got it right or got it wrong. We need to look at what they didn't consider and did not rule on.

So I want to walk through this list of

what the Ninth Circuit is silent on.

The Ninth Circuit was silent on whether amendment would be futile.

They were silent on the Declaratory Judgment Act and never cited 28 USC 2201.

They were silent on the Supreme Court precedent of MedImmune which sets the case or controversy standard for declaratory judgment.

They were silent on the second prong of the redressability analysis with respect to whether the Court has the authority to award declaratory judgment.

They were silent on the likelihood of partial redressability through declaratory judgment.

They were silent on the remedial effect of a change in legal status of the parties if declaratory judgment was ordered and how that would impact the ongoing and worsening harm caused by the Government's conduct.

They were silent, of course, as to any new factual allegations in the Second Amended Complaint as well as Plaintiffs' new request for relief because that was not before them.

And of course they were silent on the new Supreme Court precedent on Uzuegbunum v.

Preczewski, which also was decided after their opinion.

So the Ninth Circuit does not lay any of those issues to rest. The Ninth Circuit never said this Court cannot declare a constitutional violation where there is an active case or controversy with ongoing injury and causation. And it would have been wrong had they said that, but they didn't get to that issue.

So in a constitutional case of this magnitude and of first impression, these issues of declaratory judgment, partial redressability, and the scope of relief that's proper must be thoroughly and carefully resolved at a trial on standing and the merits.

For all of these reasons, Your Honor, the Second Amended Complaint should be accepted as overcoming the final jurisdictional threshold of properly pleading redressability. And if this Court disagrees, Plaintiff respectfully requests an opportunity to further plead redressability by amendment.

And unless Your Honor has further questions, I will wait and respond to any other issues on rebuttal.

THE COURT: I do have a question, and I would like to jump to having you deal with it head-on in your argument, and that is the late filing by the Government on the analysis and the implication of the Supreme Court case issued on June 17th, California v. Texas. And I -- you know, it's a decision that was focused on the Affordable Care Act, but may have implications in this case. And I'm confident it will be argued strenuously by the Government, but I would like to have your thoughts on it at this point as I look at and listen to their arguments.

MS. OLSON: Yes, Your Honor, I think that the California v. Texas case is completely irrelevant and off point to the issues before the Court here. The reason is simple. In California v. Texas, the Supreme Court found that there wasn't injury and, because there wasn't going to be injury, there couldn't be redressability.

So in that case the provision that would have imposed fines on people who didn't have insurance had already been decided by the Government that it would not be enforced. So there was no threat of the imposition of fines or harm in that case, and that's why the Supreme Court said that

there is no redress that we can or should provide here because there isn't injury in fact.

In contrast, of course, here the law of the case is that Plaintiffs have adequately established injury in fact and causation. And the harms are ongoing. I mean, I think -- this has really been a term of standing decisions. Just today, Your Honor, another decision came down in the TransUnion v. Ramirez case, which is also a standing case. And there Justice Kavanaugh, writing for the majority, says that for there to be a case or controversy under Article III, the plaintiffs must have a personal stake in the case and, to demonstrate their personal stake, Plaintiffs must be able to sufficiently answer the question, "What's it to you?"

And that question -- "What's it to you?" -- is very, very clear here. It's -- the Government is acting as if these young people hold no constitutional rights. They've said as much. They also believe that their energy system policies and practices are unreviewable and that it doesn't matter if they continue burning fossil fuels throughout the course of the century or not.

And that is a controversy between the

plaintiffs and their government that answers the question, "What's it to you?"

And -- but I think the California v. Texas case is not pertinent to this Court's resolution of Plaintiffs' motion to amend, but the TransUnion v. Ramirez case and possibly the Arthrex case, which was also decided this week, may be pertinent. And we intend to file a notice of supplemental authority at least as to the TransUnion case, Your Honor, which came out this morning.

THE COURT: Thank you. I try very hard the mornings of expected opinions to be attuned to them coming down, and I was getting ready for this case and had an earlier hearing and did not know that case came down. So I would have missed just your eloquent summary of the argument and the essence of the case, "What's it to you?" So I'm very grateful I asked that question.

And you've got to have -- it's interesting that all these cases have been basically the body of the work of the Supreme Court in these last few days.

Anything else you need to add? Thank you. That was helpful to -- that late submission.

Anything else you need to add,

Ms. Olson, or are you finished and I can turn to the Government? And I will come back to you for further argument.

MS. OLSON: Yes, Your Honor. I'll reserve time for after the Government argues. Thank you.

THE COURT: You're welcome. For the Government? Is it -- Mr. Duffy, are you going to argue?

MR. DUFFY: Yes, that's right, Your Honor.

THE COURT: Go right ahead.

MR. DUFFY: Good morning, and may it please the Court, this is Sean Duffy with the United States Department of Justice on behalf of the defendants.

Your Honor, I'm going to go straight to the bottom line issue before the Court today. The Ninth Circuit has decided this case and ordered that it be dismissed. The Ninth Circuit, en banc, declined to reconsider that decision. There is no standing. There is no jurisdiction. There is nothing left for this Court to do but to dismiss the case.

Plaintiffs disagree with the Ninth

Circuit decision. That is evident from their briefs. The appropriate venue to raise that disagreement, of course, is in the Supreme Court.

In the operative complaint, the plaintiffs sought both declaratory and injunctive relief. In the proposed amended complaint they seek essentially the same relief.

Nothing has changed in this case. To return to the trial court and litigate the same case that the Ninth Circuit has ordered this Court to dismiss as Plaintiffs propose is improper.

I'd like to begin with what we know from the Ninth Circuit's decision because there are at least a few inescapable takeaways worth noting.

First, we know declaratory relief standing alone is not enough to satisfy the redressability requirement for standing. And while Plaintiffs have their reasons for disagreeing with the Ninth Circuit's conclusion, that disagreement isn't for this Court to resolve.

Second, we know an injunction also won't suffice because the Ninth Circuit is skeptical that even the incredibly broad injunction Plaintiffs initially sought would not be substantially likely to redress their injuries. It follows that the

vaguer injunction that they now seek falls even shorter of satisfying redressability.

Plaintiffs' primary contention is that they can amend the complaint to seek stand-alone declaratory judgment on a constitutional issue. They cannot do so.

Just last week in California v. Texas, the Supreme Court reaffirmed the long-standing principle that the Declaratory Judgment Act alone does not provide a court with jurisdiction. Instead, like every other type of remedy, declaratory judgment actions must satisfy Article III's case or controversy requirement.

The Plaintiffs referred to the MedImmune decision. The Supreme Court in California v. Texas relied on that decision as well for this exact proposition. In California v. Texas the plaintiffs sought a declaration that the minimal coverage provision of the Affordable Care Act is unconstitutional. But because the provision that Plaintiffs challenged is not enforceable, they would achieve no redress without a declaration -- or with a declaration of it's constitutional.

The Supreme Court held that a plaintiff did not have standing merely to obtain an

opinion that some government action is unconstitutional. In other words, an Article III court cannot declare constitutional rights in a vacuum. There must be a redressable claim.

That holding applies here. Plaintiffs' injuries will not be redressed merely if the Court declares government action to be unconstitutional. Here the Ninth Circuit found that the claim for declaratory relief is not redressable because a declaration on a constitutional ruling is not likely to redress their injuries. The Ninth Circuit concluded that the, quote, psychic satisfaction of a declaration standing alone cannot satisfy the redressability requirement.

And the Supreme Court decision in California v. Texas affirms this principle.

THE COURT: So, Counsel, how do you -- you have to acknowledge that in the California case, without a doubt -- and why every scholar who was watching that case knew that the issue was that the fine or fee had been eliminated and so it was really rather a moot point to just simply make a pronouncement about the Affordable Care Act. And nobody could tie that together with the ability to take those kids -- but this is very different

because the Ninth Circuit acknowledged that there was harms to the plaintiffs in this instance and that they had -- they had -- there was a link in causation. And so it's postured very differently.

And then today -- and I haven't obviously read the decision that just came down, but I'm -- and I will, you know, immediately following this hearing. But if Justice Kavanaugh is writing that a case or controversy requires a personal stake of "What's it to you," it seems me these 21 children have certainly put that in the arena of controversy and -- in their amendment, which would be their first opportunity -- first amendment in this case to put in -- an opportunity to address this declaratory action and have the -- have, then, the opportunity for the federal government to understand that courts are going to protect a constitutional right, which I think I wrote clearly about -- that is, the ability to breathe, have clean water, have an energy source, and be free from, let's say, for example in Oregon, fires, wildfires, drought, inability to provide resources for the community -- that they would have a chance to have that right, declaratory judgment.

And then it would then empower the government -- certainly a district court judge would

not be running the government -- but the government to know that they have an obligation to address policies that impinge on that constitutional right.

And that's, in essence, I think what the Ninth Circuit case talked about in terms of understanding the -- from their vantage point -- from their vantage point what was possible for a court to do. Although I may disagree that the -- an opportunity for a district court judge to oversee and to help all three branches of government do a better job of protecting the constitutional right to breathe the air, have water, have resources available, certainly that's contemplated in the way in which our government was established. But that's way down the road.

So I think -- you know, I'm happy to hear further argument.

I also think that the Ninth Circuit anticipated that if there could be a way to replead this case, it was not foreclosed to this Court.

So anyway, I just think the new case today -- I guess I'm thinking a little bit out loud. The new case today -- "What's it to you?" -- these young people have certainly thrown down that question.

And it seems like the Supreme Court decisions in these two most recent cases give me guidance as to what I need to do. So go ahead.

MR. DUFFY: Your Honor, I confess I haven't read the decision that came down today, but if Your Honor wants to have supplemental briefing on that, we'll certainly do that.

THE COURT: Oh, I would like supplemental briefing. And I will get the transcript of this argument and do further research.

But -- so go right ahead. But it's clear to me that there's -- this changes -- these cases from the Supreme Court changed the complexion of the case in significant ways.

And again, I believe even the Ninth Circuit has given me some guidance. We're just looking at what's the most appropriate. The Government has a lot of latitude on how we should proceed in this case.

So go right ahead. Continue your argument.

MR. DUFFY: Okay. Well, I will respond to your first point about the Court's decision in California v. Texas. The plaintiffs distinguish that case on the basis that their -- the

first prong of standing wasn't met in that case. But the Supreme Court never sliced up the argument that way. It looked -- it really just looked at standing generally and determined that a declaratory judgment standing alone without meeting the standing requirements is impermissible.

Turning to the Ninth Circuit's decision in this case, on the plaintiffs' request for injunctive relief, the Ninth Circuit found at least two reasons why Plaintiffs lack standing. First, it expressed doubt that an injunction would be substantially likely to redress Plaintiffs' injuries. Based on Plaintiffs' own expert testimony, injunctive relief is not likely to stop climate change or ameliorate their injuries.

Second, the Court identified the severe separation of powers concerns that this lawsuit posts. It found the Plaintiffs' claims are not redressable because the injunctive relief they seek is not within the power of an Article III court to grant.

The Ninth Circuit concluded that any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches

and held that those decisions must be made by elected representatives.

The proposed second complaint fairs no better than the first one. In it Plaintiffs fundamentally seek the same declaratory and injunctive relief that they sought previously. With regard to the declaratory relief, in both complaints Plaintiffs seek a declaration that the energy system violates their constitutional rights and the public trust doctrine and a declaration that Section 201 of the Energy Policy Act is unconstitutional.

The declaratory relief that Plaintiffs seek is the same in both complaints.

With regard to the injunctive relief in the proposed amended complaint, Plaintiffs seek to enjoin Defendants from carrying out policies, practices, and affirmative actions that harm them.

Both complaints seek essentially the same injunctive relief, which is to have the Court essentially commandeer the energy policy of the United States. This is not a possible remedy, and it raises severe separation of powers issues.

And it is noted that the Ninth Circuit found that both of these forms of relief are not redressable.

Three important consequences flow --

THE COURT: I would -- excuse me. I would disagree with that. I think what it does is it gives direction to the Government to say when you have choices and you have rights at stake and you have a choice to use a source of energy that is damaging or even a source that will sustain all the abilities that the public may have to clean air, clean water, resources -- you know, all that were listed -- that their obligation is to choose the source that will not damage.

I mean, I don't think it directs anything. What it does is it gives guidance to the federal government about, again, stepping up and protecting the constitutional rights that have been discussed.

So what is interesting in this case is -- and what I think many people have not understood -- is a district court is a place where the facts are developed and the facts are laid out. And perhaps you noted in my earlier decision, I bifurcated. I bifurcated for a reason. I bifurcated because if the facts and the trial on those facts were out there, I strongly suspect -- it goes right along with Ms. Olson's argument -- I

strongly suspect that -- when she says that the federal government is likely to follow a court's declaratory action, I strongly suspect if the Government had those facts aired in open court, that before the Court could even act there may be both executive and legislative action that begins to redress and address the damage done to the rights that have been expressed by the 21 young people and others.

So I think it's framing this in a way in which trial courts are -- our best use is to develop those facts. And then that's why I had a second bifurcation and a place to -- how are those redressed.

So, you know, this case is more sophisticated than I think the Ninth Circuit understood or that the Ninth Circuit understood what a district court is capable of doing.

It's hard for me in this instance to say otherwise, but so much work is done in settlement discussions. That's why I often refer everyone to settlement. In a settlement conference, there's so much work that can come to the table when people are interested in problem-solving and putting mechanisms in place that allow people to address

these issues, because sometimes courts aren't the best place.

But courts can be in a position where they are, shall we say, backstopping the rights and protecting those rights while solutions are reached between and among the various parties who are both in the case and not in the case.

So I hear you and the argument, but I'm wanting you to think a little broader in terms of -- not in such absolute terms, but to understand why I think getting facts on the table all along in this situation have been the goal of the Court and important that these facts be developed on both sides. Go ahead.

MR. DUFFY: Okay. I take your point, Your Honor. But with respect to settlement, the parties can explore settlement outside of the shadow of this case.

THE COURT: Mr. Duffy, I am well aware of that. And I know that -- I know that is a parallel track. In most of my cases, it is a parallel track because in so many ways I believe settlement allows people to come to a resolution of a case that -- where maybe nobody is particularly perfectly satisfied, but they understand that there

is a problem to be addressed and they approach it in a different fashion.

So, yes, I'm aware of that. But I'm also trying to get you to focus on how this case, moving forward with an amendment -- given what the Supreme Court has said in the two most recent cases and the way this case is postured, amending the complaint is, frankly, not such a -- shall we say, a controversial request on the part of the plaintiffs.

MR. DUFFY: Well, I disagree with Your Honor's interpretation of what the Ninth Circuit has ordered in this case. If the Ninth Circuit had any inkling that the plaintiffs could file an amended complaint on remand, I think there would have been some language in that opinion to that effect, and I see no language in the opinion to that effect.

THE COURT: Well, we're going to agree to disagree on that point, because, let me tell you, having been on the bench a long time, when they want to dismiss with prejudice, they do that. I get those opinions. When they don't, they leave it open. And this was left open. I'm just saying.

MR. DUFFY: Okay. Well, with regard -- you raise a couple of points going to the merits. And let's not forget, the Ninth Circuit and the

Supreme Court understood that the striking breadth of Plaintiffs' claims presents substantial grounds for difference of opinion while at the same time citing the standards for interlocutory appeal under Section 1292(b). That observation wasn't only made on standing. The Supreme Court clearly referred to all aspects of the case.

So to the extent Plaintiffs insist that an amendment is necessary to vindicate a clear constitutional right, I just want to be clear that the Ninth Circuit and the Supreme Court have not accepted that view.

Even if Plaintiffs are ultimately allowed to amend their complaint here, they will ultimately have to contend with the faults in all other aspects of their case, including the merits.

So we believe that three important consequences flow ineluctably from the foregoing analysis.

First, the Court must follow the Ninth Circuit's mandate and dismiss the case. Dismissal must be with prejudice, and the Court must deny the motion to amend the complaint.

Under the rule of mandate, as Your Honor's aware, a lower court is unquestionably

obligated to execute the terms of the mandate. And the post-mandate conduct of the district court must also be consistent with the spirit of the mandate. The Ninth Circuit mandate is clear in this case. They've instructed the Court to dismiss the case for lack of Article III jurisdiction. That opinion leaves no room for continuing this lawsuit based on the minor amendments to the amended complaint.

Dismissal should be with prejudice. Dismissal with prejudice is appropriate where a complaint cannot be saved by an amendment. That's the case here. Plaintiffs lack standing not merely because of a pleading deficiency that could be cured. That is clear from the proposed amended complaint itself which does not in any way cure the incurable standing deficiency that the Ninth Circuit identified.

At bottom, the proposed amended complaint -- in it there's no change -- there's no allegation changing -- change in the government action that was challenged. There's no change in the types of harm the plaintiffs allege, and there's no change in the declaratory relief the plaintiffs seek. Indeed, Plaintiffs concede that they are not bringing any new claims.

So dismissal should be with prejudice because any claim Plaintiffs intend to bring is no different than the unsuccessful claims they already brought.

And the motion to amend should be denied as futile. Futility by itself is grounds for denying an amendment. Here futility mandates denial of the proposed amendment because the proposed complaint seeks the same declaratory injunctive remedies that the Ninth Circuit found failed to establish redressability for purposes of standing.

In sum, both the rule of mandate and the futility of amendment mandate the same result in this case, dismissal with prejudice.

At root, Plaintiffs' request for declaratory relief seeks a constitutional opinion without a remedy. But Article III courts do not decide theoretical inquiries; they decide cases.

And Plaintiffs' request for injunctive relief seeks nothing more than a request that the judiciary commandeer the executive branch and do so at the expense of the legislative branch of government. Our constitution crafted separated powers that does not allow one branch of government to commandeer another. Under our system of

government, the resolution of some critical issues that are perceived as requiring judicial resolution are not always amenable to a judicial resolution. And that reality is no doubt frustrating to those who hoped for the judicial process to accomplish what the political process has not.

It was surely frustrating to the states in Texas v. California who sought to end the Affordable Care Act. But the constitutional limitations on the powers of the courts and the separations of powers principles within that document preserved the process by which our democracy functions.

We do not disrespect youth and the important cause that they take up, but the place to take up that cause is not the courtroom but instead with their elected representative.

For all the foregoing reasons, the Court should deny the motion to amend and it should dismiss this case with prejudice as the Ninth Circuit mandate requires.

If Your Honor has any further questions, I'm happy to take those.

THE COURT: No, I'm fine. Thank you.

MR. DUFFY: Thank you, Your Honor.

THE COURT: Ms. Olson, do you have something more to add?

MS. OLSON: Yes, thank you. I just have, I think, two or three quick points, Your Honor.

I think it's incredible that six years into this case where Plaintiffs have adequately demonstrated they have ongoing and really life-threatening injuries and they have demonstrated with sufficient evidence that the Government is the substantial cause of those injuries -- and those findings or rulings of this Court below have been affirmed by the Ninth Circuit -- but we are still here arguing, six years later, over whether Plaintiffs can get a declaratory judgment on their constitutional rights.

It's -- I know of no other case that would say that declaratory relief is not appropriate and not required in this situation.

And the reason why it's so important -- I want to emphasize this -- and it really ties into what Mr. Duffy said. Mr. Duffy says that the energy system is up to the political branches and that these young people need to go convince their elected officials or they need to go to the polls

and vote to change that system. And there's no other instance where a constitutional right, a fundamental right, is being violated that plaintiffs are told to go to the polls.

So, for example, people who want to protect their Second Amendment gun rights, they are not told, "Go to the polls." They are granted standing to come to the federal courts to have an adjudication of their rights.

And every decision the Government has made about the energy system today and for the past 50 years has been, to this point, solely up to the political will of the majority and has not been cavened by the constitution. And those policies and practices, which Defendants admit are endangering these Plaintiffs, have never been evaluated for their constitutionality. But fundamental to our constitutional democracy and its survival is these young people's inalienable constitutional rights that cannot be put up to a vote or the politics of lobbyists.

They are protected. The founders protected people and their rights from having to just go to the polls to secure them and protect them.

And I think the Ninth Circuit case in Ibrahim v. Department of Homeland Security at page 993 also brings this home. And it says a plaintiff is not required to solve all roadblocks to full realization of their rights at one time, that a declaration of people's rights can remove one vital roadblock to actually redressing harm that has been caused.

So Plaintiffs clearly -- I just want to state this clearly. We've said this for a long time, but we do not ask the Court to commandeer the nation's energy system. We want the Court here to do its job -- to hear the evidence on both sides, find the facts, declare the rights, and, if Your Honor finds violations of those rights, to also declare them.

And what Plaintiffs truly want is for the political branches of government to stop infringing their rights and to make policy decisions that are protective of them.

And -- and then the last point, and then I'll conclude, is that the defendants keep saying that the nation's energy policy is dedicated to their unfettered discretion. But they have never once argued that the nation's energy system presents

a nonjusticiable political question for the nation's energy policy. And they've never once said that the climate crisis and the harms it's imposing on these children are nonjusticiable because of the political question doctrine. And that argument has done -- it's been decided. It's law of the case.

So as we head into over 110-degree temperatures this early summer weekend in Eugene, Oregon, and a summer again ravaged by drought, with looming threats of another vicious wildfire season, there's a new draft report by the United Nations that just came out, and it says, quote, The worst is yet to come affecting our children's and our grandchildren's lives much more than our own.

Six years into this case these plaintiffs are still being individually harmed by their government's policies and practices, and only a declaration by this Court of their constitutional rights and the Government's violation thereof, after all of the facts are laid bare, will truly begin to protect their rights and redress their ongoing injuries.

And with that, Your Honor, unless you have further questions, I just have a couple of housekeeping matters.

THE COURT: Go ahead. I don't have any other questions. Thank you.

MS. OLSON: Okay. So we will file the notice of supplemental authority and respond on the California v. Texas case and perhaps the Arthrex case, which we need to read more carefully.

And we also are going to submit a new Second Amended Complaint that corrects for all of the individual defendants who have now been appointed and confirmed to those defendant positions as well as remove the organizational plaintiff, Earth Guardians, as a named plaintiff in the Second Amended Complaint since this case is moving forward for the individual violations.

And we will also look at adding the nominal damages request for relief.

THE COURT: Would you in your supplement briefing obviously touch on the case that came down today? I have fortunately had a law clerk who has read it quickly and summarized it for me, but I would essentially like you to talk about that case as well in your supplement.

MS. OLSON: Absolutely, Your Honor. We will do that.

THE COURT: All right. Thank you.

MS. OLSON: Thank you very much.

THE COURT: Anything else for you, Mr. Duffy?

MR. DUFFY: No. I just have one comment, and that will be it.

It's not Mr. Duffy who said that the energy system is up to the political branches. It's the Ninth Circuit who said that definitively in its opinion.

And insofar as Plaintiffs are saying that a declaratory judgment would be enough to grant some redressability here, there again, the Ninth Circuit has spoken to that definitively. It said no, and this Court is bound by that.

THE COURT: So, Mr. Duffy, I would also tell you that the Government has the chance to take a look -- and I will obviously pull the UN report, the worst is yet to come, and I will read that carefully -- that report carefully as well. And I would think at this point the Government might take a look at what -- what courts can do to be helpful in this instance.

And I was hopeful that your argument might have been different today. But I'm prepared to go forward and make my decision in this case.

But I'm going to tell you honestly -- and I'm just putting this -- noting this for the record. I'm not going to be able to get at this immediately, and I'll tell you why. I have emergency hearings on water cases in part of this state. I have an emergency ESA case. I have TROs that are in front of me. And you will have your opinion as I get to it.

But the nature of the work is such that as a district court judge in Oregon, I'm keenly aware of some of the issues that were argued here today. So I will get you an opinion when we -- I've also asked for a transcript. I will look for the supplemental briefing. But do not look for an immediate ruling. I'm taking this under advisement.

I thank you for your time this morning, and we're in recess. Thank you.

MS. OLSON: Thank you, Your Honor.

MR. DUFFY: Thank you, Your Honor.

(Conclusion of proceedings.)

State of Oregon)
) ss.
County of Lane)

I, Eleanor G. Knapp, CSR-RPR, a Certified Shorthand Reporter for the State of Oregon, certify that the witness was sworn and the transcript is a true record of the testimony given by the witness; that at said time and place I reported all testimony and other oral proceedings had in the foregoing matter; that the foregoing transcript consisting of 53 pages contains a full, true and correct transcript of said proceedings reported by me to the best of my ability on said date.

If any of the parties or the witness requested review of the transcript at the time of the proceedings, such correction pages are attached.

IN WITNESS WHEREOF, I have set my hand this 28th day of June 2021, in the City of Eugene, County of Lane, State of Oregon.

Eleanor G. Knapp, CSR-RPR
CSR No. 93-0262
Expires: September 30, 2023