

No. 18-36082

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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

v.

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

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

**BRIEF OF *AMICI CURIAE*, FOOD & WATER WATCH, INC., FRIENDS
OF THE EARTH - US, AND GREENPEACE, INC.
IN SUPPORT OF PLAINTIFFS-APPELLEES**

Zachary B. Corrigan
Food & Water Watch, Inc.
1616 P Street, NW, Suite 300
Washington, DC 20036
(p) 202-683-2451
zcorrigan@fwwatch.org

Attorney for *Amici curiae*,
Food & Water Watch, Inc., Friends of the Earth – US, and Greenpeace, Inc.

CORPORATE DISCLOSURE STATEMENT

Amici curiae, Food & Water Watch, Inc., Friends of the Earth - US, and Greenpeace, Inc. are nonprofit corporations that have no parent corporations or stock held by any publicly held corporation.

STATEMENT PURSUANT TO RULE 29

All parties have consented to the filing of this brief. No party or counsel thereof authored this brief; no person other than *Amici* contributed money that was intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. INTEREST OF *AMICI CURIAE*..... 2

III. ARGUMENT 3

 A. The District Court’s Conclusion That Plaintiffs Have Standing Was Not Erroroneous. 3

 1. Global warming’s impacts on our oceans are real and have caused Plaintiffs particularized harm..... 3

 2. Defendants’ permitting, authorizing, and subsidizing of fossil-fuel extraction, production, transportation, utilization, and exports cause Plaintiffs’ injuries..... 10

 3. Plaintiffs’ painstakingly detailed allegations of Defendants’ broad statutory discretion to limit greenhouse-gas emissions are sufficient to establish redressability. 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

AFGE Local 1 v. Stone, 502 F.3d 1027 (9th Cir. 2007).....20

Alaska Fish & Wildlife Fed’n & Outdoor Council v. Dunkle, 829 F.2d 933 (9th Cir. 1987).17

America’s Cmty. Bankers v. FDIC, 200 F.3d 822 (D.C. Cir. 2000).....17

Bennett v. Spear, 520 U.S. 154 (1997)11

Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1 (1961).....19

Greenwood v. FAA, 28 F.3d 971 (9th Cir. 1994).....20

Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973).....19

Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2017)... 4, 11, 12, 15, 17, 20

Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018)..... 10, 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....4

Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018)3

Mendocino Env’tl. Ctr. v. Mendocino Cty., 192 F.3d 1283 (9th Cir. 1999)3

Novak v. United States, 795 F.3d 1012 (9th Cir. 2011)10

Nw. Requirements Utils. v. FERC, 798 F.3d 796 (9th Cir. 2015)11

Pease v. Udall, 332 F.2d 62 (9th Cir. 1964).....19

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)4, 7, 10

Wash. Env’tl Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).....11

Webster v. Doe, 486 U.S. 592 (1988).....20

Statutes

30 U.S.C. § 201 (2012)19

30 U.S.C. § 226 (2012)19

30 U.S.C. § 241(a)(1) (2012).....19

42 U.S.C. § 4372(d)(5) (2012)20

43 U.S.C. § 1701 (2012).....19

Other Authorities

Appliance Standards Awareness Project and Am. Council for an Energy-Efficient Econ., *US light bulb standards a save billions for consumers but manufacturers seek rollback*, July 201815

Bureau of Land Mgmt., “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7924 (Feb. 22, 2018).....13

Chris Mooney, *The U.S. Has Caused More Global Warming Than Any Other Country. Here’s How the Earth Will Get Its Revenge*, Wash. Post, Jan. 22, 2015.7

Dept. of Interior Secretarial Order 3338 (Jan. 15, 2016)12

Dept. of Interior Secretarial Order 3348 (Mar. 29, 2017).....12

Dustin Mulvaney *et al.*, *The Potential Greenhouse Gas Emissions from U.S. Federal Fossil Fuels* (Aug. 2015).....15

Gavin A. Schmidt, Derek Arndt, *Annual Global Analysis for 2018, 2018 was 4th warmest for globe, 3rd wettest for United States*, NAT’L AERONAUTICS AND SPACE ADMIN., NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Feb. 2019).....5

Intergovernmental Panel on Climate Change, 2013, *Summary for Policymakers, in Climate Change: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (T.F. Stocker *et al.*, eds. 2013)5,6

Millennium Alliance for Humanity and Biosphere (2013) *Scientific Consensus on Maintaining Humanity's Life Support Systems in the 21st Century Information for Policy Makers*.....6

Presidential Executive Order on Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017).....12

U.S. Dept. of Commerce *et al.*, *NOAA Fisheries Climate Science Strategy* (Jason S. Link *et al.*, eds., Aug. 2015).....8

U.S. Dep’t of Energy, “2019-02-11 Energy Conservation Program: Energy Conservation Standards for General Service Laps; Notice of proposed rulemaking and request for comment,” 84 Fed. Reg. 3,120 (Feb. 11, 2019).....15

Dep’t of Transp., Nat’l Highway Traffic Safety Admin., “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018).....14

U.S. EPA, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64661 (Oct. 23, 2015).....14

U.S. EPA, “Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program,” 83 Fed. Reg. 44,746 (Aug. 31, 2018).....14

U.S. Global Change Research Program (2014) *Climate Change Impacts in the United States: The Third National Climate Assessment*.....16

U.S. Global Change Research Program (2017) *Climate Science Special Report: Fourth National Climate Assessment, Volume I*.....9

U.S. Global Change Research Program (2018) *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*7,16,18

I. INTRODUCTION

The undersigned *amici curiae* submit the following brief in support of Plaintiffs-Appellees' ("Plaintiffs") Opening Brief.

While this case is undeniably unprecedented in its importance, the Plaintiffs have clearly demonstrated standing. Their injuries, including ocean-related harms, are real and particularized. Global-warming-induced sea-level rise and ocean acidification are caused in no small part by Defendants' permitting, authorizing, and subsidizing of fossil-fuel extraction, production, transportation, utilization, exports, and combustion that result in greenhouse-gas emissions. The same statutory discretion Defendants have exploited to authorize this conduct can instead serve to redress Plaintiffs' injuries by enabling the Defendants to implement an enforceable national plan phasing out fossil fuel infrastructure and the elimination of greenhouse-gas emissions from the continuing use of fossil fuels.

Defendants simply disagree with the District Court's conclusions, but this is far from a demonstration of legal error. *Amici* therefore urge this Court to reject Defendants' request for remand and dismissal of this case.

II. INTEREST OF *AMICI CURIAE*

Food & Water Watch, Inc. (“FWW”) is a national, non-profit, public-interest consumer advocacy organization with more than 33,721 active members nationwide. FWW advocates for policies shifting the nation from fossil fuels to 100% renewable energy by 2035.

Friends of the Earth - US (“FOE”) is a national, non-profit, environmental advocacy organization with more than 1.7 million members and activists across the United States. FOE advocates for policies to reduce fossil-fuel subsidies, production, and consumption and to protect our oceans.

Greenpeace, Inc. (“Greenpeace”) is an independent campaigning organization, which uses non-violent, creative confrontation to expose global environmental problems, and to force the solutions which are essential to a green and peaceful future.

III. ARGUMENT

A. The District Court's Conclusion That Plaintiffs Have Standing Was Not Erroneous.

Upon interlocutory appeal, this Court may not review a district court's "determination that the evidence presented by the parties raises genuine factual disputes." *See Mendocino Env'tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1291 (9th Cir. 1999). However, Defendants have simply ignored the evidence reviewed by the District Court and the fact that it clearly determined that said evidence was sufficient to establish genuine issues of material fact on standing that can only be resolved at trial. *See Martin v. City of Boise*, 902 F.3d 1031, 1040 (9th Cir. 2018). Instead, their brief entirely misconstrues Plaintiffs' multitudinous injuries, underscoring Defendants' apparent disregard for the very real and serious consequences of anthropogenic climate change. All standing issues associated with this case require an evidentiary analysis that is outside of the Ninth Circuit's scope of review on interlocutory appeal.

1. *Global warming's impacts on our oceans are real and have caused Plaintiffs particularized harm.*

The District Court clearly found that Plaintiffs met their burden of demonstrating injury-in-fact. Their First Amended Complaint pled "an invasion of a legally protected interest' that is 'concrete and particularized'" and "actual or imminent, not conjectural or hypothetical[;]" *see Spokeo, Inc. v. Robins*, 136 S.

Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); due to their extensive allegations of ongoing injuries from global warming—from drought, to water contamination, to increased flooding. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2017) (ECF No. 83). Perhaps most compelling were Plaintiffs’ ocean-related injuries, including sea-level rise and acidification. *See id.* at 1244, 1256, n.11. The District Court concluded that these injuries flow from government mismanagement of ocean resources that the federal government holds in trust under the Public Trust Doctrine. *Id.*

Defendants now contend that these injuries are not “concrete and particularized.” (Def. Brief at 13.) However, for reasons below, it would be anomalous to construe Plaintiffs’ alleged injuries from fossil fuel-driven global warming as anything but “concrete” or, as the Supreme Court has recently simplified this requirement, “real.” *See Spokeo*, 136 S. Ct. at 1542.

The Earth’s energy imbalance cannot be legitimately disputed. Global mean temperatures have dramatically increased since the 1900s. (Hansen Decl. ¶ 31, ECF 7-1.) Defendants further “admit that human activity (in particular, elevated concentrations of [greenhouse gases]) is likely to have been the dominant cause of observed warming since the mid-1900s.” (ECF No. 98 at ¶49.) Moreover, Defendants’ own Answer states that “global atmospheric concentrations of CO₂, methane, and nitrous oxide are at unprecedentedly high levels compared to the past

800,000 years of historical data and pose risks to human health and welfare.” (*Id.* at 4.)

As a result of these historically high concentrations of greenhouse gases, the planet has witnessed warmer global temperatures in the past three decades than any preceding 10-year period since modern record-keeping began in 1850, and the last 30 years have been the warmest of the last 1400 years in the Northern Hemisphere.¹ The federal government itself, through the two federal agencies tasked with tracking global climate trends, has acknowledged that the last four years have also been the hottest in recorded human history.² If drastic action is not taken promptly to address fossil fuel production and consumption, as sought by Plaintiffs, the United Nations’ Intergovernmental Panel on Climate Change (“IPCC”) projections estimate a mean surface temperature increase of 3.7°C to

¹ Intergovernmental Panel on Climate Change (“IPCC”), 2013, *Summary for Policymakers, in Climate Change: The Physical Science Basis*. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 5 (T.F. Stocker *et al.*, eds. 2013), http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf.

² Gavin A. Schmidt, Derek Arndt, *Annual Global Analysis for 2018, 2018 was 4th warmest for globe, 3rd wettest for United States*, NAT’L AERONAUTICS AND SPACE ADMIN., NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Feb. 2019) Available at <https://www.ncdc.noaa.gov/sotc/briefings/201902.pdf>.

4.8°C by 2100³ which is hotter than Earth has been since the Miocene era, over 14 million years ago.⁴

As a result of increasing atmospheric warming, the world's oceans have absorbed nearly 90% of the Earth's excess energy, causing them to warm and expand, leading to sea-level rise. (See Hansen Ex. 2, at 5, ECF 7-3; First Amend. Compl. ¶ 218, ECF 7.) Recent observation-based estimates show rapid warming of the Earth's oceans over the past few decades, with an observed rate of warming nearly 40% faster than U.N. models predicted only five years ago.⁵ Parts of the East and Gulf Coasts of the United States have seen dramatic seawater incursions, spurred by a combination of seawater expansion and melting terrestrial glaciers and sea ice. (First Amend. Compl. ¶ 219.)

Without dramatic reductions in greenhouse-gas emissions, scientists expect that the global sea level will rise by more than 3 feet by 2100. (See Hansen Ex. 2, at 6; Ex. 3, at 20091, ECF 7-4.) This will be catastrophic, with flooding, erosion,

³ IPCC (2014) "Summary for Policymakers." *Climate Change 2014: Mitigation of Climate Change*. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.

⁴ Millennium Alliance for Humanity and Biosphere (2013) *Scientific Consensus on Maintaining Humanity's Life Support Systems in the 21st Century Information for Policy Makers*. Available at <http://mahb.stanford.edu/consensus-statement-from-global-scientists/>.

⁵ Cheng L, et al. (2019) *How fast are the oceans warming?* Am. Ass'n for the Advancement of Science, vol. 363, no. 6423, 128-129. <https://doi.org/10.1126/science.aav7619>

higher storm surges, and, in some areas, permanent inundation. Another two-foot sea-level rise would jeopardize one-trillion dollars of U.S. property with permanent inundation.⁶ (*See* First Amend. Compl. ¶ 253 (estimating coastal damage of at least \$5 trillion).) Other effects include saltwater intrusion of drinking-water supplies and the undermining of measures like seawalls. (*Id.* ¶ 87.)

Such incursions would have happened much sooner if not for the protection of the seas themselves. The oceans have acted as a giant heat sponge, causing seawater to expand uniformly. But now, as a greater proportion of sea-level rise is due to melting land ice, such as on Antarctica, sea levels are rising faster. (*See id.* ¶¶ 41, 218; Hansen Ex. 2, at 4, 6; Ex. 3, at 20062.) Due to its location, North America is expected to feel the brunt of this rise.⁷

Plaintiffs alleged they are directly harmed by sea-level rise, meaning their injuries are adequately “particularized.” *See Spokeo*, 136 S. Ct. at 1548, n.7. Levi D., for example, alleged that his home is threatened by sea-level rise, the barrier

⁶ U.S. Global Change Research Program (2018) *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. At Ch. 8: Coastal Effects.

<https://doi.org/10.7930/NCA4.2018.CH1>.

⁷ Chris Mooney, *The U.S. Has Caused More Global Warming Than Any Other Country. Here's How the Earth Will Get Its Revenge*, WASH. POST, Jan. 22, 2015, https://www.washingtonpost.com/news/energy-environment/wp/2015/01/22/the-u-s-has-contributed-more-to-global-warming-than-any-other-country-heres-how-the-earth-will-get-its-revenge/?utm_term=.99fde813a805.

island on which it sits has seen real-estate prices decline, and the value of his home has decreased and eventually could be lost completely, due to sea-level rise caused by global warming. (Levi D. Decl. ¶ 4, ECF 41-7.)

While global warming has essentially weaponized our seas, the damages it has caused to the ocean ecosystem are also a source of Plaintiffs' concrete and particularized injuries. Among other effects, global warming reduces sea-ice thickness and extent, alters storm tracks and intensity, changes precipitation patterns, alters freshwater input, increases acidification, and reduces dissolved-oxygen levels.⁸ (See First Amend Compl. ¶¶ 70, 218-20, 229, 231, 253; Hansen Decl. at 16, n.7; Hansen Ex. 2, at 4, 7; Hansen Ex. 3, at 20085, 20110, 20119.) Fish populations are harmed as global warming changes productivity, distribution, phenology, survivorship, abundance, and community composition.⁹ (See First Amend Compl. ¶¶ 235-36.)

Increased absorption of carbon dioxide also has caused ocean pH levels to drop precipitously. (See *id.* ¶ 231; Hansen Ex. 2, at 7.) Corals and shellfish species such as shrimp, crabs, lobsters, clams, and oyster, which currently comprise about two-thirds of U.S. marine aquaculture production and more than

⁸ U.S. Dept. of Commerce *et al.*, *NOAA Fisheries Climate Science Strategy 3* (Jason S. Link *et al.*, eds., Aug. 2015), https://swfsc.noaa.gov/uploadedFiles/Home/NOAA_Fisheries_Climate_Science_Strategy_2015.pdf

⁹ *Id.*

half of U.S. domestic-fishery landings by value, are most susceptible to ocean acidification.¹⁰ (*See* First Amend Compl.) The Defendant’s own research has stated that, if no action is taken to reduce emissions, the shellfish industry may expect to lose \$230 million by the end of the century due to ocean acidification, which is already killing shellfish and corals.¹¹

Plaintiffs’ alleged particularized injuries are a direct result of these global-warming effects. Plaintiff Jacob Lebel, for example, alleged that he and his family’s harvesting of mussels and his own crab-fishing and mussel-gathering activities in Bandon, Oregon have been harmed by scarcity linked to global warming. (*Id.* ¶ 33.) Plaintiff Alex Loznak testified that in the summer of 2015, the Oregon Department of Fish and Wildlife curtailed salmon fishing at his fishing spots due to stress from abnormally high-water temperatures and low-stream flows. (Loznak. Decl. ¶ 24, ECF 41-1.)

As if to support the merits of Plaintiffs’ underlying claims by derogating the Defendants’ trust duties, Defendants undermine these injuries, calling them “archetypal generalized grievances” arising from a “diffuse, global phenomenon that affects every other person in their communities, in the United States, and

¹⁰ *Id.* at 5.

¹¹ U.S. Global Change Research Program (2017) *Climate Science Special Report: Fourth National Climate Assessment, Volume I*, at Ch. 2: Our Changing Climate; Ch. 3: Water; Ch. 9: Oceans and Marine Resources; Ch. 11: Built Environment, Urban Systems, and Cities.

throughout the world.” (Def. Brief at 13.) However, climate change will disproportionately impact vulnerable populations; furthermore, the “fact that a harm is widely shared *does not render it a generalized grievance.*” *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2011) (emphasis added). While Defendants acknowledge the substantial threat posed by climate change, their argument disregards what the Supreme Court reiterated just two terms ago: “[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims’ injuries from a mass tort, for example, are widely shared, to be sure, but *each individual suffers a particularized harm.*” *Spokeo*, 136 S. Ct. at 1548 (emphasis added).

The Plaintiffs’ injuries are the same type as with a mass tort, only their claims target Defendants’ violations of the Due Process Clause. The District Court was correct in thus refusing to disqualify Plaintiffs’ claims, and there is no reason for this Court to upend the lower court’s injury-in-fact determination now.

2. *Defendants’ permitting, authorizing, and subsidizing of fossil-fuel extraction, production, transportation, utilization, and exports cause Plaintiffs’ injuries.*

The District Court also did not commit clear error in concluding that “[a] ruling decision on this issue will benefit from a fully developed factual record . . .” *Juliana v. United States*, 339 F. Supp. 3d 1062, 1093 (D. Or. 2018). To satisfy this criterion, Plaintiffs need only show that their injuries are “fairly traceable” to the

challenged agency action and “not the result of independent choices by a party not before the court.” *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 806 (9th Cir. 2015) (citing *Wash. Env’tl Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013)). Plaintiffs meet this burden by showing that the government action has a “determinative or coercive effect” on the third party. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

The District Court concluded that Plaintiffs demonstrated two independently sufficient chains of causation, one of which was as follows: “fossil fuel combustion accounts for the lion’s share of greenhouse gas emissions produced in the United States; defendants have the power to increase or decrease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion.” *Juliana*, 217 F. Supp. 3d at 1246.

Defendants now complain that the causal chain is so tenuous that specific actions by the Defendants cannot be pinpointed as the source of Plaintiffs’ injuries. (Def. Brief at 18.)

But what the District Court describes as Defendants’ “power to increase or decrease those emissions”—which Defendants deride for being too general—is actually a reference to an extensive list of specific government authorities alleged to “cause and promote higher levels of fossil fuel combustion.” *Juliana*, 217 F.

Supp. 3d at 1246. For example, the District Court cites to leases issued by the U.S. Department of Interior (“DOI”)’s Bureau of Land Management (“BLM”) (First Amend. Compl. ¶¶ 164, 166); specific government subsidies for fossil fuel extraction and production (*id.* ¶¶ 171, 173); licenses and export exemptions for crude oil (*id.* ¶ 181); and subsidies for Sports Utility Vehicles (*id.* ¶ 190).

It is worth noting that the District Court’s causation findings, made in November 2016, did not take into consideration numerous recent actions by Defendants under the new administration that has taken even greater steps to fast track and increase fossil fuel production in the United States. Not considered, for example, was the DOI’s 2017 order¹² revoking a moratorium on coal leasing on federal lands.¹³ The District Court also did not consider actions that agencies have taken pursuant to Executive Order 13783, which dismantled prior agency actions to address climate change and directs all federal agencies to begin the removal of any and all regulatory obstacles to expanded fossil fuel development and use.¹⁴

Additionally, the Executive Branch has consistently demonstrated the requisite discretionary authority over fossil fuel permitting, extraction, and

¹² Dept. of Interior Secretarial Order 3348 (Mar. 29, 2017), <http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/database/doi/#order3348>.

¹³ Dept. of Interior Secretarial Order 3338 at 8 (Jan. 15, 2016), <https://perma.cc/JVT4-J7VR>.

¹⁴ Presidential Executive Order on Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

combustion throughout the United States over the past 2 years. For instance, the BLM has attempted to repeal regulations meant to reduce methane emissions by restricting flaring; such a repeal is designed to support increased fossil fuel extraction, thereby allowing methane emissions to increase by 1.8 million tons.¹⁵ Furthermore, the current administration has made significantly more public land available to oil and gas companies at bargain prices; the amount of land made available for lease by the BLM has increased six times over 2016 levels while the agency has also expedited the leasing process.¹⁶ Nationally, BLM says it generated \$360 million from oil and gas leases in 2017, an 86% increase from 2016,¹⁷ demonstrating a clear action by the current administration to intentionally increase extraction and combustion of fossil fuels under federal control despite the irrevocable future harm such actions will have.

¹⁵ Bureau of Land Mgmt., “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7924 (Feb. 22, 2018); Matthew Brown, *List of regulation rollbacks for oil, gas and coal industry*, ASSOCIATED PRESS, Jan. 27, 2019, <https://apnews.com/faca868339eb413f9a446ccb990dba05>; Lisa Friedman, *Trump Administration Targets Obama-Era Effort to Limit Methane*, THE NEW YORK TIMES, Feb. 12, 2018, <https://www.nytimes.com/2018/02/12/climate/trump-methane-rule-repeal.html>;

¹⁶ Bureau of Land Mgmt., *State Oil and Gas Lease Sales*, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales>.

¹⁷ Cooper McKim, *Trump Push for ‘Energy Dominance’ Boost Drilling on Public Land*, NAT’L PUB. RADIO, Nov. 25, 2018, <https://www.npr.org/2018/11/25/666373189/trump-push-for-energy-dominance-boosts-drilling-on-public-land>

The pattern of behavior is seen outside of the DOI as well, as the U.S. Environmental Protection Agency (“EPA”) has proposed a replacement of an existing emissions regulation of new power plant emissions;¹⁸ the agency’s proposed replacement would allow up to 61 million additional tons of carbon dioxide compared to current regulations.¹⁹ As for the Defendants’ regulation of transportation, the U.S. Department of Transportation (“DOT”) has proposed to freeze passenger vehicle fuel efficiency standard increases²⁰ after consistent pressure from the fossil fuel industry.²¹ This regulatory repeal will allow for emission increases of 961 million tons of carbon dioxide and 1.7 million tons of methane, and would permit the oil industry to gain revenues on up to 79 billion gallons of additional fuel sales for vehicles built through 2029.²² Finally, the U.S.

¹⁸ U.S. EPA, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64661 (Oct. 23, 2015).

¹⁹ U.S. EPA, “Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program,” 83 Fed. Reg. 44,746 (Aug. 31, 2018).

²⁰ Dep’t of Transp., Nat’l Highway Traffic Safety Admin., “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018).

²¹ See Hiroko Tabuchi, *The Oil Industry’s Covert Campaign to Rewrite American Car Emissions Rules*, THE NEW YORK TIMES, Dec. 13, 2018, <https://www.nytimes.com/2018/12/13/climate/cape-emissions-rollback-oil-industry.html>

²² Matthew Brown, *List of regulation rollbacks for oil, gas and coal industry*, ASSOCIATED PRESS, Jan. 27, 2019, <https://apnews.com/faca868339eb413f9a446ccb990dba05>

Department of Energy (“DOE”) has recently published a proposed rule that would remove a large portion of light bulbs from stricter energy efficiency standards,²³ costing consumers an additional \$12 billion in utility electricity costs while increasing the amount of fossil fuels used to power less efficient lighting across the nation.²⁴

These Defendant actions, including the direct permitting, authorizing, and subsidizing of fossil-fuel extraction, production, transportation, utilization, and exports, result in substantial greenhouse-gas emissions that spur global warming (First Amend. Compl. ¶ 279) and cause Plaintiffs’ injuries. *Juliana*, 217 F. Supp. 3d 1224. Not only does approximately one-quarter of U.S. fossil-fuel extraction occur on federal public lands (First Amend. Compl. ¶ 164), federal fossil fuels account for 46 to 50% of total U.S. potential greenhouse-gas emissions.²⁵

Moreover, such behavior clearly demonstrates the Defendants’ willful disregard of

²³ U.S. Dep’t of Energy, “2019-02-11 Energy Conservation Program: Energy Conservation Standards for General Service Lamps; Notice of proposed rulemaking and request for comment,” 84 Fed. Reg. 3,120 (Feb. 11, 2019).

²⁴ Appliance Standards Awareness Project and Am. Council for an Energy-Efficient Econ., *US light bulb standards a save billions for consumers but manufacturers seek rollback*, July 2018. https://appliance-standards.org/sites/default/files/light_bulb_brief_appendices.pdf

²⁵ Dustin Mulvaney, et al., *The Potential Greenhouse Gas Emissions from U.S. Federal Fossil Fuels*, ECO-SHIFT CONSULTING, at 16 (Aug. 2015), <http://www.ecoshiftconsulting.com/wp-content/uploads/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf>.

its own research on the climate impacts caused by these policies,²⁶ as the government must facilitate “substantial reductions in net global [carbon dioxide] emissions prior to 2040 relative to present-day values” to prevent the worst effects of catastrophic climate change.²⁷ Yet it has instead chosen to increase national permitting and production of fossil fuels. It is clear that these and other actions

²⁶ The collaborative efforts of the U.S. Global Change Research Program (“USGCRP”) have clearly demonstrated the future impacts of climate change caused by fossil fuel emissions. This program consists of research by 13 federal agencies: the Departments of Agriculture, Commerce (NOAA), Defense, Energy, Health and Human Services, Interior, State, Transportation, along with the Environmental Protection Agency, National Aeronautics and Space Administration, the National Science Foundation, the Smithsonian Institute, and the U.S. Agency for International Development. *See generally*, USGCRP (2014) *Climate Change Impacts in the United States: The Third National Climate Assessment*. [Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, (eds.)]. U.S. Global Change Research Program, 841 pp. <https://doi.org/10.7930/J0Z31WJ2> ; USGCRP (2016) *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*. U.S. Global Change Research Program, Washington, DC, 312 pp. <http://dx.doi.org/10.7930/J0R49NQX> ; USGCRP (2017) *Climate Science Special Report: Fourth National Climate Assessment, Volume I* [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp. <https://doi.org/10.7930/J0J964J6> ; USGCRP (2018) *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 186 pp.

²⁷ USGCRP (2018) *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief*, Executive Summary at 22.

taken by the current administration are evidence that Defendants continue to cause Plaintiffs' injuries by spurring even greater fossil-fuel extraction and warming.

The District Court's conclusion that this pattern of behavior establishes causation was not in error, and outside the scope of this Court's review, as it is blackletter law that plaintiffs can establish causation by showing the "administrative agency *authorized* the injurious conduct." *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 827 (D.C. Cir. 2000) (emphasis added) (citing cases); accord *Alaska Fish & Wildlife Fed'n & Outdoor Council v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987).

3. *Plaintiffs' painstakingly detailed allegations of Defendants' broad statutory discretion to limit greenhouse-gas emissions are sufficient to establish redressability.*

The District Court issued a cautious redressability ruling, recognizing a number of difficult questions for later resolution. *Juliana*, 217 F. Supp. 3d 1224. But, at the pleading stage, the District Court found that Plaintiffs had sufficiently demonstrated a remedy that would slow or reduce their alleged injuries. An order requiring Defendants to prepare an enforceable national remedial plan to phase out fossil-fuel emissions and draw down excess carbon dioxide would be substantially likely to redress Plaintiffs' injuries. *Juliana*, 339 F. Supp. 3d at 1094.

The redressability of Plaintiffs' injuries by such a remedial plan has already been directly attested to by the Defendants through statements by the USGCRP,

which stated that it is technically feasible for governmental action to limit emissions to a level capable of preventing catastrophic climate disruption, “whereas there would be virtually no chance if net global emissions followed a pathway well above those implied by country announcements” in the 2015 Paris Climate Accord.²⁸ This is particularly significant given that after a downward trend, U.S. greenhouse gas emissions rose in 2018,²⁹ and the current administration’s has announced that Defendants plan to pull the United States, a nation responsible for nearly one-sixth of global greenhouse gas emissions, out of the 2015 Paris Climate Accord.³⁰

Defendants’ primary argument is that neither Plaintiffs nor the District Court have “cited any legal authority that would permit” remedial action as sought by Plaintiffs. (Def. Brief 22.) Defendants’ Answer has already ostensibly admitted that Plaintiffs alleged such authority throughout their complaint, however. (*See generally* Def. Answer). There, Plaintiffs painstakingly review Defendants’ broad authority to issue fossil-fuel leases, permits, and export authorizations. While

²⁸ USGCRP, (2018) *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief*, Executive Summary at 23.

²⁹ Rhodium Group, *Preliminary US Emissions Estimate for 2018*, Jan. 8, 2019. <https://rhg.com/research/preliminary-us-emissions-estimates-for-2018/>

³⁰ Ali Vitali, *Trump Pulls U.S. Out of Paris Climate Agreement*, NBC NEWS, June 1, 2017. <https://www.nbcnews.com/politics/white-house/trump-pulls-u-s-out-paris-climate-agreement-n767066>

historically the Defendants have used this discretion to authorize and encourage greenhouse gas emissions, their authority is not so limited.

For example, under the Federal Land Policy Management and the Minerals Leasing Acts (First Amend. Compl. ¶ 110); 43 U.S.C. § 1701 (2012); 30 U.S.C. §§ 201, 226, 241(a)(1) (2012); Defendant DOI has enormous discretion on whether to lease land for fossil-fuel development, including the authority “*not to lease at all . . . if it was felt that such leasing would be detrimental to the public interest.*” *Pease v. Udall*, 332 F.2d 62, 63-64 (9th Cir. 1964) (emphasis added). Likewise, DOI has extensive authority under the Outer Continental Shelf Lands Act (First Amend. Compl. ¶ 111), including to suspend energy leases in federal water to conserve the outer continental shelf’s natural resources. *See Gulf Oil Corp. v. Morton*, 493 F.2d 141, 144-45 (9th Cir. 1973). Defendants also have considerable discretion in approving infrastructure used to process and transport fossil fuels for domestic supply and export.³¹

That Defendants demand Plaintiffs plead more specific authority, while themselves providing no clear authority limiting the Judiciary’s involvement in these proceedings, suggests that somehow courts otherwise do not have the

³¹ For example, the Federal Energy Regulatory Commission may deny certificates of public convenience and necessity for pipelines and other natural-gas-transportation infrastructure for conservation. *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 20-22 (1961).

independent power to remedy Constitutional violations—a plain misunderstanding of the Article III.³² *Greenwood v. FAA*, 28 F.3d 971, 975 (9th Cir. 1994) (“[I]n the absence of very explicit language from Congress precluding review . . . , judicial review of colorable constitutional claims is available, even where statutory claims are otherwise committed to agency discretion”) (citing *Webster v. Doe*, 486 U.S. 592, 603-04 (1988).)³³

IV. CONCLUSION

Defendants fail to point to a fundamental flaw in the District Court’s determinations of a dispute of material fact and only raise disagreements. The District Court’s decisions reflect a reasoned conclusion that Plaintiffs have met all three criteria for standing at this stage of the case—real and particularized ocean-related injuries, caused by Defendants’ authorizations of fossil-fuel permitting, production, transport, and export, under authorities which instead should be

³² Nor would the court need to enjoin the President. (*See* Def. Brief at 35.) The Council of Environmental Quality and White House Office of Environmental Quality have independent authority to coordinate federal agencies and programs affecting environmental quality. *See* 42 U.S.C. § 4372(d)(5) (2012).

³³ This is what the District Court meant by “[P]laintiffs’ theory of the case requires no citation to particular statutory or regulatory provisions” *Juliana*, 217 F. Supp. 3d at 1240; *see also AFGE Local 1 v. Stone*, 502 F.3d 1027, 1038 (9th Cir. 2007) (“The power of the federal courts to grant equitable relief for constitutional violations has long been established”) (citation omitted).

implemented to reduce or slow down climate change. Thus, the Court should rule in favor of Plaintiffs and deny Defendants' interlocutory appeal.

Respectfully submitted,

DATED: March 1, 2019

Amici curiae, Food & Water Watch, Inc.,
Friends of the Earth – US, and
Greenpeace, Inc.

By their attorney,

s/ Zachary B. Corrigan
Zachary B. Corrigan
(State Bar No. Wash., DC, 497557)
1616 P Street, NW, Suite 300
Washington, DC 20036
(p) 202-683-2451
zcorrigan@fwwatch.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5) and Circuit Rules 21-2(c), 32-3(2) because it contains 4,511 words.
2. This brief has been prepared in a proportionally spaced typeface of 14 point, Times New Roman, using Microsoft Word for Mac. 2015.

DATED: March 1, 2019

s/ Zachary B. Corrigan
Zachary B. Corrigan
(State Bar No. Wash., DC, 497557)
1616 P Street, NW, Suite 300
Washington, DC 20036
(p) 202-683-2451
(f) 202-683-2452
zcorrigan@fwwatch.org

Attorney for *Amicus curiae*, *Amici curiae*,
Food & Water Watch, Inc., Friends of the
Earth – US, and Greenpeace, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the U.S. Court of Appeals or the 9th Circuit using the CM/EMF system on March 1, 2019. I certify that all the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Zachary B. Corrigan
Zachary B. Corrigan