No. 18A-65

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., APPLICANTS,
v.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
and
KELSEY CASCADIA ROSE JULIANA, et al., RESPONDENTS

RESPONSE BRIEF OF RESPONDENTS JULIANA, ET AL., TO APPLICATION FOR A STAY PENDING DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON AND ANY FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN ADMINISTRATIVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Real Parties in Interest Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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INTRODUCTION

Respondents, twenty-one children and youth ("Plaintiffs"), respectfully request this Court deny Petitioners' ("Defendants") application for stay ("Application").[1] Plaintiffs' Fifth Amendment substantive due process claims allege that Defendants have deprived Plaintiffs of recognized liberties and other unalienable rights. In response, Defendants concede Plaintiffs have made a *prima facie* case of injury-in-fact and are already in the "danger zone" from climate change. That danger zone is exemplified by one Plaintiff, ten-year-old Levi D., who is losing his Florida barrier island to sea level rise, the security of his home and school to storm water inundation, and the security of his person and mental health to traumatic stress from the government-sanctioned fossil fuel energy system, which is causing climate change. Mischaracterizing the case's procedural posture and status of discovery, and without any credible claim of harm, Defendants ask this Court to micromanage the district court and stay proceedings in this urgent constitutional case.

On July 20, 2018, the Ninth Circuit denied Defendants' most recent petition for writ of mandamus ("second petition"), finding it identical in all material respects in both argument and circumstance to an unsuccessful petition for writ of mandamus Defendants filed on June 9, 2017 ("first petition").[2] On March 7, 2018,

[1] Defendants request that this Court alternatively construe their Application as a petition for writ of mandamus or petition for certiorari from the Ninth Circuit's prior mandamus decision. Application at 38. As requested by the Court, Plaintiffs respond herein only to Defendants' request for a stay pending further review and reserve the right to respond separately to Defendants' alternative requests if invited by this Court.

[2] Appendix ("App.") at 4a.

Chief Judge Sidney Thomas of the Ninth Circuit wrote a well-reasoned opinion denying the first petition as wholly failing to satisfy any of the factors for mandamus. *In re United States*, 884 F.3d 830 (9th Cir. 2018). Defendants chose not to seek immediate review of that denial, instead requesting from this Court two extensions of their deadline for review, belying their present claim of any supposed "emergency" or impending harm.

In again declining "to exercise [their] jurisdiction to grant mandamus relief," App. at 5a, the Ninth Circuit's *per curiam* opinion determined "that the issues that the government raises in its petition are better addressed through the ordinary course of litigation." *Id*. The July 20 opinion reaffirms:

> We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief.
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> The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

Id. at 4a, 9a.

Defendants have not made the showing necessary to justify the extraordinary relief of eliminating the district court's discretion in managing these proceedings in a fundamental rights case brought by children. Defendants' inaccurate portrayal of the current procedural posture of this case is unsupported by the record. While

Defendants allude to "burdensome discovery on a highly compressed timeframe," Application at 36, they fail to cite a single order requiring responses to specific discovery propounded by Plaintiffs. The district court ruled on Defendants' motion for a protective order, which sought to preclude all discovery, correctly denying such overbroad relief. D. Ct. Doc.[3] 212, 300. There are no discovery orders requiring Defendants to produce a single document, respond to a single interrogatory or request for admission, or sit for a single deposition.[4]

In denying the first petition, the Ninth Circuit observed that the record completely lacked any order directing "burdensome or otherwise improper discovery" and that Defendants failed to satisfy *any* of the factors for mandamus. *In re United States*, 884 F.3d at 834-35. The Ninth Circuit reiterated that finding in denying the second petition. App. at 9a-10a.

Contrary to statements made in their Application, all pending discovery requests to which Defendants object have been held in abeyance pursuant to mutual agreement of the parties. Application at 15. In fact, there is no discovery currently pending to which Defendants must respond except notices of deposition of Defendants' eight disclosed experts. Nor is there a burden on Defendants to conduct discovery, other than their decision to take the depositions of Plaintiffs' experts and sit their proffered experts for deposition. Further, the conferral process between the

[3] Plaintiffs refer to the district court docket as "D. Ct. Doc.," the Ninth Circuit docket from Defendants' first petition for writ of mandamus as "Ct. App. I Doc.," and the Ninth Circuit docket for Defendants' second petition for writ of mandamus as "Ct. App. II Doc."

[4] There have been depositions of Defendants' witnesses in this case to which Defendants did not object, further belying their claims regarding discovery burdens. App. at 30a, ¶¶ 51-52; App. at 32a-41a.

parties and regular status conferences with the magistrate judge assigned to pre-trial matters have successfully avoided all discovery disputes to date. As the Ninth Circuit just determined: "the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers." App. at 6a.

Plaintiffs have carefully avoided conducting discovery that would intrude on executive privilege and have not served any discovery on the President. In response to Defendants' pending motion for judgment on the pleadings seeking dismissal of the President, in which Defendants argue that the President is not a necessary party for purposes of Plaintiffs' remedy, Plaintiffs agreed to dismissal of the President without prejudice. App. at 17a, 22a.

Further, in denying the second petition, the Ninth Circuit panel found that preemptive mandamus relief is not appropriate:

> Since that opinion [denying the first petition], the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring all discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

App. at 6a-7a.

At the time they filed this Application, Defendants had pending motions for judgment on the pleadings and for summary judgment in their ongoing effort to

dispose of the children's case or narrow the issues for trial. Both motions were heard by District Court Judge Aiken on July 18, 2018, who said she would rule promptly. Accordingly, the district court is proceeding swiftly to resolve all of Defendants' pending motions, including their motion to dismiss the President. App. at 19a.

Thus, Defendants' principal objection here is simply that they are subject to the normal burdens of litigation because the district court did not dismiss Plaintiffs' important constitutional claims, burdens not cognizable for the extraordinary relief they request. *See, e.g.*, *F.T.C. v. Std. Oil Co. of California*, 449 U.S. 232, 244 (1980). These claims assert that Defendants' systemic affirmative conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite reasonable alternatives to that system and despite long-standing knowledge of the resulting destruction to our nation and profound harm to these young Plaintiffs, violates their substantive due process, equal protection, and public trust rights. A fully developed factual record will show that the brunt of Defendants' energy system falls on children who have no voice in the matter and who are too important and too vulnerable to permit the state to trifle with their most sacred constitutional rights, including their recognized liberty right not to be deprived of their personal security by their government.[5]

[5] In *Brown v. Board of Education*, the Court began to recognize the constitutional protections of children. 347 U.S. 483 (1954). A little over a decade later, in *In re Gault*, the Court held that the Due Process Clause and Bill of Rights applied to children. 387 U.S. 1, 13 (1967). More recently, in a line of child-centered Eighth Amendment cases, the Court treated children as similarly situated to adults in terms of the crime they have committed but "constitutionally different from adults in their level of culpability." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). In *Obergefell v. Hodges*, this Court recognized the constitutional importance of

The scope of this case is directly proportional to the systemic nature and magnitude of Defendants' constitutionally violative conduct. In their Answer to Plaintiffs' Amended Complaint, Defendants admit the United States' emissions comprise "more than 25 percent of cumulative global CO_2 emissions," that "'business as usual' CO_2 emissions" imperil Plaintiffs with "dangerous and unacceptable economic, social, and environmental risks," that "the use of fossil fuels is a major source of these emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path," and that Defendants "permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation." D. Ct. Doc. 98 ¶¶ 7, 150, 151. Depositions of Defendants' witnesses independently confirm that current levels of atmospheric CO_2 and climate change are "dangerous," and that our nation is in an "emergency situation." App. at 30a-31a ¶¶ 53-54; App. at 33a-35a, 37a.

In their expert reports, Plaintiffs' experts[6] confirm the urgent plight of these youth to secure their rights. Plaintiffs' experts starkly present reliable evidence that

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safeguarding children. 135 S. Ct. 2584, 2600 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . . Marriage also affords the permanency and stability important to children's best interests. . . . [Children] also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.").

[6] Expert testimony in this case will come from Nobel laureate economist and scientists, award-winning historians, a former head of the Council on Environmental Quality during the Carter administration, and the top climate scientists in the world, including the former head of NASA's Goddard Institute for Space Studies. Specifically, Plaintiffs experts are Dr. Frank Ackerman, Peter A. Erickson, Howard Frumkin, M.D., Dr. James E. Hansen, Dr. Ove Hoegh-Guldberg, Dr. Mark Jacobson, Susan E. Pacheco, M.D., Jerome A. Paulson, M.D., Dr. Eric Rignot, Dr. G. Philip Robertson, Dr. Steve W. Running, Catherine Smith, J.D., James Gustave Speth, Dr. Joseph E. Stiglitz, Lise Van Susteren, M.D., Dr. Kevin E. Trenberth, Dr. Harold R. Wanless, Dr. James H.

more injuries will undoubtedly befall Plaintiffs because the dangers from CO_2 and other greenhouse gases (collectively "GHGs") are already locked in. D. Ct. Doc. 262-1 (Rignot Expert Report) at 4 ("Thus between the irreversible melting of portions of Greenland's and Antarctica's ice sheets, humanity has already committed itself to a 3-6 m rise in sea level."). Plaintiffs also present reliable evidence of the imminent and substantial risk of injury that projected increasing GHG levels and temperatures will cause Plaintiffs if a remedy is not granted here. D. Ct. Doc. 274-1 (Hansen Expert Report) at 34-41.

In his expert report, Nobel laureate Joseph Stiglitz opines:

> Defendants' continuing support and perpetuation of a national fossil fuel-based energy system and continuing delay in addressing climate change is saddling and will continue to saddle Youth Plaintiffs with an enormous cost burden, as well as tremendous risks, which is causing substantial harm to the economic and personal well-being and security of Youth Plaintiffs.
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> [Transitioning to a low/no carbon economy] is not only feasible, the relief requested will benefit the economy. More importantly, this action is necessary if Defendants are to prevent the extreme cost and damages Youth Plaintiffs and Affected Children are facing and will face to an even greater extent if Defendants continue on a path that does not account for what is scientifically necessary to protect the climate system they depend on for their future well- being and their personal and economic security.

D. Ct. Doc. 266-1 (Stiglitz Expert Report) at 10, 50.

As summarized in the expert opinion of Dr. Lise Van Susteren,

> [T]hese youth Plaintiffs, and many other children, are already experiencing acute and chronic mental health impacts as a result of climate change and its impacts. These mental health impacts are exacerbated because climate change is a direct result of actions taken by the federal defendants, who are

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Williams, and Andrea Wulf. Expert reports were served on Defendants in April, except for Dr. Speth. D. Ct. Docs. 257-269, 271-272, 274, 275, 298; *see also* D. Ct. Doc. 318 at 13.

> supposed to be protecting the Plaintiffs and future generations. Some of the Plaintiffs are in a state of despair, others are angry and have feelings of hopelessness. They are extremely worried about their futures and the world that they will grow up in. Without immediate action by the federal defendants to address climate change, it is my expert opinion that these Plaintiffs will continue to suffer acute and chronic mental health impacts and that their suffering will worsen. These conclusions are consistent with what I have seen in my practice and the literature.

D. Ct. Doc. 271-1 (Van Susteren Expert Report) at 23.

In upholding the denial of Defendants' motion to dismiss under the no clear error standard and denying Defendants' first petition, Chief Judge Thomas' March 7, 2018 opinion directed that this case proceed with discovery and trial so Plaintiffs' important claims can be decided and reviewed on appeal in the clear light of a full factual record. *In re United States*, 884 F.3d at 837. Such a record is indispensable to resolution of the fundamental constitutional issues presented in this case, including the youths' standing. As this Court held in *Obergefell v. Hodges*, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." 135 S. Ct. at 2598.[7] The decision in *Obergefell* continued:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between

[7] Important fundamental rights cases were all decided on appeal of merits decisions. *See, e.g.*, *Obergefell*, 135 S. Ct. 2584 (three final decisions for plaintiffs and one preliminary injunction); *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954) (four district court records); *Brown v. Plata*, 563 U.S. 493, 499-500 (2011) (two district courts); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Furman v. Georgia*, 408 U.S. 238 (1972).

> the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 2598. A complete factual record as to Defendants' systemic conduct in creating, controlling, perpetuating, and promoting a national fossil fuel-based energy system and their long-standing knowledge of the resulting global warming dangers currently faced by these Plaintiffs is precisely the type of "new insight" relevant to whether a "claim to liberty must be addressed" here. *Id.*

Allowing such a factual record to be completed and for this case to proceed to decision on dispositive motions and trial is entirely consistent with the separation of powers. As Justice Scalia wrote in his concurrence in *National Labor Relations Board v. Noel Canning*, the Court's jurisprudence on separation of powers "rest[s] on the bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'" 134 S. Ct. 2550, 2593 (2014). Accordingly, this Court should deny Defendants' Application and permit Plaintiffs to continue to develop the factual record necessary for review of their constitutional claims, including eventual review by this Court in the ordinary course of appeal.

Defendants misinform this Court by fundamentally mischaracterizing Plaintiffs' claims, the relief requested, and the rulings of the district court and Ninth Circuit, as explained *infra*. This case does not rest solely on the district court's recognition of a previously unrecognized unenumerated fundamental liberty interest. In order to dismiss this case, this Court would need to reverse over a hundred years of jurisprudence and find the Fifth Amendment does not provide

Americans the fundamental rights to personal security, property, life, family autonomy and security, and equal protection, among other rights. Defendants' radical Application seeks to deny these children access to their third branch of government when they allege infringement of fundamental rights long recognized by the judiciary and when Defendants themselves admit the threat to Plaintiffs' lives and security. This case raises constitutional questions that must first be answered by the very capable district court upon a complete record in the ordinary course of judicial review. When Defendants admit the climate system is in the "danger zone" (App. at 31a, ¶ 54; App. at 41a), unsupported claims of inconvenient discovery and trial do not warrant micromanaging the district court by staying this constitutional case. Defendants fail to satisfy their burden for the extraordinary relief they request.

STATEMENT

1. Plaintiffs commenced this action on August 12, 2015 and filed their First Amended Complaint ("FAC") on September 10, 2015. D. Ct. Doc. 7. Plaintiffs allege that Defendants' systemic affirmative ongoing conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite long-standing knowledge of the resulting destruction to our nation and profound harm to these young Plaintiffs, violates Plaintiffs' constitutional due process rights. Specifically, Plaintiffs allege Defendants' conduct violates their substantive due process rights to life, liberty, and property, to dignity, to personal security, to a stable climate system capable of sustaining

human lives and liberties, as well as other previously recognized unenumerated liberty interests, and has placed Plaintiffs in a position of danger with deliberate indifference to their safety under a state-created danger theory. *Id.* ¶¶ 277-89, 302-06. Further, Plaintiffs allege Defendants' conduct violates their rights as children to equal protection by discriminating against them with respect to their fundamental rights and as members of a protected or quasi-protected class. *Id.* ¶¶ 290-301. Finally, Plaintiffs allege Defendants' conduct violates their rights as beneficiaries to public trust resources under federal control and management. *Id.* ¶¶ 307-10. With respect to all claims, the FAC seeks a declaration of Plaintiffs' rights and the violation thereof and an order directing Defendants to cease their violations of Plaintiffs' rights, prepare an accounting of the nation's greenhouse gas emissions, and prepare and implement an enforceable national remedial plan to cease the constitutional violation by phasing out fossil fuel emissions and drawing down excess atmospheric CO_2, as well as such other and further relief as may be just and proper. *Id.* at Prayer for Relief.

2. Three trade organizations collectively representing the United States' fossil fuel industry successfully moved to intervene. D. Ct. Doc. 14. These Intervenors moved to dismiss Plaintiffs' claims, arguing that there is no federal public trust doctrine, that any such federal public trust is displaced by the Clean Air Act, that Plaintiffs' claims present non-justiciable political questions, and that Plaintiffs lack standing. D. Ct. Doc. 20.

3. Defendants moved to dismiss Plaintiffs' claims, arguing that Plaintiffs lack standing, that Plaintiffs failed to state constitutional claims, and that there is no federal public trust doctrine. D. Ct. Doc. 27-1

4. After hearing oral argument on March 9, 2016, Magistrate Judge Thomas Coffin recommended on April 8, 2016, that Defendants' and Intervenors' motions to dismiss be denied and Plaintiffs' claims proceed to trial. D. Ct. Doc. 68. Defendants and Intervenors objected to Judge Coffin's findings and recommendations. D. Ct. Doc. 73, 74.

5. After a second round of oral argument on September 13, 2016, Judge Ann Aiken, then Chief Judge for the District of Oregon, denied the motions to dismiss on November 10, 2016. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). Judge Aiken recognized that, "[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Id.* at 1241. In allowing Plaintiffs' claim of infringement of an unenumerated right to a stable climate system capable of sustaining human life to proceed to trial, along with Plaintiffs' other claims, Judge Aiken recognized that such a right, if supported by evidence at later stages of litigation, would be, like the right in *Obergefell*, a right "underlying and supporting other liberties" and "quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Id.* at 1250 (quoting *Obergefell*, 135 S. Ct. at 1298-99). Regarding redressability and remedy, Judge Aiken acknowledged that the district court "would no doubt be compelled to

exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so." *Id.* at 1241 (citations omitted). Ultimately, Judge Aiken concluded that "speculation about the difficulty of crafting a remedy could not support dismissal at this early stage." *Id.* at 1242 (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

6. On December 15, 2016, Intervenors filed their Answer, denying virtually all of Plaintiffs' allegations. D. Ct. Doc. 93. On January 13, 2017, Defendants filed their Answer, admitting many of Plaintiffs' factual allegations. Notably, Defendants' admissions in their Answer to the FAC directly contradict the claim that Plaintiffs will suffer no substantial harm if this Application is granted. Defendants admit, among other significant facts:

> [T]hat current and projected atmospheric concentrations of . . . GHGs, including CO_2, threaten the public health and welfare of current and future generations, and thus will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change.

D. Ct. Doc. 98 ¶ 213; *see also* D. Ct. Doc. 146 at 2-4 (District Court setting forth "non-exclusive sampling" of significant admissions in Defendants' Answer to the FAC).[8]

[8] The best available climate science further illustrates that even a modest delay in resolution of Plaintiffs' claims could substantially injure Plaintiffs. Atmospheric CO_2 concentrations are already well above the level necessary to maintain a safe and stable climate system, dangerous consequences of climate change are already occurring, CO_2 emissions persist for hundreds of years and affect the climate system for millennia, impacts such as sea level rise register non-linearly, and additional emissions could exceed irretrievable climate system tipping points. *See* Decl. of Dr. James E. Hansen, D. Ct. Doc. 7-1. Absent rapid emissions abatement, sea levels could rise by as much as fifteen meters, with dire consequences to Plaintiffs such as Levi D. Decl. of Dr. Harold R. Wanless, Ct. App. II Doc. 5-4 ¶¶ 14-15.

7. As a result of Intervenors' denial of a significant portion of the allegations in the FAC, Plaintiffs were forced to engage in significant discovery against all parties to prepare for trial because of the scope of the contested facts. *See* D. Ct. Doc. 146 at 2-4 (Judge Coffin illustrating non-exhaustive comparison between Answers filed by Defendants and Intervenors).

8. Four months after the denial of their motions to dismiss, Defendants and Intervenors asked the district court to certify its November 10, 2016 order denying their motions to dismiss for interlocutory appeal, restating the arguments in their previous motions. D. Ct. Doc. 120-1, 122-1.

9. On May 1, 2017, Judge Coffin recommended denial of the motions for certification for interlocutory appeal, in part because:

> [A]ny appellate review of the Order of the District Court allowing plaintiffs to proceed on their public trust and due process constitutional claims will only be aided by a full development of the record regarding the contours of those asserted rights and the extent of any harm being posed by the defendants' actions/inactions regarding human-induced global warming. This case, the issues herein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings.

D. Ct. Doc. 146 at 9. With respect to the public trust doctrine, addressing *PPL Montana LLC v. Montana*, 565 U.S. 576 (2012), Judge Coffin concluded the federal public trust doctrine would not be extinguished by a case "that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." *Id.* at 12-13. Judge Coffin further found that any separation of powers concerns were "purely hypothetical and ignore[d] the court's

ability to fashion reasonable remedies based on the evidence and findings after trial." *Id.* at 9. Defendants and Intervenors objected to Judge Coffin's findings and recommendations. D. Ct. Doc. 149, 152. On June 6, 2017, with their objections having been fully briefed for a mere two weeks, Defendants demanded the district court resolve their objections by June 9, 2017. D. Ct. Doc. 171. After reviewing Defendants' and Intervenors' motions for interlocutory appeal *de novo*, Judge Aiken denied the motions on June 8, 2017. D. Ct. Doc. 172.

10. On June 9, 2017, Defendants filed their first petition for writ of mandamus with the Ninth Circuit. Ct. App. I Doc. 1. Just as they do here, Defendants claimed separation of powers harms from general participation in the discovery and trial process and sought dismissal of Plaintiffs' claims on the basis of standing, the Administrative Procedure Act ("APA"), separation of powers, and the merits of Plaintiffs' constitutional and public trust claims, offering arguments and authorities previously offered in their motions to dismiss and for interlocutory appeal.[9]

11. On June 28, 2017, Judge Coffin granted the motions of all three Intervenors to withdraw. D. Ct. Doc. 182. As a result of the withdrawal of Intervenors, who had denied substantially all of the factual allegations in the FAC,

[9] Beginning with their motion to dismiss, Defendants have consistently and repeatedly presented the argument that Plaintiffs' claims must be pled under the APA and cannot proceed as pled under the Due Process Clause. See D. Ct. Doc. 208 at 5-14 (Excerpting and explaining the numerous instances in which the parties have addressed this argument and the district court and Ninth Circuit's resolution of the same); *see also* D. Ct. Doc. 195 at 10-22; D. Ct. Doc. 196; D. Ct. Doc. 207 at 14-20; D. Ct. Doc. 212; Ct. App. II Doc. 1 at 29-34.

the scope of issues for trial was substantially narrowed, thereby reducing the scope of discovery.

12. On July 20, 2017, Plaintiffs took the deposition testimony of Dr. Michael Kuperburg, biologist for Defendant Department of Energy and director of the U.S. Global Change Research Program. App. at 30a-31a, ¶¶ 52, 54; App. at 38a-41a. Defendants did not object to this deposition. Dr. Kuperberg testified that the United States is currently in the "danger zone" with respect to climate change and that he is "fearful," that "increasing levels of CO_2 pose risks to humans and the natural environment," and that he does not "think current federal actions are adequate to safeguard the future." App. at 31a, ¶ 54; App. at 39a-41a.

13. On July 21, 2017, Plaintiffs took the deposition testimony of Dr. C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration, a division of Defendant Department of Commerce. App. at 30a, ¶¶ 52-53; App. at 32a-37a. Defendants did not object to this deposition. Dr. Eakin similarly testified that NOAA "consider[s] the impact of carbon dioxide and climate change on our oceans to be dangerous." App. at 30a, ¶ 53; App. at 33a.

14. On July 25, 2017, a panel of the Ninth Circuit consisting of Judges Marsha Berzon, Alfred Goodwin, and Alex Kozinski stayed proceedings in the district court pending consideration of Defendants' first petition. Ct. App. I Doc. 7.

15. On August 25, 2017, Judges Aiken and Coffin submitted a letter to the Ninth Circuit, explaining the district court's view that:

> [A]ny error that [it] may have committed (or may commit in the future) can be corrected through the normal route of direct appeal following final

> judgment. Indeed, we believe that permitting this case to proceed to trial will produce better results on appeal by distilling the legal and factual questions that can only emerge from a fully developed record.

Ct. App. I Doc. 12.

16. On August 28, 2017, Plaintiffs answered Defendants' first petition. Ct. App. Doc. 14-1. On September 5, 2017, over 90 *amici* filed eight *amicus* briefs in support of Plaintiffs in the Ninth Circuit. Ct. App. I Doc. 17, 19-24, 30, available at 2017 WL 4157181-86, 4157188. The *amici* included the Global Catholic Climate Movement, Leadership Conference of Women Religious, The Sisters of Mercy of the Americas' Institute Leadership Team, Niskanen Center, League of Women Voters of the United States, Center for International Environmental Law, Union of Concerned Scientists, Sierra Club, and Food & Water Watch. The *amici* also included over 60 legal scholars and law professors, including Dean Erwin Chemerinsky and Dean David Faigman, many of whom are teaching about this case in their classes due to its constitutional import.

17. On December 11, 2017, a panel of the Ninth Circuit consisting of Chief Judge Sidney Thomas and Judges Marsha Berzon and Alex Kozinski heard oral argument on Defendants' first petition. Judge Michelle Friedland joined the panel upon Judge Kozinski's retirement. *In re United States*, 884 F.3d at 833 n.*.

18. On March 7, 2018, Chief Judge Thomas, writing for the Ninth Circuit, denied Defendants' petition, ruling that Defendants had not satisfied any of the factors for mandamus and affirming the district court's denial of Defendants' motion to dismiss as involving no clear error. *In re United States*, 884 F.3d 830.

Specifically, the panel determined that mandamus relief was inappropriate where, as here, Plaintiffs had not moved to compel—nor had the district court compelled—any discovery, the parties were resolving specific discovery disputes through the meet and confer process, and Plaintiffs had withdrawn a number of discovery requests. *Id.* at 834-35; *see* Plaintiffs had withdrawn a number of discovery requests. *Id.* at 834-35; *see* ¶¶ 29, 31, 35-36; Section II, *infra*. The Ninth Circuit explicitly rejected Defendants' contention—which they repeat unaltered in their second petition and in their Application—that all discovery is categorically improper, stating: "If a specific discovery dispute arises, the defendants can challenge that specific discovery request on the basis of privilege or relevance." *Id.* at 835 (citation omitted and emphasis added). The Ninth Circuit reasoned that "defendants will have ample remedies if they believe a specific discovery request from the plaintiffs is too broad or burdensome." *Id.* (emphasis added). Both at oral argument and in its order, the panel made clear that the primary cases on which Defendants rely for dismissal via mandamus are inapposite. *Id.* at 835 ("In both cases, the district court had issued orders compelling document production.") (citing *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 376, 379 (2004); *Credit Suisse v. U.S. Dist. Ct. for Cent. Dist. of California*, 130 F.3d 1342, 1346 (9th Cir. 1997)); *id.* at 835 n.1 (finding *In re United States*, 138 S. Ct. 443 (2017) inapposite because there the district court had "deferred ruling on the defendants' earlier motion to dismiss."). The panel also held that any merits errors were correctable through the ordinary course of litigation and that the district court's denial of Defendants' motion to

dismiss did not present the possibility that the issue of first impression raised by the case would evade appellate review. *In re United States*, 884 F.3d at 836, 837. The panel concluded that the issues Defendants raised were better addressed through the ordinary course of litigation and emphasized that mandamus is not to be "used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Id.* at 834 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the Ninth Circuit panel was "not persuaded" by Defendants' argument, repeated here, that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten separation of powers," concluding that "simply allowing the usual legal process to go forward will [not] have that effect in a way that is not correctable on appellate review." *Id.* at 836. In ushering Plaintiffs' claims towards trial, the Ninth Circuit noted: "There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of the issues by the trial courts." *Id.* at 837.

19. On April 12, 2018, the district court set this matter for an October 29, 2018 trial date. In terms of scheduling the length of trial, Plaintiffs initially projected 20 days for their case in chief. App. at 28a, ¶ 18. Defendants responded that 20 days would not be enough for Defendants' case and stated that it would be better to ask for more time than less for trial. *Id.* Thus, as a result of meet and confer efforts, the parties agreed jointly to request 50 trial days, 4 days a week, 6 hour days (approx. 12 weeks). *Id.* The next day, at the April 12 Status Conference,

Defendants confirmed the parties' agreement of 5 weeks per side with the Court. D. Ct. Doc. 191 at 8:3-5 (Apr. 12, 2018 Tr.) (Defendants' counsel stating: "Yes, Your Honor, with the understanding that if we don't need five weeks, we don't use five weeks.").

20. Following the Ninth Circuit's denial of Defendants' first petition, Defendants filed a series of motions, each substantively and procedurally duplicative of arguments raised in their motion to dismiss, and all previously rejected by the district court, and by the Ninth Circuit on mandamus with a single exception regarding dismissing the President specifically.

21. First, on May 29, 2018, Defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). D. Ct. Doc. 195. As Defendants acknowledged, a motion under Rule 12(c) is governed by the same standard as a Rule 12(b)(6) motion to dismiss. *Id.* at 6. Defendants' Rule 12(c) motion reasserted two arguments for dismissal previously rejected in their motion to dismiss, whether Plaintiffs' claims must be pled under the APA, and separation of powers concerns, and for the first time since the case was filed in 2015 asked for dismissal of the President as an unnecessary party. *See generally id.* On July 18, 2018, Judge Aiken heard oral argument on Defendants' Rule 12(c) motion. D. Ct. Doc. 325; *see also* App. at 11a-19a (excerpts).

22. Second, on May 9, 2018, the same day they filed their Rule 12(c) motion, Defendants moved for a protective order and stay of *all* discovery pending resolution of their Rule 12(c) motion, arguing as they did in their motion to dismiss

and their first petition, that Plaintiffs' claims must be pled under and subject to the strictures of the APA and that separation of powers principles preclude discovery. D. Ct. Doc. 196.

23. Third, on May 22, 2018, Defendants filed a motion for partial summary judgment, arguing that Plaintiffs lack standing, that two of Plaintiffs' constitutional claims fail on the merits, that there is no federal public trust doctrine, that Plaintiffs' claims must be pled under the APA, and that separation of powers concerns bar Plaintiffs' claims and requested relief. D. Ct. Doc. 207. Defendants did not move for summary judgment on Plaintiffs' other substantive due process and equal protection claims. Oddly, Defendants purported not to dispute any material facts relevant to summary judgment despite their denials of material facts in their Answer. *Id.*; *see also* D. Ct. Doc. 98. In finding that Defendants did not satisfy any of the factors for mandamus, the Ninth Circuit did not, as Defendants contend, issue any "directive" (D. Ct. Doc. 195 at 1) to file duplicative and dilatory motions, but only stated that, as in all cases, Defendants would be able "to raise legal challenges to decisions made by the district court on a more *fully developed record . . . .*" *In re United States*, 884 F.3d at 837 (emphasis added). However, discovery is still underway (primarily expert discovery) and the parties have not yet had sufficient time to develop a full record upon which summary judgment would be appropriate. App. at 27a-28a, ¶¶ 12-17.

24. On May 24, Defendants applied to this Court for an extension within which to file a petition for a writ of certiorari to review the Ninth Circuit's denial of

their first petition. D. Ct. Doc. 211-1. Notably, Defendants conceded that they already presented their APA arguments to the Ninth Circuit, which found no clear error in the district court's denial of the same. *Id.* ¶ 3 ("The government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order contravened fundamental limitations on judicial review imposed by . . . the [APA]."). Further, Defendants made no reference to any urgency. Justice Kennedy granted Defendants' application for an extension on May 29, 2018, Ct. App. I Doc. 70, and granted Defendants' application for a further extension (filed on June 25), to and including August 4, 2018. Ct. App. I Doc. 71. Even though it was brought barely three weeks before the instant Application, Defendants' second application for an extension also did not reference any urgency in addressing the underlying proceedings.

25. On May 25, 2018, Magistrate Judge Coffin denied Defendants' motion for protective order and stay of all discovery, reasoning that the APA is not the exclusive means for bringing Plaintiffs' constitutional claims, that the district court had already addressed and rejected Defendants' APA arguments, and that Defendants' arguments failed because they did not address a "specific discovery request." D. Ct. Doc. 212 at 2. Defendants objected to Judge Coffin's ruling. D. Ct. Doc. 215. On June 29, 2018, Judge Aiken sustained Judge Coffin's ruling. D. Ct. Doc. 300.

26. On June 8, 2018, Plaintiffs moved to defer consideration of Defendants' motion for summary judgment until after the conclusion of discovery and in

conjunction with trial. D. Ct. Doc. 226. On July 13, 2018, the district court denied Plaintiffs' motion and simultaneously granted Defendants' request that the district court hold oral argument on Defendants' motion for summary judgment on July 18, 2018 in conjunction with argument on Defendants' Rule 12(c) motion. D. Ct. Doc. 316.

27. There is only one issue that was raised in Defendants' pending motions, their petition, and the instant Application that has not previously been determined by the district court at the motion to dismiss stage and affirmed on mandamus by the Ninth Circuit: their argument in the Rule 12(c) motion that the President should be dismissed from the case. On July 16, prior to Defendants' submission of the instant Application, Plaintiffs met and conferred with Defendants and agreed to Defendants' requested dismissal of the President, provided that such dismissal is without prejudice. App. at 17a, 22a. On July 17, Plaintiffs informed the district court of this development during the status conference, also prior to Defendants' filing with this Court. *Id*. Finally, at oral argument on Defendants' motions for judgment on the pleadings and summary judgment on July 18, 2018, Plaintiffs reiterated their agreement to Defendants' requested dismissal of the President, provided that such dismissal is without prejudice. App. at 17a, 22a.

28. After Judge Aiken sustained Judge Coffin's denial of Defendants' motion for protective order and stay of all discovery, Defendants filed their second petition in the Ninth Circuit. Ct. App. II Doc. 1. The second petition duplicated Defendants' arguments from their motion to dismiss and first petition, arguing that

Plaintiffs' claims should be dismissed on the basis of standing, separation of powers concerns, the merits of Plaintiffs' claims, that Plaintiffs' claims must be pled under the APA, and asserting unsubstantiated harms stemming from the general process of participating in discovery and trial. Ct. App. II Doc. 1. Defendants admit the arguments advanced in their second petition are duplicative and raised under the same standard applicable to their first petition. *Id.* at 10. As part of their second petition, Defendants made an emergency motion to the Ninth Circuit to stay the proceedings in the district court pending its consideration of the petition. *Id.* Defendants also concurrently submitted a motion to the district court to stay proceedings pending the Ninth Circuit's disposition of the second petition. D. Ct. Doc. 317. On July 16, 2018, The Ninth Circuit denied Defendants' request for a stay and indicated that it would rule on Defendant's second petition expeditiously. Ct. App. II Doc. 9. Defendants filed their Application with this Court on July 17, 2018. The district court denied Defendants' motion for stay pending the Ninth Circuit's disposition of their second petition later the same day. D. Ct. Doc. 307.

29. Defendants will suffer no cognizable burden for purposes of mandamus in participating in discovery generally and proceeding through trial. Following the Ninth Circuit's denial of Defendants' first petition, Plaintiffs completed and served expert reports, agreed to make themselves and their experts available for deposition per Defendants' requests, propounded narrowly-tailored requests for admissions based on government documents with footnoted citations to the government source of the fact sought for admission, and noticed Rule 30(b)(6) depositions. Ct. App. II

Doc. 5-1 at 3; App. at 24a, ¶ 3. Plaintiffs did not propound any requests for production of documents.

30. On June 4, 2018, Defendants' moved for a protective order as to some of the requests for admissions and the Rule 30(b)(6) depositions on June 4, 2018. D. Ct. Doc. 217.

31. Through the ordinary meet and confer process, and upon the recommendations of both Judge Coffin and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance, and the district court entered a corresponding order holding in abeyance, all pending discovery (the propounded requests for admissions and deposition notices). In lieu thereof, the parties agreed to proceed with motions *in limine* seeking judicial notice of publicly available government documents and to propound limited contention interrogatories to discover the bases for Defendants' positions on certain disputed material facts. D. Ct. Doc. 247, 249; Ct. App. II Doc. 5-1 at 3; App. at 26a, ¶ 7.

32. Via letter dated July 12, 2018, Defendants identified a list of eight experts who they may call to testify at trial. In that letter, Defendants stated that they consider the identities of the listed experts to be "Confidential Materials" under the terms of the parties' protective order. Joint Status Report as of July 16, 2018, D. Ct. Doc. 319 at 14; D. Ct. Doc. 221 (Stipulated Protective Order).

33. On July 20, 2018 Plaintiffs issued deposition notices for the expert witnesses Defendants identified in their July 12, 2018 letter.

34. On July 20, 2018, Defendants issued deposition notices for all 18 of Plaintiffs' experts, 17 of whom have served written reports on Defendants.

35. Thus, there is no pending discovery to which Defendants are required to respond. Based on notices served to date, Defendants' sole discovery obligations are to produce expert reports on August 13 pursuant to a schedule to which Defendants agreed; to present their own proffered experts for deposition; and to conduct the depositions of Plaintiffs' experts, which Defendants have noticed. Ct. App. II Doc. 5-1 at 3-4; App. at 25a-26a, ¶ 6. Defendants have not specifically objected to expert discovery. Ct. App. II Doc. 5-1 at 4; App. at 27a, ¶¶ 13, 16. There is no evidence of a discovery burden substantiating a stay.

36. On July 20, 2018, the Ninth Circuit declined to exercise jurisdiction to grant mandamus relief, concluding:

> The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal.

App. at 9a-10a. This Application should meet a similar result.

ARGUMENT

I. STANDARD OF REVIEW

A stay of proceedings "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). The Court affords considerable deference to a

lower court's decision granting or denying a stay. *See, e.g.*, *Bonura v. CBS, Inc.*, 459 U.S. 1313, 1313 (1983); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973). Defendants bear the "heavy burden" of justifying the "extraordinary" relief occasioned by a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975); *see also* Robert S. Stern, et al., Supreme Court Practice 907 (8th ed. 2002) (A lower courts' disposition of an application for stay "is essentially an act of discretion . . . it is entitled to *prima facie* respect, to be set aside only if deemed clearly erroneous.").[10]

An application for stay may only be granted if the petitioner carries the heavy burden to establish:

> [There is a] (1) reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). "Relief is not warranted unless" all of these elements "counsel in favor of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009). Defendants have the burden to make a clear showing of their injury. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). "An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus*, 463 U.S. at 1317. Delay in seeking a stay "blunt[s] [any] claim of urgency and counsels against the grant of a stay." *Id.* at 1317-18. Finally, the Court

[10] During a recent eight-year period, this Court received more than 1,900 applications for extraordinary writs and granted none. Stephen M. Shapiro, et al., Supreme Court Practice § 11.1, at 661 n. 9 (110th ed. 2013).

balances the equities to determine whether the injury asserted by the applicant outweighs the harm to the other parties. *Rostker*, 448 U.S. at 1308. Under this standard, relief is not warranted and Defendants' Application must be denied.

II. DEFENDANTS HAVE NOT SHOWN IRREPARABLE INJURY FROM THE DENIAL OF THE STAY TO JUSTIFY THIS COURT'S INTERVENTION

To adopt Defendants' argument on irreparable injury would be to find that, every time the federal government is a defendant in a constitutional case about alleged deprivation of the recognized liberty rights of individuals, the government's participation in discovery over a six-month period in preparation for a bench trial of an agreed-upon length, predominantly involving expert testimony and government document evidence, is alone grounds for an emergency stay by the Supreme Court. Specifically, Defendants describe the limited basis of their irreparable injury as:

> Absent relief from the Ninth Circuit or this Court, the government will be forced to participate in a highly compacted period of discovery and trial preparation followed by a 50-day trial, all of which will itself violate bedrock limitations on agency decisionmaking and the judicial process imposed by the APA and the separation of powers.

Application at 5-6. Such a finding would turn irreparable injury on its head, open the floodgates for constant second-guessing by this Court of the conduct of routine discovery and bench trials, and unduly burden individuals seeking constitutional protection from their Article III courts, in this case children, who are already being deprived their rights from the abuses of government power. As the Ninth Circuit just ruled:

> The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur

> without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

App. at 8a.

Moreover, Defendants already allowed, without objection, depositions of government witnesses who answered questions about climate change danger. *See* App. 30a-31a, ¶¶ 51-54. Presently, however, there is no pending discovery that would require agency officials to answer any questions on the topic of climate change or "agency decisionmaking." The proper course for Defendants is to object to, or move for protective order on, any specific discovery they believe is improper. Barring specific objectionable discovery, Defendants have made no showing, and cited no precedent, that any form of routine discovery, and a bench trial generally, in a constitutional case about individual liberties is in and of itself irreparable harm warranting this Court's intervention. Indeed, the discovery and trial burdens in this case pale in comparison to other cases aimed at protecting the nation's resources. For example, the instant case is in stark contrast to the massive discovery in which the government was involved for the *Deepwater Horizon* litigation, wherein more than ten federal agencies produced over 100 million pages of documents; there were over 500 days of depositions; and trial of the government's claims took place in three phases over three years.[11]

[11] John C. Cruden, Steve O'Rourke, & Sarah D. Himmelhoch, *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 Mich. J. Envtl. & Admin. L. 65, 110, 112, 118 (2016).

Here, Defendants have not responded to a single request for admission or produced a single document, Plaintiffs have forgone Rule 30(b)(6) depositions, Plaintiffs anticipate fewer than 1,000 documents at trial, and the number of days of depositions will be fewer than 50 for both sides. App. at 18a. Moreover, given the fewer number of witnesses to be called by Defendants than originally anticipated, the trial should be shorter than the 50 days Defendants requested be calendared by the district court. App. at 18a. Given the record before this Court, particularly as to routine discovery leading to a bench trial, there can be no finding of irreparable injury, and the Application should be denied on that basis alone. *Ruckelshaus*, 463 U.S. at 1317.

III. THIS COURT IS UNLIKELY TO OVERTURN THE DENIAL OF DEFENDANTS' FIRST OR SECOND PETITIONS

In light of the Ninth Circuit's proper denial of Defendants' second petition, this Court would be unlikely to reverse or issue a writ of mandamus. "Mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 369 (citation omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* at 380 (quotes, citations omitted).[12] As petitioners, Defendants bear the heavy burden of showing: (1) they have "no

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[12] "From the very foundation of our judicial system," the general rule has been that "the whole case and every matter in controversy in it [should be] decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-66 (1891). "This final-judgment rule, now codified in [28 U.S.C.] §1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017).

other adequate means to attain the relief [they] desire[]"; (2) their "right to issuance of the writ is clear and indisputable"; and (3) issuance of the writ would be an appropriate exercise of the Court's discretion. *Id.* at 380-81 (quotes, citations omitted). Here, Defendants satisfy none of these requirements.

A. Defendants Have Other Adequate Means to Obtain Their Desired Relief

Defendants' second petition principally seeks dismissal of Plaintiffs' claims on the basis of alleged and unsupported burdens of participating in the ordinary discovery and trial process. In all but the most unique and extraordinary circumstances, inapplicable here,[13] the proper course for seeking a writ of mandamus premised on discovery burdens is to challenge the discovery order under which the alleged burdens arise, not the very existence of the case under which discovery issues. Not only are Defendants alleged harms in participating in discovery and trial not cognizable for purposes of mandamus or a stay, *see* Section II, *infra*, Defendants have no current discovery obligations other than serving their expert reports and presenting their experts for deposition, to which they have long agreed, and deposing Plaintiffs' experts per their own request. Moreover, as the Ninth Circuit noted in denying Defendants' second petition: "Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief." App. at 7a. (emphasis in original) "The government retains the

[13] The cases upon which Defendants rely to argue for dismissal based on alleged discovery harms are inapposite, as the Ninth Circuit properly noted. *In re United States*, 884 F.3d at 835; *see Cheney*, 542 U.S. at 376 (discovery order compelled disclosure of records sought on merits of Federal Advisory Committee Act claim), *dismissed on merits on remand* 406 F.3d 723; *Credit Suisse v. U.S. Dist. Court for Cent. Dist. Of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (complying with discovery request would violate "Swiss banking secrecy and other laws which carry criminal penalties.").

ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten separation of powers." *Id.* at 6a; *In re United States*, 884 F.3d at 835 (same). In order to obtain a stay of proceedings, a petitioner must "set out with particularity why relief is not available from any other court." Sup. Ct. R. 23.3. Defendants can clearly avail themselves of relief from the district court with respect to any future *specific* discovery requests to which they object.

B. Defendants Have No Right to Issuance of the Writ of Mandamus on The Merits

Because Defendants' fail to satisfy any of the other criteria for mandamus or a stay, the merits of Plaintiffs' claims are not properly before this Court or the Ninth Circuit at this time. This Court will have the opportunity to review Plaintiffs' legal claims after a final determination on the merits, aided by a fully developed factual record, which does not presently exist. App. at 9a-10a. ("The merits of the case can be resolved by the district court or in a future appeal."). Even were this Court to reach the merits of the district court's denial of Defendants' motion to dismiss, the district court's conclusions are neither "clearly" nor "indisputably" erroneous as would be required to justify mandamus.

1. The District Court's Preliminary Conclusions Regarding Standing Are Not Clearly Nor Indisputably Erroneous[14]

As the district court concluded, and the Ninth Circuit affirmed under the standard applicable here, Plaintiffs plausibly alleged that their injuries are fairly traceable to the systemic conduct of Defendants in authorizing, permitting,

[14] Notwithstanding Defendants' argument in their Application that Plaintiffs' injuries are generalized grievances, Defendants conceded at oral argument before the district court on July 18, 2018 that Plaintiffs made a *prima facie* showing of injury-in-fact. App. at 15a.

promoting, and incentivizing fossil fuel production, consumption, transportation, and combustion. In *Brown v. Plata*, this Court recognized causation based upon aggregate, systemic acts like those at issue here:

> Because plaintiffs do not base their case on deficiencies in care provided on any one occasion, this Court has no occasion to consider whether these instances of delay—or any other particular deficiency in medical care complained of by the plaintiffs—would violate the Constitution . . . if considered in isolation. Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to "substantial risk of serious harm" . . . .

563 U.S. 493, 500 n.3 (2011); *see also Wilson v. Seiter,* 501 U.S. 294, 304 (1991) ("Some conditions . . . may establish" a constitutional "violation 'in combination' when each would not do so alone . . . .") (emphasis in original omitted). Similarly, in *Hills v. Gautreaux*, the Court approved a structural remedy to address the systemic actions leading to the "racially segregated public housing system" created by the Department of Housing and Urban Development. 425 U.S. 284, 289 (1976).

Defendants' speculation about third-party behavior is misplaced and misconstrues the nature of Plaintiffs' claims. *Bennett v. Spear* rejected a similar argument about causation, noting the government:

> [W]rongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is "the result of the *independent* action of some third party not before the court," . . . that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

520 U.S. 154, 168-69 (1997) (internal citations, alterations omitted). Here, Plaintiffs will prove at trial that their injuries are fairly traceable to Defendants' conduct in

authorizing, permitting, promoting, sanctioning, and incentivizing fossil fuel production, consumption, transportation, and combustion. Defendants' actions have a "determinative or coercive" effect on the emissions to which Plaintiffs' injuries are traceable. *Id.*

Defendants' arguments regarding redressability are likewise erroneous.[15] Courts retain broad authority "to fashion practical remedies when faced with complex and intractable constitutional violations" like those alleged here. *Plata*, 563 U.S. at 526. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills*, 425 U.S. at 293-94 (quoting *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 744 (1974); citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Even if the district court did not grant all of the relief Plaintiffs request, it could undoubtedly order Defendants to cease certain actions which substantially cause and sanction CO_2 emissions, thereby reducing, delaying, and remedying Plaintiffs' injuries.

2. Plaintiffs' Claims Comport with the Judiciary's Core Purpose

Notwithstanding Defendants' argument regarding the "courts at Westminster," it is a central jurisprudential precept that "the ability to sue to enjoin

[15] Defendants' reliance on *Simon v. E. Ky. Welfare Rights Org.*, which only challenged the effect of a single revenue ruling by the Internal Revenue Service with respect to tax subsidies on nonprofit hospitals' services to indigents, is misplaced. 426 U.S. 26 (1976). Here, Plaintiffs challenge not only a multitude of federal incentivization actions, but also Defendants' numerous affirmative acts in authorizing, permitting, promoting, and sanctioning fossil fuel production, consumption, transportation, and combustion. In addition, Plaintiffs' injuries are a direct, not speculative, consequence of Defendants' actions, making this case more in line with cases like *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969) and *Barlow v. Collins*, 397 U.S. 159 (1970), that were distinguished in *Simon*, 426 U.S. at 45 n.25.

unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015). The canon of this Court's most celebrated cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (systemic conditions across state prison system); *Brown v. Bd. of Educ.*, 349 U.S. 294 (systemic racial injustice in school systems); *Hills*, 425 U.S. 284 (systemically segregated public housing system created by state and federal agencies).

3. The APA Is Not the Sole Means of Review for Constitutional Challenges to Agency Conduct

In their May 24 application for extension from this Court, Defendants concede that, in denying their first petition, the Ninth Circuit rejected Defendants' argument that the APA provides the exclusive means for challenging the legality of agency conduct. *See* D. Ct. Doc. 211-1 ¶ 3 ("The government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order contravened fundamental limitations on judicial review imposed by. . the Administrative Procedure Act.").[16] In any event, Defendants restate this argument here even though this Court has ruled on several occasions that constitutional claims are not subject to the APA and may be brought independently.

[16] In deciding a stay application, the Court affords considerable deference to the conclusions of the lower court "both on the merits and on the proper interim disposition of the case[.]" Rostker, 448 U.S. at 1308.

In *Franklin v. Massachusetts*, a case "rais[ing] claims under both the APA and the Constitution," the Court reached the merits of the constitutional claims against the Secretary of Commerce separately from its analysis of the APA claims, which the Court found were not viable for lack of "final agency action." 505 U.S. 788, 796-801, 803-06 (1992). Likewise, in *Hills v. Gautreuax*, a non-APA case brought directly under the Fifth Amendment and 28 U.S.C. § 1331 against the Department of Housing and Urban Development for systemic deprivation of fundamental rights, the Court approved a structural remedy for a comprehensive remedial plan similar to the relief requested here. 425 U.S. 284. Similarly, in *Webster v. Doe*, the Supreme Court held a constitutional claim against an agency official was judicially reviewable even though not viable as an APA claim. 486 U.S. 592, 601, 603-05 (1998). Justice Scalia's lone dissent, in which he postulated with an asterisk that "if relief is not available under the APA it is not available at all" serves only to prove the *Webster* majority's rejection of Defendants' argument that all constitutional claims are subject to the strictures of the APA. *Id.* at 607 n.*. No majority of the Supreme Court has ever agreed that the APA supersedes the Constitution, including the Fifth Amendment.

Defendants erroneously rely on inapposite cases concerning Congress' power to limit the authority of courts to redress violations of statutorily created rights,[17] cases concerning the limitations on actions brought under the APA,[18] and cases

[17] *Armstrong*, 135 S. Ct. 1378; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[18] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). The holding in *Lujan* was confined to whether establishing standing for a discrete number of

where courts have considered extending a claim in damages for constitutional violations.[19] Plaintiffs do not premise their claims on violations of statutorily-granted rights, do not bring their claims under the APA, and do not seek damages for the systemic constitutional violation they allege. Whether cases brought under the APA focus on discrete agency actions rather than programmatic action is irrelevant here. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1851-52 (2017); *id.* at 1862 (stating in direct Due Process challenge to "large-scale policy decisions" that "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief."); *Hills*, 425 U.S. 284 (approving remedy in non-APA direct Fifth Amendment due process challenge to systemic constitutional violations by federal agency).

Defendants' reliance on *Armstrong* is also misplaced because, irrespective of whether the Supremacy Clause or any other constitutional provision creates a right of action, it is well established that Plaintiffs may rest their claims "directly on the Due Process Clause of the Fifth Amendment." *Davis v. Passman*, 442 U.S. 228, 243-44 (1979); *Hills*, 425 U.S. 284; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (remanding for grant of equitable relief in school desegregation case resting directly on the Fifth Amendment). It is a central precept of constitutional law that the Fifth Amendment provides a right of action for equitable relief from systemic infringements of fundamental rights.

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coal leases sufficed to permit a challenge to hundreds of leases under the APA, which were not causing Plaintiffs' injuries, whereas here, Plaintiffs' harm is caused by a system of aggregate actions. Defendants' reliance on these cases is further misdirected as each expressly challenged the violation of statutory law through the APA.

[19] *Seminole Tribe of Fla.,* 517 U.S. 44; *Western Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116 (9th Cir. 2009); *Wilkie v. Robbins*, 551 U.S. 537 (2007).

4. The District Court's Recognition of a Right to A Stable Climate System Capable of Sustaining Human Life Is Not Clearly and Indisputably Erroneous[20]

The district court committed no clear and indisputable error in acknowledging a previously unrecognized fundamental liberty interest within the unique circumstances of this case. This Court has regularly availed itself of its authority to review and recognize new fundamental rights. "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution [and] 'has not been reduced to any formula.'" *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)). In deciding whether to recognize a newly asserted fundamental right, this Court has asked "whether that right is fundamental to the Nation's scheme of ordered liberty . . . or . . . whether it is 'deeply rooted in this Nation's history and tradition.'" *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). A full fundamental rights analysis involves an empirical inquiry.[21] Here, both historical and scientific factual evidence are material to this analysis,[22] which should be fully developed at trial so that the appellate courts have a complete record to consider with findings of fact and conclusions of law. *See* D. Ct. Doc. 255 at

[20] Defendants mischaracterize Plaintiffs' claims and the district court's order, implying that this case involves only two alleged constitutional violations. Application at 28. In addition to Plaintiffs' claims for violations of the public trust doctrine and the right to a stable climate system capable of sustaining human life, Plaintiffs alleged violations of their substantive due process rights to life, liberty, and property and previously recognized unenumerated rights, as well as equal protection violations for discrimination with respect to their fundamental rights and as members of a suspect or quasi-suspect class. Defendants' Application does not confront these claims, all of which present clear questions appropriate for judicial review on the merits in the district court and none of which was dismissed by the district court.

[21] *See* note 7*, supra*.

[22] *See Obergefell*, 135 S. Ct. at 2605 ("There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings.").

42-46. Such a record will reveal precisely the "new insight reveal[ing] discord between the Constitution's central protections" and Defendants' systemic conduct necessary to determine whether "a claim to liberty must be addressed." *Obergefell*, 135 S. Ct. at 2598.

As the district court properly concluded, the right to a stable climate capable of sustaining human life, like the right to marry extended to same-sex couples in *Obergefell*, is "a right underlying and supporting other vital liberties," including rights to move freely, to family, and to personal security, amongst other rights. *Juliana*, 217 F.Supp.3d at 1250 (citing *Obergefell*, 135 S. Ct. at 2599). Defendants contend that "there is no relationship . . . between a distinctly personal and circumscribed right to same-sex marriage and the alleged right to a climate system capable of sustaining human life that apparently would run indiscriminately to every individual in the United States." Application at 29. This argument concedes the point, demonstrating a profound misunderstanding of the very concept of fundamental rights, which by their very nature are those in which everyone may claim an interest. By Defendants' logic, not even our inherent rights to life, liberty, and property would qualify as fundamental since they could be advanced by any person in the nation. Along with Plaintiffs' other Fifth Amendment claims, Plaintiffs' claim with respect to the right to a stable climate system capable of sustaining human life should proceed to trial so this Court may evaluate the propriety of the right's recognition in the full light of a robust factual record. The

district court committed no clear and indisputable error in recognizing this important unenumerated right.

5. The District Court's Recognition of a Federal Public Trust Doctrine Extending to Territorial Seas Is Not Clearly and Indisputably Erroneous

The district court committed no clear and indisputable error in allowing Plaintiffs' public trust claim to proceed to trial. The public trust doctrine is an inherent obligation incumbent on every government, including the United States federal government, "by virtue of its sovereignty" and as such, the trust and its concomitant powers and duties "cannot be relinquished." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453, 455 (1892). As the district court explained, numerous decisions recognize the public trust doctrine's application to the federal government. *Juliana*, 217 F.Supp.3d at 1258-59.

Defendants principally and erroneously rely on two cases for their argument that there is no federal public trust doctrine. In *PPL Montana*, this Court stated in dicta that "the public trust doctrine remains a matter of state law." 565 U.S. at 603. Defendants take the phrase completely out of context. As the district court explained:

> The Court [in *PPL Montana*] was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. *PPL* said nothing at all about the viability of public trust claims with respect to federally-owned trust assets.

Juliana, 217 F.Supp.3d at 1257. This Court recognized the deep historical roots of the doctrine in *PPL Montana*:

> The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. See . . . D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990).

PPL Montana, 565 U.S. at 603 (citing D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990)); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 283-87 (1997). In citing the Slade treatise in *PPL Montana*, this Court implicitly acknowledged that "there is no single 'Public Trust Doctrine.' Rather, there are over fifty different applications of the doctrine, one for each State, Territory of Commonwealth, *as well as the federal government*." D. Slade, Putting the Public Trust Doctrine to Work 4 (1990) (emphasis added).

Defendants reliance on *Alec L. ex. rel. Loorz v. McCarthy*, an unpublished opinion from the D.C. Circuit, is likewise misplaced. 561 Fed. Appx. 7 (2014). That case relied solely and erroneously on the dicta Defendants' quote from *PPL Montana*. *Id.* at 8. Defendants' oft-repeated acontextual recitation of a single line of dicta from *PPL Montana* belies the absence of any logical or solid jurisprudential basis for excluding the federal government from the public trust doctrine, in those instances where the federal government owns or exercises jurisdiction over recognized public trust resources, such as navigable waters.[23]

Defendants thus present no convincing argument and fail to carry their heavy burden to establish any clear and indisputable error committed by the

[23] As Judge Coffin noted, if this Court were to have ruled that the public trust doctrine does not apply to the federal government, "it assuredly would not be in the form of tangential dicta in the context of a Supreme Court ruling on a matter that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." D. Ct. Doc. 146 at 13-14.

district court in allowing Plaintiffs' claims to proceed to trial. To stay proceedings in this important case would deprive this Court of the record necessary for considered appellate review of Plaintiffs' claims, analysis and application of the constitutional principles upon which they rest, the climate science upon which they are founded, and the historic and ongoing actions of Defendants, which are harming Plaintiffs' fundamental rights.

IV. FOUR JUSTICES ARE UNLIKELY TO SUPPORT A STAY WHEN THE DISTRICT COURT HAS ALREADY CONSIDERED DEFENDANTS' THRESHOLD ARGUMENTS AND WHEN NO SPECIFIC DISCOVERY ORDER INTRUDES ON EXECUTIVE PRIVILEGE OR SEPARATION OF POWERS.

Given that this Application attempts to interject this Court into routine discovery and pre-trial issues more properly handled by the district court, and that Defendants have shown no irreparable harm, it is unlikely that four Justices of the Court will vote to grant a stay or certiorari at this stage. Contrary to Defendants' erroneous assertions, this case is incomparable in any material respect to this Court's recent decision regarding a record supplementation dispute in a challenge to the Deferred Action on Childhood Arrival program. *In re United States*, 138 S. Ct. 443 (2017). There, this Court directed the district court to rule on the government's motion to dismiss prior to ordering record supplementation. *Id.* In denying Defendants' second petition, the Ninth Circuit panel used this same procedural posture to distinguish the instant case:

> This fact distinguishes this case from *In re United States*, 138 S. Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over

> the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id.* at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests.

App. at 7a.

Here, the district court has already considered and denied Defendants' motion to dismiss and is in the process of deciding Defendants' other dispositive pre-trial motions, which largely restate arguments from their motion to dismiss.[24] *In re United States*, 138 S. Ct. 443, is wholly inapposite.

Any reliance on *Cheney* is also misplaced because there is no specific discovery order at issue and Plaintiffs are not conducting discovery that has any chance of intruding into executive privilege. 542 U.S. 367; App. at 4a, 9a, 12a, App. 27a-28a ¶¶ 12-17.

Finally, even under a strict original intent analysis, which differs from the fundamental rights analysis articulated by this Court in *Obergefell*, the unalienable rights claimed by these children are rights the nation's founders believed were implicit in ordered liberty and deeply rooted in the health and longevity of the new nation. As James Madison said in his celebrated speech of May 12, 1818:

> Animals, including man, and plants may be regarded as the most important part of the terrestrial creation.... *To all of them, the atmosphere is the breath of life. Deprived of it, they all equally perish....*

[24] The only exception is Defendants' request to dismiss the President, to which Plaintiffs' agreed, without prejudice, and on which the district court will rule shortly. The President will suffer no prejudice in the interim as Plaintiffs are not seeking any discovery from him.

> * * *
>
> The atmosphere is not a simple but a compound body. In its least compound state, it is understood to contain, besides what is called vital air, others noxious in themselves, yet without a portion of which, the vital air becomes noxious. ... Is it unreasonable to suppose, that if, instead of the actual composition and character of the animal and vegetable creation, to which the atmosphere is now accommodated, such a composition and character of that creation, were substituted, as would result from a reduction of the whole to man and a few kinds of animals and plants; is the supposition unreasonable, that the change might essentially affect the aptitude of the atmosphere for the functions required of it; and that so great an innovation might be found, in this respect, not to accord with the order and economy of nature?
>
> * * *
>
> The immensity of the atmosphere, compared with the mass of animals and vegetables, forms an apparent objection only to this view of the subject. The comparison could at most suggest questions as to the period of time necessary to exhaust the atmosphere of its unrenewed capacity to keep alive animal or vegetable nature, when deprived, either, of the support of the other.[25]

At the core of the Constitution is a system of intergenerational ethics focused on preservation of the human species. D. Ct. Doc. 60 (citing John Locke, *Two Treatises of Government* ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967). Plaintiffs believe that no four Justices on this Court would vote to stay a case showing no irreparable harm to Defendants, where a full factual record will better position this Court to one day review the rights and injuries for which these children and youth seek redress, unalienable liberty rights our founders intended to preserve for Posterity.

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[25] "Address to the Agricultural Society of Albemarle, 12 May 1818," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Madison/04-01-02-0244, discussed in the expert report of Andrea Wulf. D. Ct. Doc. 269-1 (Wulf Expert Report), at 11-15.

V. THE BALANCE OF EQUITIES OVERWHELMINGLY FAVORS A DENIAL OF THE STAY

The Court's power to issue a stay is intended to preserve the status quo so that important constitutional questions do not evade the Court's review. *See, e.g.*, *Rosenburg v. United States*, 346 U.S. 273, 286 (1953). Here, the status quo is preserved by allowing Plaintiffs' claims to continue to proceed to trial because Defendants can offer no credible claim of harm in participating in the ordinary process of litigation and trial. Defendants have already considerably delayed this case through their first petition, which is identical to their second petition, both of which the Ninth Circuit found meritless. In contrast, any further delay irreparably prejudices Plaintiffs and exacerbates the injuries and threats to their fundamental rights. D. Ct. Doc. 98 ¶¶ 6, 237, 241.

Notwithstanding Defendants' wholly unsubstantiated claims of allegedly burdensome discovery, Defendants have no outstanding discovery obligations, with the exception of serving a modest number of expert reports, presenting their designated experts for deposition, and conducting their noticed depositions of Plaintiffs' experts. All outstanding discovery requests are currently in abeyance at the suggestion of Defendants and per the mutual agreement of the parties. D. Ct. Doc. 247, 249. Based on the current procedural posture, the only additional discovery requests that Plaintiffs intend to serve are limited contention interrogatories, per an agreement with Defendants. D. Ct. Doc. 247, 249. Further, while the previous discovery requests that Defendants' describe as burdensome were pending, Defendants applied for and received two extensions of time to appeal

the denial of their first petition, belying any claim of urgency or harm here. Moreover, the ordinary burdens of discovery and trial of which Defendants complain are not cognizable for purposes of alleging any harm that may befall them before this Court's review of a final judgment on the merits of Plaintiffs' claims. *See, e.g.*, *F.T.C.*, 449 U.S. at 244 (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm); *Petroleum Expl. v. Pub. Serv. Comm'n of Kentucky*, 304 U.S. 209, 221-22 (1938) ("the expense and annoyance of litigation is 'part of the social burden of living under government.'") (citation omitted); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

Further, the separation of powers principles argued by Defendants counsel the Court to deny Defendants' Application. As the Ninth Circuit properly concluded in denying Defendants second petition, as it had with respect to the first petition: "[A]llowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." App. at 9a (citing *In re United States*, 884 F.3d at 836).[26] When the political branches fail to protect the

[26] None of the cases Defendants cite in pages 34-35 of their Application support their argument that the separation of powers precludes discovery or limits review of Plaintiffs' claims to agency records. In fact, in *Tag Bros. v. Moorhead*, this Court explicitly excepted "issues presenting claims of constitutional rights" from record review limitations at issue. 280 U.S. 420, 443. Defendants' other cases are equally unavailing. *See Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143 (1946) (statutory unemployment claim); *U.S. v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) (Wunderlich Act limited breach of contract claim to agency record). Further the evidence Plaintiffs will present substantially consists agency documents and expert testimony, to which Defendants have consistently not objected, and goes primarily to establish Plaintiffs' standing, which Defendants dispute as a factual matter. D. Ct. Doc. 98 at ¶¶ 16-97.

constitutional rights of citizens—particularly those too young to vote, whose only recourse is the courts, and actively infringe upon those rights—the separation of powers directs the judiciary to fulfill its duty to serve as a check and balance on the other branches of government to safeguard constitutional liberty. *Marbury v. Madison*, 5 (U.S. 1 Cranch) 137 (1803); *Nat'l Labor Relations Bd.*, 134 S. Ct. at 2593 (Scalia, J., concurring) (Separation of powers "rest[s] on the bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'").[27]

In contrast to Defendants, issuance of a stay would unquestionably result in irreparable harm to Plaintiffs. Defendants cite no evidentiary support or legal authority to substantiate their claim that emissions attributable to them during resolution of their Application "are plainly *de minimis* in context and not a source of irreparable harm." Application at 38. Notably, Defendants' admissions in their Answer to Plaintiffs' FAC directly contradict the claim that Plaintiffs will suffer no substantial harm. D. Ct. Doc. 98 ¶¶ 7, 150-51; *Id.* ¶ 213 ("[C]urrent and projected atmospheric concentrations of six well-mixed GHGs, including CO_2, threaten the public health and welfare of current and future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in

[27] The Opinions and Recommendations Clauses cited by Defendants have never been interpreted by any court to preclude relief or judicial review. The relief Plaintiffs seek would not implicate the President's ability to "require the Opinion, in writing, of the principle Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices, U.S. Const. art. II, § 2, cl. 1, nor the ability to "recommend to" Congress for "Consideration such measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Further, it is entirely speculative at this stage to assert that any remedy that might be issued would implicate separation of powers. *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 280 (1977) ("[T]he nature and scope of the . . . remedy is to be determined by the nature and scope of the constitutional violation.").

ever greater rates of climate change."); *see also* D. Ct. Doc. 146 at 2-4 (District court setting forth "non-exclusive sampling" of significant admissions in Defendants' answer).

The harm Plaintiffs will suffer if their case is stayed before trial is irreparable. Environmental harm is by nature irreparable as is often infringement of constitutional rights: "Environmental injury, by its nature, can seldom be adequately remedies by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see* also Decl. of Steven W. Running, Ct. App. II Doc. 5-3 ¶¶ 12-14; Decl. of Dr. Harold R. Wanless, Ct. App. II Doc. 5-4 ¶¶ 16-22. Both environmental harm and infringement of constitutional rights are threatened here by the ongoing actions of Defendants. Unlike other cases where environmental harm is threatened, here, the harm to the climate system threatens the very foundation of life, including the personal security, liberties, and property of Plaintiffs. Unlike other cases, Defendants concede the scope of harm, admitting that existing harm has already put our nation in the danger zone, and that the harm could be irreversible for millennia. D. Ct. Doc. 98 ¶¶ 8, 207, 216, 241.

Because atmospheric CO_2 levels are already dangerous, every day of more carbon emissions and increased fossil fuel extraction and infrastructure exacerbates the danger. Defendants have provided no evidence, such as no expert testimony, to support their bald assertion that delay of months or years to resolve Plaintiffs' claims will not cause Plaintiffs harm.

Dr. Harold Wanless, a highly respected geologist and climate expert, explains how urgent the climate emergency is and how even a short delay causes Plaintiffs harm. Wanless Decl., Ct. App. I Doc. 14-3 at ¶¶ 1-5, 18-19, 22, 25-63. Dr. Wanless explicates that sea level rise of 15-40 feet is very likely by the end of the century and that Defendants' estimates of up to 8 feet of sea level rise by 2100, while still devastating to coastal cities, properties, and populations, does not present the full risks and magnitude of sea level rise we are very likely locking in by heating the oceans. *Id.* ¶¶ 29-38. Almost 94% of human-caused heating is going into the oceans and melting our planet's largest ice-sheets. *Id.* ¶ 25. The U.S. is responsible for more than 25% of that heat. Dkt. 98 ¶ 7.

Moreover, the harm is not generalized harm, but is particular to Plaintiffs. Plaintiff Levi D. lives on an island off the Atlantic coast of Florida at 3 feet above sea level. Levi Decl., Ct. App. I Doc. 14-5 at ¶ 1-3; Wanless Decl., Ct. App. I Doc. 14-3 at ¶ 50. Already locked-in ocean heating and sea level rise could inundate Levi's island and home by mid-century, making it unlivable. Wanless Decl., Ct. App. I Doc. 14-3 at ¶ 50. The only chance Levi has to protect his home, his personal security, and his health from the ongoing systemic actions of Defendants depends upon an injunction that requires carbon emissions to decline quickly. *Id.* ¶¶ 51-63. "We are in the danger zone in southern Florida and any delay in a judicial remedy for Plaintiff Levi poses clear and irreversible harm to his interests and his future." *Id.* ¶ 62.

Plaintiff Jacob Lebel moved to Oregon with his family to start a farm and grow nearly all of their own food. Jacob's land and livelihood are uniquely threatened by climate change and Defendants' ongoing fossil fuel energy system. Jacob Decl., Ct. App. I Doc. 14-4 at ¶¶ 1-25. Jacob experiences increasing drought, wildfire threats, threats to air quality, and farming days exceeding 100 degrees F. *Id.* ¶¶ 6-13. Moreover, the harm is not generalized harm, but is particular to Plaintiffs.

Defendants do not dispute with evidence the irreparable harms asserted by Levi, Jacob, or Plaintiffs' experts. Because these irreparable environmental and human harms are undisputed and because fundamental rights are at stake, the balance of harm clearly favors denying the Application. If a stay is entered, Defendants' violations of Plaintiffs' rights would continue, thus establishing irreparable harm per the nature of Plaintiffs' claims. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of" fundamental constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 1984) ("[T]he balance of equities favor[s] preventing the violation of a party's constitutional rights."). As the constitutional and environmental harms Plaintiffs will suffer if their case is stayed before trial are irreparable, the balance of equities clearly disfavors any intervention into the district court's management of these proceedings.

CONCLUSION

Defendants' Application for a stay should be denied. The district court needs to consider these issues further in the first instance. In its opinion denying Defendants' second petition, the Ninth Circuit panel correctly summarized the complete lack of prejudice to Defendants given the current procedural posture: "The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial." App. at 8a. There is no pending discovery to which Defendants must respond. The next important step in the pre-trial process is the routine service by Defendants of their expert reports, set for August 13, and expert depositions. Defendants have already disclosed these experts, evincing no burden. The district court has before it two motions which may narrow this matter; both motions have been argued and are under submission. This Court should no micro-manage the underlying proceedings and this litigation should be allowed to proceed in the district court.

DATED this 23rd day of July, 2018, at Mammoth Lakes, CA.

Respectfully submitted,

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APPENDIX

FILED

JUL 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA; CHRISTY GOLDFUSS; MICK MULVANEY; JOHN HOLDREN; RICK PERRY; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS; U.S. DEPARTMENT OF DEFENSE; JAMES N. MATTIS; U.S. DEPARTMENT OF STATE; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP; MICHAEL R. POMPEO; ANDREW WHEELER,

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UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her official capacity as Director of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; RICK PERRY, in his official capacity as

No. 18-71928

D.C. No. 6:15-cv-01517-AA

OPINION

Secretary of Energy; UNITED STATES DEPARTMENT OF INTERIOR; RYAN ZINKE, in his official capacity as Secretary of Interior; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; JAMES N. MATTIS, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; ANDREW WHEELER, in his official capacity as Acting Administrator of the EPA; MICHAEL R. POMPEO, in his official capacity as Secretary of State; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

EUGENE,

Respondent,

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummersen; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Real Parties in Interest.

Petition For Writ Of Mandamus

Submitted July 19, 2018*

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

PER CURIAM.

In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief. The factual and procedural history of this case was detailed in our prior opinion, and we need not recount it here. *In re United States*, 884 F.3d at 833-34.

I

We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. In considering whether to grant a writ of mandamus, we

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

are guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977):

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief;
>
> (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and
>
> (5) whether the district court's order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654-55).

"Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

II

The government does not satisfy the *Bauman* factors at this stage of the litigation. It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation. We thus decline to exercise our discretion to grant mandamus relief.

A

The government does not satisfy the first *Bauman* factor. The government argues that mandamus is its only means of obtaining relief from potentially burdensome or improper discovery. However, the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers.

In our opinion denying the first mandamus petition, we stated:

> The defendants will have ample remedies if they believe *a specific discovery request* from the plaintiffs is too broad or burdensome. Absent any discovery order from the district court, or even any attempt to seek one, however, the defendants have not shown that they have no other means of obtaining relief from burdensome or otherwise improper discovery.

In re United States, 884 F.3d at 835 (emphasis added).

Since that opinion, the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling

discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

This fact distinguishes this case from *In re United States*, 138 S. Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id*. at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests. It does not satisfy the first *Bauman* factor.

B

Nor does the government satisfy the second *Bauman* factor. The government makes two arguments for why it will be prejudiced in a way not correctable on appeal. Neither is persuasive.

The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief. *See Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (granting mandamus relief when a discovery order would force defendants "to choose between being in contempt of court for failing to comply with the district court's order, or violating Swiss banking secrecy and penal laws by complying with the order").

The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first

mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id*. No new circumstances disturb that conclusion.[1] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

C

As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors. *In re United States*, 884 F.3d at 836-37. No new circumstances give us cause to reevaluate these conclusions.

III

Because petitioners have not satisfied the *Bauman* factors, we deny the mandamus petition without prejudice. The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the

[1] Following our previous opinion, the government moved for the first time in the district court for judgment on the pleadings with respect to the inclusion of the President as a named party, and a decision is pending on that motion.

district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

PETITION DENIED WITHOUT PREJUDICE.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. ANN AIKEN, JUDGE PRESIDING

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

WEDNESDAY, JULY 18, 2018

PAGES 1 - 77

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GENERAL INDEX

14:33:56 government at large. He decided to stay at his hand, recognizing that the body that is most equipped to deal with these issues is, by definition, the legislature. That comes from a long line of historical precedent, including AAP with a very similar situation as this where the court also decided that separation of power concerns meant that the agencies best equipped and given the power by Congress to address these issues are the ones that are constitutionally charged with making the decisions at issue here.

The court said, and I quote, the court will stay its hand in favor of solutions by the legislative, executive branches.

I would invite this court to do the same thing here.

I will now turn the argument over to my colleague Frank Singer.

MR. SINGER: Good afternoon, Your Honor. My name is Frank Singer.

I will be addressing two of the issues that are raised in our motion for summary judgment Ms. Piropato did not address. Those issues are standing and the legal sufficiency of plaintiffs' claims.

The Article III standing requirement, as Your Honor knows, has three elements, injury in fact, traceability, and redressability.

14:35:07

At the moment -- the standing arguments were heard and litigated at the pleading stage in the Rule 12 motion, and one question that might arise is what's changed since then.

And the answer is that we now look beyond the complaint. We look at the evidence. At the pleading stage on the Rule 12 motion, Your Honor held that the allegations of certain specific injuries, loss of homes, flooding were sufficient to trigger injury in fact under Article III of the Constitution. And plaintiffs have submitted declarations in support of those allegations. And so those -- there has been a prima facie case made for those injuries.

There are other injuries that plaintiffs allege in their declarations that are not cognizable under Article III standing requirements, and those would be more subjective harms like nightmares or general anxiety or frustration with political bodies.

But be that as it may because there are specific injuries, the question moves to causation. And looking at those injuries, looking at things like flooding, asthma symptoms, allergy symptoms, et cetera, lost skiing opportunities and other aesthetic losses, the question is whether plaintiffs can show a causal connection exists between the injuries they assert and the conduct they

14:51:03

We will point out on the depraved indifference claim that in the cases cited by plaintiffs, there is an affirmative interaction between the government and the individual plaintiffs in this case that is lacking here where the government specifically has taken action with regard to each individual plaintiff in those cases and put them in a worse position than they were in and that that kind of direct interaction between the federal government and the plaintiffs is lacking in this case.

But unless Your Honor has any further questions, I am happy to submit.

MS. PIROPATO: And one other thing, Your Honor.

As we mentioned in our opening, we just respectfully request that if this court were to deny our 12(c) motion and our summary judgment motion that it certify this --

THE COURT: I have heard your request.

MS. PIROPATO: Okay. I just want to reiterate it.

THE COURT: I heard it.

MS. PIROPATO: Thank you very much, Your Honor.

THE COURT: Anything else?

MR. SINGER: No, nothing else, Your Honor.

THE COURT: Ms. Olson.

MS. OLSON: Okay. May it please the court, I'd like to begin my argument today addressing the question of

14:52:25 whether the president should be a defendant in this case in the context of the defendants' Rule 12(c) motion to dismiss.

We believe the issues in the case can be narrowed by the president's dismissal from the case without prejudice.

After I discuss our reasons for asking for dismissal without prejudice, I will move on to the APA and separation of powers arguments.

I will briefly discuss their motion for summary judgment on the merits of plaintiffs' claims and then turn to standing, and at that time I will call counsel Andrea Rodgers to assist.

On Monday the plaintiffs conferred with defendants about their motion to dismiss the president, and we offered, based upon our reading of their reply brief on their 12(c) motion, that we could agree to stipulate to dismiss the president without prejudice.

There are three reasons why we believe the court should order today that the president be dismissed without prejudice.

First, the defendants argue that the president is an unnecessary party in this case because a remedy could be obtained against the other defendants in the place of the president.

And, Your Honor, that's at Pages 6 and 7 of their

15:00:59 be providing testimony.

The defendants have said they'll have potentially eight witnesses, eight to ten witnesses at this point.

And then we anticipate, Your Honor, fewer than a 1,000 documents that the court will have to contend with, and we are working to narrow that even more substantially.

And this is in stark contrast to the massive discovery that the United States was involved in in the *Deepwater Horizon* litigation, which was not about fundamental constitutional rights but where the U.S. produced over 100 million pages of documents, including 17 million pages in a five-month period. There were 500 days of depositions. The trial of the government's claims took place in three phases over three years.

Here, the United States has not responded to a single RFA. They have not produced a single document. We have foregone our 30(b)(6) depositions. We do anticipate documents in the hundreds, not the thousands, and the depositions will probably be under 50 days for both sides.

We also believe, given the more limited number of witnesses of defendants, we can try the case in a shorter number of days.

So I raise those issues because they go also to some of the arguments that have been made regarding separation of powers and the burden on the government to

15:49:16 grant our Rule 12(c) motion and summary judgment in favor of the United States.

We appreciate, again, Your Honor, for your time in holding this oral argument in a compressed time frame.

Thank you, Your Honor.

THE COURT: Anything else?

Thank you. I am taking this under advisement. We'll have something out shortly. Although every single day we seem to be getting new information. We'll just attempt to do our work in a timely fashion and have something out I think in the relatively near future.

So thank you for your time. Appreciate the argument. Appreciate that -- thank you to the staff for accommodating the numbers of people here today, and I hope the other courtroom was able to hear the argument.

Thank you.

MS. PIROPATO: Thank you, Your Honor.

MS. OLSON: Thank you, Your Honor.

THE COURT: We are in recess.

(The proceedings were concluded this 18th day of July, 2018.)

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, JULY 17, 2018

PAGES 1 - 34

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10:29:03 testimony, I would think the government would want to cooperate as much as they could.

MR. SINGER: We would, Your Honor, because that would abate the prejudice if we would identify a person by name earlier than later.

So, yes, we understand that the clock is ticking, and if we are going to give individual names for these two subject matters, it behooves us to do it sooner than later.

THE COURT: Yes, I encourage everybody to work together.

Good. Okay. Next thing.

MS. OLSON: The next issue, Your Honor, is yesterday plaintiffs -- in light of the motion to dismiss the president under the Rule 12(c) motion for judgment on the pleadings that's pending before Judge Aiken --

THE COURT: That's going to be heard tomorrow.

MS. OLSON: -- and it will be argued tomorrow, plaintiffs asked whether the defendants would stipulate to dismissing the president without prejudice, and they were going to check with their upper management on that question.

And I don't know if you have any further information on that or if we should leave it for tomorrow.

MS. PIROPATO: Your Honor, we raised it with our management, but that has to be vetted with the White House, and we do not have a response yet.

Case No. 18-71928

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *et al*.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Real Parties in Interest

On Petition For Writ of Mandamus In
Case No. 6:15-cv-01517-TC-AA (D. Or.)

DECLARATION OF JULIA A. OLSON IN SUPPORT OF OPPOSITION OF REAL PARTIES IN INTEREST TO PETITIONERS' EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL

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I, Julia A. Olson, hereby declare as follows:

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Emergency Motion for a Stay of Discovery and Trial. I have personal knowledge of the facts stated herein, except as to those stated on information and belief, and if called to testify, I would and could testify competently thereto.
2. Since the commencement of this litigation, counsel for Plaintiffs have gone to great lengths to collaborate with counsel for Defendants and the district court to tailor and narrow Plaintiffs' discovery requests. Attached as **Exhibit 1** to this Declaration is a true and correct copy of excerpts of the most recent Joint Status Report (Dkt. 218) submitted by the parties to the district court on June 5, which includes a table at pages 4-6 illustrating the current status of discovery and the lengths to which Plaintiffs have gone to narrow discovery.
3. After the Ninth Circuit's March 7, 2018 denial of the government's first Petition for Writ of Mandamus (the "March 7 Denial"), *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692), Plaintiffs have engaged in the following discovery:
    a. completed and served seventeen expert reports;

b. at the request of counsel for Defendants, each of the Youth Plaintiffs have reserved dates to make themselves available for deposition, and counsel for Defendants were provided with these dates and initially agreed to those dates;

c. at the request of counsel for Defendants, on May 29, 2018, Plaintiffs provided Defendants with the availability of their expert witnesses for depositions throughout the summer;

d. propounded requests for admissions based on facts stated in government documents; and

e. noticed Rule 30(b)(6) depositions of agency Defendants as to four specific topics.

4. While requests for production of documents were at issue in the first Petition, since the March 7 Denial, there have been no outstanding requests for production of documents.

5. Since discovery commenced, Plaintiffs have committed to work with Defendants to conduct discovery with the least burdensome requests and to avoid litigating issues such as executive privilege.

6. Plaintiffs have also informed Defendants that they will not propound discovery on the President or the Executive Office of the President. In their Emergency Motion for a Stay, Defendants entirely ignore Plaintiffs'

agreement not to propound discovery against the President or the Executive Office of the President, incorrectly claiming that "the public interest strongly favors a stay, because absent such relief the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued unlawful discovery and forced to divert substantial resources away from their essential function of 'faithfully execut[ing]' the law. U.S. Const. art. II, § 3." Pet. at 53. In fact, there is no pending discovery served on the President or the Executive Office of the President, and Plaintiffs have committed to Defendants not to serve such discovery in the future. Notably, Defendants do not identify the allegedly "unlawful discovery."

7. Most of Plaintiffs' exhibits at trial will be government documents. Through the ordinary meet and confer process, and upon the recommendations of both Magistrate Judge Thomas Coffin and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance all pending discovery (the propounded requests for admissions and depositions noticed under Rule 30(b)(6)). In lieu thereof, Plaintiffs agreed to file motions *in limine* seeking judicial notice of publicly available government documents and to propound limited contention interrogatories to discover the bases for Defendants' positions on certain disputed material facts, such as their denials and affirmative defenses in their Answer.

12. Defendants' sole discovery obligation at this time is to identify their expert witnesses on July 12 and to produce their expert reports on August 13, per a schedule Defendants agreed to.

13. Counsel for Defendants did not object to engaging in expert discovery and agreed to identify experts on or before July 12. **Exhibit 1**, at 18.

14. On July 4, 2018, at his request, I, and my co-counsel Philip Gregory, had a telephone call with Frank Singer, counsel for Defendants. During the course of that call, Mr. Singer stated that Defendants have already retained their expert witnesses and Defendants are prepared to disclose their expert witnesses on July 12.

15. During the course of our meet and confer sessions, counsel for Defendants also indicated that Defendants may choose not to rebut each of Plaintiffs' experts and that they may seek to limit the testimony of Plaintiffs' experts through motions *in limine* prior to trial.

16. At no point in these proceedings have Defendants objected to participating in expert discovery.

17. Beyond Defendants' current singular discovery obligation in disclosing experts and producing their expert reports, the only remaining discovery Plaintiffs intend to conduct prior to trial is to depose Defendants' trial witnesses and to propound contention interrogatories to Defendants, as

proposed by Defendants in meet and confers, in order to determine the identity of fact witnesses, determine the evidence supporting denials in Defendants' Answer, and identify issues regarding Defendants' efforts in setting climate change targets.

18. In terms of scheduling the length of trial, at a meet and confer session with counsel for Defendants on April 11, 2018, counsel for Plaintiffs initially projected 20 days for their case in chief. Counsel for Defendants responded that 20 days would not be enough for Defendants' case and stated that it would be better for the parties to ask the Court for more time than less for trial. Thus, as a result of that meet and conferral, the parties agreed to request 50 trial days, 4 days a week, 6 hour days (approx. 12 weeks). The next day, at the April 12 Status Conference, counsel for Defendants confirmed the parties' agreement of 5 weeks per side with the Court. *See* Transcript of Proceedings, Dkt. 191, at 7:19-8:7.

19. Since the First Petition was denied, Defendants filed a motion for judgment on the pleadings under Rule 12(c) and a motion for summary judgment, the former of which will be argued on July 18 and the latter of which will be fully briefed on July 12. On July 3, Defendants filed a motion in the district court for oral argument to be held on the motion for summary judgment on July 18 as well. Plaintiffs oppose that motion due to the very short amount

Case No. 17-71692

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *et al*.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Real Parties in Interest

On Petition For Writ of Mandamus In
Case No. 6:15-cv-01517-TC-AA (D. Or.)

DECLARATION OF JULIA A. OLSON IN SUPPORT OF ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

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Depositions

51. On March 24, 2017, pursuant to Local Rule 30-2, Plaintiffs informed Federal Defendants of their intent to notice depositions in order to meet and confer on potential witnesses and dates. Dkt. 151-9. On April 11, 2017, Plaintiffs sent Federal Defendants a letter describing the general categories of information likely to be included within the subject areas for the Rule 30(b)(6) depositions.

52. On May 11, 2017, Plaintiffs noticed the depositions of C. Mark Eakin, Coordinator of NOAA's Coral Reef Watch Program, and Michael Kuperberg, Executive Director of the U.S. Global Change Program within the U.S. Office of Science and Technology. The deposition of Dr. Kuperberg was taken on July 20, 2017, and the deposition of Dr. Eakin was taken on July 21, 2017.

53. During his deposition, Dr. Eakin testified that NOAA considers the impact of carbon dioxide and climate change on our oceans to be dangerous and that current levels of atmospheric carbon dioxide are dangerous for coral. Ex. 7 at 31:1-4, 34:25-35:3 (July 21, 2017 Eakin Dep. Tr.). Dr. Eakin also agreed "that carbon dioxide emissions that we emit today and carbon dioxide concentrations today will actually lock in impacts to coral reefs 10 or 20 years from now." *Id*. at 34:12-16. Dr. Eakin testified that he thinks we are in an "emergency situation" with respect to protecting our oceans. *Id.* at 70:19-22.

54. Dr. Kuperberg testified that he is "fearful," as a terrestrial ecologist and biologist about what is happening to our terrestrial climate system and that he "feel[s] that increasing levels of CO_2 pose risks to humans and the natural environment." Ex. 8 at 149:12-16, 150:1-3 (July 20, 2017 Kuperberg Dep. Tr.). Dr. Kuperberg also testified that he does not "think that the current federal actions are adequate to safeguard the future against climate change." *Id*. at 150:13-15. Finally, Dr. Kuperberg testified that "our country is currently in a danger zone when it comes to our climate system." *Id*. at 151:5-8.

55. During the deposition of Dr. Kuperberg, counsel for Federal Defendants instructed the witness not to answer a limited number of questions on deliberative process privilege grounds and counsel conferred as to the applicability of this privilege. *Id*. at 71:10-77:15. The parties agreed to meet and confer on this issue off the record, and the Plaintiffs expect to resolve these deliberative process issues through the meet and confer process or with the assistance of the District Court. *Id.* at 76:19-77:5.

56. Also during the deposition of Dr. Kuperberg, counsel for Federal Defendants raised "concerns" about certain questions "that could involve executive privilege." *Id*. at 100:7-104:8. Specifically:

> So I don't want to instruct you not to answer on executive privilege. But I just would, one, want to know what, the relevance of this is, and two, if it's something that you feel you need to pursue, perhaps we need to try

BEFORE THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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KELSEY CASCADIA ROSE JULIANA, :
XIUHTEZCATL TONATIUH M., :
through his Guardian TAMARA :
ROSKE-MARTINEZ, et. al., :
Plaintiffs, : Civil Action Number
vs. : 6:15-cv-01517-TC
THE UNITED STATES OF AMERICA, :
DONALD TRUMP, in his official :
capacity as President of the :
United States, et al., :
Defendants. :

- - - - - - - - - - - - - - - - -x

Videotaped deposition of C. MARK EAKIN, called for examination pursuant to agreement of counsel, on Friday, July 21, 2017, in Washington, DC, at the offices of the United States Department of Justice, 601 D Street Northwest, at 10:03 a.m., before CARMEN SMITH, a Notary Public within and for the District of Columbia, when were present on behalf of the respective parties.

Job No. 2659793

Pages 1 - 88

Q Sure, sure. Does NOAA consider the impact of carbon dioxide and climate change on our oceans to be dangerous?

A Yes.

Q So just to shift gears for a moment, Mark -- and I'm going to grab my phone so I can track time. 10:45:45

President Trump has a proposed budget for 2018 out, and it's my understanding that the proposed budget would cut NOAA's budget by approximately 16 percent. Is that accurate? 10:46:22

A I don't recall.

Q Are you aware that the proposed budget would cut NOAA's budget?

A Yes. 10:46:40

Q If that were to happen, how might that impact the Coral Reef Watch program and the satellite programs that you help oversee?

A At this point, we're really not sure.

Q Do you believe that budget cuts would affect NOAA's capacity to continue monitoring the oceans and the impacts of climate change? 10:47:04

A It depends on the budget cuts.

Q Has the president proposed to eliminate the Coastal Zone Management Grants Program? 10:47:32

Q Do you know what level of atmospheric carbon dioxide corresponded with those bleaching events?

A I don't recall.

Q Is it accurate that when bleaching events occur, that it's actually based on emissions and carbon dioxide levels that occurred decades earlier? 10:51:37

A Yes.

Q And why is that?

A There is a lag effect in the climate response to CO2 increases in the atmosphere. 10:52:06

Q So is it accurate to say that carbon dioxide emissions that we emit today and carbon dioxide concentrations today will actually lock in impacts to coral reefs 10 or 20 years from now? 10:52:37

A Yes.

Q Are current carbon dioxide levels approximately 405 parts per million as a global mean?

A Approximately. 10:52:57

Q I haven't checked recently, but I think it's --

A Neither have I.

Q -- around that.

Are current atmospheric carbon dioxide 10:53:06

levels of approximately 405 parts per million dangerous for coral?

A Yes.

Q In talking about levels of atmospheric carbon dioxide or temperature increases that protect corals, do you use the word "safe"? 10:53:31

A Not usually.

Q What phrase do you use to describe that maximum threshold?

A Maximum threshold. I mean, I'm sorry, rephrase, please. 10:53:48

Q So when I think of water quality standard for lead that is safe --

A Right.

Q -- for children, I would use the word that's a safe level in water for that amount of a pollutant. And so that's a word I use when I think of atmospheric carbon dioxide levels, I think of is it safe. 10:54:13

But it seems that scientists may use a different phrase, and so I'm trying to figure out what that word is that NOAA may use to describe thresholds. 10:54:28

A Different words may be used depending on the context. 10:54:45

explain what you mean by "urgent and rapid action to reduce global warming"?

A In the context of this, we're talking about actions to address emissions or potentially atmospheric CO2 levels on a scale of years to a few decades. 13:39:42

Q This paper also concludes that the time for recovery of corals is diminishing. Do you agree with that statement?

A I would have to read exactly how it's phrased, because that doesn't quite sound right. 13:40:00

Q Are you a scuba diver?

A Yes.

Q And have you been diving and seen coral reefs? 13:41:46

A Yes.

Q What's your favorite reef to dive on?

A Ant Atoll in Micronesia.

Q Do you have a favorite reef in U.S. waters? 13:42:03

A I'm trying to remember the name, it's something like Coral Gardens in one of the islands of the Commonwealth of the Northern Mariana Islands.

Q Have you seen firsthand coral bleaching on these reefs? 13:42:26

A On those reefs, no.
Q Have you seen coral bleaching firsthand?
A Yes.
Q Have you -- have you been there watching it as the algae are expelled? 13:42:40
A No.
Q Have you seen the effects of bleaching after the fact --
A Yes.
Q -- with the white skeletons? 13:42:52
And have you seen the effects after the coral completely die and then algae take over the skeletons?
A Yes.
Q And what is that process of the coral 13:43:05
going from the white bleached skeleton to the brown or greenish colors?
A I mean, that's the death of the corals.
Q When you witness that firsthand, do you -- do you think that we're in an emergency situation 13:43:42
with respect to protecting our oceans?
A Yes.
MS. OLSON: We're just going to step outside for one moment and then I think we'll be close to wrapping up. 13:44:26

BEFORE THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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KELSEY CASCADIA ROSE JULIANA, :

XIUHTEZCATL TONATIUH M., :

through his Guardian TAMARA :

ROSKE-MARTINEZ, et. al, : Case Number

Plaintiffs, : 6:15-cv-01517-TC

vs. :

THE UNITED STATES OF AMERICA, :

DONALD TRUMP, in his official :

capacity as President of the :

United States, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - x

VIDEOTAPED DEPOSITION OF JAMES MICHAEL KUPERBERG

Washington, D.C.

Thursday, July 20, 2017

REPORTED BY:

SARA A. WICK, RPR, CRR

by "overshoot."

Q Well, that the CO2 emissions are such that there are consequences that are already threatening and will in the short term rise to, I'll call it, unbearable unless action's taken to abate fossil fuel emissions? 16:51:07

A I'll put this in my words. There are effects of increasing CO2 concentrations in the atmosphere that are currently seen and detectable and that our projections for the future say they're going to get worse. 16:51:31

Q Are you fearful as a terrestrial biologist -- terrestrial ecologist and biologist about what's happening to our terrestrial climate system? 16:51:50

A Yes, I am.

Q As a terrestrial ecologist, do you believe that 450 parts per million and 2 degrees warming are dangerous level of carbon dioxide?

A I can't characterize a specific number as being dangerous, which implies that another specific number is not dangerous. 16:52:03

In general, I feel that increasing levels of CO2 pose risks to humans and the natural environment.

Q Do you think that the U.S. government is currently paying attention to the National Climate Assessment and engaging in climate and energy policies that will protect our climate system? 16:52:28

A You asked two questions. There are certainly parts of the federal government that are paying attention to the National Climate Assessment. 16:52:46 I don't --

Q What -- go ahead. I'm sorry.

A I don't think that the current federal actions are adequate to safeguard the future against climate change. 16:53:02

Q What agency or department do you believe is paying attention to the National Climate Assessment, or departments?

A EPA's endangerment finding is based, to a substantial degree, on findings from the National Climate Assessment. 16:53:25 There are management activities going on within the Department of Interior that take

into account -- that I'm aware of that take into account projections from the National Climate Assessment. Those are two examples that come to mind.

Q Sir, do you believe that our country is currently in a danger zone when it comes to our climate system? 16:53:45

A Yes, I do.

MR. GREGORY: That's all we have.

MR. SINGER: Okay. I have a couple redirect, I think, if I can go through my notes a little bit. 16:54:11

EXAMINATION

BY MR. SINGER:

Q Dr. Kuperberg, I'll ask you to turn to Exhibit 2. You recall being asked questions about this 2012 "National Global Change Research Plan"? 16:54:23

A I do.

Q And I believe you said that this appeared to be a true and accurate copy of the report; correct? 16:54:42

A I did.